CHAPTER ONE

INTRODUCTION

1.1 Background to the Study

The seas have long been a critical arena for international relations; and so, since man first set forth upon the seas, the subject of sovereign control over the seas and its resources has been a concern to nations of the world. Ever before there was air travel and instantaneous communication, people, goods, services, and ideas travelled round the world by ship. Over centuries, a strong maritime presence for both military and commercial purposes has been essential for States with great power aspirations. Today, even with the advances in technology, seaborne commerce remains the inchpin of the international economy especially with the discovery of the rich economic resources of the sea and the attendant capacity to explore and exploit them.

The creation of international ocean governance framework has its origins in sixteenth century European imperialism.[1] As States increasingly competed for trade routes and territory, two theories of ocean use emerged and collided head on: on the one side, some nations, particularly Spain and Portugal claimed vast area of the sea space including the Gulf of Mexico and the entire Atlantic Ocean as part of their territorial domain.[2] Opposed to this view were the proponents of "freedom of the seas" theory. Since no nation could really enforce claims to such vast and enormous areas of the sea, and given the need of all the rising colonial powers then to have assured access and traverse the seas to their overseas territories, the proponents of freedom of the seas, the

[1] S.G. Borgerson, 'The National Interest and the Law of the Sea', 2009. <www.cfr.org/content/publications/attachments/Law of the Sea - CSR46 pdf> accessed on 24 June, 2015.
[2] *Ibid*.

foremost of whom was the Dutch jurist Hugo Grotius emerged triumphan.[3] Consequently, the concept became the basis for modern ocean law.

Over three centuries, the concept of the freedom of the seas became almost universally accepted subject only to the exception that in an area extending three metric system from the shoreline or roughly the range of iron cannons of the day, a coastal State exercised sovereignty.[4] Coastal States' control, however, was not absolute as foreign vessels were given the right of innocent passage through the territorial seas. The Nineteenth Century witnessed a steady increase in ocean commerce, so that freedom of the seas concept was qualified by the concept of "reasonable" use of the sea.[5]

Due mainly to the slow pace of technological developments prior to the Industrial Revolution, these miles seemed adequate and provided effective governance of the world's oceans. However, with the technological developments of the mid-19th and early 20th centuries, not only did ships become more powerful, but technology allowed humanity to explore and exploit ocean resources that had never before been envisioned. Fishermen that were once limited to areas around their own coasts were now equipped with vessels that could allow them to stay at sea even for months at a time and capture fish harvests that were far from their native waters. As a result of the concept of freedom of the sea, fleets from around the world travelled to areas rich in fish stocks. The lack of restriction on the part of the fishermen resulted in fish stocks around the world being depleted without any regard to the stability of the numbers.

[3] *Ibid.*
[4] *Ibid.*
[5] This means basically, respect for the rights of other users of the sea.

Also, evolving technology allowed for the exploitation of hitherto inaccessible off-shore resources, especially oil and even diamond, gravel and precious metals. As a result of the above developments, coastal States, in order to protect their local sea resources both living and non-living, began to expand their claims of sovereignty beyond the territorial limit. The real spur to the seaward expansion of territorial claims by coastal States began during the 20th century with the discovery of oil under the continental shelf of the United States.[6] Thus, the United States became the first nation to challenge the doctrine of the freedom of the seas when on September 28, 1945 President Harry S. Truman signed what later became commonly known as the Truman Proclamation of 1945.[7] The proclamation claimed for the United States exclusive rights to explore and exploit the mineral resources of its continental shelf beyond the traditional 3 metric limit. This sparked quick reactions from other nations particularly Chile, Peru and Ecuador which unilaterally set 200 territorial metric limits while majority of other nations extended their territorial seas to 12 metric systems by 1967.[8] This unilateral declaration sets the stage for international conflicts in the form of repeated seizure particularly by Ecuador of ships of the United States which continued into mid 1970s.[9]

This unilateral extension was growing concerns to the world's major maritime powers particularly the United States and Soviet Union because of the fear that the trend might affect adversely freedom of navigation as the critical portions of the world's oceans might be severely curtailed. The maritime powers tried, but ended in failure, to cap these unilateral extensions in two UN Conferences – The first was in 1958 and the

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[6] S.G. Borgerson, *op. cit.*
[7] 'Office of Coast Survey'<www.nauticalcharts.noaa.gov/staff.law-sea.html> accessed on31 January, 2014.
[8] United Nations Convention on the Law of the Sea<www.un.org/depts/los/convntion-agreements/texts/.../unclos-e.pdf.> accessed on 24 June, 2015.
[9] S.G. Borgerson, *op. cit.*

second in 1960. Hence, the need for a third United Nations Conference on the Law of the Sea which gave birth to the present legal regime of the sea (United Nations Convention on the Law of the Sea 1982). This present legal regime of the sea is peculiar in the sense that it successfully defines the rights and responsibilities of nations with respect to their use of the world's oceans, establishing guidelines for both business, the environment and the management and the rights to exploitation of the economic resources of the sea. The Convention was concluded in 1982 thereby replacing the four 1958 treaties[10] concluded in the Geneva Switzerland. The Convention came into force in 1994, a year after Guyana became the 60th nation to sign the treaty[11], and as of January 2015, 166 countries and the European Union have joined the Convention.[12]

UNCLOS I

In 1956, the United Nations convened its first Conference on the Law of the Sea (UNCLOS I) at Geneva Switzerland which Conference resulted in four treaties concluded in 1958.[13] Although UNCLOS I was considered a success, it left the important issue of the breath of the territorial seas open.

UNCLOS II

In 1960, The United Nations held the second Conference on the Law of the Sea (UNCLOS II). However, this Geneva Conference did not result in any agreements

[10] Treaties on Territorial Sea and Contiguous Zone, Continental Shelf, The High Seas and Fishing & Conservation of Living Resources of the High Seas.

[11] "The United Nations Convention on the Law of the Sea: A historic perspective" United NationsDivision for Ocean Affairs and the Law of the Sea<www.un.org?search oceans and law of the sea sites> accessed on 24 June 2015.

[12] 'Division for Ocean Affairs and the Law of the Sea, Office of Legal Affairs, United Nations' <www.un.org/... chronological-lists-of-ratifications.htm …>accessed 24 June, 2015.

[13] - Convention on the Territorial Sea and Contiguous Zone
- Convention on the High Seas
- Convention on Fishing and Conservation of Living Resources of High Seas
- Convention on the Continental Shelf.

especially with respect to the nagging issue of the breath of territorial waters which was the leading need for the Conference.

UNCLOS III

The issue of varying claims of territorial waters by States was raised in the United Nations in 1967 by ArvidPardo of Malta, and in 1973 the United Nations Conference on the Law of the Sea was convened in New York.[14] The Conference lasted until 1982 with over 160 nations participating. The long negotiations resulted in the present legal regime of the sea (the Convention) which came into force on 16 November 1994.

The Convention introduced quite 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, exploitation regime, protection of the marine environment, scientific research and settlement of disputes.

This present legal regime of the sea sets the limit of various zones of the sea, measured from a carefully defined baseline. Under this regime, seas are divided into: Internal Waters; Territorial Seas; Contiguous Zone; Exclusive Economic Zone, and Continental Shelf with varied degree of national jurisdiction/rights. The high seas and the seabed are free from national jurisdiction with common heritage principle in force.

Apart from its provisions defining ocean boundaries, the Convention also establishes general obligations for safeguarding the marine environment and protecting freedom of scientific research on the High Seas, and creates an innovative legal regime for controlling mineral resources exploitation in deep seabed areas beyond national

[14] United Nations Convention on the Law of the Sea<www.un.org/depts/los/convntion-agreements/texts/.../unclos-e.pdf.> accessed on 24 June, 2015.

jurisdiction under the auspices of the International Seabed Authority and through the common heritage principle.[15] Under this present legal regime of the sea, Landlocked States are given a right of access to and from the sea, without taxation of traffic through transit States.[16]

In fact, in our considered view, the UNCLOS III is one of the largest and likely one of the most important legal agreements so far in history. One of the most powerful features of UNCLOS III is that it settled the question of national jurisdiction/sovereignty over the oceans and seabed. However, whether the present legal regime of the sea has adequately represented the divergent States' interests in the sea and its resources is seriously in doubt.

1.2 Statement of Problem

Although the present legal regime of the sea (The Convention) has been applauded even in this work, for a number of reasons,[17] the Convention is not without some inherent flaws. The flaws as this work discusses relate mainly to the lack of wide and effective representation of the divergent States' interests in the seas and the economic resources of the sea. The relevant articles of the Convention with regard to the rights of full participation in the exploitation of economic resources in the juridical zones of the sea especially those resources lying in the seabed beyond national jurisdiction failed to take due cognizance of the conditions and interests of developing States especially landlocked ones, and geographically disadvantaged States. Also, the present legal regime of the sea

[15] J. Frakes, 'The Common Heritage of Mankind Principle and the Deep Seabed, Outer Space and Antarctica; Will Developed and Developing Nations Reach a Compromise'? (2003) *Wisconsin international law journal*, 21, 409.
[16] UNCLOS, Art. 125.
[17] The Convention has successfully set territorial limits apportioning jurisdiction to different States on the zones of the sea in varying degrees. It has also, among others things, introduced an innovative system of dispute settlement on the law of the sea.

seems to be rather myopic while introducing the innovative concept of Exclusive Economic Zones in favour of coastal States only without considering the interests of island nations. The Convention failed to provide adequately for rights of transit by landlocked States to and from the seas as Article 125 which provides for this rights had been adjudged inadequate, weak and ineffective. The implication is that a number of nation-States are blocked or seriously hindered from access to the economic resources of the sea including those lying beyond national jurisdiction which have been declared common heritage of mankind.

On the same plane, Articles 69 and 70 of the Convention which provide respectively for the rights of landlocked and geographically disadvantaged States' participation on an equitable basis in the living resources of the Exclusive Economic Zone of the same sub-region or region have failed to give any legal backing to the affected States thereby leaving the landlocked and geographically disadvantaged States at the mercy of their coastal State neighbours. This lack of wide and effective representation of divergent States interests and a more harmonized method of exploitation of the resources of the sea will certainly result in under-exploitation of the resources which nature has bestowed in the world oceans. This in turn might adversely affect the international economy, especially in this period of global economic recession.If on the other hand, the national and international authorities fail to surmount the technical, economic and legal barriers to the development and coordinated exploitation of these resources, the world will be losing an important opportunity to enhance the economic well-being of the peoples of the world.

1.3 Purpose of the Study

The desire to research on this topic "Exploitation of Economic Resources beyond National Jurisdiction in the Present Legal Regime of the Sea: A Critical Analysis" aroused out of the knowledge of the fact that greater percentage of the Earth's surface is covered by waters, and from the realization of the fact that nature has bestowed such enormous economic resources in the seas which if thoroughly and effectively exploited can serve as alternative to the dissipating natural resources on the land space. Harmonized and maximal exploitation of these resources can equally help to assuage the negative impact of deep economic recession that currently bedevils most nations of the world.

It is therefore the core objective/purpose of this study to ascertain whether, and to what extent the present legal regime of the sea (United Nations Convention on the Law of the Sea, 1982) has in essence represented the various States' interests in the exploitation of the resources of the sea, especially those lying beyond national jurisdiction which have been declared to be common heritage of mankind. The implication of this declaration by the Convention is that every State should have equal right of access to these resources. Despite this declaration however, it is found that certain factors seriously inhibit the chances of some States to participate in the exploitation of these resources, thereby making the declaration of none effect to them. These factors include but not limited to remoteness of some States from the sea by reason of being landlocked, other geographically disadvantaged position which is a mere creation of the law as in the case of Island Nations, poor technological advancement for High Seas operations, and divergent claims by States to the sea resources.

The above development makes it paramount that States' interests and attitudes towards exploitation of these resources in the sea are harmonized for the optimum exploitation and utilization of the resources. Against this backdrop therefore, this work aims at discovering and postulating how competent authorities both at national and international level will, through the instrumentality of the present legal regime of the sea, regulate this economic development opportunity in such a sustainable manner in areas within and beyond national jurisdiction that will guarantee an increased improvement in the world economy for the overall interest of mankind.

It is equally the purpose of this study to ascertain how the Convention has, through its relevant articles, regulated the attitudes of various States towards exploitation of these resources, identify failures/shortcomings on the part of the Convention and proffer workable recommendations.

1.4 Scope of the Study

This research work, "Exploitation of Economic Resources beyond National Jurisdiction in the Present Legal Regime of the Sea: A Critical Analysis" discusses the present Law of the Sea as it relates and applies to the International Community as a whole.

1.5 Significance of the Study

This research is significant in the sense that every State, whether coastal or landlocked, and the peoples of the world are affected in some ways by the happenings in the seas. The seas are therefore strategic to human existence. As a result, any research conducted and aimed at enhancing the law and use of the seas, as in the present case, is a significant one.

This study is specifically significant in the field of international law particularly with regard to the law of the sea in that it unravels the flaws/shortcomings inherent in the

present legal regime of the sea in relation to States' interests in the economic resources of the sea which it fails to cover adequately. This study offers workable recommendations to that effect which if adopted by the international community, would lead to a more harmonized and improved method of the exploitation of sea resources by nation-States. This would in turn set the stage for an improved and steady growth of the global economy for the good of the entire humanity.

1.6 Research Methodology

A doctrinal method is adopted in this work. This involved an examination of the present Legal Regimes of the Sea through an appraisal. We achieved this by utilizing primary sources of materials such as the United Nations Convention on the Law of the Sea (UNCLOS) 1982; the Constitution of the Federal Republic of Nigeria, 1999;Exclusive Economic Zone Act, LFN Cap.E17 2004; Territorial Waters Act, LFN Cap.T5 2004 and other legal regimes of the sea. Case law was also examined. The secondary sources of materials such as textbooks by eminent international legal scholars, law journals, articles, conference papers, newspapers and internet materials were as well utilised.

These materials were sourced from public libraries, libraries of institutions of higher learning, and internet centers. Additionally, personal judgments and evaluations were used where and when necessary.

1.7 Definition of Terms

Archipelago: A large group of islands. A sea such as the Aegean, or an area in a sea

containing a large number of scattered islands.[18] Archipelago means a sea or stretch of water containing many islands.

Archipelagic State: This means any State or country that is internationally recognized that comprises a series of islands that form an archipelago. The United Nations Convention on the Law of the Sea defined the term in order to also define what borders such States should be allowed to claim in the seas.

Baseline:

1. Starting point or point of departure from where implementation begins, improvement is judged, or comparison is made.[19]
2. A line serving as a basis, for measurement, calculation, or location.[20]
3. Simply put, baseline means a minimum or starting point used for comparisons or measurements.

Contiguous Zone: This is a maritime zone contiguous to a State's territorial sea which may not extend beyond 24 nautical miles from the baselines from which the breadth of the territorial sea is measured.

Continental Shelf: This is an underwater landmass which extends from a continent, resulting in an area of relatively shallow water known as a shelf sea.

Convention: This is a set of agreed, stipulated, or generally accepted standards, norms, social norms, or criteria, often taking the form of a custom.

Economic Resources:

[18]<dictionary.reference.com/browse/archipelago> accessed on 24 June, 2015.
[19]'Business Dictionary'<www.businessdictionary.com/definition/baseline> accessed on 24 June, 2015.
[20] T. Lance, 'Baseline DataServices'<www.thefreedictionary.com/baseline> accessed on 24 June, 2015.

1. The goods or services available to individuals and businesses used to produce valuable consumer products.[21]
2. A service or other assets used to produce goods and services that meet human needs and wants.

Exclusive Economic Zone: This is a sea zone prescribed by the United Nations Convention on the Law of the Sea at most 200 nautical miles, over which a coastal State has special rights regarding the exploration and use of maritime resources, including energy production from water and wind.

Ex-gratia:

1. The word "ex-gratia" is of Latin origin meaning "by favour" and it is most often used in legal contexts. When something has been done *ex-gratia*, it has been done voluntarily out of kindness or grace.
2. With reference to payment, done from a sense of moral obligation rather than because of any legal requirements.[22]

High Seas: This is the open seas or part thereof beyond the limit of territorial jurisdiction of any State. Under the present legal regime of the sea, the high seas include all parts of the sea that are not included in the exclusive economic zone, the territorial sea or in the internal waters of a State, or in the archipelagic waters of an archipelagic State.

Innocent Passage: This is a concept in the Law of the sea which allows a vessel to pass through the territorial waters of another State, subject to certain restrictions. Passage is

[21]<smallbusiness.chron.com> finances and taxes? Economics> accessed 19 June, 2015.

[22] 'Definition of Ex-gratia in English'<www.oxforddictionaries.com/definition/english/ex-gratia>accessed 24 June, 2015.

innocent so long as it is not prejudicial to the peace, good order or security of the coastal State.

Internal Waters: A nation's internal waters include waters on the landward side of the baseline of the nation's territorial water, except in archipelagic States. They include waterways such as rivers, and canals and sometimes the water within small bays.

Juridical:

1. of or relating to the administration of justice or the office of judge;
2. of or relating to law or jurisprudence: legal.

Jurisdiction:

1. the territory over which authority is exercised;
2. the geographical area over which authority extends;
3. legal authority.

Mare Liberum:

1. a body of navigable water to which all nations have unrestricted access;[23]
2. simply, the sea that is free and open to all nations.

Maritime: This is connected to the sea, especially in relation to seaborne trade or naval matters.

Ocean:

1. the vast body of salt water that covers almost three-fourth of earth's surface;[24]
2. the salt water that covers much of the earth surface.

[23]Defining the Term 'Mare Liberum'<dictionary.referece.com/browse/mare liberum> accessed on 19 June, 2015.
[24]<dictionary.referece.com/browse/ocean> accessed on 19 June, 2015.

Resources:

1. the collective wealth of a country or its means of producing wealth;
2. Money, or any property that can be converted into money; assets;
3. A natural source of wealth or revenue;[25]
4. Resources can be widely defined as a stock or supply of money, material, staff, and other assets that can be drawn by a person, organization or nation in order to function effectively.

Res Communis: Things owned by no one and subject to use by all. Things such as light, air, the sea, running water which are incapable of entire exclusive usage or appropriation.[26]

Sea: Sea has been variously defined as:

1. a great body of salt water that covers much of the earth; broadly, the waters of the earth as distinguished from the land and air;[27]
2. a continuous body of salt water covering most of the earth's surface, especially this body regarded as a geographical entity distinct from earth and sky; a relatively large body of salt water completely or partially enclosed by land;[28]
3. Simply put, sea is the salt water covering most of the earth's surface.

Territorial Sea: This is a belt of coastal waters extending at most 12 nautical miles from the baseline (usually the mean low water mark) of a coastal State.

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[25]<www.merriam-webster.com/dictionary/res%20communes> accessed on 24 June, 2015.
[26]<www.merriam-webster.com/dictionary/resources> accessed on 19 June, 2015.
[27]<www.merriam-webster.com/dictionary/sea> accessed on 19 June, 2015.
[28]<www.thefreedictionary.com/sea> accessed on 19 June, 2015.

Transit Passage: This is a concept of the law of the sea which allows a vessel or aircraft the freedom of navigation or over-flight solely for the purpose of continuous and expeditious transit of a strait between one part of the high seas or exclusive economic zone and another.

Vessel:

1. a craft for traveling on water, now usually one larger than an ordinary rowboat; a ship or boat;
2. an airship.

CHAPTER TWO

UNDERSTANDING "THE SEA"

Feared and loved, often deified, from time immemorial, the sea[29] has been part of man's consciousness. This is due to the fact that greater part of man's fortune is tied to the sea. The rich resources, both living and non-living buried in the seas makes it so. The increased awareness of the presence of the rich economic resources in the seas and seabed through advance in technology, growth in world population and increased economic values of these resources led to an increase in States' interests and agitations over the rights to exploit them. Over the millennia of man's use and abuse of the seas and their resources, regulation became inevitable. At first, the level of group or community, later the city, nation, and finally the world. The Sea has also been, time and again, considered a power base for nations, continents, and empires of gold, the energy store of emergent and prospective world powers. With its vast lengths, limitless resources, and hidden secrets, the sea constitutes a reservoir and testimony of the sheer power that nature wields. It is this power that many a nation-state are blessed by, and enamored with, by sheer accident of geography as we will soon see in this work.

The sea has been defined as "a continuous body of salt water covering most of the earth's surface, especially this body regarded as a geographical entity distinct from earth and the sky".[30]It has also been defined as "the salt water covering the Earth or a large body of salt water which is partially enclosed by land. Examples of the seas are the

[29]The words, 'sea' and 'ocean' are used interchangeably in this work.
[30]Free Online Dictionary<www.thefreeonlinedictionary.com/sea> accessed on February 23, 2014.

oceans of the world".[31]The sea can succinctly be defined as the large area or body of salt water that covers most of the surface of the Earth.

Attempts have been made to differentiate oceans from seas as two different types of bodies of waters.Some experts argue that seas are typically located where the land and the ocean meet. They posit that seas are partially enclosed by land and are relatively smaller than oceans. Oceans are therefore, deep masses of water that separate continents and are expansive. Oceans do not have plant life on the ocean beds as compared to seas which have variety of plant life.Despite the above perceived distinctions, we have elected, in this work, to use the two terms interchangeably for a number of reasons. In the first place, the definitions given to the seas by some authors suggest that they also possess those attributes ascribed to oceans. Also, there is nothing in the Convention[32] which suggests that there is another larger body of waters known as oceans and distinct from the seas to which the law of the sea does not apply. In fact, when the Convention makes reference to the High Seas and Deep Seabed, it seems that it is referring to what some experts would rather call the ocean as against the sea.

The sea covers more than seventy percent of the Earth's surface. With an average depth of almost 4,000 meters, it is estimated that more than ninety percent of the planet's living biomass is found therein. The sea forms one of the Earth's most valuable natural resources. Its ecosystems support all life on this planet by providing oxygen and food; managing vast amounts of human pollutants, buffer the world weather and regulate global temperature. A vast portion of the world's seas is still unexplored, including the

[31]<www.dictionary.com/sea> accessedon February 23, 2014.
[32]United Nations Convention on the Law of the Sea, 1982.

biology of the deep seabed. Deep seabed environments are considered the largest reservoir of biodiversity on the planet today.[33]

The word oceans have figured prominently in the world history, dating back to the earliest days when maritime links bound the colonies to the British Empires. The oceans have played vital roles in the development of virtually every nation. They provide the marine highways/transportation network that binds us together through trade, carrying about ninety percent of nations' imports and exports, and most world's oil passing through shipping choke points such as Suez Canal and the straits of Malacca.[34] The oceans are a theater of conflict, a space in which traditional navies extend sovereign power, and a frontier where pirates, drug traffickers and human smugglers proliferate. In peacetime, the ability of national forces to navigate and overfly the oceans is a critical deterrent to conflicts.[35] The Law of the Sea Convention addresses all these issues and also includes articles covering traditional geostrategic concerns, such as naval mobility and maintaining what the early-twentieth century American naval theorist Admiral Alfred Thayer Mahan called "Sea lanes of communication", the lifelines of the world economy. It is by way of the seas that the world powers especially the United States are able to conduct international trade and project military powers abroad.

Additionally, the seas are crucially important to human existence in various aspects. They yield much of the food that feed us. They act also as laboratories for scientific research and contain the natural resources that can help sustain and encourage

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[33]C.Schwarte& L.Siegele, *Marine Protected Areas on the High Seas*(London: Field, 2008) p.1. <www.citeulike.org/user/highsea/article/2836920> accessed on 26 January 2014.

[34]S. G.Borgerson, 'National Interest and the Law of the Sea'(May 2009) *Council on Foreign Relations, Council Special Report* No. 46, 14.

[35]*Ibid*.

economic development throughout the world.[36] The seas also shape the planet's weather and climate. They redistribute heat from the tropics to cooler regions, for example Western Europe, which profoundly affects the habitability of those lands. They serve as massive sinks for carbon dioxide (CO_2) emissions, thereby slowing global warming. However, the seas are in dire environmental predicament because, since they absorb CO_2, they are rapidly becoming more acidic, making the marine environment less hospitable to the ecosystems that mankind depends upon.[37]

Controlling the sea and what lies under it has at present become much more important because governments around the world are becoming increasingly aware of and press harder to secure the blessings which nature has bestowed in the seas for the good of their citizens. The fish, oil and natural gas available in a State's offshore zone can help it in coping with the rising food and fuel costs. Unfortunately however, the development of these economic resources of the sea particularly those embedded in the seabed is considered more problematic today than was thought to be the case some years back. The point as stated earlier in this work is that if the national and international authorities fail to surmount the technical, economic and legal barriers to the development and coordinated exploitation of these resources, the world will be losing an important opportunity to enhance the economic well-being of the peoples of the world.

2.1 Wealth of the Sea

Similar to our earlier observations, the world's seas serve as a source of energy and natural resources, and play a crucial role in global weather patterns, but they are under

[36]For example, the following resources – salt, sand, gravel, and some manganese, copper, nickel, iron and cobalt can be found in the deep sea and drilled for crude oil.
[37]*Ibid*p.15.

some threats from over consumption ofcertain living resources, pollution and climate change.[38] The world has hardly begun to explore what the seas contain in terms of marine life and resources. Therefore, flexible legal frameworks and sophisticated scientific models are seriously required to deal adequately with these changes, to ease conflict and guarantee sustainable use of the sea.

Since more than seventy percent of the Earth's surface is covered with seawater, it has a huge influence on life on our planet. Research however reveals that the potential wealth available in the sea is largely untapped and even unexplored yet. Thisis partly because of the logistical difficulties and the specialist equipment needed to reach all areas. Reserves of gas and oil have not been fully identified and man has not yet begun to exploit alternative energy sources, such as thermal, wind, wave or tidal energy, significantly, let alone the mineral stores beneath the sea bed.[39] The sea contains vast amounts of mineral resources. As much as forty percent of the world's recoverable resources may lie offshore. Based on potential recoverable reserves of one thousand to five thousand billion barrels, there is likely four hundred to six hundred billion barrels of oil offshore, and possibly as much as two trillion. It has been estimated that eight percent or more of these reserves are within 200 nautical miles offshore (the evolving boundary between coastal State and international jurisdiction over economic resources in the sea).[40] This and more estimates still leave a substantial portion of the resources, up to twenty percent, in the seabed, though one expert had expressed doubts as to whether these

[38] R. Wolfrum, 'Understanding the Sea'*Institute for Comparative Public Law and International Law, Heidelberg, Mailto.*< Sekrewo@mpil.de> accessed in November 2012.

[39] *Ibid*.

[40] J. Johnston, 'Petroleum Revenue Sharing from Seabed Beyond 200 Miles Offshore'(1980) *Marine Technology Society Journal* vol.14, 28-30.

reserves will ever become commercially recoverable.[41] In any event however, the value of the sea deposits of oil is immense, and would be worth between fourteen and seventeen trillion dollars, at a price of thirty-five dollars per barrel.

There are also significant reserves of gas and natural gas liquids. Research reveals that close to 2000 trillion cubic feet of natural gas (equivalent to 296 billion barrels of oil) and roughly 52 billion barrels of natural gas liquids (equivalent to 36 billion barrels of oil) lie within roughly 200 nautical miles of the United States.[42] It is believable that additional reserves also lie beyond the 200 mile mark, but no estimates have been made.

The sea's hard mineral resources may rival the energy deposits in value.[43]In line with the United States Geological Survey discovery, the floor of America's continental shelf alone

contains more than one trillion cubic meters of sand and gravel, 155 billion cubic meters of shell and carbonate sand, three and a half billion metric tons of heavy-metal sand, a similar amount of phosphorite, 70,000 kilograms of precious coral, and 17 billion metric tons of rock salt.[44] These regions also contain varying amounts of titanium, gold, platinum, zircon, and other heavy metals.[45]It is pertinent to note that the coastal areas of other world nations do contain these mineral resources in varying degrees.

Significant mineral deposits also lie on the ocean basin – the deep seabed. The most important of these mineral resources are manganese nodules. It has been estimated that the Pacific Ocean has the richest deposits, containing one to one and a half trillion

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[41]F. Singer, 'The Great UN Snorkel'(May 1981)*The American Spectator,* 24.

[42]D. Johnson and D. Logue, 'Economic Interests in Law of the Sea Issues' in Amacher and Sweeney (eds), *The Law of the Sea: U.S. Interests and Alternatives*, (Washington D.C.:America Enterprise Institute, (1976)p.50.

[43]D.Bandow, 'Developing the Mineral Resources of the Seabed'(1982) 3*Cato Journal,*Vol.2, 794.

[44]*Ibid*.

[45]P.Roma, 'Marine Mineral Resources'(1981) *Natural Resources Forum,* vol.5, 89-90.

tones, making this perhaps the largest mineral deposit on earth.[46] Nodules[47] are also found on the seabed of the Atlantic and Indian Oceans and an estimated 250 million metric tons of them are found on America's outer continental shelf.[48]

Recently, other rich deep seabed deposits have been discovered. Polymetallic sulfides have been found in the East Pacific, along the Juande Fuca Ridge, on the Galapagos Rift off Ecuador, in the Guayamas Basin in the Gulf of California, and also in the Red Sea.[49] These minerals collect near volcanic hot springs, and contain copper zinc, and silver in addition to sulfur. It is believed today that a large dept sits of mineral resources probably exist in unexplored portions of mid-ocean ridges and such continuing fast pace of mineral discoveries indicate potentially immense resources at our disposal in the sea. The increased awareness and knowledge of these rich resources in the sea and their benefits account for the reason why nations of the world are developing stronger and divergent interests in the seas with various claims as is the case especially in the South China Sea today. Unfortunately however, the value of these rich mineral deposits may remain theoretical for some time as only small fraction of them are presently exploited due to some scientific, technical, economic and legal limitations. The current state of scientific knowledge regarding the process of mineral accretion and concentration does not allow us to accurately predict the full extent of the mineral wealth of the seabed. Scientists are constantly surprised at the vast amounts of new seabed resources that are being discovered. For instance, the scientific community was taken aback when

[46]W. Hawkins, 'Reaffirming Freedom of the Seas'(1982) *The Freeman*, 182.
[47]The nodules are rounded mass of manganese oxide which form through chemical precipitates from the ocean, accreting around objects such as bones, stones or teeth.
[48]W. Hawkins,*op cit.*
[49]D.Bandow, *op cit,* p.795.

polymetallic sulfides were discovered in 1970, and when cobalt resources were found recently.

The seas therefore play central role in scientific research, whether it is focused on economic endpoints or on understanding the natural world through questions of climatology, palaeocimatology, biology or geophysics.[50] The seas play an important role in global weather patterns: oceanic current such as the Gulf Stream influence the global climate and affect the

climatological features of different world regions. However, the seas are themselves influenced by climate change: ice melting in the Arctic and its influence on the Arctic Ocean is one good example.

Additionally, the world oceans are also deeply affected by global economic and demographic developments. Advances in technology and explosive population growth in the past century have led to an increased consumption of marine resources. Use of the oceans for wind farms or waste disposal has created conflicts. The over exploitation of resources, pollution of the seas and climate change have damaged marine resources, leading to drastically reduced fish stocks and even the extinction of some species of marine life, as well as ecological damage to marine environment.

It was against the above backdrop and more that the United Nations Convention on the Law of the Sea (UNCLOS), 1982 was enacted to address issues surrounding the use of the sea resources, as we will see soon in this work. Section 2, Articles 116-120 of the Conventionparticularly addresses the issue of conservation and management of living resources of the High seas.

[50]R.Wolfrum, *op cit.*

In addition to these immense mineral deposits, the world's oceans/seas also serve as a natural habitat to a host of aquatic creatures including animals and plants which serve as a veritable source of protein to the world populace. For instance, whale stocks, various species of cetaceans, marine turtles, seahorses, corals and many other commercial marine fishing species such as basking sharks inhabit the seas. Fisheries today provide about sixteen percent of the total world protein and are enormously important to the economy and wellbeing of the world communities.

2.2 State of the Sea

Despite the ocean's great natural capacity for self-purification, the health, productivity and biodiversity of the marine environment is severely threatened by human activities. The level of harmful substances entering the seas has multiplied tremendously over the last few decades.[51]Plastic and synthetic materials are the most common types of marine debris and researches reveal that many animals have been injured or died after being entangled in or ingesting these materials in the seas. Marine creatures increasingly show signs of contamination and damage resulting from sea pollution. Equally, fishing, shipping and other uses of the sea have caused further damage and there is fear that many species will be lost before they have even been discovered.

Of all, fishing activities seem to be posing the most pressing threat to open ocean and deep seabed biodiversity.[52] Nowadays, harvesting the living resources of the sea has been transformed into a highly industrialized business reaching even the remotest areas. Overfishing and the unfettered use of destructive fishing practices have drastically

[51]C.Schwarte and L. Siegele, *op cit*, p.4.
[52]*Ibid*.

reduced many fish stocks as well as other marine lives well below sustainable levels. It has been observed that pelagic longlines, widely used to catch tuna and billfish, also kill hundreds of thousands of seabirds, turtles and cetaceans.[53] In a quest to catch sparser and more far flung fish stocks, many fishing fleets have resorted to 'bottom trawling', a fishing method where heavily weighted nets are towed along the seafloor catching everything in their path and scraping off the coral cover of seamounts and other sea structures.[54]

Shipping also has serious negative impacts on marine wildlife and habitats through noise, accidental spills of oil or the deliberate, operational discharge of wastes, chemical residues and ballast water as well as the use of anti-fouling paints. The use of powerful sonar system in military operations and scientific researches, air guns for seismic surveys and drilling for mineral, gas and oil exploration are thought to cause heavy loss of marine lives and disrupt feeding, communication, mating and migration pattern in whales, dolphins and other ocean-going species.[55]

Additionally, the laying of cables and pipelines and large-scale scientific research can also result in significant disturbances of sensitive ecosystems. Already, oil and gas development can take place well below a depth of 3,000m and new technologies which may facilitate seabed mining, the exploration of hydrocarbons or the storage of greenhouse gases in the ocean floor may soon be available. Finally, scientists are only just beginning to understand the impact that climate change will have on ocean ecosystem, including warming and acidification which will affect the growth of marine phytoplankton and lead to coral bleaching, among other things. A recent study has

[53] *Ibid*.
[54] *Ibid*.
[55] *Ibid*.

revealed/suggested that unless some of these trends are reversed and large sea conservation areas unimpaired by human activities are soon established, the world's fish stocks will be totally eradicated in the next four decades. That possibly explains the reason why the former Executive Director of the United Nations Environment Programme, Klaus Topfer, predicted as follows, "… our grandchildren will have to learn about turtles, dugongs and coral reefs at the knees of a history teacher, and we will have the tough jobs of explaining what a fish is".[56]

It is hoped however that the relevant provisions of the various Articles of the United Nations Convention on The Law of the Sea 1982 can take adequate care of this situation since the conservation of the seas living resources forms one of the core purposes of the preamble when it stated *inter alia*:

> Recognizing the desirability of establishing through this
>
> Convention, with due regard for the sovereignty of all States, a legal order for the seas and oceans which will facilitate international communication, and will promote the peaceful uses of the seas and oceans, the equitable and efficient utilization of their resources, the conservation of their living resources, and the study, protection, and preservation of the marine environment.[57]

[56]*Ibid*, p.5.
[57]United Nations Convention on the Law of the Sea (UNCLOS) 1982, para. 5 of the Preamble.

As far back as 1946, much earlier before the UN Convention on the Law of the Sea 1982 came into operation, the International Convention for the Regulation of whaling[58] was agreed with the sole purpose of ensuring the proper and effective conservation of whale stocks. The Convention applied to factory ships, land stations and whale catchers under the jurisdiction of the parties to the Convention and to all waters within which whaling is carried out.[59] It established an International Whaling Commission, composed of Member States to organize scientific studies and investigations and to collect, analyze and disseminate data on the issue. The Commission's main task was to review and revise as necessary the measures laid down in the Convention. It was saddled with the duty to fix where necessary, the limits of open and closed waters, designate sanctuary areas, prescribe seasons, catch and size limits for each species of whale as well as prohibit types and methods of fishing.

It has been observed however that until recently, environmental protection in the seas has focused primarily on particular species. Unlike on land, safeguarding ecosystems has been rather unusual.[60] At present, less than one percent of the world's seas are subject to a particular conservation regime compared to twelve percent of the earth's land surface. The vast majority of Marine Protected Area (MPAs) is located along the coast, whilst the more distant offshore on the high seas remain virtually unprotected. This might perhaps, be due to the problem of accessibility of this zone and or as a result of the concept of the freedom of the high seas.

2.3 Importance and uses of the Sea

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[58] The International Whaling Commission <http://www.iwcoffice.org/commision/convention.htm> accessed in October 2012.

[59] *Ibid*.

[60] C.Schwarte and L.Sieele, *op cit*, p.1.

From the foregoing on the wealth of the seas which focused on the rich mineral deposits of the deep seabed and the living resources in the high seas, the importance of the living ocean to mankind is clearly articulated, with values ranging from obvious economic returns that most people expect, to the hidden but vital services that many take for granted. We have also in the preceding subheading had a hard look at what man is doing which stands to jeopardize natural systems including over fishing, destructive methods of removing wildlife from the sea, pollution, and flawed policies that have an over-reaching influence on human behaviour. It is our intention however to discuss in brief term the importance of the seas in this subheading.

It is widely acknowledged that life on earth began in the sea and still provides more than ninety-five percent of the biospheres. It is trite that ocean covers about seventy percent of the planet's surface and its depth, accounts for over ninety five percent of its life supporting space.[61] It has been stated that the ocean and atmosphere engage in interplay that makes continued life on earth possible. Without the ocean, Earth would be intolerably hot during the day and frozen at night. The ocean absorbs and stores heat energy from the sun's rays and redistributes it around the globe, affecting the movement, temperature and moisture content of air masses over sea and land.[62] We all need and use ocean. Whether we live in Marine or Montana, New York or Nevada, or Africa, the ocean has a vital influence in every life everywhere. Not only that the ocean contributes an estimated seventy percent of our oxygen but it also removes a significant amount of carbon dioxide from our atmosphere.[63] Research has revealed that two-thirds of the

[61]How inappropriate it is to call this planet earth, when clearly it is ocean.

[62]B.Mckay*et al*,*Danger At sea: Our Changing Ocean*<www.seaweb.org/resources/documents/reports-dangeratsea.pdf> accessed on 19 January, 2014.

[63]*Ibid*.

world's human inhabitants live within 40 miles of the ocean. The rain that falls, the waters we drink and baths in-all are inextricably linked to the ocean.

Marine ecosystems are characterized by a diversity of important functions as well as a diversity of species.[64] Sea grass meadows are protective nursery area for many estuarine and ocean fish. Healthy estuarine are a rich source of nutrients and food organisms that support their own high productivity and that of adjunct coastal waters, and often supporting valuable fisheries as a result. Some coastal areas of the seas are abundant sources of larvae that are transported by currents to other areas where they replenish depleted populations which may include populations of commercially valuable shellfish.[65] Marshes trap sediments and filter nutrients and chemical from the water - a function that may help protect coastal waters from some of the pollutions that humans allow to flow from the land to the sea. Coastal upwelling areas provide nutrients for highly productive food weeds that support other sea life and human beings. Coral reefs provide physical structure, food, and protection for a great diversity of marine species and the coral itself is composed of carbonate which has been produced by animals and plants in a process that sequesters large quantities of carbon dioxide from the environment.[66] It is apparent today that some of the functions of marine ecosystems happen to have special value to man, and as a result;some economists have attempted to determine their worth in dollars.[67] However, it is important also to appreciate that these functions are essential or useful to supporting a healthy ocean system in its entirety and

[64]H. A. Mooney *et al*, 'Biodiversity and ecosystem functioning: ecosystem analysis'in V. H.Heywood and R T Watson (eds), *Global Biodiversity Assessment*(Cambridge: Cambridge University Press, 1995) pp. 327-453.

[65]B.Mckay, *op cit*.

[66]*Ibid*.

[67]R.Costanza, 'The Value of the World's Ecosystem Services and Natural Capital'(1997)*Nature* vol. 387, 253-259<www.nature.com/nature/journal/v387/n6630/abs/387253a0.html>accessed on 19 January, 2014.

contribute to the support of all life on earth, regardless of any direct monetary value to the human species.

The seas as we have seen from the above are so important because of the various uses into which they can be put. We have decided in this work to discuss the uses of the sea succinctly under six areas.

- **Fishery Exploitation**: One of the major uses of the sea is for fishery, essentially for commercial purposes. The seas are exploited by commercial fishery (Cod, herring, flat fish, sprat, salmon, and sea trout) from both small boats and the largest trawlers.[68] The development of fixed gear for flounder, salmon, trout, cod, and pike perch is common in fishery especially around the vistulamouth and along the outer part of Puck Bay.[69] Fixed gear poses serious threats to sea mammals and sea birds which are attracted to this gear by the readily available food resources and thereby become entangled in

  them. It is estimate that some 17,000 birds die in fishing nets every year in the Gulf of Gdansk alone while drowning in fishing nets is the main mortality factor among sea birds along the Polish Coast.[70]

- **Geological Exploitation**: Gas extraction (oil rigs), sand and gravel extraction and amber extraction are carried out in the sea. It has been revealed that at present, the exploration for and exploitation of crude oil and gas deposits are concentrated at four drilling platforms including Petrobaltic, Baltic Beta, PG-1, and a new

[68] 'Institute of Oceanology: Polish Academy of Sciences'<http://www.iopan.gda/oceanologial. p. 517>accessed in November 2012.
[69] *Ibid*.
[70] *Ibid*.

platform, D-6 in the Russian EEZ (Kaliningrad oblast), where extraction began in 2006.

- **Recreation**: The seas are the arena for recreation activities. This includes all coastal sea bathing areas, beaches, wind surfing and sports involving small boats. The most common recreational activities in Poland, for example, are sunbathing, swimming and spending time on sandy beaches. Yachting is less popular in Poland than in Germany and the Scandinavian countries, but diving (mainly in Puck Bays are gaining in popularity.[71]

- **Large Infrastructures**: Another important use to which the seas can be put includes harbours, pipelines and planned wind farms. Electricity transmission lines usually require spaces which are readily provided by the seas. Because of its extended longitudinal shape, the Baltic Sea is particularly suitable for energy transfer between various coastal countries, as well as between the main land and Islands.[72] Study shows that currently, there are nine high voltage direct current (HVDC) transmission lines in operation. One of these is the Swepol Link, which lies in the Polish Marine Area. Connecting Poland and Sweden, this 245km-long link (600 megawatts) is one of the world's longest HVDC cable connections.

- **Navigation**: shipping routes, anchorages and harbour approaches are operations carried out in the sea which directly and indirectly enhance international trade and commerce.

[71] *Ibid*, p.518.
[72] *Ibid*.

- **Military Uses**: In the recent time, the seas have been used especially by the powerful nations, as the arena for military operations and activities. They also serve as a principal area of military development, maneuver and harbour for sophisticated military weapons. Among other uses, the seas are also used for scientific research and development.

2.4 Management, Control and Protection of Sea Resources

The United Nations Convention on the Law of the Sea (UNCLOS), 1982 which is often referred to as the 'Constitution for the Oceans', clearly distinguishes between areas of the Sea under national jurisdiction and those beyond which are generally referred to as the high seas or simply 'the Area'.[73] Because they are beyond national jurisdictions, environment and fisheries governance in the high seas pose particular challenges. A number of efforts have been made to improve management of sea resources especially fisheries management beyond the limits of national jurisdiction, for example through Regional Fisheries Management Organizations or Arrangements (RFMO/As),[74] but there is still limited experience in implementing Marine Protected Areas, both in the field of fisheries management and in biodiversity conservation.

The United Nations Conventions on the Law of the Sea 1982 provides the general framework for establishment of conservation and management measures in the high sea, although, it has been argued that such provision is not exhaustive in terms of elaborating the mechanisms or tools for conservation. It does however, provide that coastal States

[73]'The Area' is the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction. Source: United Nations Convention on Law of the Sea (UNCLOS) 1982 Part I,Art. I (1).

[74]The mandate of Regional Fishery Bodies vary: those that have a management mandate are called Regional Fisheries Management Organizations (RFMO). They adopt fisheries conservation and management measures that are binding on the members. The difference between a RFMO and a Regional Fisheries Management Arrangement (RFMA) is that the former has established a secretariat that operates under a governing body of Member States, while the latter has not.

and States that engage in fishing in the high sea must seek "to agree on the measures necessary to coordinate and ensure the conservation and development of such stock.[75] Moreover, it envisages the protection of "rare or fragile ecosystems", and where living marine resources are "depleted, threatened or endangered", their habitats are to be protected.[76]

The 1995 Agreement to promote compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas (the FAO Compliance Agreement) and the 1995 Agreement for the Implementation of the Provisions of the UNCLOS of 10 December 1982 Relating to Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (United Nations Fish Stocks Agreement) are highly relevant in this context and build directly on provisions contained in UNCLOS. The former emphasizes the primary responsibility of a Flag State[77] to exercise control over vessels entitled to flag its flag, while the latter underscores the duty of States to cooperate in the conservation and management of straddling and highly migratory fish stock. States are also required to cooperate with each other in the conservation and management of the living resources of the high seas. States whose nationals fish for the same living resources or in the same area are required to negotiate adequate conservation measures. To this end they must cooperate to establish sub-regional or regional fisheries organizations. For instance, the UNCLOS provides that: "All States have the duty to take

[75]UNCLOS, Art. 63.
[76]*Ibid*, Art. 194.
[77]The flag State in relation to fishing vessel is the State under whose laws the fishing vessel is registered or licensed.

or to cooperate with other States in taking, such measures for their respective nationals as may be necessary for the conservation of the living resources of the high seas".[78]

The Convention went ahead to provide as follow:

> States shall cooperate with each other in the conservation and management of living resources in the areas of the high Seas. States, whose nationals exploit identical living resources, or different resources in the same area, shall enter into negotiations with a view to taking the measures necessary for the conservation of the living resources concerned. They shall as appropriate, cooperate to establish sub-regional or regional fisheries organizations to this end.[79]

Conservation measures must be designed on the basis of the best scientific evidence available to maintain populations at levels which can produce the maximum sustainable yield and avoid threats to the species associated with or dependent upon harvested species.[80] UNCLOS contemplates that further global and regional roles will be developed both for marine environmental protection and high seas living resources.

Together, these instruments form the legal frame work against which marine living resources in the high Seas are managed and controlled by States. When viewed collectively, these instruments confirm that in such areas, States enjoy the freedom to

[78]UNCLOS, Art. 117.
[79]*Ibid*, Art. 118.
[80]*Ibid*, Art. 119(1) (a) & (b) and (2).

allow their nationals to engage in fishing activities. However, such freedom is not unfettered as it is subject to correlating obligation to protect the marine environment, to protect and conserve living resources and to cooperate with other States for conservation purposes.

Apart from these conservation provisions, different States have enacted laws which seek to protect certain species of sea living resource from unchecked exploitation. For instance, all six of sea turtles in the United States are protected under the Endangered Species Act of 1973.[81] Under section 7 of the Act, sea turtles are protected by ensuring that Federal actions will not jeopardize the continued existence of the species. Successful consultations have been conducted with the minerals management services for oil and gas activities, the United States Army Corps of Engineers for dredging activities, the United States Navy for explosives testing, for dredged material disposal sites, and many other federal agencies for activities ranging from nuclear power plant Construction to Scientific research. One of the most important ways National Marine Fisheries (NMFs) acts to protect sea turtles is through requiring trawl fishermen to use Turtle Excluder Devices (TED) while fishing. Because sea turtles nest on land, responsibility for their protection and conservation are shared between National Marine Fisheries Services (NMFs) and the United States Fish and Wildlife Service (USFWS).

The celebrated case of the *Shrimp-TurtleCase* strictly bothered on the attempt which sought to protect certain species of sea turtles by the United States, even though the matter

[81]<http:/ www.nmfs.noaa.gov/protres/laws/ESA Home.html> accessed in November 2012.

came up before the Dispute Settlement Body of the World Trade Organization for determination.[82] This case was instituted by India, Malaysia, Pakistan and Thailand against the United States. The appellate and panel reports were adopted on November 1998. The case is officially referred to as "United States Import Prohibition of Certain Shrimp Products", and the official WTO Case numbers are 58 and 61.[83]

Seven species of sea turtles have been identified. They are distributed around the world in sub-tropical and tropical areas. They spend their lives at sea, where they migrate between their foraging and nesting grounds. Sea turtles have been adversely affected by human activity, either directly (their meat, shells and eggs have been exploited), or indirectly (incidental capture in fisheries, destroyed habitats, polluted oceans). In 1997, India, Malaysia, Pakistan and Thailand brought a joint complaint against a ban imposed by the United States on the importation of certain shrimp turtle products. The protection of sea turtles was at the heart of the ban. The United StatesEndangered Species Act of 1973 listed as endangered or threatened the five species of sea turtles that occur in US waters, and prohibited their "take"[84] within the US, its territorial sea and the high seas. Under the Act, the United States required US shrimp trawlers to use "turtle excluder devices" (TEDs) in their nets when fishing in areas where there is significant likelihood of encountering sea turtles. Pursuant to section 609,[85] provisions were made with regard to the imports of shrimp turtles. It states*inter alia,* that shrimp harvested with technology that may adversely affect certain sea turtles may not be imported into the United States unless the harvesting nation was certified to have a regulatory programme and an

[82]<www.wto.org.topic-disputesettlement> last accessed in February 2012.
[83]*Ibid*.
[84]"Take" in this context means harassment, hunting, capture, killing or attempting to do any of these.
[85]United States Public Law (1989) 101–102.

incidental take-rate comparable to that of the United States, or that the particular fishing environment of the harvesting nation did not pose a threat to sea turtles.

In practice, countries that had any of the five species of sea turtles within their jurisdiction, and harvested shrimp with mechanical means, had to impose on their fishermen requirements comparable to those borne by the US shrimpers if they wanted to be certified to export shrimp product to the United States. Essentially this means the use of TEDs at all times.

In its reports, the Appellate Body sounded it clear that under WTO rules, countries have the right to take action to protect the environment (in particular, human, animal or plant life and health) and endangered species essentially exhaustible sea resources. It went on to state that measures to protect sea turtles would be legitimate under GATT Article 20 which deals with various exceptions to the WTO's trade rules, provided certain criteria such as non-discrimination were met.

The United States however lost the case, not because it sought to protect the sea resources or the environment but because it discriminated between WTO members. It provided countries in the Western hemisphere – mainly in the Caribbean, technical and financial assistance and longer transition periods for their fishermen to start using turtle excluder devices. It did not give the same advantages to the four Asian countries (India, Malaysia, Pakistan and Thailand) that filed the complaint with the WTO. The Appellate Body went on to say:

> In reaching these conclusions, we wish to underscore what we have not decided in this appeal. We have not decided that the protection and preservation of the

> environment is of no significance to the members of the WTO. Clearly, it is. We have not decided that the sovereign nations that are members of the WTO cannot adopt effective measures to protect endangered species, such as sea turtles, clearly they can and should. And we have not decided that sovereign States should not act together bilaterally, plurilaterally or multilaterally, either within the WTO or in other international fora, to protect endangered species or otherwise to protect the environment. Clearly they should and do.
>
> What we have decided in this appeal is simply this: although the measure of the United States in dispute in this appeal serves an environmental objective that is legitimate under paragraph (g) of 'Article xx (i.e. 20) of the GATT 1994, this measure has been applied by the United States in a manner which constitutes arbitrary and unjustifiable discrimination between members of the WTO.

All sea turtles in Hawaii are protected under the Endangered Species Act and Wildlife Law of the State of Hawaii.[86] These laws prohibit harassing, capturing, (possessing or removing), harming or killing sea turtles under State law. Violation is a misdemeanour

[86]C. David, 'Hawaii's State-wide Aquatic Wildlife Conservation Strategy'<http://www.state ni.us/dlnr/dofaw/rules/chap124> accessed in November 2012.

criminal offence, punishable by fine up to $2,000 and/ or 30 days in jail. In Hawaii, sea turtles both living and dead are protected. If one sees a sea turtle in the wild, he will not attempt to touch it or grab it. The recommended distance for observation of sea turtle in the wild is 50 yards. The law protects the turtles from even being approached by dogs.

2.5 A Changing Sea

The Sea has long been widely viewed as limitless, immune to human activity and not susceptible to change. Just as recently as 1956, a marine scientist wrote that:

> It may be rash to put any limit on the mischief of which man is capable, but it would seem that those hundred and more million cubic miles of water… is the great matrix that man can hardly sully and cannot appreciably despoil.[87]

Yet, it has become evidently clear today that the sea, for all its vast dimensions, can after all be significantly altered by human activity. From the coastal zones of the sea to far inland, the life-styles of our growing numbers and the industries that support us affect coastal and marine environments from the edge of the land and beyond, into the deep sea.[88] It has been averred that across the United States, and around the world, the constant increase in population and consumption, and the concomitant growth of commercial, industrial and recreational activity continues to promote environmental change and degradation. The specific causes of change in the sea are intertwined and complex.

[87]M.Graham, 'Harvests of the Seas' in W L Thomas*et al*(eds), *Man's Role in Changing the Face of the Earth*(Chicago: University of Chicago Press, 1956) pp.501-502.
[88]B.Mckay, *op cit*.

However, we can identify several broad categories of such human activity that due to their shear intensity and pervasiveness are occasioning ground in the alteration of the global sea.

The Causes of Sea Change

(a) **Chemical Pollution and Marine Debris**

The dumping or discharge of oil, nuclear waste, plastics and other debris, and a vast variety of chemical contaminants cause a wide range of impacts.[89] The contaminants directly poison marine life or cause chronic disease, reproductive failure or deformities. Marine pollution comes as a result of chemical, military and recreational shipping and boating, run-off from urban streets and agricultural field, oil drilling installations, and industries and sewage treatment plants.

(b) **Fishing**

Destructive or non-existent fisheries polices and the development of oversized, over capitalized, over mechanized and highly subsidized fleets have inevitably led to the depletion of numerous fish populations and the consequent collapse of various fisheries. Many commercialfisheries are also responsible for adverse impacts on non-target species and on marine habitats. The incidental catch and mortality of marine mammals, sea bird, sea turtles and unwanted fish species or age groups by various fishery-types, and the destruction of habitats and benthic communities by bottom-dragging fishing gear, are all identified as altering food chains and sea-life communities.[90]

(c) **Nutrient Pollution**

[89] *Ibid.*
[90] *Ibid.*

The discharge or release of nutrients and other substances from human wastes, sewage, fertilizer and animal waste from farm runoff; and air emissions from coal- and oil burning electric utilities, industries and gas-burning vehicles, all contribute in polluting waters, promote harmful algal blooms, and dramatic reductions in the richness of sea-life communities in the affected environments.

(d) **Coastal Development**

It has been suggested that urbanization, road construction, port and marine activities, boating, dredging and dumping; mining; and coastal agriculture, forestry, and aquaculture, among other activities, continue to reduce, fragment, or degrade coastal habitats and lead its reductions in plant and wildlife populations and local and regional extinctions of certain species in the sea.

(e) **Introduction of Exotic Species**

The introduction of exotic species and their pathogens, often inadvertently, causes the disruption of natural systems on a global scale. The major cause of marine environment introduction is the transport and subsequent discharge of species via ships' ballast water into environments where they did not previously occur.[91] Other vectors include those aqua culture practices where exotic species are purposefully introduced or can escape into local waters. Such introduced or exotic species can prey on or out-compete native species and cause fundamental and irreversible alterations in natural communities.[92]

(f) **Damming Rivers**

[91] *Ibid.*
[92] *Ibid.*

The damming or diversion of rivers for power generation, flood control or irrigation purposes has resulted *inter alia*, in significant reduction and or changes in the timing of fresh water flow to the sea, reduced sediment flow into deltas and wetlands, and obliteration of fish spawning habitat. Impacts have been widespread to include fisheries reduction, loss of biodiversity, increased concentrations of pollutants, the salinization and subsidence of surrounding coastal lowlands, and the overall alteration of estuaries.

(g) **Destruction of the Ozone Layer**

There is today, a human-induced reduction in the stratospheric ozone layer which has allowed increased ultraviolet-B radiation to reach the earth's surface.[93] Study has revealed that this radiation can seriously affect human health and damages or kills fish eggs and larvae and tiny plank-tonic animals and plants which live in the surface of the sea.

(h) **Global Climate Change**

The human- induced global climate change with concomitant sea level rise, increased air and water temperatures, and changes in precipitation patterns is predicted to alter coastal and oceanic environments through a variety of direct and indirect impacts.

2.6 The Concept of Freedom and Commonage of the Sea

For about four hundred years after *Hugo Grotius*, a renowned Dutch jurist, historian, theologian and diplomat prevailed in his famous controversy with John Seldom, international law saw the seas as belonging to everyone or to no one, and *mare liberum*(freedom of the seas) as the fundamental principle of the law of the sea although

[93]*Ibid*.

subject in war time to the laws of war. Freedom of the sea implies primarily that everyone/State has equal rights and access to the sea, while the concept of commonage signifies that the seas belong to every State and no State should appropriate any point of the sea as an indivisible part of its territorial domain. That status and that principle applied throughout the seas. However, exceptions, principally in favour of Coastal States, developed slowly, and historically, at least, were seen and resisted as carved out of the commonage, as derogations from freedom.[94] Gradually, zones of 'national jurisdiction' for the Coastal State began to emerge: - the territorial sea, the continental shelf, the exclusive economic zone, creating distinctions between them and the rest of the seas and ascribing the latter the distinguishing label, the "high seas".[95]

Freedom of the sea had meant unfettered freedom to use the seas, so that no uses have been barred. It should be noted that the principal use of the seas has been navigation, fishing, trade, travel and war. In time, the seas began to lend themselves to tunneling, laying of cables, submarine travel and scientific research. In today's world as noted earlier in this work, the seas are a principal arena of military development, maneuver and harbor for sophisticated military weapons and equipment.[96] The seas have also recreational and scientific importance as already noted. They have been for a long time a repository for waste, recently also for atomic waste.

The notion of freedom also conceptualized the air above the seas and it too, has been open to all for aviation and its various uses and purposes. There has been no consensus, however, as to "who owns the seabed", as whether the "commonage" of the

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[94]L.Henkin*et al*, *International Law Cases and Materials*(2nd edn, St.Paul Minn.: West Publishing Co., 1987) P.1231.

[95]All these jurisdictional zones will be discussed fully in the subsequent chapters of this work.

[96]*Ibid*.

seas applies as well to the seabed and its subsoil.[97] Some have urged that the seas are not subject to national appropriation solely because that would interfere with freedom, particularly for navigation, but there is no similar reason for denying national acquisition and sovereignty in the seabed and its subsoil. Such doubt would however, not be expressed in this present day. This is because the United Nations Convention on the Law of the Sea (UNCLOS) 1982 has unequivocally declared the seabed, ocean floor and its subsoil beyond the limits of national jurisdiction as the common heritage of mankind. It follows therefore that all resources exploration and exploitation activities in the 'Area' are to be carried out for the benefits of mankind as a whole taking into particular consideration the interest of developing countries. The UNCLOS has declared *inter alia* that no State shall claim or exercise sovereignty or sovereign rights over any part of the 'Area' or its resources, nor shall any State or natural or juridical person appropriate any part thereof.[98] The International Seabed Authority (ISA) was established to organize and control such activities and share the resulting benefits for the good of the entire mankind.

The terms "freedom" and "commonage" are complementary to each other. The reason is found on the ground that while freedom as a concept allows everyone free access to the seas, the concept of commonage restrains any nation from using the sea in a way that affects other nations' right as the co-owners of the seas.

The freedom of the seas and the principle that they belong to all, or no one has meant also freedom for all nations to exploit sea resources, principally to fish and to keep one's catch.[99] Those who held the view and insisted strictly that the seas were common property might hit hard point here explaining why individual nations have/could

[97]*Ibid*.
[98]UNCLOS, Section 2, Arts. 136 and 137 (1) – (3).
[99]L.Henkin,*opcit*, p.1236.

appropriate the fish that belonged to all. It has been suggested that such questions are merely theoretical, as fishing was older than international law, and no nation had any interest in insisting that fishing was generally prohibited. Besides, the fish reproduced themselves and seemed plentiful and inexhaustible.[100] Even when it is proved that fish were not in fact always and everywhere plentiful and inexhaustible, the freedom to fish in the seas at large survived unimpaired.

2.7 Vessels on the Sea

A vessel implies any ship or boat which is not propelled by Dars.[101] The principal uses of the sea have required vessels. While small vessels were individual property, larger vessels tended to be the property of sovereign States and thereby enjoyed sovereign privileges and immunities.[102] In time, all vessels that plied the seas came to enjoy the protection of the sovereign and vessels acquired "nationality", usually reflected in documents of registration and the right to fly the sovereign flag. Both the 1958 and 1982 Conventions on the Laws of the Sea place the law as to ships in the context of the law governing the high seas.[103] The nationality and status of ships and the rights and duties of the flag Sates, however, have application as well in places other than high Seas.

2.7.1 Nationality of Vessels

Every State, whether coastal or land-cocked, has the right to sail ship flying its flags on the high seas.[104] Ships sailing the high seas are generally under the jurisdiction of the

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[100]*Ibid*.
[101]D. P. O'Connell, *The International Law of the Sea* (Oxford: Oxford University Press, 1984) p.748.
[102]L.Henkin, *opcit*, p.1236.
[103]*Ibid*.
[104]UNCLOS, Art. 90.

State whose flag they fly. They are required to comply with the laws and safety standards which the flag State enforces.The Convention states that:

> Ships shall sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or in this Convention, shall be subject to its exclusive jurisdiction on the high seas. A ship may not change its flag during a voyage or while in a port of call, savein the case of a real transfer of ownership or change of registry.[105]

Many fishing nations require fishing vessels to obtain authorization, license or permit before engaging in high seas fishing. Some States impose gear restrictions, prohibit fishing techniques or do not allow vessels flying their flags to fish in vulnerable high sea areas. To sell fish on their domestic markets, some States require high seas vessels to have on board observers, be equipped with monitoring devices and submit catch reports. The Convention also provides as follow:

1. Every State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Ships have the nationality of the State whose flag they are entitled to fly. There must exist a genuine link between the State and the ship.

[105]*Ibid*, Art. 92(1).

2. Every State shall issue to ships to which it has granted the right to fly its flag documents to that effect.[106]

The above provisions suggest that States are saddled with responsibility to effectively exercise their jurisdiction and control in administrative, technical and social matters over ships flying their flag.

The principle of flag State jurisdiction is subject to some exceptions. For instance, in the case of piracy, any State, by ship or plane in government service, may take action against a vessel and its crew. Under the UNCLOS, States may also enjoy additional rights with regard to preventing and punishing the transport of slaves, suppressing unauthorized broadcasting, pursuing a foreign vessel for violation of domestic law, boarding ships without nationality and addressing major pollution incidents. Warships however have complete immunity from the jurisdiction of any State other than the Flag State.

2.7.2 Jurisdiction over Vessels

i. Requisition and Control of National Vessels

Under international law, the general proposition is that the right to requisition[107] ships rests with the State of registry. This opinion or proposition was probably formulated after the British-Dutch exchange on whose right it was to requisition a vessel owned by Dutch corporation. In 1917, the British Government informed the Netherland that it intended to requisition a number of vessels which, although owned by Dutch corporation and registered in the Netherlands, were 'in reality British' because of the fact that British

[106]*Ibid*, Art. 91 (1)and (2).

[107]Torequisition a ship means to make an official order or request by a State demanding for surrender, and assuming control of a ship in the sea, usually when members on board are suspected to have committed a crime. This is done with the aim of checking criminal activities in the sea.

nationals owned the shares of the controlling corporations. The Netherland Government delivered a strong protest, asserting that it alone had the right to requisition vessels flying the Dutch flag. In reply, the British Government changed its position, noting that it did not seek to rely upon the fact of British ownership or control but upon the recognized right of a belligerent to requisition neutral ships present in its territory. It was admitted that a State of 'ultimate ownership' is entitled to requisition foreign-flag vessels with the consent or acquiescence of the country of registry.[108] If the State of registry should resist the transfer of its vessels to the control of another State, the latter could still requisition these orother vessels, whether or not owned by its nationals, which it finds within its territory.[109] It has been suggested also that requisition by a State of national-owned vessels found on the high seas or in foreign ports might be justified, even without the consent of the flag State, on the ground that the latter is unable to afford the vessels adequate protection against the dangers of hostilities.

Additionally, States can allow other States to stop, board, search or arrest its vessels through international agreements or on an *ad hoc* basis. States have, for example, entered into international treaty arrangements to facilitate the interception of drug trafficking, terrorism, illegal fishing and other unlawful acts on the high seas. In addition, measures against foreign ships on the high seas have also been justified on the grounds of self-defence or necessity.

ii. Jurisdiction over Acts Committed on National Vessels

[108]L.Henkin, *opcit*,p.1240.
[109]*Ibid*.

The flag State has both rights and duties to exercise jurisdiction over acts committed on vessels which fly its flag. In the Rights and Duties of the Flag State Restatement (Revised). 502.[110]

1. The flag State is obliged
    a. to exercise effective authority and control over the ship in administrative, technical and labour matters; and
    b. i. to take such measures as are necessary to ensure safety at sea, prevent collisions, and prevent, reduce and control pollutions of the marine environment, and

       ii. to adopt laws and regulations and take such other steps as are required to achieve the conformity of these measures with generally accepted international standards, regulations, procedures and practices, and to secure their implementation and observance
2. The flag State may exercise jurisdiction to prescribe, to adjudicate, and to enforce by non-judicial means with respect to the ship or any conduct that takes place on the ship.

The Convention provides that:

> In the event of a collision or any other incident of navigation concerning a ship on the high seas, involving the penal or disciplinary responsibility of the master or of any other person in the service of the ship, no penal or disciplinary proceedings may

[110]Citedin *Ibid,* p.1241.

> be initiated against such person except before the judicial or administrative authorities either of the flag State or of the State of which such person is a national.[111]

In *Regina v. Leslie*[112] involving the question whether a conviction for false imprisonment could be sustained against the master of an English Merchant ship who, under contract with the Chilean Government transported to England a group of persons who had been banished from Chile and who were placed aboard the ship by Chilean Government officials while the ship was in Chilean waters. After indicating that the conviction could not be sustained for what was donein Chilean waters because the Chilean Government could "justify all that it did within its own territory" and the defendant merely acted as its agent, the court sustained the conviction for acts committed on the high seas, stating:

> … it is clear that an English ship on the high seas, out of any foreign territory, is subject to the law of England, and persons, whether foreign or English, on board such ship are as much amenable to English law as they would be on English soil. In *Reg. v. Sattler* (7 Cox Crim.Cas.431), this principle was acted on as to make the prisoner, a foreigner, responsible for murder on board an English ship at sea. The same principle has been laid down by

[111]Art. 97.
[112]8 Cox Crim.cas. 269 (ct.crim.App. 1860).

> foreign writers on international law…. Now, as the contract of the defendant was to receive the prosecutor and the others as prisoners on board his ship, and to take them without their consent over the sea to England, although he was justified in first receiving them in Chili (sic), yet that justification ceased when he passed the line of Chilean (sic) jurisdiction, and after that, it was a wrong which was internationally planned and executed in pursuance of the contract, amounting in law to a false imprisonment.

In the historical *Lotus Case*[113] between France and Turkey, Turkey's assertion of jurisdiction over a French citizen who had been the first officer of a ship that collided with a Turkish ship on the high seas was challenged by France as a violation of international law.

A collision occurred shortly before midnight of 2nd of August 1926 between the French Mail Steamer Lotusand the Turkish Collier Boz-kourt. The French Mail Steamer was captained by a French citizen (Demons), while the Turkish Collier Bot-kourt was captained by Hassan Bey. The Turks lost in the incident, eight men after their ship cut into two and sank as a result of the collision.

Although the Lotus did all it could do within its powers to help the ship wrecked persons, it continued on its course to Constantinople, where it arrived on August 3rd 1926. On the 5th August, Lieutenant Demons was asked by the Turkish authority to go ashore to

[113]*France v. Turkey* (1926-7) PCIJ Series A N0. 10.

give evidence. After Demons was examined, he was placed under arrest without informing the French Consul-General and Hassan Bey. Lieutenant Demons was convicted by the Turkish courts for negligence conduct in allowing the accident to occur.

This basis was contended by Demons on the ground that the court that convicted him lacked jurisdiction over him. With this, both countries agreed to submit to the Permanent Court of International Justice (PCIJ), the question of whether the exercise of Turkish criminal

jurisdiction over Demons for an accident that occurred on the high seas contravened international law.

The issue was whether a rule of international law which prohibits a State from exercising criminal jurisdiction over a foreign national who committed acts outside of the State's national jurisdiction existed. It was held by the Court that a rule of international law

which prohibits a State from exercising criminal jurisdiction over a foreign national who has committed act outside of the State's national jurisdiction does not exist. According to the Court, failing the existence of a permissive rule to the contrary is the first and foremost restriction imposed by international law on a State and it may not exercise its power in any form in the territory of another State. This does not imply that international law prohibits a State from exercising jurisdiction in its own territory in respect of any case that relates to acts that have taken place abroad which it cannot rely on some permissive rule of international law. In this situation, according to the Court, it was impossible to hold that there was a rule of international law that prohibited Turkey from prosecuting Demons because he was abroad a French ship. This stemmed from the fact that the effects of the alleged offence occurred on a Turkish vessel, the Court maintained.

The Court concluded that both States may exercise concurrent jurisdiction over this matter because there is no rule of international law in regards to collision cases to the effect that criminal proceedings are exclusively within the jurisdiction of the State whose flag is flown.

CHAPTER THREE

JURIDICAL NATURE OF THE TERRITORIAL SEA

The territorial sea gradually resulted from early recognition that the coastal State had special interests in waters adjacent to its shores for some purposes; in time, the various interests combinely culminated into "sovereignty" over a "territorial sea".[114] Coastal States claimed the need to protect their territorial interests, otherwise known as territorial sea against acts outside the territorial sea. A "contiguous zone" in which the coastal States could act against smugglers developed early; later some States claimed right to act against polluters or "pirate broadcaster". There developed also a right for the coastal State of "hot pursuit," even on the high seas, of violators of its special zones and interests.[115]

Preference or exclusive rights for the coastal State to natural resources in or beneath waters adjacent to the coast (but beyond the territorial sea) has also been recognized and developed recently; the **Truman Proclamation** justified the doctrine of Continental Shelf in the interests of conservation and as "reasonable and just".[116] Other coastal States thought it reasonable and just that the coastal States have exclusive and preferred fishing rights in coastal areas even beyond the territorial sea. The idea led to the development of an exclusive economic zone, with exclusive rights for the coastal State in all natural resources of their "patrimonial sea". These rights constitute a form of derogation from "Commonage" Principle in favour of coastal States.

Under international law, every coastal State is entitled to exercise authority in areas of the sea adjacent to its coast, as indicated in this work. There is, however, no duty

[114]L. Henkin, *op cit*. p.1244.
[115]*Ibid.*
[116]*Ibid.*

to assert or exercise such authority or to do so to the fullest extent permissible. The United States, for

instance, has refused to claim certain areas as historical waters or to draw straight baselines in certain areas where its coast is deeply indented or where there is a fringe of islands along the coast, thus diminishing the sea areas to which, under international law, its jurisdiction could have been extended.[117]

3.1 Historical Development of the Territorial Sea

After State claims to vast expanses of the sea had ceased, during the seventeenth century, to obtain international respect in law or in practice, there remained the idea that a littoral State[118] might properly claim special interests in at least certain areas of adjacent waters, the inviolability of which was necessary to its safety and protection. The doctrine of the territorial sea as it is today is traditionally regarded as having been based on the maxim laid down by the Dutch Jurist Bynkershoek in the early eighteenth century that a State's dominion extended only so far out to sea as its cannon would reach;[119] this, in turn, is regarded as having given rise to the doctrine of a three-mile belt of territorial waters, three miles supposedly being the approximate range of eighteenth century, shore-based cannons.[120]Bynkershoekseems only to have been the first writer to record a "cannon shot" rule that had already been applied in the practice of Mediterranean States to exempt from capture during wartime, all merchant vessels lying within actual gun range of

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[117]*United States v. California,* (1965)L. Ed. 2d 296 381 U.S. 139, 167 – 68, 175, 855.ct. 1401, 1416 – 17, 1421, 14.

[118]Littoral States are constituent States within a nation State which possess sea coast. Examples are Rivers, AkwaIbom or Lagos States within the Federal State of Nigeria.

[119]This was properly referred to as the "cannon-short" rule of the width of the territorial sea.

[120]L. Henkin*et al, International Law Cases and Materials* (2nd edn, St. Paul Minn.: West Publishing Co., 1987) p. 1247.

neutral ports or fortress.[121] The rule did not however, involve a continuous belt of waters, but merely constructed zones or "pockets" of adjacent sea within which prizes could not be taken without violating a duty owed to the neutral State.[122] In the north, the German jurist Pufendorfenvisaged as early as 1672 a maritime belt for offensive purposes, and Denmark (which had at various times claimed the whole ocean between Iceland and Norway, as well as the Baltic Sea) claimed for certain purposes a belt of waters, adjacent to her territories and measured in leagues.[123] Under pressure from other States, Denmark was forced in 1745 to reduce her jurisdiction for neutrality purposes to one league but that was the Scandinavian league of four nautical miles and not the mile league used in the rest of Europe.[124] When French privateers captured two British ships in 1761 within the limits of the neutral waters proclaimed by Denmark, the French government replied to the Danish protest by proposing that the belt of neutral waters surrounding Danish territories be limited to three miles, i.e., the possible range of cannon, the proposal which Denmark refused to accept.

The doctrine of a continuous belt of territorial sea, one league or three marine miles wide, received its first explicit statement in 1782, on the basis of the Italian writer Galiani'sconclusion that it would be unreasonable for the neutrality of particular waters to depend on whether or not forts were built on the adjacent shores, and on the range of the guns which might be mounted therein. Galiani's proposal of a standard three-mile limit probably had no relation to the actual or supposed range of contemporary cannons, but simply represented a convenient standard measure just as had the league in the

[121]*Ibid*.
[122]*Ibid*.
[123]*Ibid*.
[124]J. Kent, 'The Historical Origins of the Three-Mile Limit'(1954)48 *AJIL*, 538 – 545.

North.[125] The cannon shot tradition however, was to linger for many years in diplomatic practice and in writings on international law.

The first acceptance in State practice of the three-mile belt of territorial sea occurred in 1793, when the United States, forced to define its neutral waters in the war between France and Great Britain, proposed that "the belligerents should respect United States neutrality up to the utmost range of a cannon ball, usually stated at one sea league", this being the smallest breath claimed by any State.[126] Both France and Great Britain accepted this and the three-mile limit was subsequently applied in British and United States prize courts.

Thereafter, the three-mile limit was applied for a number of purposes, and States came to rely on the comprehensive notion of territorial sea as a basis for the exercise of, *inter alia*, fishing, police and revenue jurisdiction. After inclusion in a number of European treaties regulating fishing rights, and after adoption by a number of Asian and South American States, the three-mile limit became world-wide by the end of the nineteenth century, with comparatively few exceptions (notably the Scandinavian countries – four miles, Russia – three to twelve miles at different times, and Spain and Portugal – each claiming six miles).[127]

When, in 1862 Spain protested the failure of the United States ships to respect its six-mile belt of territorial waters off the coast of Cuba, arguing that six miles was not unreasonable in view of the increased range of cannon, Secretary of State Seward replied that if the sovereigntyof a coastal State were continually to be subject to change with "improvements of the science of ordinance," the consequent uncertainty would provoke

[125]L. Henkin, *op cit.*
[126]*Ibid.*
[127]*Ibid.*

endless conflicts. Seward concluded that the more practical limit of three miles had been generally recognized by nations, and no State could extend unilaterally a jurisdiction derived in the first place only from the law of nations.

Research reveals that State practice remained apparently fairly constant up to and during the first three decades of the twentieth century. During this time, considerable deep-rooted dissatisfaction with the three-mile territorial sea was unveiled by reason of the surveys conducted by the Preparatory Committee for the League of Nations' Hague Codification Conference of 1930, at which the subject of territorial waters was to be one of the three topics chosen for codification. The Committee reported that its survey of governments showed agreement that "a State has sovereignty over a belt of sea round its coast", but that there was a lack of unanimity on the issue/question of the breadth of this belt.[128] "According to the majority," stated the Committee, "the breadth is three nautical miles". No reply disputed the fact that territorial waters include such a three-mile belt, but there were several opinions which contemplated a greater breadth. The number of States opposing the three-mile limit was sufficient to prevent the Conference from reaching agreement on the point, and some States capitalized on, and interpreted this failure as giving every State leeway to fix its own limit. Thereafter and especially after the**TrumanProclamationsof1945** [129] with regard to the continental shelf and the conservation of fisheries,[130]many States extended their claims to six or twelve miles, or more.

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[128]*Ibid*, p.1249.

[129]'Office of Coast Survey'<www.nauticalcharts.noaa.gov/staff.law-of-sea.html<accessed> on 31 January 2014. In 1945, President Harry Truman of USA issued a proclamation asserting rights to explore and exploit the oil and gas resources of the continental shelf outside of the 3 nautical miles.

[130]L. Henkin, *op cit*, p.1249.

In 1951, pursuant to a recommendation of the United Nations General Assembly, the International Law Commission began work on the regime of the territorial sea. Although substantial progress was recorded in most areas, the Commission also failed to reach agreement on the breadth of the territorial sea, and in its reports, adopted at the eighth session (1956), the Commission recommended the following articles for consideration:

i. The Commission recognizes that International practice is not uniform as regards the delimitation of the territorial sea

ii. The Commission considers that the International Law does not permit an extension of the territorial sea beyond twelve miles.

iii. The Commission, without taking any decision as to the breadth of the territorial sea up to that limit, notes, on the one hand, that many States have fixed a breadth greater than three miles and, on the other hand, that many States do not recognize such a breadth when that of their own territorial sea is less.

iv. The Commission considers that the breadth of the territorial sea should be fixed by an International Conference.

The General Conference on the Law of the Sea failed to achieve the two-thirds majority that was necessary for decision on a definite limit of territorial sea. The Conference was bedeviled by a variety of miscellaneous claims. In the work of the First Committee on the territorial sea and contiguous zone, two major approaches to the lingering problem could be discerned: First, a group led by the United States and the United Kingdom struggled to retain the traditional three-mile limit, admitting however, some willingness to

compromise on the question of exclusive fishing rights. Second, the Soviet bloc (supported by the Arab States and by a number of the newly independent nations of Africa and Asia) favoured the right of coastal State to choose their own limit for territorial sea, up to twelve miles from the baseline. The latter group received occasional, and ultimately decisive, support from States such as Canada, Iceland, Mexico and other Latin American nations concerned primarily with the conservation and exploitation of fishery resources in their offshore waters.[131]

The failure of the 1958 Conference to reach agreement on the two most important problems before it namely the breadth of the territorial sea and the extent of fishing rights in the contiguous zone, motivated the decision to convene a second Conference on the Law of the Sea in 1960. Notably, between 1958 and 1960, a number of additional States had extended their territorial sea beyond three miles. The United States in the interim determined that:

> the area of compromise which would produce a proposal capable of acceptance at the Conference of 1960 was not broad enough and was, in general, the area between the previous United States' proposal and the previous Canadian proposal at the 1958 Conference, thus, incorporating a six-mile territorial sea with some kind of six-mile contiguous fishing zone.

[131] *Ibid*, p.1250.

Accordingly, the United States and Canada ultimately placed before the 1960 Conference a joint proposal based on the 1958 United States' compromise suggestion: a territorial sea of

six miles, plus a contiguous zones of additional six miles in which the coastal States were to enjoy exclusive fishing rights; the vested interests of the States in the resources of the contiguous zones would, however, be preserved, but only for a period of ten years, after which they would expire.[132]It was expected that the proposal would receive the necessary two-thirds approval, but unfortunately, opposition led by the Soviet and Arab blocs succeeded by one vote in blocking the adoption of the proposal.[133]It was at this point that the US and UK emphasized that the non-acceptance of the compromise proposal by implication left the legal situation the way it had been prior to the Conference and stated their intention to continue to adhere to the three-mile limit and not to recognize any wider or larger claims as valid against them without their agreement.[134]

However, after 1960 and with the continuing proliferation of States and the emergence of the 'third world', the agitation and drive for a twelve-mile territorial sea became stronger and more intense and the opposition to it eroded. The United States indicated its readiness to accept the twelve-mile zone, provided passages through international straits were assured. The developing coastal States also no longer saw widening the territorial sea beyond twelve-mile as the way to extending their exclusive jurisdiction over resources of the sea and joined to develop instead, the concept of a far-wider "patrimonial sea" or "exclusive economic zone".

[132]Second UN Conference on the Law of the Sea, Official Record Annexes, (1960) 178.
[133]Second UN Conference on the Law of the Sea, Official Record, Summary Record (1960) 30.
[134]L.Henkin,*opcit*.

3.2TheTerritorial Sea[135]

The Territorial Sea could simply be defined as an area extending from internal waters to the sea- ward side which in this present legal regime of the sea extends up to twelve nautical miles. As we noted earlier in this work, the territorial sea resulted from early recognition and agitation that coastal States had special interests in waters adjacent to their shores for some purposes, which eventually culminated into sovereignty over the area now designated as territorial sea. The United Nations Convention on the Law of the Sea recognizes and provides for this legal status of the territorial sea of a coastal State. Not only does a coastal State have sovereignty and exercises jurisdiction over territorial sea but such jurisdiction extends to the air space above the territorial sea, its bed and subsoil. In its Article 2, The UNCLOS provides that:

1. The sovereignty of a coastal State extends, beyond its land territory and internal waters and, in the case of an archipelagic State, its archipelagicwaters, to an adjacent belt of sea, described as the territorial sea.
2. This sovereignty extends to the air space over the territorial sea as well as to its bed and subsoil.

Articles 24 and 25 of the Convention provide respectively for the duties and rights of coastal

States in the territorial sea. Article 24 provides as follow:

[135]The term "Territorial Sea" is interchangeable with "Territorial Waters".

1. The coastal State shall not hamper the innocent passage of foreignships through the territorial sea except in accordance with this Convention.In particular, in the application of this Convention or of any laws orregulations adopted in conformity with this Convention, the coastal Stateshall not:

(a) impose requirements on foreign ships which have the practicaleffect of denying or impairing the right of innocent passage; or

(b) discriminate in form or in fact against the ships of any state oragainst ships carrying cargoes to, from or on behalf of anyState.

2. The coastal State shall give appropriate publicity to any danger tonavigation, of which it has knowledge, within its territorial sea.

Article 25 which stipulates for the rights of coastal States provides that:

1. The coastal State may take the necessary steps in its territorial sea toprevent passage which is not innocent.
2. In the case of ships proceeding to internal waters or acall at a port facility outside internal waters, the coastal State also has the right to take the necessary steps to prevent any breach

of the conditions to which admission of those ships to internal waters or such a call is subject.

3. The coastal State may, without discrimination in form or in fact among foreign ships, suspend temporarily in specified areas of its territorial sea the innocent passage of foreign ships if such suspension is essential for the protection of its security, including weapons exercises. Such suspension shall take effect only after having been duly published.

It is however important to note that sovereignty over the territorial sea is not exercised arbitrarily by the coastal States but must be in conformity with the clear provisions of the Convention. This is the contemplation of the Convention when it provides in Article 2 (3) that "the sovereignty over the territorial sea is exercised subject to this Convention and to other rules of international law". The analogues articles in the 1958 Convention on the territorial sea and the contiguous zone (Articles 1 and 2) do not have any reference to archipelagic States.[136] But, as a way of innovation and improvement, the 1982 Convention consciously contains a new Part IV, Articles 46-54, prescribing specifically for such States.

[136] An Archipelagic State is any internationally recognized State or country that comprises a series of islands that form an archipelago. One example of an Archipelagic State is Indonesia.

There can be little doubt that the above rules [137] also represent customary international law. The other rules of international law referred to in Article 2 (3) presumably include both

Internationalcustomary rules for example, concerning the treatment of aliens and treaty obligations for example, concerning navigation at sea.[138] In the *Grisbadarna Case*,[139]the Permanent Court of Arbitration held that when certain land territory was ceded to Sweden,

"the radius of maritime territory constituting an inseparable appurtenance of this land territory must have automatically formed a part of this cession". Also, in the *Anglo-Norwegian Fisheries Case*,[140] Judge Sir Arnold McNair, in his dissenting opinion stated:

> International law does not say to a State: 'You are entitled to claim territorial waters if you want them'. No maritime State can refuse them. International law imposes upon a maritime State certain obligations and confers upon it certain rights arising out of the sovereignty which it exercises over its maritime territory.

3.3 Passage through the Territorial Sea

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[137]United Nations Convention on the Law of the Sea UNCLOS (1982), Art.2 and theGeneva Convention on Territorial Sea (1958), Arts.1 and 2.

[138]D. J. Harris, *Cases and Material on International Law (*6th edn, London:Sweet and Maxwell, 2004) p.386.

[139]*Norway v Sweden*, Scott (1909) Hague Court Reports 121 at 127.

[140]*United Kingdom v Norway*(1951) ICJ Rep.116 at 160<http://www.worldcourts.com/icj/eng/decision/1951.12.18 fisheries.htm> accessed on 31 January 2014.

A coastal State may now claim a territorial sea extending up to twelve nautical miles beyond its land territory or internal waters (or beyond its archipelagic waters, in the case of an archipelago).[141] Within its territorial sea, a coastal State has rights and duties inherent in sovereignty, that is to say, reservation of fisheries for nationals and exclusion of foreign vessels from cabotage,[142] although the coastal State must accord to a foreign-flagged vessel the right of innocent passage.

The question therefore is, to what extent can the sovereignty of a coastal State in its territorial sea be restricted or set aside to permit unhindered passage of foreign vessels through this zone. In its attempt to find an acceptable solution to the conflict of interests inherent in this question, the United Nations Convention on the Law of the Sea uses the concept of innocent passage.[143] Passage has been defined as navigation through the territorial sea for the purpose of crossing that sea without entering internal waters or of proceeding to or from that sea without entering internal waters or of proceeding to or from internal waters.[144] It may include temporary stoppages, but only if they are incidental to ordinary navigation or necessitated by distress or force *majeur*.[145]

The right of innocent passage seems to be the result of an attempt to reconcile the freedom of the sea navigation with the theory of territorial waters. While reconciling the necessity of granting to literal States a zone of waters along the coast, the family of nations was unwilling to prejudice the newly gained freedom of the seas.

3.3.1 Innocent Passage

[141]UNCLOS, Arts.3 and 46 respectively.
[142]The term *cabotage* means "coastal trade".
[143]UNCLOS, Art. 17.
[144]M. N. Shaw, *International Law*(5th edn. Cambridge: Cambridge University Press, 2004) p.508.
[145]The UNCLOS, Arts.17 and 18; Nicaragua Case: (1986) ICJ Reports 12,111; 76 ILR, 1.

Customary international law has long recognized the right of ships of all States the peaceful or innocent passage through the territorial sea.[146] Though, it has been argued elsewhere[147]that the term "innocent passage" is vaguely described rather than precisely defined. The Law of the Sea Convention, in attempt to codifying the right of innocent passage has defined it as passage that is "not prejudicial to the peace, good order or security of the Coastal State".[148]

A catalogue of activities can be used as a guide in determining whether a passage is innocent or not. For instance, Article 19 (2) (a) – (l) of the 1982 Convention on the Law of the Sea states that:

> Passage of a foreign ship shall be considered to be prejudicial to the peace, good order or security of the coastal State if in the territorial sea, it engages in any of the following activities:
>
> a. any threat or use of force against the sovereignty, territorial integrity or political independence of the coastal State, or in any other manner in violation of the principles of international law embodied in the Charter of the United Nations;
>
> b. any exercise or practice with weapons of any kind;

[146]M. Brownlie, *Principles of Public International* Law (5thedn, Oxford:Oxford University Press, 1998) pp.191-192; See also *Ibid* Art.17.

[147] Bernaerts' Guide to the United Nations Convention on the Law of the Sea, (1982) <www.amazwn.com/bernaerts-guide-united-nations-convention/.../> Accessed on 29 November 2014.

[148]UNCLOS, Art.19 (1).

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;

g. loading or unloading of 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 this 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.

With the exception of the general clause which reads: “any activity not having direct bearing on passage”, the clauses above cover activities which pose a serious and unacceptable threat to the costal State. The general clause must be read within mind and

applied *MutanddisMutaddi* only in case of a threat which, while not specifically listed, would be of a weight equal to that of the activities given. In addition, the general term "innocent passage" must be interpreted and applied in the light of national law which has been implemented by Coastal State. Every Coastal State can adopt law regarding the safety of navigation, laying of submarine cables, resources of the sea, fishing, environmental protection, scientific research, prevention of infringement of customs, fiscal, immigration, or sanitary laws [149] and prevention of collision [150] as well as implement sea lanes and traffic separation schemes [151] or suspend temporary without discrimination in form or in fact among foreign ships the right of innocent passage in specified areas of its territorial sea for the purpose of protecting its security,[152] subject only to the restriction that any such measures must be in conformity with the Convention and international law relating to "innocent passage".[153]The sovereignty of the Coastal State in establishing law is also limited to the extent that the imposed requirements may not have the practical effect of hampering, denying, or impairing the right of innocent passage [154] or discriminating against the ships of any State or against ships carrying cargoes to, from, or on behalf of any State.[155]

It is important to note that the concept of innocent passage does not apply to ships which are just present in the territorial sea, however innocent such presence might be. As the term itself suggests, the foreign vessels must be in passage, that is to say, in transit

[149]*Ibid*, Art. 21.
[150]*Ibid*,para. 4.
[151]*Ibid*,Art. 22.
[152]*Ibid*, Art. 25, para 3.
[153]*Ibid*, Art. 21, para.1.
[154]*Ibid*, Art. 24, para.1(a).
[155]*Ibid*, para 1(b).

through the territorial sea between any two points not in this zone[156] and the passage must be continuous and expeditious,[157] a condition which does not, however, exclude stops for navigational purposes and other acceptable reasons. Even if these conditions have been met, there still remain exceptions to the right of innocent passage with respect to criminal and civil jurisdiction of the coastal State on foreign vessels, which can be summarized as follows: a coastal State may not exercise its jurisdiction on board a foreign vessel unless there is serious threat to the coastal State,[158] measures for the suppression of drug traffic are necessary,[159] requests for aid have been made,[160] or there is a particular situation in which the vessel has left the internal waters of coastal State and is still in the territorial sea and action by the coastal State is warranted. If the vessel cannot be stopped in the territorial sea, further action may be taken in accordance with the provisions for hot pursuit.[161]

One major controversy of considerable importance revolves around the issue of whether the passage of warships in peacetime is or is not innocent. The question was further complicated by the omission of an article on the problem in the 1958 Convention on the

Territorial Seaand the discussion of innocent passage in a series of articles headed 'Rule applicable to all ships'.[162] This has led some writers to insist that this includes warships by implication or reference, while other authorities argue that such an important issue could not be resolved purely by omission or reference, especially in the light of the

[156]*Ibid*, Art. 18 para 1.
[157]*Ibid*,para 2.
[158]*Ibid*, Arts, 27 paras.1(a)-(b)and 5; 73; and 220.
[159]*Ibid*, Art. 27 para 1(d).
[160]*Ibid*, para 1(c).
[161]*Ibid*, Art. 111.
[162]M. N. Shaw, *op cit,* p.509.

reservation by many States to the Convention rejecting the principle of innocent passage for warships and in view of comments in the various preparatory materials to the 1950 Geneva Conference.[163]

It is primarily the Western States, with their preponderant naval power, that have historically maintained the existence of a right of innocent passage for warships, as opposed by the Communist and Third World nations. However having regard to the rapid growth in their naval capacity in the recent years and the ending of the Cold War, Soviet attitudes toward the issue had undergone some form of modification.[164]

In September 1989, the US and the USSR issued a 'Joint Statement on Uniform Interpretation of the Rules of International Law Governing Innocent Passage'.[165] The joint statement reaffirms that the relevant rules of international law are embedded in the 1982 Convention. It then provides in paragraph 2 that:

> All ships, including warships, regardless of Cargo, armament or means of propulsion, enjoy right of innocent passage through the territorial sea in accordance with international law, for which neither prior notification nor authorization is required.

The above statement indicates that where a warship in passage through the territorial sea did not engage in any of the activities laid down in Article 19 (2), it is in 'innocent passage' since that provision is exhaustive. This statement is important due to the fact

[163]*Ibid*.

[164]*Ibid*, p.510.

[165](1990) 84 *AJIl*, 239. The joint statement was as a result of discussion between the US and USSR over several years and is based upon and interprets the provisions of the 1982 Convention, which the two States consider, "with respect to traditional uses of the oceans, generally constitute international law & practices.

that it lend considerable credence to the view that warships as well as merchant ships have indeed a right of innocent passage through the territorial sea and one that does not require prior notification or authorization. This view is in line with the decision of the International Court of Justice in the classic *Corfu Channel Case*[166]where the Court held *inter alia* that the British warship passing through Corfu Channel in Albanian waters was innocent. One of the leading issues in the case was whether the United Kingdom had violated international law by passing through a strait in Albanian waters.

On October 22nd 1946, two British cruisers and destroyers, coming from the South, entered the North Corfu Strait. That channel they were following, which was in Albanian waters was regarded as safe because it had been swept in 1944 and checked swept in 1945. One of the destroyers, the Saumarez, when off Saranda, struck a mine and was gravely

damaged. The other destroyer, the Voltage, was sent to assist her but, while towing her, struck another mine and was seriously damaged. This lead to the loss of forty- five British officers and sailors and forty-two others were wounded.

An accident had already occurred in these waters on May 15 1946 where an Albanian battery fired in the direction of two British Cruisers. The United Kingdom Government had protested, stating that innocent passage through straits is a right recognized by international law; the Albanian Government replied that foreign ships whether warships or merchant vessels had no right to pass through Albanian territorial waters without prior authorization by Albania. On August 2nd 1946, the United Kingdom Government replied that if in the future, fire was opened on a British warship passing

[166]*United Kingdom v. Northern Ireland Albania* (1949) ICJ Rep 244.

through the channel, the fire would be returned. After the explosions on October 22nd, the United Kingdom Government announced its intention to sweep the Corfu Channel shortly which it did amidst Albania's protest. During the sweeping operations, about twenty- two moored mines were cut within Albanian territorial waters in the channel which had been swept previously before the incident on October 22nd.

The Court, after considering the whole facts and submissions by the parties reached a conclusion that even if those mines were not laid by Albania as they claimed, the laying of those mines could not have been accomplished without Albanian knowledge. Having knowledge of those mines therefore, it was the Albania's international responsibility to notify shipping and especially to warn the ships proceeding through the strait on October 22nd of the danger to which they were exposed. The Court found that Albania made no efforts to prevent the disaster and this gave omission to her international responsibility.

The Court held *inter alia*that the Albanian claim to make the passage of ships conditional on a prior authorization conflicted with the generally admitted principle that States, in times of peace, have a right to send their warships through straits used for international navigation between parts of the high seas, provided that such passage is innocent. The Court held further that the Corfu Channel belonged geographically to this category even though it was of a secondary importance in the sense that it was not a necessary route between two parts of the high seas, and irrespective of the volume of traffic passing through it. The Court also held that, in view of the special circumstances of the strait, Albania would have been justified if it had issued regulations in respect of passage, but not in prohibiting such passage or subjecting it to the requirement of special

authorization. The Court held conclusively that the passage by British vessel on the 22nd October 1946 through the Corfu Channel was innocent both in principle and method.

The State practice on the question of a right of innocent passage for warships seems to have followed significantly the view expressed in the US-USSR Joint Statement;although,writing in 1990, *kwiatowska*[167] has maintained*inter alia* that the position taken in the joint statement "is not shared by a relatively large number of over 40 coastal States, as evidenced by national legislations made by these States upon signing and ratifying the 1982…Convention."

3.3.2 Passage through International Straits[168]

With respect to passage through international straits, it is provided as follow:

> There shall be no suspension of the innocent passage of foreign ships through straits which are used for international navigation between one port of the high seas and another port of the high seas or the territorial sea of a foreign State.[169]

This provision should be read in conjunction with the decision of the ICJ in the celebrated *Corfu Channel Case*[170] where the Court recognized that at customary international law, the right of innocent passage cannot be suspended on grounds of

[167] A. G. O. Elferink, (1990)21 ODIL, p.447<books.gogle.com/books?isbn=900413669x> accessed on February 23, 2014.

[168] International Straits are those straits used for international navigation and therefore open to ships of all countries under equal conditions. Strait means a narrow passage of water connecting two seas or two other large areas of water. Example, "Straits of Gibraltar".

[169] The Geneva Convention on the Territorial Sea (1958), Art.16 (4).

[170] *Supra*, 4.

security in a part of the territorial sea that is an international strait used for navigation from one part of the high seas to another, as it can in other parts of the territorial sea.

As we related above, British warships passing through the straits were fired upon by Albanian guns. Several months later, an augmented force of Cruisers and Destroyers sailed through the North Corfu Channel and two of them were severely damaged after they struck mines. This constrained the British authorities to sweep the Channel three weeks later, and to clear it of some mines of German manufacture.[171] The Court in its much-quoted passage reiterated that:

> States in time of peace have a right to send their warships through straits used for international navigation between two parts of the high seas without the previous authorization of a coastal State, provided that the passage is innocent.[172]

The Court also held that the mines sweeping operation by the British authorities was in no way innocent and was indeed a violation of Albania's sovereignty, although the initial passage by the British naval vessels were legal.[173]

The rule which underlines the premium placed upon access to the high seas was extended by Article 16 (4) of 1958 Territorial Sea Convention, to straits which lead from the high seas into the territorial sea of a State. This extension is also repeated by Article 45, 1982 Convention. An important example of such straits is the straits of Tiran in the

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[171]M. N. Shaw, *op cit*, p.512.

[172]The Court emphasized that the decisive criterion regarding the definition of 'strait' was the geographical situation of the strait as connecting two parts of the high seas, coupled with the facts that it was actually used for international navigation. See *ibid*.

[173]*Ibid*.

Red Sea.[174] These lead into the Gulf of Aqaba, which is about 17 miles at its widest point and which is bordered by Egypt, Israel, Jordan and Saudi Arabia. Now, it should be borne in mind first, that many States including Egypt and Saudi Arabia, which border the Gulf at its mouth and along most of its length, lay claims up to twelve milesand the fact that all the Gulf falls within territorial sea.[175] It was reported that in 1967, the United Arab Republic (now Egypt) decided to prevent Israeli and other ships carrying strategic material to Israel from passing through the straits of Tiran, which decision led to a "six day war." At the time of that closure, the British Prime Minister was reported as saying "it is the view of Her Majesty's Government… that the Straits of Tiran must be regarded as an international waterway through which the vessels of all nations have a right of passage".[176]

Also, the UN Security Council Resolution,[177] setting out the basis for the settlement of the Arab-Israeli dispute, referred to the need to guarantee 'freedom of navigation through international waterways in the sea'. By the 1979 Treaty of Peace between Egypt and Israel,[178] it is provided that:

> The Parties consider the Straits of Tiran and the Gulf of Aqaba to be international waterway open to all nations for unimpeded and non-suspendable freedom of navigation and over-flight. The Parties will respect each other's right to navigation and

[174]D. J. Harris, *op cit*, p.424.
[175]The water-lines across the Straits of Tiran are about 17 miles long. It is interrupted by the Island of Tiran which is about three miles from the Egyptian side of the Straits and four miles from the Saudi Arabian side. The only navigable channel is on the Egyptian side of the Island. See*ibid*.
[176]UNDOC.5/PV 1342, (May 23, 1967) p.20.
[177](November 22, 1967) p.223.
[178]D.J. Harris, *op cit*, p.425.

over- flight for access to either country through the Straits of Tiran and the Gulf of Aqaba.

Passage through a number of other straits is also guaranteed in varying degrees by particular treaty regimes as in the case of passage through the Bosphorus and the Dardanelles which is fully guaranteed for merchant ships by the 1936 Treaty of Montreux.[179]

The subject of passage through international straits has become more important as States continually widen their territorial seas. Responding to the Western concern at this increased encroachment upon the freedom of the high seas, the 1982 Convention contains provision which introduced a new concept of right known as 'right of transit passage' through an international strait within the territorial sea of one or more coastal States. The right involves the exercise of the freedom of navigation and over-flight solely for the purpose of continuous and expeditious transit of the Strait and does not preclude passage through the Strait to enter or leave a State bordering the Strait.[180] States bordering the Straits should not hamper or suspend transit passage.[181]This would explain the action Iran recently threatened to take in the Strait of Hormuz. As retaliatory measure to the Western powers import bans on Iranian oil and warnings of other sanctions against Iran because of its nuclear programme, Iran has threatened to block the passage of oil tankers through the Strait of Hormuz.[182] This Strait is of strategic importance to the Western world. The question this insight addresses is, whether under international law, Iran has the right to

[179]*Ibid*.
[180]UNCLOS, Art.38.
[181]*Ibid*, Art.44. Exclusions to the right of transit passage are contained in Arts.36, 38(1) and 45 of the Convention.
[182]N. Oral, 'Transit Passage Rights in the Strait of Hormuz and Iran's Threat to Block Passage of Oil Tankers'<www.peacepalacelibrary.nl/.../transit-page-rights-in-the-strait-of-hormuz...>accessed on 8 December, 2014.

block the passage of merchant vessels through the Strait of Hormuz. The regime of passage through international straits was one of the key issues in the negotiations of the 1982 United Nations Convention on the Law of the Sea, and the Strait of Hormuz presents an interesting legal situation in this work. On the one hand, Iran has signed but not ratified the UNCLOS but it has ratifiedthe 1958 Geneva Convention on the Territorial and Contiguous Zone.[183] On the other hand, Oman, the other coastal State has ratified UNCLOS. Both Iran and Oman, however, subject the passage of foreign warships to prior notification. The United States, which is having issues with Iran in the Strait has not signed the UNCLOS but considers it to reflect customary international law. From our discussion so far on the UNCLOS relevant

provisions on transit passage through international strait, it is safe to argue that if Iran were to carry out its threat of blocking the passage of oil tankers through the Strait of Hormuz in response to Western economic sanctions, this would amount to a violation of international law by interfering with the rights of transit passage under the UNCLOS as well as the rights of non-suspendable innocent passage under the 1958 Geneva Convention. This is because, the imposition of economic sanctions bears no relationship to the physical act of passage of vessels through the Strait of Hormuz. The legal right of a coastal State to prevent transit or non-suspendable innocentpassage of ships is limited to acts that take place while the ship is engaged in passage through the strait that constitute a threat or actual use of force against the sovereignty, territorial integrity, or political independence of States bordering the strait; or when the ship acted in any other manner in violation of the principles of international law embodied in the United Nations Charter.

[183]*Ibid.*

One further issue in this respect is, if any State were to attack Iranian territory, be it America or whoever, without a collective decision of the United Nations Security Council, the question would arise as to whether the provisions for transit passage under the UNCLOS would continue to apply or whether Iran could invoke the laws of war and take action against any tankers, especially if they are deemed to be assisting the enemy. We think that even if the customary laws ofnaval warfare were to apply in lieu of the right of innocent passage, any self-defence claim Iran might assert as a jurisdiction to block tankers from passage in the Strait of Hormuz especially by laying mines would also likely fail to meet the requirements of necessity and proportionality. If Iran were to lay mines across the Strait of Hormuz to block passage of merchant vessels and ships without reasonable justifications, it would amount to an unlawful use of force in violation of Customary International Law and the United Nations Charter.[184]

Ships and aircrafts in transit through international straits must observe and obey the relevant international regulations and refrain from all activities other than those incidental to their normal modes of continuous and expeditious transit, unless rendered necessary by *forcemajeure*or by distress.[185] What can be deduced from the above is that, although there is no formal requirement for 'innocent' transit as in the case of innocent passage, the effect of Articles 38 and 39 of the Convention would appear to mean rendering transit passage subject to the same constraints.

It appears however, that the regime of transit passage is more generous than the right of innocent passage through other parts of the territorial seas. The regime of transit passage allows for example, the passage of aircraft and probably for underwater

[184]Military and Paramilitary Activities in and Against Nicaragua, Nicaragua v. United States (1985) ICJ Reports, 14.
[185]*Ibid*, Art. 37.

submarines, while there are fewer constraints, on conduct during passage and less power for the coastal State to control passage than the case in innocent passage.[186]

The 'right of unimpeded transit passage' through the Dover Straits is recognized by the 1958 Anglo- French Joint Declaration.[187] However, it is still unclear whether the right of transit passage has passed into customary international law as State practice is as yet ambiguous.[188]

3.3.3 Archipelagic Sea-Lane Passage

In Archipelagic waters, in addition to the general right of innocent passage for ships, all ships and aircraft are entitled to the right of Archipelagic sea lane passage. That is to say, passage through all routes normally used for international navigation or aircraft or over archipelagic waters, using sea lanes and air routes designated by the archipelagic State and adopted by the competent international organization, whenever such arrangements have been made.[189]

Accordingly under the concept of archipelagic sea lane passage, foreign ships and aircraft enjoy the right of passage through designated archipelagic sea lanes and air routes, which must include all normal navigational channels used for international navigation or over-flight. Where there exist two routes of similar convenience between the same entry and exit points, only one need to be designated.[190] The sea lanes and air routes are to be designated by agreement between the archipelagic State and the competent international organization, principally the International Maritime Organization

[186]*Ibid*, Art. 44.
[187](1989)CM.557, p.4.
[188]M. N. Shaw, *op cit*, p.514.
[189]L.Henkin*et al, op cit*, p.1268.
[190]*Ibid*.

(IMO).[191] Such passage is generally subjected to the same standards as in the case of transit through Straits.[192] It is however clearly specified here that with respect to transit through Straits, that passage is allowed in 'normal mode; for example, submarines may travel under the water.[193] In a case where the archipelagic State has not designated archipelagic sea lane as required, the right of archipelagic sea lanes passage may still be exercised through the routes normally used for international navigation. In archipelagic waters other than the designated sea lanes, ships of

all States enjoy the right of innocent passage similar to the one they enjoy in relation to the territorial sea, except as it relates to inland waters delimited by straight lines drawn across mouths of rivers, bays and entrances to ports.[194] It seems that the acceptance by the major maritime States of the concept of archipelagic State was conditional on the acceptance by the latter of the right of archipelagic sea lanes passage. The main rules relating to international straits apply also, although with such modifications as may be necessary, to archipelagic sea lanes passage.[195]

3.4 States' Jurisdiction on Territorial Sea[196]

Under the UNCLOS, coastal States exercise sovereign rights over a belt of water adjacent to their territory not exceeding twelve nautical miles. Foreign vessels are however, allowed "innocent passage" as discussed above in this work. Coastal States exercise sovereignty with respect to natural resources, certain economic activities, marine

[191]UNCLOS, Art. 53.
[192]*Ibid*, Art. 54.
[193]Compare *ibid*, Arts.38 (2) and 53 (3).
[194]*Ibid*, Arts.50 and 52 (1).
[195]*Ibid*, Arts. 46-54.
[196]D.P. O'Connell, *The international Law of the sea, Vol.1* (Oxford: Oxford University Press, 1989) p.59.

scientific research and environmental protection on their continental shelf and within a 200 nautical miles Exclusive Economic Zone (EEZ).

There have been in essence, a number of theories as to the precise legal character of the territorial sea of the coastal State. These theories range from treating the territorial sea as part of the *res communis,* but subject to certain rights exercisable by the coastal State, to regarding the territorial sea as part of the coastal States' territorial domain subject to a right of innocent passage by foreign vessels.[197] It cannot however, be disputed today that the coastal States enjoy sovereign rights over their maritime belt and also exercise extensive jurisdictional control, having regard to the relevant rules of international law[198] and States practice. In the words of Malcolm N. Shaw;

> The fundamental restriction upon the sovereignty of the coastal State is the right of other nations to innocent passage through the territorial sea, and this distinguishes the territorial sea from the internal waters of the State, which are fully within the unrestricted jurisdiction of the coastal nation.[199]

Articles l and 2 of the Territorial Sea Convention, 1958[200] provide that the Sovereignty of the coastal State extends over its territorial sea and to the air- space and seabed and subsoil thereof, subject however, to the provisions of the Convention and of international

[197]*Ibid*, pp.60-71.So many theories of the territorial sea existed such as the property theory;police theory; competence theory and servitude theory.
[198]M. N. Shaw, *op cit*, p.506.
[199]*Ibid*, p.507.
[200]See also the UNCLOS, Art. 2.

law. Thus, the territorial sea forms an undeniable part of the land territory to which it bounds, so that a cession of land will automatically include a band of territorial waters.[201]

The deduction from the above is that the coastal State may, if it so desires, exclude foreign nationals and vessels from fishing within its territorial sea and (subject to agreement to the contrary) from coastal cabotage, and reserve these activities solely for its citizens. On a similar note, the coastal State also has extensive powers of control with regard to; *inter alia,* security and custom matters. It has been stated however, that how far a State chooses to exercise the jurisdiction and sovereignty to which it may lay claim under the principles of internationallaw will depend largely upon the terms of its own municipal legislation, andsome States will not wish to take advantage of the full extent of the powers permitted them within the international legal system.[202]

3.4.1 Jurisdiction over Acts Committed on Foreign Vessels in the Territorial Sea

a. Jurisdiction of the Coastal State

Where foreign ships are in passage through the territorial sea, the coastal State may only exercise its criminal Jurisdiction in relation to the arrest of any person or the investigation of any matter connected with a crime committed on board ship in defined situations. Such situations are as enumerated in Article 27 (1) of the 1982 Convention on the Law of the Sea, which reaffirms Article 19 (1) of the 1958 Convention on Territorial Sea, Stating as follows:

a. if the consequences of the crime extend to coastal State; or

[201]J. McNair in *Anglo-Norwegian Fisheries Case*(1951) ICJ Reports pp.116, 160. The *Beagle Channel Case(*1977)HMSO;52 ILR p.93.
[202]M. N. Shaw, *op cit.*

b. if the crime is of a kind likely to disturb the peace of the country or the good order of territorial sea; or
c. if the assistance of the local authorities has been requested by the master of the ship or by a diplomatic agent or consular officer of the country of the flag State; or
d. if such measures are necessary for the suppression of illicit traffic in narcotic drugs or psychotropic substances.[203]

However, if the ship is passing through the territorial sea having left the internal waters of the coastal State, then the coastal State may act in any manner prescribed/authorized by its laws for the purpose of an arrest or investigation on board foreign ship and is not restricted by the terms of Article 27 (1). On the contrary however the authorities of the coastal State

cannot act in a case on board a foreign ship proceeding from a foreign port, passing through the territorial sea to arrest any person or to conduct any investigation in connection with any crime where the crime in question was committed before the ship entered the territorial sea, provided the ship is also not entering or has not entered internal waters. Pursuant to Article 28 of the 1982 Convention, the coastal State should not stop or divert a foreign ship passing through its territorial sea for the purpose of exercising civil jurisdiction in relation to any person on board ship, nor levy execution against or arrest the ship, unless and until obligations are involved which were assumed or incurred

[203]The latter phrase was added by Article 27 (d) of the 1982 Convention.

by the ship itself in the course of, or for the purpose of, its voyage through waters of the coastal State, or unless the ship is passing through the territorial sea on its way from internal waters.[204]

As it relates to warships and other government ships operated for noncommercial purposes, they are immune from the jurisdiction of the coastal State as articulated in Article 27 (1) of the 1982 Convention. However, they may be required to leave the territorial sea immediately for any act in breach of the rules governing passage and the flag State will bear international responsibility in cases of loss or damage resulting from such act of breach.

i. Vessels in Ports

There has been a form of nagging question as to whether there exists an unhindered access of vessels to foreign ports. It has been argued that, as no civilized State has the right to isolate itself wholly from the outside world, there seems to be a corresponding obligation imposed upon each maritime power not to deprive foreign vessels of commerce access to all of its ports.[205]The argument in support of right of access of ships to foreign ports was based on the idea of an obligation to promote international commerce and free communication, as well as the idea that without free access to foreign ports, freedom of navigation would be meaningless.

It seems today that there is a clear customary international law right of entry into foreign ports by ships in distress in order to save human life. A ship does not however enjoy an absolute right to enter foreign ports or internal waters in order to save its cargo, where human life is not at risk, or if the gravity of the ship's situation is outweighed by

[204]M. N. Shaw, *op cit*, pp.511-12.
[205]L.Henkin*et al, op cit*, p.1272.

the probability, degree and kind of harm to the coastal State that would arise were the ship allowed to enter. It appears to be a well settled rule of customary international law that a ship entering a foreign port by reason of *force majeure* or distress may claim as of right entire immunity from the local jurisdiction. Example, when the ship was driven by storm, carried in by mutineers, or sought refuge for repairs or provisioning. In that case, port State should not take advantage of its necessity. In the words of A V Lowe,[206] "all merchant ships in distress have a right to enter the ports of a foreign State. This right is grounded on humanitarian consideration" and comes as a matter of grace.The Convention does not however, mention the right of access of ships to foreign ports, but the customary law on the subject matter includes a number of international agreements and has been confirmed by at least one international decision.[207]

The trend used to be that in time of peace, commercial ports must be left open to international traffic, and that the liberty of access to ports granted to foreign vessels implies their rights to load and unload their cargos; embark and disembark their passenger. Although it has been argued that they were no precedents showing that the law of nations accorded an unrestricted right of access to harbours by vessels of all nations,[208] it seemed then that the ports of a State which were designated for international trade were in the absence of any express provisions to the contrary made by a port State, presumed to be open to the merchant ships except when the peace, good order, or security of the coastal State necessitated closure.[209]

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[206]'The Right of Entry into Maritime Ports in International Law' (1977) *San Diego L. Rev*. 597,610.

[207]*R v. Flahaut*(1935) 2DLR, 685. It was held *inter alia* in this case that there is a clear customary law right of entry into ports by ships in distress in order to preserve human life.

[208]*Khedivial line, S.A.E.v Seafarers' International Union* (2d Cir. 1960) 278 F. 2d 49, 52.

[209]L. Henkin*et al, op cit*. It should be noted however, that a port State has right underinternational law to deny access to its waters and harbours to certain categories of ships such as nuclear shipslicensed by another State.

Gradually, coastal States powers increased so they can condition the right of entry into their ports by foreign ships on compliance with specified laws and regulations. In the *Nicaragua (Merit) Case*[210]the ICJ stated that "by virtue of its sovereignty… a coastal State may regulate access to its ports". In the recent years, the jurisdiction of the coastal State has

been expanded to allow the State, with respect to ships proceeding to its internal waters or calling at a port facility even outside internal waters, to take steps in the territorial sea necessary to prevent any breach of the conditions to which admission of those ships to internal waters or a call at such facility is subject.[211]

b. Jurisdiction of the Flag State

The flag State may exercise jurisdiction to prescribe, to adjudicate, and to enforce by non-

judicial means with respect to the ship or any conduct that takes place on the ship. Confusion may however arise with respect to who exercises jurisdiction in a case where jurisdiction over an offence committed on a foreign vessel is asserted by the sovereignty in whose waters it was lying at the time of its commission, since for some purposes, the jurisdiction may be regarded as concurrent, in that the courts of either sovereignty may try the offense. There has not been entire agreement among nations or writers on international law as to which sovereignty should yield to the other when the jurisdiction is asserted by both flag State and the State in whose waters the offense is committed.[212]

[210]*Nicaragua v United States*(1986) ICJ Reports p.14 at 111.
[211]The UNCLOS, Art.25 and the 1958 Convention on Territorial Sea and Contiguous Zone, Art.16 (2).
[212]L.Henkin*et al, op cit,* p.1285.

In the *Wildenhus*'s Case,[213] the United States, while indicating its position with respect to the above question stated that at least in the case of major crimes, affecting the peace and tranquility of the port, the jurisdiction asserted by the sovereignty of the port must prevail over that of the vessel.

The United State eventually noted however, that the doctrine as enunciated in the above case does not impinge on that laid down in *United States v Rodgers*[214] to the effect that the United States may define and punish offences committed by its own citizens on its own vessels while within foreign waters where the local sovereign has not asserted its Jurisdiction. It therefore seems acceptable generally that, in the absence of any controlling treaty provisions, and any assertion of Jurisdiction by the territorial sovereign, it becomes the duty of the flag State to apply to offences committed by its citizens on vessels flying its flag, its own statutes, and interpret same in the light of recognized principles of international law.

In *United States v Reagan,*[215] the defendant was accused of killing a fellow seaman on an American vessel in a German harbour. The Court stated *inter alia:*

> Since there is no 'controlling treaty provision' the resolution of the question before us turns upon whether there has been 'any assertion of jurisdiction by the territorial sovereign,' it is our view that there was no 'assertion of jurisdiction' by Germany and,

[213](1887) 120 US I, 7 S. Ct. 385, 30 L. Ed. 565.
[214](1893)150 US 249, 14 S. Ct. 109, 37 L. Ed. 1071<supreme.justia.com…united states v Reagan-232 us 37> accessed on 31 January 2014.
[215](6th Cir. 1971) 453 F. 2d 165as cited in L. Henkin*et al, op cit,* p.1286.

therefore, that the district court was not without jurisdiction.

3.4.2Determination of National Jurisdiction in Relation to International Jurisdiction on the Territorial Sea

The law is now trite that coastal States enjoy and exercise sovereign rights over their territorial waters with respect to the exploration and exploitation of natural resources in this maritime zone whether living or none-living. Within the territorial sea of a State, foreign vessels only enjoy the right of innocent passage as we discussed above, since the territorial seas are now part of coastal State's territorial domain.

However, laws and regulations of coastal States with respect to the exercise of their jurisdiction within their territorial seas must be made and enforced with due regards to the provisions of the relevant Articles of the United Nations Convention on the Law of the Sea, to that effect. The UNCLOS, particularly Article 21 allows a coastal State to "adopt laws and regulations in conformity with the provisions of this Convention and other rules of international law, relating to innocent passage through the territorial sea". Such laws and

regulations must therefore, of necessity, conform to the UNCLOS and other rules of international law. In essence therefore, coastal States may not adopt laws and regulations which are more restrictive than the provisions of the Convention or of other rules of international law since each State might come up with its own rules which will run counter to international law.

Due to the fact that rules made by coastal States if not harmonized in accordance with international standards might create obstacle to maritime activities, the UNCLOS

makes bold attempt to ensure that there is a universality of standards adopted by coastal States since otherwise; no ship would be able to traverse the territorial sea of other States. The UNCLOS sets out the subject matter of the laws and regulations to be adopted by coastal States to include:

a. The safety of navigation and regulation of marine traffic
b. The protection of navigational aids and facilities and other facilities of installation
c. The protection of cables and pipelines
d. The conservation of the living resources of the sea
e. The prevention of infringement of the fisheries laws and regulations of the coastal State
f. The preservation of the environment of the coastal State and the prevention, reduction and control of pollution thereof
g. Marine scientific research and hydrographic surveys
h. The prevention of the infringement of the custom, fiscal, immigration or sanitary laws and regulations of the coastal State.[216]

The deduction from the foregoing is that, in the determination and exercise of national jurisdiction by coastal States in their territorial seas, due attention must be paid to the relevant provisions of the Convention and other rules of international law to that effect although States have rights to make the laws unilaterally.

3.5 Maritime Delimitation

[216] UNCLOS, Art. 21 (1) (a) – (h).

The delimitation of maritime boundaries between sovereign States has occasioned much litigation before the International Court of Justice (ICJ) and Arbitral Tribunals because of the importanceof oil and other economic resources at stake.[217] The jurisprudence on maritime boundaries delimitation is a convoluted one, in that the relevant cases have bothered on opposite or adjacent States; different maritime boundaries including territorial sea, exclusive economic/fishing zone, continental shelf boundaries or even a combination of them; the application of either customary international law or the 1958 or 1982 Conventions. Article 15 of the 1982 Convention on the Law of the Sea which basically follows Article 12 of the Geneva Convention on the Territorial Sea did provide as follow:

> Where the coasts of two States are opposite or adjacent to each other,neither of the two States is entitled, failing agreement between them to thecontrary, to extend its territorial sea beyond the median line every point ofwhich is equidistant from the nearest points on the baselines from which thebreadth of the territorial seas of each of the two States is measured. Theabove provision does not apply, however, where it is necessary by reason ofhistoric title or other special circumstances to

[217]D. J. Harris, *op it*, p.488.

> delimit the territorial seas of thetwo States in a way which is at variance therewith.[218]

Despite the above provision however, a different application may occur as is seen in its second arm, where it became necessary by reason of historic title or other special circumstance to delimit the territorial sea of the two States in a different way.[219]

In the land and maritime boundary dispute between *Nigeria and Cameroon*,[220] the two States, being adjacent States with a land border that extends to the sea in the south on the Gulf ofGuinea, requested the Court *inter alia* to delimit a "single maritime boundary" beyond the limit of territorial sea that would divide both the continental shelves and Exclusive Economic Zone (EEZ) of the States. The Court in its judgment stated *inter alia* that both Nigeria and Cameroon are parties to the United Nations Convention on the Law of the Sea 1982, and accordingly,Articles 74 and 83 of the Convention, which concern delimitation of continental shelf and the EEZ between States with opposite or adjacent coasts,[221] would apply. The Court also noted that the Parties agreed in their written pleadings that the delimitation between the maritime areas should be effected by single line. As the Court had occasion to recall on its judgment of 16 March, 2001 in the case concerning maritime delimitation and territorial question between Qatar and Bahrain,[222]

> The concept of a single maritime boundary does not stem from multilateral treaty law but from State

[218]The UNCLOS, Art. 15.See also in this, *Qater v Bahrain* (2001) ICJ Reports Para. 177.
[219]M. N. Shaw, *op cit,* p.506.
[220](October 10, 2002) ICJ General list No. 94.
[221]Paragraph 1 of those Articles provides that such delimitation must be effected in such a way as to "achieve an equitable solution".
[222]*Supra,* Para. 173.

> practice, and… finds its explanation in the wish of States to establish one uninterrupted boundary line delimiting the various- partially coincident- zones of maritime jurisdiction appertaining to them.

The Chamber formed by the Court in the *Case concerning the Delimitation of the Maritime Boundary in the Gulf of Marine Area between Canada and the United States of America* had stated that the determination of such a line:

> can only be carried out, by the application of a criterion, or combination of criteria, which does not give preferential treatment to one of the zones to the determinant of the other, and at the same time is such as to be equally suitable to the division of either of them.

The Court stressed in this connection that delimitation with a concern to achieving an equitable result, as required by current international law, is not the same as delimiting in equity. The Court in answer to the Cameroonian contentions maintained that concavity of the coastlines, islands etc may constitute relevant or special circumstances to be considered while embarking on maritime delimitation, but none of them formed a relevant circumstance in the present case as argued by Cameroon. The Court also, while denying the request of Cameroon acknowledged that a substantial difference in the length of the Parties' respective coastlines may be taken into consideration in order to adjust or to shift the provisional delimitation line. But, in the present case, according to the Court,

the relevant coastline of Cameroon … is not longer than that of Nigeria. Therefore, there is no reason to shift the equidistance line in favour of Cameroon on the ground….[223]

The Court accordingly decided after adequate consideration of relevant points raised by the parties,that the equidistance line represents an equitable result for the determination of the area in respect of which it has jurisdiction to give a ruling. As it relates to 'relevant' circumstances that might call for a deviation from the equidistance line in order to achieve an 'equitable result' as required in international law, in *Cameroon v Nigeria* the ICJidentified certain geographical features- the concave nature of a coastline, a lack of proportion between a State's coastline and the area of its jurisdictional zone and effect of Island and oil concession practice, but it finally did not find that any of these features required it to deviate from the equidistance on the fact.

3.6 Internal Waters

The term 'internal waters' in international law refer to such parts of the seas which are neither the high seas nor relevant zones or territorial sea. They are waters wholly or largely surrounded by State's land territory, including sea waters on the landward side of the baseline[224] of the territorial sea or of the archipelagic waters. Accordingly, they are classed as appertaining to the land territory of the coastal State concerned. One outstanding criterion distinguishing internal waters is that, whether it is harbours, lakes, or rivers, they are to be found on the landward side of the baselines from which the width of the territorial and other zones of the sea are measured,[225] and are as such assimilated with the territory of the coastal State. Internal waters are different from territorial sea

[223]*Cameroon v Nigeria*, *Supra*, Para. 301.
[224]M. N. Shaw, *op cit*, p.493.
[225]UNCLOS, Art. 8 (1). See also Geneva Convention Art. 5 (1). Exceptions are made in the former provision
with respect to archipelagic States.

primarily because, there is no right of innocent passage from which foreign ships may benefit. However, where the straight baselines encloses as internal waters what had previously been treated as territorial waters, there may exist right of innocent passage.[226]

3.6.1 Jurisdictions over Foreign Ship in Internal Waters

In international law, a coastal State may exercise its jurisdiction over foreign ships within its internal waters. However the judicial authorities of the flag State may equally operate where crimes occurred on board the ship. This concurrent jurisdiction is evident in at least two notable cases of *R v Anderson*[227]where the Court of Criminal Appeal in the UK maintained that an American national who committed manslaughter on board a British vessel in French internal waters was within the jurisdiction of the British courts, even though he was also subject to the jurisdiction of French justice and (as well as American justice by reason of his nationality), and thus could be correctly convicted under English law. Also, in the *Wildenhus'Case*,[228]the United States Supreme Court declared that the American courts had jurisdiction to try a crew member of a Belgian vessel for the murder of another Belgian nationalwhen the vessel was docked in Port of Jersey City in New York.

In practice, it seems to be the fundamental position that a merchant ship in a foreign port or in foreign international waters is automatically within/subject to the local jurisdiction of the coastal State, except there is an express provision/agreement to the contrary. However, in a case where purely disciplinarian issues relating to the ship's crew are involved, which do not bother on the maintenance of peace, and good order within the

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[226]UNCLOS Art.8 (2); Geneva Convention Art.5 (2).

[227](1868) Cox's Criminal Cases 198<www.ic.gc.ca/app/cc/srch/nvgt.do?lang=eng8prtl...>accessed on 31 January 2014.

[228]*Supra*.See also *Armament Dieppe SA v United States* (1968) 399 F. 2d 794.

territory of the coastal State, the matter would by courtesy be left to the authorities of the flag State to regulate.[229]

The coastal State may out of considerations of public policy elect/choose to forgo the exertion of its jurisdiction or to exert the same in only a limited way, but in all, this is a matter resting solely within its discretion. But, as was pointed out in the *WildenhusCase*, and gathering from experience, it has been found long ago that it would be beneficial to commerce if the coastal States would abstain from interfering with the internal discipline of the ship, and the general regulation of the rights and duties of the officers and crew toward the vessel or among themselves. Consequently, it became generally understood that:

> all matters of discipline and all things done on board
>
> which affected only the vessel or those belonging to her, and did not involve the peace or disunity of the country, or the tranquility of the port, should be left by the local government to be dealt with by the authorities of the nation to which the vessel belonged.[230]

In the other vein, if crimes are committed on board a foreign ship of a character to disturb the peace and tranquility of the coastal State, the perpetrators of such offences have never

[229]M. N. Shaw, *op cit*, p. 494.
[230]L.Henkin*et al*, *op cit*, p.1282. The Position was also reiterated in *Lauritzen v Larsen* (1953) 345 U.S. 571, 585 – 86, 73 s. ct. 921,930, 97.

by comity or usage been entitled to any exemption from the exercise of the coastal State laws for punishment, once the local tribunals deem it fit to assert authority.

However, an entirely different approach exists where foreign ship involved is a warship, in which case, the authorization of the captain or of the flag State must be sought and obtained before the coastal State may exercise its jurisdiction over the ship and its crew. The position is so because of the status of the warship as a direct arm of the sovereign of the flag State. But, if any of such refuses to comply with port regulations, it may be required to leave the port and the flag State may bear international responsibility for any damage caused.

3.7 States' Maritime Claims and the UNCLOS

We intend under this heading to make a succinct juxtaposition of the age-long conflicting States' maritime claims, especially with regards to the territorial sea limit, with the provisions of the present legal regime of the sea to that effect. Prior to the emergence of the United Nations Convention on the Law of the Sea, 1982, as we discussed earlier in this work, nations of the world laid various claims to what would constitute their own territorial sea. The conflicts in claims generated quarrels amongst nations of the world which UNCLOS I and II could not settle.

It is however safe to argue today that with the coming in place of the United Nations Convention on the Law of the Sea, 1982, most nation States, especially States Parties to the Convention are no longer willing to assert maritime claims which are at variance with the clear provisions of the Convention. Even those States which, for some reasons, have not ratified the Convention, also today adhere to the provisions of the Convention to a great extent. The United States for instance, even though not a party to

the Convention, recognizes the 12 and 24 nautical miles for the territorial sea and the contiguous zone respectively,[231] as provided by the Convention.[232]

Nigeria in particular, while asserting maritime claim had given due consideration to the provisions of the UNCLOS with regard to the juridical zones of the sea and the degree of rights and control exercisable by States in these zones. Nigeria therefore claims territorial sea of 12 nautical miles, contiguous zone of 24 nautical miles, Exclusive economic zone of 200 nautical miles and continental shelf of 200 mile depth or to the depth of exploitation.[233] The relevant sections of both Territorial Waters Act and Exclusive Economic Zone Act provide to that effect and the claims and definitions of these zones by Nigeria are excerpted from the United Nations Convention on the Law of the Sea, 1982. Section I of the Territorial waters Act[234] provides that "the territorial waters of Nigeria shall for all purposes include every part of the open sea within twelve nautical miles of the coast of Nigeria (measured from low water mark) or of the seaward limits of inland waters".[235]

Section 3 of the Territorial Waters Actprovides as follows:

[231] Nigeria Maritime Claims <www.index mundi.com> accessed 17 June, 2015.
[232] UNCLOS, Arts. 3 and 33 respectively.
[233]Nigeria maritime claims, *op. cit.*
[234] Cap. T5 LFN 2004.
[235] This provision is tandem with Article 3 of the Convention which provides that every State has the right to establish the breadth of its territorial sea up to a limit not exceeding twelve nautical miles measured from baselines determined in accordance with this Convention.

a. In the definition of territorial waters contained in section 18(1) of the Interpretation Act[236]for the words "thirty nautical miles" there shall be substituted the words "twelve nautical miles", and
b. reference to territorial waters or to the territorial waters of Nigeria in all other existing Federal enactments (and in particular the Sea Fisheries Act shall be construed accordingly).

The preamble to the Exclusive Economic Zone Act[237] provides as follows:

> An act to delimit the Exclusive Economic Zone of Nigeria being an area extending up to 200 nautical miles seawards from the coast of Nigeria within the zone, and subject to universally recognized rights of other States including landlocked States, Nigeria would exercise certain sovereign rights, especially in relation to conservation or exploitation of natural resources (mineral, living species, etc) of the seabed, its subsoil and superjacent waters and the right to regulate by law, the establishment of artificial structures and installations and marine scientific research, amongst other things.

Section I of the Act stipulates as follows:

[236] S. 18(1) of Interpretation Act 1990 defined Territorial water "to mean any part of the open sea within thirty nautical miles of the coast of Nigeria (measured from low water mark/or of the seaward limit of inland waters). By reason of section 3 of the Territorial Waters Act, the effect of S. 18(1) of the Interpretation Act no longer exists so that Nigeria currently claims a territorial sea of 12 nautical miles in line with the provisions of the UNCLOS.
[237] Cap. E17 LFN, 2004.

> Subject to other provisions of this Act, there is hereby denominated a zone to be known as exclusive economic zone of Nigeria (in this Act referred to as the "Exclusive Zone") which shall be an area extending from the external limit of the territorial waters of Nigeria up to a distance of 200 nautical miles from the baseline from which the breadth of the territorial waters of Nigeria are measured.[238]

Article 15 of the Convention has provided that:

> where the coasts of two States are opposite or adjacent to each other, neither of the two states is entitled, failing agreement between them to the contrary, to extend its territorial sea beyond the median line every point which is equidistance from the nearest point on the baselines from which the breadth of territorial seas of each of the two States is measured.

Today, economic considerations are playing an increasingly preeminent role in orienting the course of International Law of the Sea and the concept of exclusive economic zone, which recognizes a coastal State's sovereignty over the resources of the sea adjacent to it's coasts rather than over the zone itself.[239]The territorial sea, the contiguous zone, theexclusive economic zone, and the continental shelf are however, not coterminous in extent or essence as we have seen earlier in this work. Nigeria's Exclusive Economic Zone Act has full force and effect as a law duly passed within the Nigerian legal system. The Act has remained faithful to the

[238] The above provision is in line with Art. 55 of the UNCLOS which provides for Exclusive Economic Zone of the Sea

[239] B. O. Okere, 'Nigeria's Exclusive Economic Zone' (1981) *The Nigerian Law Journal*,Vol. 12, 65-78.

general framework and purport of the United Nations Convention on the Law of the Sea (UNCLOS).[240]

The foregoing reveals that the Convention serves as a guide and it regulates the attitudes of various States on the maritime claims. Nigeria's maritime claims have been in compliance with the provisions of the UNCLOS to that effect. It should be pointed out here however that peradventure a State, particularly State Party to the Convention chooses to assert maritime claims which run counter to the provisions of the Convention, such national claims cannot stand in the face of the existing Convention or it will amount to a breach of international duty on the part of that State and it might incur international responsibility should such claims occasion any injury or loss to other States.

3.8 Problems Associated with States' Off-Shore Jurisdiction

It should be noted here that the clash of interests on the exploitation of sea resources does not only occur between or among sovereign States but also is possible to be a case between a sovereign State and its constituent authorities. In a State where unitary system of government is practiced, such problems cannot be contemplated, because the jurisdiction of the government is readily definable due to the fact that there are no competing claims over natural resources within the shores of the State. In that case, the Jurisdiction of the central government extends over the entire State territory without rivals. The position however differs in a Federate State where the focal point is the division of powers between the Federal and State authorities. Such distribution of powers

[240]*Ibid*. For more study on Nigeria's Exclusive Economic Zone, seeB.O. Okere, *Nigeria's Exclusive Economic Zone and Freedom of Navigation, Ocean Development and International Law*, (New York: 1983) pp. 535-538; B. O. Okere 'Nigeria's Exclusive Economic Zone' (1982)*Lloyd's Maritime and Commercial Law Quarterly*, 124-137 and B. O. Okere, 'The Evolution of the International Law of the Sea' (1978-1988) *The Nigerian Juridical Review*, vol. 3, 1-23.

creates a kind of inter-relation between the municipal constitutional arrangements and rules of international law.[241] For instance, while the Federal Government in exercise of its functions in respect of the external affairs of the State deals with the nature, character and extent of the territorial waters, at the local level, it has to be determined still whether the territorial waters so delimited fall within the Jurisdiction of the Federal or State Governments. The same position also applies with respect to the seabed and subsoil of the continental shelf.[242]

It has been observed that the conflict of interest between the Federal and State Governments and possibly, between or among the littoral States within the Federation over the off-shore areas of the State is a problem which has long beset most Federal States.[243] For instance, Nigeria as a Federal State has had occasions of such clash of interests between it and its littoral States and those disputes occurring among the littoral States themselves. In such a situation, the principles of International Law and State Practice used in determination of maritime boundaries of nation States, such as the United Nations Convention on the Law of the Sea, 1982, for example the strict equidistance principle/method, the historical titles method etc, are not always applicable. Such dispute between the Federal State and any of the littoral States or between littoral States within the Federation is within the internal affairs of the Federal State and the best applicable law will be the domestic law of the Federal State.The celebrated *case of the*

[241]T. O. Elias(ed), *Proceedings of the fourth, fifth and sixth Annual Conference of the NigerianSociety of International Law*(Benin City: Ethiope Publishing Corp., 1978) p.34.
[242]*Ibid*.
[243]D. P. O'Connell(ed), *Australian Coastal Jurisdiction in international law in Australia* (London: 1965) p.291.

Attorney-General of Rivers State v. Attorney-General ofAkwaIbom State & Attorney-General of the Federation[244] is classical on this point.

What was in issue in that case was whether the defendants can unilaterally jettison the political solution agreement agreed between the two States and revert to the historical solution in demarcating the maritime map of the littoral States contrary to the decision laid down by the Supreme Court in the *case of Attorney-General, Federation v. Attorney-General Abia State&3Ors*[245]and the provisions of Article 15 of the UNCLOS.

The fact of the case was that, following the passage of an Act on offshore/onshore dichotomy, the National Boundaries Commission was directed by the Federal Government to produce maps of the littoral States to determine the location of oil wells and demarcate their maritime boundaries under the map drawn. After the exercise, the plaintiff was allotted 172 oil wells. The 1st defendant however alleged an annexation of a triangular portion of the sea from AkwaIbom State to Rivers State and requested that in the settlement of the dispute, the historical title method of demarcation of maritime boundary, rather than the strict equidistance technical line method earlier adopted should be applied. The Federal Government intervened in the matter and a political solution was rather adopted under which 50 percent of the disputed oil wells comprising 82 wells were ceded with revenue allocation there taking effect from November 2006.[246] Subsequently, the National Boundaries Commission produced a new maritime map which resulted in the plaintiff losing the remaining 86 wells to the 1st defendant. The plaintiff therefore commenced an action in the Supreme Court under its original jurisdiction claiming declaratory reliefs that the pre-

[244](2011) All FWLR p.1023.
[245](2002)FWLR pt.102, p.1
[246]*Attorney-General Rivers State v Attorney-General AkwaIbom&Anor, supra,* p.1027

2006 maritime boundary between the plaintiff and defendant representing the equidistance method was the existing boundary and was extinct, in the alternative, to declare that the defendants were bound by the October 2006 political solution agreement and *stopped* from acting contrary to the terms contained in the agreement, and that the plaintiff was entitled to revenue accruing from the 176 oil wells situated in the delimitation area based on the pre-2006 equidistance principle method. The plaintiff also prayed for an order that it be paid all outstanding revenue arising therefrom or in the alternative, an order that it was entitled to revenue from the 86 wells located within the delimitation area pursuant to the political solution agreement.

In its reply to the suit, 2nd defendant filed a preliminary objection challenging the jurisdiction of the Court, but it was over-ruled by the Court which decided that it has original jurisdiction to hear the matter pursuant to the 1999 Constitution[247] which provides*inter alia*that the Supreme Court shall have original jurisdiction in any dispute between the Federation and a State or between States *inter se*.

In deciding the matter during which the Supreme Court unanimously upheld the plaintiff's claim, the Court considered *inter alia*section 151 of the Evidence Act which states that:

> When one person has, by his declaration, act or omission intentionally caused another person to believe a thing to be true and to act upon such belief; neither he nor his representative in interest shall be allowed in any proceedings between himself and such person or such

[247]The Constitution of the Federal Republic of Nigeria, 1999, section 232 (1).

> person's representative in interest to deny the truth of that thing.

In the words of Katsina-Alu CJN:

> …the parties are bound by the agreement. The parties are e*stopped* by their acts…. In the present case, the defendants must accept the legal relations as modified by them in the agreement they voluntarily entered into with the plaintiff. Surely, it will be inequitable to permit the defendants to walk out of the agreement which on the evidence before me was not obtained by fraud, misrepresentation or deception…. In the present case, the defendants are *stopped* from resiling from the terms of the agreement they entered into with the plaintiff; they are strictly bound…. I must stress here and this is also settled law that if parties enter into an agreement, they are bound by its terms…. No court, *a fortiori*the Supreme Court, will allow itself to be used as an instrument of bad faith and breach of contractual obligation voluntarily entered into by parties before it. This Court will be shirking in its judicial responsibility as the last court of the land if it refuses to intervene to stop a party before it from

> foisting bad faith and subterfuge on the other party or even the Court itself.…[248]

On what should form the paramount factor when determining maritime dispute between States, the Court held that the broad general principle of every maritime boundary dispute settlement is the achievement of an equitable solution consistent with domestic laws and practices. The paramount thing when dealing with maritime boundary dispute between States is to offer an equitable solution.

While deciding whether the plaintiff and 1st defendant in the case qualify as nation State for the United Nations Convention on the Law of the Sea on delimitation of maritime territorial boundaries to apply to the dispute between them; the Court, *per*Onnoghen CJN, was of the view that the principles of International Law and State Practices used in delimitation of maritime boundaries of nation States, such as the United Nations Convention on the Law of the Sea, 1982, the strict equidistance principles/methods, the historical title method etc are not applicable. According to the Court, it was not in dispute that the plaintiff and 1st defendant were littoral States within the nation State of the Federal Republic of Nigeria which means in effect that they were not nation States known to International Law and State Practice. In a related case,[249] where the Supreme Court was invited to determine the seaward boundary of the littoral States of the Federal Republic of Nigeria, the Court stated with regards to the connotation of "state" under International Law as follows:

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[248]*Attorney-General Rivers State v. Attorney-General AkwaIbom State &Anor, supra*, 1034-1035.

[249]*Attorney-General, Federation v. Attorney-General Abia State &3Ors* (N0 2) (2002) FWLR pt. 102, 1; (2002) 6NWLR pt.764, 542.

> 'Coastal States' under the United Nations Convention on the Law of the Sea, 1982, means Nation States and not internal States of a country like the littoral States in Nigeria. In a Federation, it applies not to the Federating States that comprise the Federation. This is necessary because international law applies to countries that are members of the comity of nations. The Federation of Nigeria is such a country and the constitution of the Federal Republic of Nigeria, 1999 affirms this by including "external affairs" as item 26 in the Exclusive Legislative List. The 36 constituent States of Nigeria are not member States of the comity of nations and so the provisions of international law in a convention do not directly apply to them but to the Federation.[250]

In resolving these conflicts, no uniform approach has been adopted, but each State seems to find a solution within the context of its political, economic and administrative set up. In the United States for instance, the Supreme Court has declared that the States have no title to or property interest in the submerged lands off their respective coasts outside of inland waters. [251] On the contrary however, subsequent Statutes did grant States ownership of all submerged land lying within three miles seaward of the coast lines.[252]

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[250]*Supra,278-279.*
[251]*United States v California*(1947) 332 U.S. 19.
[252]The Submerged Lands Act 1953, 43 U.S.C. A.,paras. 1301-1315.

The same trend was followed by the Canadian Supreme Court which has held that the territorial waters fall within the jurisdiction of Canada and not the Provinces.[253]

In Nigeria however, the issue bothering on the off-shore jurisdiction has been a matter of interest to both constitutional and international lawyers in examining how these problems have been tackled in the country. It is not hoped however that an extensive discussion on the subject matter will be made here.[254] In the distribution of legislative powers between the Federal and Regional legislatures in Nigeria, the 1951 Constitution included fisheries (including sea fisheries) in the Regional legislative list.[255] What it meant in effect was that a Region could legislate on fishing within the territorial waters. But after series of other enactments on the matter, the then Military Government in1971 promulgated the Sea Fisheries Decree[256] which applies throughout the whole country. The Decree controlled the operation or navigation of any motor fishing boats within the territorial waters of Nigeria. The powers of control were vested in the Director of the Federal Department of

Fisheries,who was the licensing officer and the Federal Commissioner charged with responsibility for fisheries and may make fisheries regulations.[257] In effect, the Decree repealed the Sea Fisheries (Lagos) Act 1961 and the Western Region Fisheries Law, 1965 which gave powers to the Regions to legislate on matters of territorial sea, thereby transferring jurisdiction over sea fisheries from Regional or State Governments to the Federal Government. Also, pursuant to Section 1(a) of Off-shore Revenue Decree, 1971,

[253]T. O. Elias, *op cit.*
[254]Refer to *ibid* for study on this subject.
[255]Third schedule to the 1951 Constitution.
[256]No. 30 of 1971.
[257]The Sea Fisheries Decree (1971) ss. 2,3 and 11.

the Federal Military Government vested in itself the 'ownership of and the title to' the territorial waters.

Pursuant to section 2(a) of the Decree, "the ownership of, and the title to the territorial waters and the continental shelf vests in the Federal Military Government." The equivalent provision to the above section of the Decree is contained in section 162 (2)of the 1999 Constitution of the Federal Republic of Nigeria as amended which vests the exclusive jurisdiction and ownership of off-shore resources on the Federal Government.

One of the possible two ways of interpreting the provision is that it conferred full and exclusive control over the territorial waters and continental shelf on the Federal Government as opposed to the component States. When understood in this sense, the provision settles any doubt as to whether the territorial waters and continental shelf belong to the Federal or State Governments.[258] During the 15 September 2012 off-shore debate, the then Nigerian Attorney General and Minister of Justice, Mohammed Bello Adoke, SAN stated that the issue of who exercises jurisdiction over off-shore resources has been laid to rest by the Supreme Court since 2005. He made reference while buttressing this point, to the judgment of the Supreme Court[259] where the Court was invited to rule on the constitutionality or otherwise of the "Allocation of Revenue (Abolition of Dichotomy in the Application of Principle of Derivation) Act.[260] The Act provides that for the purpose of the application of the Principle of Derivation, it shall be immaterial whether the revenue accruing to the Federal account from a State is derived from natural resources located onshore or offshore. Hon Justice G. A. Oguntade (as he then was) in his supporting judgment stated *inter alia* that the Act was directed at placing

[258]T. O. Elias, *op cit,* p.43.
[259]*A-G Adamawa & 21Ors v A-G Federation & 8Ors*[2005] 18 NWLR (pt 958) 581.
[260]LFN Cap C23 2004.

the implementation of the provisions of section 162 of the 1999 Constitution on a more certain and predictable basis.[261]

It has been noted that the development of the law relating to the off-shore jurisdiction of Nigeria has to a large extent, been influenced by our constitutional development. Unlike what holds in the older federations such as the United States, Canada and Australia, Nigeria moved from unitary to federal system of government.[262] As a result, the States were not, as in the case of the above countries, in existence before the emergence of the Federal Government. It is revealed that part of the problem of solving the coastal jurisdiction in the United States in particular was that the States had territorial and other rights prior to their joining the Union. In Nigeria, a different situation holds as both the Federal and State Governments emerged simultaneously so that there were no consolidated rights or claims to be contended with.[263]

Apart from that, Nigeria was a colonial State/Federation from 1951 to 1960, during which period there was little or no awareness of the importance of determining the control over the territorial waters and the continental shelf. Even after gaining sovereignty, the interest in those areas was limited to sea fishing.[264] However, with the discovery of oil in commercial quantities in the off-shore region of the country, interest in this area became of paramount importance.

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[261]Delimitation of Maritime Boundaries and the Issue of Resource Control in Nigeria… <http://www.google.com.ng/search?q=offshore+jurisdiction+in+nigeria+section+162+1999+constitution>accessed on February 24, 2004.

[262]*Ibid*, p.45.

[263]*Ibid*.

[264]*Ibid*

CHAPTER FOUR

OTHER JURIDICAL ZONES OF THE SEA

The Geneva Conventions on Territorial Sea and Contiguous Zone, Continental Shelfand High Sea, and the United Nations Convention on the Law of the Sea (UNCLOS) which was adopted on 29 April 1958 and 10 December 1982 respectively, were recognized as universal legal documents on the seas. The Conventions provide a comprehensive legal regime for the world's oceans and divide marine space into different recognized zones and set out the rights and responsibilities of States within the zones. Such maritime zones include internal waters and territorial sea discussed above, contiguous zone, exclusive economic zone, continental shelf,[265] and archipelagic waters which are to be established by coastal States. As noted earlier, the Conventions equally state the rights and obligations of the States on managing and governing their activities including protection and preservation of natural resource in the zones.[266] Furthermore, the States enjoy their rights in the Area and High Sea which are beyond their national jurisdiction, for the purpose of exploration and exploitation. It would serve our present purpose here to examine briefly the general interests of States in these zones and their rights and obligations over these areas.

4.1 The Contiguous Zone[267]

[265]These three zones will serve our present purpose here.

[266]M.Ravin, *Law of the Sea, Maritime Boundaries and Dispute Settlement Mechanisms* (Germany: Nippon Foundation, 2005) p.5.

[267]D. P. O'Connell, *The international Law of the sea, vol.1* (Oxford: Oxford University Press, 1989) cap 27; A. V. Lowe, 'The Development of the Concept of the Contiguous Zone' (1981)52 *BYIL*, 109.

Historically some States have claimed to exercise certain rights over particular zones of the high seas.[268] These claims have in effect involved some diminution of the principle of the

freedom of the high seas as the jurisdiction of the coastal State has been extended into areas of the high seas contiguous to the territorial sea although for defined purposes only.[269] The word 'contiguous' means no more than 'sharing a common border' or'touching'. For example, the Southern Ocean is 'contiguous' to the Atlantic Ocean. 'Contiguous' equally means adjacent, neighbouring, bordering, etc. The maritime term 'contiguous zone' therefore means a band of water extending from the outer edge of the territorial sea up to 24 nautical miles from the baseline, within which a State can exert limited control for the purpose of preventing or punishing infringement of its customs, fiscal, immigration or sanitary laws and regulations. Contiguous zone is a maritime zone adjacent to the territorial sea that may not extend beyond 24 nautical miles from the baselines from which the breadth of the territorial sea is measured.[270]

In accordance with the 1982 United Nations Convention on the Law of the Sea, the coastal States have rights to establish their contiguous zone which is adjacent to the territorial sea. The Convention in its article 33 provides that the contiguous zone may extend up to, but not beyond 24 nautical miles from baseline from which the territorial sea is measured. The establishment of contiguous zone is aimed at preventing violation of laws and regulations within the coastal State's territorial sea. Article 33, Paragraph1 of

[268]M. N. Shaw, *op cit*, p.515.
[269]*Ibid*.
[270] Farlex,'Defining Contiguous Zone by The Free Dictionary'<www.thefreedictionary.com/contiguous+zone>accessed on 28 October 2014.

the 1982 Convention provides that in contiguous zone, the coastal State may exercise control necessary to:

a. Prevent infringement of its customs, fiscal, immigration, or sanitary laws and regulations within its territory or territorial sea;
b. Punish infringement of the above laws and regulations committed within its territory or territorial sea.

In the spirit of the above article, a coastal State may exercise its rights in a contiguous zone to defend its interests by stopping foreign ship suspected of offending against its laws and regulations, in order to search, inspect or punish the offenders. In a case where suspected foreign ship intends to evade responsibility and leaves the contiguous zone, the coastal State has the Jurisdiction to pursue it beyond the limit of contiguous zone. Pursuant to Article 111 of the 1982 Convention, pursuit must be commenced when the foreign ship or one of its boats is withinthe internal water, territorial sea or contiguous zone of thepursuing State, and may only be continued outside the territorial sea or contiguous zone if the pursuit has not been interrupted. It has been argued that Article 33 of the 1982 Conventionwhich provides for the rights of coastal States to create contiguous zoneis not exhaustive. This was part of the decision in the case of *United States v Fishing Vessel Taiyo Maru*[271] in which a Japanese ship was found fishing illegally in the United States exclusive fishing zone nine miles off-shore and beyond the United State territorial sea limit. It was held that the list of purposes in Article 24 for which a contiguous zone may be established is not exhaustive. The article is permissive

[271]No.28 (1975)395 F. Supp. 413; (1976) 70 AJIL, 95.

rather than restrictive. Although the article only recognizes the right of a coastal State to create a contiguous zone for one of the four purposes enumerated therein, nothing prevents the establishment of such zone for other purposes, including the enforcement of domestic fisheries law.

It is however understood that this power of control or the right accorded coastal States does not in any case change the legal status of the zone as part of the high seas. These waters are and remain a part of the high seas and are never subject to the sovereignty of the coastal State, which can exercise over them only such rights as are conferred on it by the present legal regime of the sea or are derived from international treaties.[272]

When establishing a contiguous zone, the coastal State should take cognizance of the fact of the sea areas, which are, in some cases, bordering by two or more States whose breath does not exceed twice the breath of the territorial sea.[273]For instance, the Strait of Malacca, used for international navigation is less than 24 nautical miles wide. In such case, the bordering States have to undertake their agreement in the delimitation of maritime boundary and cooperate in the establishment of international sea route.[274]

4.2 The Continental Shelf

The continental shelf is a geological expression referring to the ledges that project from the continental landmass into seas and which are covered with only a relatively shallow layer of water (some 150- 200 meters) and which eventuallyfall away into the ocean

[272]D. J. Harris, *Cases and Material on International Law (*6th edn, London:Sweet and Maxwell, 2004) p.460.
[273]M.Ravin, *op cit*, pp.13-14.
[274]*Ibid*.

depths some thousands of meters deep.[275]The ledges or shelves take up some 7 to 8 percent of total area of ocean and their extent varies considerably from place to place. The 1982 Convention describes continental shelf as:

1. The continental shelf of a coastal State comprises the seabed andsubsoil of the submarine areas that extend beyond its territorial seathroughout the natural prolongation of its land territory to the outer edgeofthe continental margin, or to a distance of 200 nautical miles from thebaselines from which the breadth of the territorial sea is measured where theouter edge of the continental margin does not extend up to that distance.
2. The continental shelf of a coastal State shall not extend beyond thelimits provided for in paragraphs 4 to 6.
3. The continental margin comprises the submerged prolongation of theland mass of the coastal State, and consists of the seabed and subsoil oftheshelf, the slope and the rise. It does not include the deep ocean floor withitsoceanic ridges or the subsoil thereof.[276]

[275]M. N. Shaw, *op cit*, p.521.
[276]Art. 76 (1)-(3).

Continental shelves are known for their rich oil and gas deposits which often make them host to expensive fishing grounds. According to Malcolm N. Shaw, this fact stimulated a round of appropriations by coastal States in the years following the Second World War, which gradually altered the existing legal position/status of the continental shelf from being part of the high sea and free for exploitation by all States until its current recognition as exclusive to the coastal States.[277]

The first and leading move to coastal appropriation of the continental shelf was the Truman Proclamation of 1945.[278]The Proclamation emphasized on the technological capacity to exploit the riches of the shelf and the need to establish a recognized jurisdiction over such and declared that the coastal State was entitled to such jurisdiction on a number of grounds first because utilization or conservation of the resource of the subsoil and seabed of the continental shelf depended upon co-operation from shore; secondly because the shelf itself could rightly be regarded as an extension of the landmass of the coastal State, and its resources were often merely an extension into the sea of deposits lying within the territory; and finally, because the coastal State for reasons of security, was profoundly interested in activities off its shore which would be necessary to utilize the resource of the shelf.[279]The Truman Proclamation precipitated series of other proclamations in the similar tones. However, this would not at all affect the legal status of waters above continental shelf as high seas.

In the *North Sea Continental Shelf Case*,[280]the Court reiterated that:

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[277]M. N. Shaw, *op cit,* p.521.
[278]Whiteman, Digest, Vol. IV, p.756.
[279]*Ibid*.
[280]*Federal Republic of Germany v Denmark, Federal Republic of Germany v Netherlands*(1969) ICJ Reports, pp.3, 22; 41 ILR, pp.29,51.

> The rights of the coastal State in respect of the area of continental shelf that constitutes a natural prolongation of its land territory into and under the sea exist *ipso facto* and *ab initio,*by virtue of its sovereignty over the land and as an extension of it in an exercise of sovereign rights for the purpose of exploring the seabed and exploiting its natural resources. In short there is here an inherent right.

The concept of the establishment of the continental shelf in the international law of the sea is a probable result of the activities of exploitation of natural resources in the seabed of the developed countries.[281]In a bid to circumventing the danger inherent in the claim and division of the continental shelf, the International Law Commission (ILC) was saddled with the responsibility to prepare the draft for the purpose of controlling such exploration and exploitation. As a result of the work of the Commission and the discussion at the Conference, the Convention on the Continental Shelf (CCS) was adopted in 1958 in Geneva and got into force in 1964.[282]The coastal States are given the sovereign rights to explore and exploit the natural resources of the seabed and subsoil in the submarine area adjacent to the mainland or islands, but outside the area of territorial sea, to a depth of 200 meters, or beyond that limit to a point where the exploitation of such resources becomes impossible.[283]

[281]M.Ravin, *op cit*, p.13.
[282]*Ibid*.
[283]The Geneva Convention, Art.1.

It can be deduced from the provision of the 1958 Convention that 'continental shelf' was defined in terms of its exploitability rather than relying upon the accepted geological definition. The definition is so imprecise as it depends on the rate of scientific and technological progress in exploitation of resources in the seabed and ocean floor. The definition here is therefore far from adequate. As noted by Gutteridge*:*

> The definition is bound to result in uncertainty; and may lead to disputes between States in cases where the same continental shelf is adjacent to the territories of opposite or adjacent States, or at the least to difficulties in fixing by agreement the boundaries of such shelves. Moreover, exploitability is a subjective criterion. It may well be asked as it was asked at the Conference, how is it to be determined that a particular submarine area beyond the depth of 200 meters admits of exploitation.[284]

This approach has however been modified somewhat under the 1982 Convention on the Law of the Sea. Article 76 (1), of the Convention provides as to the outer limit of the continental shelf that:

> The continental shelf of a coastal State comprises the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the

[284]J. C.Gutteridge, 'The 1958 Geneva Convention on Continental Shelf' quoted in M.Ravin, *op cit*, p.13.

> 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 from which the breath of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance.[285]

Here, an arbitrary, legal and non-geographical definition is given. Where the continental margin extends beyond 200 miles, geographical factors are put into consideration in establishing the limit, which in any event should not exceed either 350 miles from the baselines or 100 miles from the 2,500 meter *isobaths.*[286] Where the shelf does not extend as far as 200miles from the coast, natural prolongation is complemented as a guiding principle by that of distance.[287]

Under the 1982 Convention, the coastal State may exercise sovereign rights over the continental shelf for the purposes of exploring and exploiting its natural resources. Such rights are exclusive in that no other State may undertake such activities without prior and express authorization from the coastal State.[288] It has been argued that the sovereign rights recognized as part of the continental shelf regime specifically relate to natural resources, so that, for example, wrecks lying on the shelf are not part of the

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[285]The United Nations Convention on the Law of the Sea (UNCLOS m), Art.76 (3) defines continental margin.

[286]UNCLOS, Art.76 (4) - (8) and (9).

[287]*Libya/Malta Continental Shelf Case* (1985) ICJ Reports, pp.13,33-34; 8 ILR, pp238,265-6. This case is significant in that it established a methodology for the ICJ to approach maritime boundary cases. Note that information on the limits of the continental shelf where it extends beyond 200 nautical miles is to be submitted to the Commission on the Limits of Continental Shelf composed of experts in geology, geophysics and hydrographic, which is formed by coastal States to the Convention for determination.

[288]UNCLOS, Art. 77.

contemplation of the provision.[289] Additionally, the rights of coastal State over the continental shelf do not depend on occupation, effective/notional or any express proclamation. It has been indicated also that the exercise of the rights by coastal State over the continental shelf shall not infringe on the freedom of navigation, or on other rights and freedom of foreign ships as the legal status of the superjacent waters as part of the High Seas remains unaffected.[290]Article 77 of the 1982 Convention therefore gives only limited rights to the coastal State in the continental shelf not sovereignty. Where the continental shelf of a coastal State extends beyond 200miles, Article 82 of the Convention provides that the State must make payments or contributions in kind in respect of the exploitation of the non-living resources of the continental shelf beyond the 200 miles limit.

4.2.1 Delimitation of Continental Shelf between States with opposite or Adjacent Coasts[291]

There exists a close similarity or relationship between the delimitation of the continental shelf and that of the exclusive economic zone respectively between adjacent or opposite States.[292]The question of the delimitation of the continental shelf has given rise to a considerable debate and practice from the 1958 and 1982 Conventions to case-law and a variety of treaties. In principle, delimitation is an aspect of territorial sovereignty, but, where other States are involved, agreement is required. Most difficulties arising from delimitation in this area are resolved by agreement and the guiding principle of

[289]M. N. Shaw, *op cit*, p.525.
[290]UNCLOS, Art. 78 (1) & (2).
[291]M. D. Evans, Relevant Circumstance and Maritime Delimitations <www.researchgate.net/.../248623806-M.D.-Evans-Relevant-Circumstance... p.527> accessed on 19 January, 2014.
[292]*Libya/Malta Continental Shelf* Case, *supra*.

international law is that disputes over continental shelf boundaries are to be resolved by agreement in accordance with equitable principles.[293]

Article 6 of the Continental Shelf Convention (CSC) 1958had declared that in the absence of agreement and unless another boundary lines was justified by special circumstance, the boundary should be determined by application of the principle of

equidistance[294] from the nearest points of the baseline from which the breadth of the territorial sea of each State is measured; that is to say by introduction of the equidistance or median[295] line which ordinarily would operate in relation to the sinuosity of the particular coastlines.[296]

Disputes relating to continental shelf delimitation between adjacent or opposite States have been considered in a plethora of cases during which some of the courts had found occasion to apply the provision of Article 6 mentioned above. However, where strict adherence to the provision of Article 6 will produce an undesirable result, the court has not hesitated to determine the issue through other means in order to circumvent such result. For instance, in the *North Sea Continental Shelf Case*[297] it was found that equidistance principle enunciated by Article 6 would give Germany a small share of the

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[293]In the *Gulf of Maine Case, Canada v The United States* (1984)ICJ Reports, pp.246, 299; 77 ILR, pp.57, 126, the International Court stated that 'no maritime delimitation between Stateswith opposite or adjacent coasts may be effected unilaterally by one of those States. Such delimitation must be sought and effected by means of agreement, following negotiation concluded in good faith and with genuine intention of achieving a positive result. Where such agreement cannot, however, be achieved, delimitation should be effected by recourse to a third party possessing the necessary competence'.

[294]Equidistance simply means, the same distance from two other things. A point is said to be equidistance from two other points when it is always the same distance away from those points. In *Qatar v. Bahrain* (2001) ICJ Reports, para. 177 the Court defined the equidistance line as "…the line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of each of the two States is measured".

[295]The median line of measurement is used when a distribution (in the sea) is skewed. The median line is a line segment from a vertex (corner point) to the midpoint of the opposing side.

[296]M. N. Shaw, *op cit*, p.528.

[297]*Federal Republic of Germany v Holland and Denmark*, (1969) ICJ Reports 3.

North Sea Continental Shelf, in view of its concave northern shoreline between Holland and Denmark. It was held that the principle enunciated in Article 6 did not in any way constitute rules of international customary law and as such Germany was not bound by them since Germany had not ratified the 1958 Continental Shelf Convention. The Court went ahead to state that the relevant rule is that:

> Delimitation is to be effected by agreement in accordance with equitable principles, and taking account of all the relevant circumstances, in such a way as to leave as much as possible to each party all
>
> those parts of the continental shelf that constitute a natural prolongation of its land territory into and under the sea, without encroachment on the natural prolongation of the land territory of the others.[298]

The Court took the view that delineation was based upon a consideration and weighing of some relevant factors in order to produce an equitable result. Included among the range of factors was the element of a reasonable degree of proportionality between the lengths of the coastlines and the extent of the continental shelf.[299]

In the *Anglo-French Continental Shelf Case*,[300]both States were Parties to the 1958 Convention and therefore, Article 6 applied. It was stated that Article 6 contained one overall rule, 'a combined equitable-special circumstances rule,' which in effect

[298]*Ibid*, pp. 3, 53.
[299]*Ibid*. pp. 3, 52.
[300]*United Kingdom v France*(1978)Cmnd 7438; 54 ILR 6.

"gives particular expression to a general norm that, failing agreement, the boundary between States abutting on the same continental shelf is to be determined on equitable principles".[301]

The approach adopted in the delimitation, whether equidistance or any other method will depend upon the pertinent circumstances of the case. The fundamental norm both under customary law and the Convention was that such delimitation had to be in accordance with equitable principles. In this present case, the Court put into consideration 'special circumstances' in relation to the situation of the channel Islands which justified delimitation other than the median line as proposed by the UK.[302]

In the *Tunisia/Libya Continental Shelf Case*,[303] the Court had no option than to decide the dispute on the basis of custom as neither State was a Party to the 1958 Convention. The Court reiterated that 'the satisfaction of equitable principles is, in the delineation process, of cardinal importance'. So, according to the Court, the concept of natural prolongation was of some importance depending upon the circumstances, but not on the same plane as the satisfaction of equitable principles.[304] The United Nations Convention on the Law of the Sea has in its article 83 provided for the continental shelf delimitation between States. Article 83, Paragraph 1 provides *inter alia*that the delimitation of continental shelf between States with opposite or adjacent coast shall be effected by agreement on the basis of international law … in order to achieve an equitable solution.

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[301]*Ibid*, p.94.
[302]*Ibid*.
[303]*Tunisia v Libya*(1982) ICJ Reports 18; 67 ILR, 4.
[304]*Tunisia/Libya Continental Shelf Case, supra,* 47.

In *the Gulf of Maine Case*,[305] which considered in-depth, the delimitation of both the continental shelf and fisheries zones of Canada and the United States, the Chamber of the International Court of Justice (ICJ) came up with two principles reflecting what general international law prescribes in every maritime delimitation. In the first place, it noted that there could be no unilateral delimitation. Delimitations had to be sought and effected by agreement between the States Parties, or if necessary, with the aid of third parties. Secondly, it held that delimitation is to be effected by the application of equitable criteria and by the use of practical methods capable of ensuring, with regard to the geographic configuration of the area and other relevant circumstances, an equitable result.[306]The Court took as its starting point the criterion of equal division of the areas of convergence and overlapping of the maritime projections of the coastlines of the States concerned, a criterion regarded as intrinsically equitable.

In *Qatar v Bahrain*,[307] the Court reiterated that close relationship exists between continental shelf and economic zone delimitations, and held that the appropriate methodology was first to provisionally draw an equidistance line and then to consider whether circumstances existed which will occasion an adjustment of that line.[308] The Court held further that 'the equidistance/special circumstance' rule, applicable to territorial sea delimitation, and the 'equidistance/relevant circumstance', rule as developed since 1958 in case-law and practice regarding the delimitation of the

[305]*Canada v The United States*(1984)ICJ Reports 246; 71 ILR, 74. The Gulf of Maine is a large gulf of the Atlantic Ocean on the east coast of North America. It is delineated by Cape Cod at the eastern tip of Massachussets.

[306]*Gulf of Maine Case, supra*,paras.299-300.

[307](2001)ICJ Reports, Para. 226.

[308]*Qatar v Bahrain,supra,* para. 230.

continental shelf and exclusive economic zone were 'closely related'.[309] It was also considered that for reasons of equity in order to avoid disproportion, no effect could be given to *FashtalJarim*, a remote projection of Bahrain's coastline in the Gulf area, which constituted a marine feature located well out to the sea and most of which was below water at high tide. This same approach was reaffirmed by the Court in *Cameroon v Nigeria*[310] where it was held that the applicable criteria, principles and rules of delimitation concerning a line 'covering several zones of coincident jurisdiction' could be expressed in 'the so-called equitable principles/relevant circumstances method'. It has been noted that, while considering the variety of applicable principles, a distinction has traditionally been drawn between opposite and adjacent States

for the purpose of delimitation. In the former case, there is less difficulty in applying the equidistance method than it is in the latter. This is as a result of the distorting effect of an individual geographical feature in the case of adjacent States which will more quickly result in an inequitable delimitation.[311]

4.3 The Exclusive Economic Zone[312]

The exclusive economic zone has been defined in the following sentence:

> The exclusive economic zone is an area beyond and adjacent to theterritorial sea, subject to the specific legal regime established in this Part,under which the

[309]*Supra*, para. 231.
[310](October 10, 2002) ICJ General List No. 94; M N Shaw, *op cit*, p.539.
[311]*Ibid*, p.535.
[312]D.Attard, *Exclusive Economic Zone in International Law* (Oxford: Oxford University Press, 1987).

> rights and jurisdiction of the coastal State and the rights andfreedoms of other States are governed by the relevant provisions of thisConvention.[313]

The above definition offered by the Convention reveals that in the Exclusive Economic Zone, there are shared rights and jurisdictions between coastal States and their neighbouring States especially the geographically disadvantaged States. This implies that coastal States, unlike what obtains in the territorial seas, lack absolute sovereignty over their exclusive economiczone. A coastal State can only exercise jurisdiction with respect to exploitation of the natural resources within its exclusive economic zone and as it regards other activities such as marine research and conservation of the living resources of the zone. Unlike the case with territorial sea, other States have freedom of navigation and over-flight within the exclusive economic zone.

The concept of the exclusive economic zone is one of the most important pillars of the United Nations Convention on the Law of the Sea.[314] It has its roots in the concept of the exclusive fishing zone and the doctrine of the continental shelf.[315]

The exclusive fishing zone is a zone of the sea adjacent to a coastal State's territorial sea within which the coastal State has exclusive jurisdiction over fishing. The concept came as a result of the then extravagant 200-mile claims by certain Latin American States in the late 1940s to protect whaling and other fishing interests in the zone.[316] These claims became subject of serious protest and were thought to be unlawful. However, then and as now, it seems to be understood that such claims were motivated by

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[313]UNCLOS, Art.55.
[314]M.Ravin, *op cit*, p.16.
[315]D. J. Harris, *op cit*, p.466.
[316]*Ibid*, p.467.

genuine concern for conservation as well as other national interest and consideration especially when it seemed that international actions were proving ineffective. National views on this concept changed drastically with the failure of the 1958 Conference on the Law of the Sea and the Supplementary 1960 Conference to agree upon a wider territorial sea than the traditional three-mile sea or upon fishing jurisdiction for coastal States beyond their territorial sea.[317] Majority of the States took the view, after the failure, that in the absence of agreement to the contrary, fishing beyond the limit of a lawful, territorial sea was open to all nations in accordance with 'freedom of fishing' on the high seas. The unilateral action by Iceland and other States in the years that immediately followed, led gradually to an acceptance of a 12-miles[318] exclusive fishing zone,[319] the legality of which was no longer questioned but was even recognized in the *Fisheries Jurisdiction (Merits) Case.*[320]Thereafter, States became even more ambitious in their clams, so that by 1978, 23 States claimed 200-mile exclusive

fishing zones and another 38 claimed exclusive economic zones.[321]By 2002, a point had been reached where 111 States, from all political groupings, claimed 200-mile exclusive economic zone, without protest from other States.[322]

4.3.1 The Exclusive Economic Zone in the 1982 Convention

The concept of exclusive economic zone of the sea was provided for under Articles 55 to 74 of the 1982 Convention on the Law of the Sea. Article 55in particular defines

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[317]*Ibid.*

[318]i.e., 12 miles measured from the same baseline as those used for the territorial sea.

[319]A survey in 1967 revealed that exclusive fishing zones (mostly 12 miles) were claimed by 33 States, including the UK (Fishery Limits Acts 1964)….

[320]Involving (UK v Iceland; F.R.G. v Iceland (1974) ICJ Reports, 3. The Court ruled that Iceland's 1971 claim to a 50 mile exclusive fishing zone was illegal.

[321]D. J. Harris, *op cit.*

[322]UK Hydrographic Office Notice (January 1, 2002), U.K. M.I.L.(2001) 72 BYIL 634.

exclusive economic zone *inter alia* as"an area beyond and adjacent to the territorial sea…under which the rights and jurisdiction of the coastal State and rights and freedom of other States are governed by…this Convention."

In the exclusive economic zone, the coastal State has sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of waters superjacent to the sea-bed and of the sea-bed and subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds.[323] It is now a trite fact that the international community allows coastal States a 200-mile exclusive economic zone. This consensus quickly emerged at the United Nations Convention on the Law of the Sea, 1982 which accordingly provided to that effect. Pursuant to Article 57 of the Convention "the exclusive economic zone shall not extend beyond 200 nautical miles from the base lines from which the breadth of the territorial sea is measured." In the *Continental Shelf Case*,[324]the International Court of Justice also noted that 'the institution of the exclusive economic zone… is shown by the practice of States to have become part of customary law'. Delimitation of exclusive economic zone between States with opposite or adjacent coasts is effected in the similar way as what obtains in continental shelf which we discussed above, and it is provided for under Article 74 of the Convention.

It is notable that the 1982 Convention cautiously and intentionally refrains from ascribing to the exclusive economic zone the legal status of the high seas. As a result, the zone is instead treated as an intermediate area of sea between the high seas and the

[323]UNCLOS, Art. 56 (1) (a).
[324]*Libya v Malta*(1985) ICJ Reports, pp.13, 33.

territorial sea with a distinct regime of its own which accords the coastal States (i) sovereign rights of exploitation of the zone's resources and (ii) ancillary and other powers of exclusive jurisdiction, notably in respect of marine research and the control of pollution.[325]It has been argued that although the position of the coastal State in the exclusive economic zone which was hitherto regarded as being fully subject to the 'freedom of the high sea' is thus strengthened greatly, it still falls far short of sovereignty.[326] This is due in particular, to the fact that States generally may continue to exercise within the zone freedom of navigation and over-flight and other freedoms[327] not covered by Article 56, 1982 Convention which traditionally form part of the established concept of 'freedom of the high seas'.[328] To this large extent therefore, the 1982 Convention does not revert to

*Selden's*idea[329] of the closed sea in respect of the zone. However, foreign ships in passage are subject to coastal State's enforcement jurisdiction with regard to illegal fishing and control of pollution.[330]

4.3.2 The Exclusive Economic Zone: A Failed Attempt to Balance Coastal State Jurisdiction and Navigational Freedom[331]

The United Nations held series of conferences on the Law of the Sea between 1958 and 1982 just to negotiate the UNCLOS, to which many nations are signatory today. One

[325]UNCLOS, Art. 56.
[326]D. J. Harris, *op cit*, p.472.
[327]Those freedoms are listed in Art. 87 of the Convention.
[328]UNCLOS, Art. 58.
[329]*Seldon* was a 17th-century English lawyer who argued unsuccessfully that the sea might be subjected to territorial sovereignty. The opposing view of open sea propounded by *Grotius*when the Netherlands was the dominant maritime power prevailed.
[330]UNCLOS, Arts.73 and 220 respectively.
[331]C. Purvis, 'Coastal State Jurisdiction under UNCLOS: The ShenNeng I Grounding on the Great Barrier Reef' (2011) *36 Yale Journal of International Law*, 209.

outcome of such decades–long effort was the emergence of the exclusive economic zone, which reflects a compromise between navigational freedom and need for coastal State's jurisdiction over marine resources. But, it has been argued that UNCLOS's resulting balance weighs too heavily in favour of navigational freedom, leaving coastal States unable to protect natural resources available in the zone.[332] As noted earlier, during the periods of mid-twentieth century, coastal States began to extend seaward their claims to jurisdiction over what was traditionally designated as the free seas, contending that they had exclusive jurisdiction over territories ranging up to two hundred nautical miles from their baselines.[333] Obviously, the coastal States have strong incentives to their claim of jurisdiction over this water: most fish stocks and oil and gas deposits lie within 200 nautical miles of coasts, and most marine, scientific, and shipping activity occur in this zone. But this 'ocean enclosure movement' ran counter to the long standing international norm that seas must remain free for navigation.[334]

The concept of exclusive economic zone constitutes the most fundamental change brought by the UNCLOS and was established at the final Conference on the Law of the Sea (UNCLOS III).[335] It converted the area extending two hundred nautical miles into the sea from coastal States baseline from the part of the high seas into new type of area.[336] Under the present legal regime of the sea, there now exist three types of maritime zones with different governing legal regimes. In the territorial sea for example, coastal States exercise high degree of jurisdictional control which is limited only by other State's right

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[332]*Ibid*.

[333]L. M. Alexander, 'The Ocean Enclosure Movement: Inventory and Prospect' (1982) 20 *SAN DIEGO L. REV*., 566-567.

[334]*Ibid*

[335]*Ibid*, p.570. For the first appearance of the EEZ as a concept, see Kenya, Draft Articles on Exclusive Economic Zone Concept, UN Doc. A/AC.138/sc.11/L.10; GAOR, 27th Sess. Supp.No.21, U N Doc.A/8271, 1872, at 180.

[336]H B Robertson, 'Navigation in the Exclusive Economic Zone' (1983) 24 *VA. J. INT'L*. 865.

of innocent passage. In contrast, coastal States have no jurisdictional control over the high seas.[337] In any case, jurisdiction in the exclusive economic zone falls between these two extremes. A coastal State may exercise jurisdiction in its exclusive economic zone, but only over resources and economic activities. Furthermore, in asserting jurisdiction over its exclusive economic zone, coastal States may not exercise the 'nearly absolute authority' over resources and activities in its exclusive economic zone as it may over its territorial seas.[338] It must have due regard to the rights and duties of other States guaranteed by UNCLOS, especially the freedom of Navigation.

In essence, the emergence of exclusive economic zone gave coastal States significantly greater control than they had enjoyed previously over the waters adjacent to their territorial seas. They are given the power and responsibility to protect marine resources in their exclusive economic zones through national legislation and regulation. Despite this increased control and responsibility however, it has been argued,[339] the exclusive economic zone compromise continues to favourthe freedom of navigation over coastal States jurisdiction as the UNCLOS's requirement that coastal States have 'due regard' for the freedom of navigation sharply constrains their ability to impose and enforce environmental efforts.[340]

The Convention limits coastal States environmental regulation efforts in order to protect the freedom of navigation in three obvious ways: first, it stipulates that environmental protective measures adopted by coastal States must conform to

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[337]R. B. Krueger and M. H.Nordquist, 'The Evolution of the 200-mile Exclusive Economic Zone: State Practice in the Pacific Basin' (1979)19 *VA. J. INT' L*, 321-323.

[338]E.Duruigbo, 'Reforming the International Law and Policy on Marine Oil Pollution' (2000) 31 *J.MAR.L.& Com.* 65, 76.; UNCLOS, Arts. 56 and 2 respectively.

[339]C. Purvis, *op cit*, p. 210.

[340]M. V. Dyke, 'Balancing Navigational Freedom with Environmental and Security Concerns' (2004)15 *Colo. J. INT'L ENVIT L. & POLICY*, 19, 28.

international standards. Article 211 paragraph 5 of the Convention provides*inter alia*"laws and regulations for the prevention, reduction and control of pollution from vessels must conform to and give effect to general accepted international rules and standards". The source of these international rules and standard is 'the competent international organization or general diplomatic conference',[341] which is the International Maritime Organization (IMO). The benefit to navigational freedom having only one source for standards in exclusive economic zones is clear: ships passing through different State's exclusive economic zones will always encounter the same environmental standards and therefore do

not have to adjust their equipment, staffing or practices.[342] The requirement that antipollution measures conform to international standards restricts coastal States' ability to protect their own marine resources. When international standards for environmental pollution are inadequate and insufficient, coastal States are handicapped and cannot act unilaterally to protect their resources but must rather submit a request and receive approval from the IMO to implement heightened protective measures.[343] But petitioning the IMO has always been greeted with disappointment since it has always been reluctant to alter international shipping rules and standards to accord with environmental concerns.

Secondly, the UNCLOS ensures that coastal State environmental efforts do not interfere with the freedom of Navigation in exclusive economic zones by limiting coastal

[341]The implication is that coastal States are handicapped and cannot prescribe national standards of construction, design, equipment or manning of vessels… that do not give effect to generally acceptable rules or standards established by the IMO.

[342]P. S.Deinpsey, 'Compliance and Enforcement Law – Oil Pollution of Marine Environment by Ocean Vessels' (1984) 6 *NW. J.INT'L & Bus*., 459, 542. It was explained that practical considerations dictate that a ship which visits many countries each year should not be subjected to conflicting requirements as to construction and equipment by each nation, but rather should be required to comply with uniform international standards.

[343]UNCLOS, Art.211 (6) (a).

States' ability to enforce protective measures. A coastal State may not enforce antipollution measure unless and until such threat of pollution presented by a vessel in its exclusive economic zone crosses a particular threshold.[344] The coastal State must have 'clear grounds for believing that a vessel' has 'committed a violation of applicable international rules and standards for the prevention, reduction and control of pollution from vessels or laws and regulations of that State conforming and giving effect to such rules and standards.[345] A coastal State's ability or power to enforce environmental rules is seriously curtailed by UNCLOS provision; only when a vessel has already emitted substantial pollution can a coastal State take any action against the vessel beyond asking for basic information and details about the vessel.[346]

Finally, the Convention limits coastal State jurisdiction in order to protect the freedom of navigation in exclusive economic zones by intentionally allowing them few options for imposing protective measures even in navigationally challenging or ecologically sensitive areas. For instance, Article 211(6) (a) stipulates among other things that where an area in an exclusive economic zone is particularly navigationally challenging or ecologically sensitive, a coastal State may 'petition the IMO to permit more stringent regulations in that area'.[347]This clause provides States concerned with few effective options, however, because requested restrictions cannot include 'design, construction, manning or equipment standards other than generally accepted international rules and standard.[348] By so doing, the Convention protects navigational freedom by placing heavy constraints on coastal State's jurisdiction in their exclusive economic zone.

[344]H. B. Robertson, *op cit*, p. 899.
[345]UNCLOS, Art. 230 (3).
[346]*Ibid*, Art. 220(5) and (6).
[347]P. S.Deinpsey, *op cit*, p.545; UNCLOS, Art.211 (6) (a).
[348]H. B. Robertson, *op cit*, p.904-5.

The power of these States to implement and enforce measures protecting marine resources is therefore seriously curtailed.

4.3.3 Expanding Coastal State Jurisdiction in Exclusive Economic Zones: The Particularly Sensitive Sea Area

From the foregoing, one can argue that UNCLOS has failed to appropriately balance coastal State jurisdiction and the navigational freedom. However, with the creation of Particularly Sensitive Sea Areas (PSSAs**)**, the IMO took certain step toward correcting this anomaly by expanding coastal State's jurisdiction in limited areas of exclusive economic zones, but it has been argued that it has not yet made effective use of this new framework.[349]

At the behest of coastal States,[350] the IMO passed IMO Assembly Resolution 720 (17), establishing 'guidelines for designing special zones and identifying particularly Sensitive Sea Areas (PSSAs).[351] PSSAs means those "areas with 'ecological, socio-economic, or scientific' importance".[352] The IMO can designate areas as PSSAs in State's territorial seas and exclusive economic zones.[353] After, determining that the Reef was an area of ecological, social, cultural, economic, and scientific importance, the IMO designated the Great Barrier Reef the world's first PSSA in 1990.[354] The area of the Reef covered by the PSSA is known as the Great Reef Barrier Reef Region, which extends 2,300 km along the east coast of Queensland and cover an area of 346,000 square km,

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[349]C. Purvis, *op cit*, p.212.

[350]D. Bodansky, 'Protecting the Marine Environment from Pollution: UNCLOSIII and Beyond' (1991)18 *Ecology L.Q*., 719, 738.

[351]H. L.Chalain, 'Fifteen Years of Particularly Sensitive Sea Areas: A Concept in Development' (2007)13 *Ocean & Coastal L. J*., 47.

[352]*Ibid*, p.48.

[353] R. C. Beckman, "PSSAs and Transit Passage- Australia's Pilotage System in the Torres Strait Challenges the IMO and UNCLOS' (2008)*Ocean Dev. & INT'L L.J*., pp. 325, 327.

[354]H. L.Chalain, *op cit*, p.48.

passing through both Australians territorial sea and exclusive economic zone.[355]Previously, the Torres Strait was not part of the Great Barrier Reef Region, but the IMO extended the Reef PSSA to the Torres Strait in 2005.

In theory, the PSSA is a powerful tool for protecting environmentally sensitive areas of the exclusive economic zones. For example, when an area is designated as PSSA, a coastal State may request for permission from the IMO to issue requirements for vessels that would 'impose considerable restrictions on the freedom of the seas and passage' in the

PSSA. The IMO must approve all protective measures for PSSAs, and such measures must protect maritime wild life or make ships safer.[356]The IMO Resolution 720(17) follows the language of Article 211(6)(a) of the Convention in a strong term, but the PSSA designation goes one step further by allowing the IMO to impose 'new or non-mandatory measures to be taken in all maritime zones of a coastal State', including measures that affect design, construction, manning, or equipment standards. The creation of the PSSA mechanism is a step taken in the right direction toward expanding coastal States' power to protect marine resources in their respective exclusive economic zones which they alone possess jurisdiction/rights to exploit.

Nevertheless, the PSSA regime has been criticized for not living up to its potentials. Identification of an area as a PSSA is nothing more… than a qualification and a basis on which protective measures may be taken by the IMO, and designating an area as a PSSA will make no difference if the IMO elects not to authorize protective measures. While in theory, the IMO can institute new measures affecting design, construction,

[355]C. Purvis, *op cit*, p.213.
[356]H. L.Chalain, *op cit.*

manning, or equipment standards in all maritime zones of PSSA, including exclusive economic zones, it has been reluctant in doing so in practice.[357]In the Reef PSSA, for example, the IMO has authorized stringent regulations only in two very navigationally challenging areas: the Northern part of the Inner Route and the Torres Strait. In the Northern part of the Inner Route, vessels are subject to mandatory *pilotage*[358] and to the Great Barrier Reef and Torres Strait Vessel Traffic Service (REEF VTS), Australia's Mandatory Reporting and Surveillance System.

It is noteworthy however, that the IMO has refused to extend either mandatory *pilotage* or mandatory reporting elsewhere in the PSSA. After a container ship grounded on the Reef outside of the mandatory *pilotage* area in 2000, environmentalist called for compulsory *pilotage* to be extended for the entire length of the Great Barrier Reef Maritime Park. The governments of Australia and Papua New Guinea instead petitioned the IMO to authorize mandatory *pilotage* especially in the Torres Strait. Other members of the IMO, especially the United States and Singapore opposed such authorization contending that it would interfere with maritime State's freedom of navigation through the international Strait.[359] The IMO considered it and concluded that it could not endorse mandatory *pilotage* in the strait 'despite the obvious environmental vulnerability of the area and the risk posed by international traffic'.[360] It agreed only to recommend voluntary *pilotage.*

From the above discourse, some have taken the view that the UNCLOS did not strike the appropriate balance between coastal State jurisdiction and the freedom of

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[357]C. Purvis, *op cit*, p.214.
[358]This means that they must hire highly skilled, experienced marine pilots to steer them through the area.
[359]J. Roberts, 'Compulsory Pilotage in International Straits: The Torres Strait PSSA Proposal' (2006) 37 *Ocean Dev. & INT'L L*., p.93.
[360]*Ibid*, p.106.

navigation.[361] While the UNCLOS gave coastal States the right and obligation to protect marine resources in their exclusive economic zones, its requirement that protective measures respect the navigational freedom of other States leaves coastal States largely unable to impose or enforce effective protective measures. Although the IMO as we saw above could readjust this imbalance using a mechanism which it has created- the PSSA- it has declined from doing so, by failing from authorizing protective measures throughout PSSAs. The consequences of this failure to coastal States are tremendous in that they cannot engage in needed environmental efforts even in exclusive economic zone areas that have been designated as having special ecological significance.[362]

It is arguable however, that the exclusive fishing rights and rights of control over marine resources given to the coastal State in the exclusive economic zone by Article 56 of the 1982 Convention are economically very valuable. The obligations placed upon coastal States to conserve fisheries in the zone are matched by rights of exploitation which make but little concession to the interest of other States. For instance, article 56 paragraphs 1 and 2 provide that:

> 1. In the exclusive economic zone, the coastal State has:
>
> (a) sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether livingor non-living, of the waters superjacent to the seabed and of theseabed and its subsoil, and with regard to other activities for theeconomic exploitation and exploration of the

[361]C. Purvis, *op cit*.
[362]*Ibid*.

zone, such as theproduction of energy from the water, currents and winds;

(b)jurisdiction as provided for in the relevant provisions of thisConvention with regard to:

(i) the establishment and use of artificial islands, installations and structure

(ii) marine scientific research;

(iii) the protection and preservation of the marine environment;

(c) other rights and duties provided for in this convention.

2. In exercising its rights and performing its duties under thisconvention in the exclusive economic zone, the coastal State shallhave dueregard to the rights and duties of other States and shall act ina mannercompatible with the provisions of this Convention.

Coastal States are also entitled under Article 62 of the Convention, to reserve all of the allowable catch for their fishermen so long they are capable of exploiting it. The access of fishermen of other nations, including land-locked and geographically disadvantaged States,[363] to the surplus would depend on agreements or other arrangements.

[363]UNCLOS, Arts. 69; 62 (2) & (3).

In view of the above, it is right to say however that the regime of exclusive economic zone has also to a large extent represented the interests of coastal States in the zone, even though there might be need to balance some remaining/conflicting interests bothering on the threats posed by maritime trade on the dwindling marine resources. In short, the exclusive economic zone regime has been considered as one of the vehicles in the 1982 Convention for achieving a new international economic order that would redress the economic balance in the interest of various States especially the developing countries.[364]

4.4 The High Seas

The high seas are the seawater beyond the limit of the national jurisdictions and excluded from States claims and sovereignty. Whereas under Article1, 1958 Convention, the high seas began where territorial sea ends, the equivalent Article 86, 1982 Convention concept of the high seas is a more limited one in that it applies only beyond the limit of the exclusive economic zone. The high seas are open to all States, whether coastal or landlocked States and are reserved for peaceful purpose.

Research shows that the legal concept of the high seas began to be developed in the 17th century. In 1608 the Dutch jurist, philosopher, poet and playwriteHugo Grotiuspublished his book Mare Liberum, meaning; 'Freedom of the Seas'. The book justified the Netherland's trading activities in the Indian Ocean and formulated the principle that beyond a limited area under national jurisdiction, the use of the seas was free for all nations.

[364]D. J. Harris, *op cit*, p.475.

By the first half of the 19th century, the notion of the high seas as an area exempt from claims to State sovereignty had, with some exceptions, become generally accepted. It followed from that principle that no State had the right to prevent ships belonging to other States from using the high seas for any lawful purpose.[365] It follows that, as with outer space and celestial bodies, the high seas are considered *re communisomnium*, or 'things common to all', and are not subject to the sovereignty of any State, apart from general acquiesce thatStates are bound to refrain from any acts which might adversely affect the use of the high seas by other States or their nationals, including navigational rights.[366]

The deduction from the foregoing is that the high seas are purely free from national jurisdiction and no nation can acquire or appropriate any part of the high seas as forming part of its territory. This general rule however is subject to the operation of the doctrines of recognition, acquiescence and prescription, where, by long usage accepted by other nations, certain areas of the high seas bounding on the territorial waters of coastal States may be rendered subject to that State's sovereignty.[367] This was emphasized by the Court in the *Anglo-Norwegian Fisheries Case*.[368]The high seas are open to all States whether coastal or land-locked and in accordance with the provision of Article 87 of the 1982 Convention on the Law of the Sea, they have the freedom of navigation, over flight, freedom to lay submarine cables and pipelines; freedom to construct artificial islands and other installations permitted under international law, and lastly, freedom of fishing and scientific research. These freedom are to be exercised by

[365]What constitutes lawful purpose is nowadays essentially determined by the United Nations Convention on the Law of the Sea, (UNCLOS).
[366]UNCLOS, Art. 90.
[367]M. N. Shaw, *op cit*, p.543.
[368](1951) ICJ Reports, p.116.

States with due regard to the interests of other States in their exercise of the freedom of the high seas.[369] Also, in addition to those freedom mentioned in Article 87 of the 1982 Convention is the freedom to use the high sea for weapon testing and naval exercises.[370]

4.5 Jurisdiction on the High Seas

A question may arise as follows, since the high seas are declared to be beyond national jurisdiction, how is jurisdiction exercised there, who exercises jurisdiction and upon whom. Because the use or exercise of freedom to use the high seas is strictly with due regard to the rights of other users of the seas who are equally entitled to enjoy the same freedom, the

issue of jurisdiction cannot be completely ruled out in the high seas. It should be noted that 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. It is, basically, the flag State that enforces the rules and regulations both of its own municipal law and that of international law. Therefore, a ship without a flag will be deprived of many of the benefits and rights available under the legal regime of the high seas.[371]

The nationality of the ship will depend upon the flag it flies, but Article 91 of the 1982 Convention states further that there must exist a 'genuine link' between the State and the ship. This provision has been a source of judicial pronouncements due to problem of ambiguity. The International Tribunal for the Law of the Sea (ITLOS) has held *inter alia* that the requirement of genuine link was in order to secure effective implementation

[369]UNCLOS, Art. 87(1) & (2).
[370]D. J. Harris, *op cit*, p.435.
[371]M. N. Shaw, *op cit*, p.545.

of the duties of the flag State and not to establish criteria by reference, to which the validity of the registration of ships in a flag State may be challenged by other States. The Court held that the determination of the criteria and establishment of the procedure for granting and withdrawing nationality to ships are matters within the exclusive jurisdiction of flag States.[372]Ships sailing the high seas are generally underthe jurisdiction of the State whose flag they fly. They are required to comply with the laws and safety standards which the flag State enforces. Many fishing nations require fishing vessels to obtain an authorization, license or permit before engaging in high seas fishing. Some States impose gear restrictions, prohibit fishing techniques or do not allow vessels flying their flags to fish in vulnerable high seas areas. To sell fish on their domestic markets, some States insist that high seas vessels should have on-board observers, be equipped with monitoring devices and submit catch reports.

Ships are required to sail under the flags of one State only and are subject to its exclusive jurisdiction, save in exceptional circumstances.[373] Where a ship does sail under the flags of more than one State, it may be treated as a ship without nationality and will not be able to claim any of the nationalities concerned.[374] Where a ship sailing the high seas is stateless, and does not fly a flag, it may be boarded and seized. This was the decision of the Privy Council in the case of *NaimMolvan v Attorney- General for Palestine*[375]which concerned the seizure by the British Navy of a stateless ship attempting to convey immigrate in Palestine. This basic principle of customary international law that

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[372]The M/V Saiga (No. 2) Case between *St Vincent and the Grenddines v Guinea* (1999) 30 O.D. I. L. 43; The '*Grand Prince' Case*, *Belize v France* (2001) para. 89<http://www.itlos.org/ start2-en.html; www.worldcourts.com/itlos/en/.../2001.04.20-Belize-v-France.pdf> accessed on 19 January, 2014.
[373]M. N. Shaw, *op cit*, p.547.
[374]The Geneva Convention, Art.6 and UNCLOS, Art.92.
[375](1948) AC 351, 13AD 51; *US v Monroy* (1980) 614 F.2d 61.

'vessels on the high seas are subject to no authority except that of the State whose flag they fly' is enunciated and elaborated in the celebrated*Lotus Case*[376]by the Permanent Court of International Justice (PCIJ), when it explained questions relating to jurisdiction on the high seas. The exclusivity of the flag State jurisdiction is without exception regarding warships and ships owned or operated by a State where they are used solely on governmental non-commercial service. In which case such ships, according toArticles 95 and 96 of the 1982 Convention,have, 'complete immunity from the jurisdiction of any State other than the flag State'.[377]

4.5.1 Exceptions to the Exclusivity of Flag- State jurisdiction

The basic principle relating to jurisdiction on the high seas which states that vessels on the high seas are subject only to the authority of the flag State is subject to exception, except in the case of warships which are not used for merchant purpose. Still, the concept of the freedom of the high seas is similarly limited by exercise of a series of exceptions.[378]

Right of Visit

This means the right accorded to warships in customary international law to approach and ascertain the nationality of ships in the high seas. However, the right of approach, to identify vessels, does not automatically incorporate the right to board or visit ships.[379] This may be undertaken, in the absence of hostilities between the flag States of the warship and a merchant vessel and in the absence of special treaty providing to the contrary, where the ship is engaged in piracy or the slave trade, or, though flying a

[376](1927) PCIJ, Series A, N0.IO 25.; *Sellers v Maritime Safety Inspector* (1999) 2NZLR 44, 46- 48.
[377]The equivalent articles are seen in articles 8 and 9 of the Geneva Convention.
[378]M. N. Shaw, *op cit*, p.549.
[379]*Ibid*.

foreign flag or no flag at all, is indeed of the same nationality as the warship or of no nationality.[380] However, the warship should always exercise care in such circumstances, since it may be liable to pay compensation for any loss or damage sustained if its suspicions are unfounded and the ship boarded has not committed any act justifying such suspicions.

While commenting on this right to visit by warships, Smith said:

> The right of any ship to fly a particular flag must obviously be subject to verification by proper authority, and from this it follows that warships have a general right to verify the nationality of any merchant ship, which they may meet on the high seas. This 'right of approach' (*verification du pavillon or reconnaissance*) is the only qualification under customary law of the general principle which forbids any interference in the time of peace with ships of another nationality upon high seas. Any other act of interference (apart from the repression of piracy) must be justified under powers conferred by treaty. Provided that the merchant vessel responds by showing her flag, the Captain of the warship is not justified in boarding her or taking any further action, unless there is reasonable ground for suspecting that

[380]*Ibid*.

she is engaged in piracy or some other improper activity….[381]

Piracy

It has been stated that piracy constitutes a strong and formidable exception to the exclusive jurisdiction of the flag State and the principle of the freedom of the high seas.[382]

Articles 100-107 of the 1982 Convention are the replica of the rules on piracy as contained inArticles 14-21 of the 1958 Convention. In addition to Article 101 of the 1982 Convention which vividly defines piracy, *Oppenheim* has defined the term in this way, "piracy, in its original and strict meaning, is every unauthorized act of violence committed by a private vessel on the high seas against another vessel with intent to plunder *animofurandi*…."[383]

The essence of or what amounts to piracy under international law is that it must be committed for private ends, that is to say, it is not committed to serve the political purpose of other States. Where a vessel involves in piracy, any and every State may seize such private ship or aircraft whether on the high seas or on *terra nullius* and arrest the persons and seize the property on board.

Unauthorized Broadcast[384]

The Convention provides that all States are to co-operate in the suppression of unauthorized broadcasting from the high seas. This unauthorized broadcasting is defined

[381]Quoted in D. J. Harris, *op cit*, p.457.
[382]M. N. Shaw, *op cit*, p.549.
[383]D. J. Harris, *op cit*, p.458.
[384]J. C.Woodlife, 'The Demise of Unauthorized Broadcasting from Ships in International Waters'(1986) 1 *Journal of Estuarine and Coastal Law*, 402.
[121]UNCLOS, Art.109 (1)-(4).

as transmission of sound or TV from a ship or installation on the high seas intended for reception by the general public, contrary to international regulations, but excluding the transmission of distress calls. Any person engaged in such broadcasting may be prosecuted by the flag State of the ship, the State of registry of the installation, the State of which the person is a national, any State where the transmission can be reached or any State where authorized radio communication is suffering interference.Any of the above States having

jurisdiction may arrest any person or ship engaging in unauthorized broadcasting on the high seas and seize the broadcasting apparatus.[385]

Hot Pursuit[386]

The right of hot pursuit of a foreign ship is a principle in international law designed to ensure that a vessel which has infringed the laws of a coastal State does not evade punishment by fleeing to the high seas. In this circumstance, a coastal State's jurisdiction is extended onto the high seas in order to pursue and seize a ship which is reasonably suspected of infringing its laws. The right of hot pursuit is as provided under Article 111 of the 1982 Convention built upon Article 23 of the High Seas Convention, 1958. Hot pursuit may only begin when the pursuing ship has satisfied itself that the ship being pursued or one of its boats is within the limits of internal waters, territorial sea, contiguous zone or economic zone or on the continental shelf of the coastal State, and may only continue in that pursuit outside the territorial sea or such other zones if it is uninterrupted. Where the pursuit commences while the foreign ship is in the continuous

[122]W. C. Gilmore, 'Hot Pursuit: The Case of *R v Mills and Others*' (1995) 44 *ICLQ*, 949.; N Poulantzas, *The Right of Hot Pursuit in International Law* (2nd edn, The Hague: MartinusNjihoff, 2002) cited in M. N. Shaw, *op cit*, p.551.

zone, it may only be undertaken or justified if there has been any form of violation of the rights for the protection of which the zone was established. The right may commence in a similar way from the archipelagic waters. It is however, essential that prior to that chase, a visual or auditory signal to ship has been given at a distance enabling it to be seen or heard by the

foreign ship and pursuit may be undertaken by warships or military aircrafts or by specially

authorized government ships or planes. The right of hot pursuit terminates as soon as the ship pursued has entered the territorial waters of its own or that of a Third State. The International Tribunal for the Law f the Sea (ITLOS) has reiterated that all these conditions as laid down in Article 111 are cumulative; each one of them must be satisfied in order for hot pursuit to be lawful.[387]

Treaty Rights

States may by treaty allow each other's warships to exercise certain powers of visit and search any vessels flying the flags of the signatories to the treaty.[388] For instance, most agreements in the last century in relation to suppression of slave trade provided that warships of the parties to such agreements have the powers to search and even detain vessels suspected of being involved in slave trade, provided such vessels were flying the flags of the Treaty States. Under the Convention for the Protection of Submarine Cables (CPSC), 1984 the warships of Contracting States are empowered to stop and search and

[387]*M/V Saiga*, *supra*, pp.143, 194.
[388]M. N. Shaw, *op cit*, p.552.

ascertain the nationality of merchant ships that were suspected of infringing the terms of the Convention.[389]

4.6 The Area

The Area is the deep seabed adjacent to the continental shelf beneath the high sea. The Area is beyond national jurisdiction and its resources are declared the common heritage of mankind.[390]No State or juridical person shall claim or exercise the sovereignty or sovereign rights over any part of the Area or its resources.[391] The Area is open to use exclusively for peaceful purposes by all States, whether coastal or land-locked, without discrimination and without prejudice to the other provision of this Part.[392] Article137 paragraphs 1-3 of the 1982 Convention stipulate for the legal status of the Area and its resources when it provides that:

1. No State shall claim or exercise sovereignty or sovereign rights overany part of the Area or its resources, nor shall any State or natural or juridical person appropriate any part thereof. No such claim or exercise of sovereignty or sovereign rights nor such appropriation shall be recognized.
2. All rights in the resources of the Area are vested in mankind as awhole, on whose behalf the Authority shall act. These resources are notsubject to

[389]*US v Biermann* (1989) 83 *AJIL*, 99; The Council of Europe Agreements on Illicit Traffic by Sea (1995).
[390]UNCLOS, Art.136.
[391]*Ibid*, Art. 137.
[392]*Ibid*, Art. 141.

alienation. The minerals recovered from the Area, however, mayonly be alienated in accordance with this Part and the rules, regulations andprocedures of the Authority.

3. No State or natural or juridical person shall claim, Acquire orexercise rights with respect to the minerals recovered from the Areaexceptin accordance with this Part. Otherwise, no such claim, acquisition orexercise of such rights shall be recognized.

The concept of common heritage of mankind was seriously canvassed for over many years and subsequently the Declaration of the Principle was adopted at the General Assembly in 1970 by 108 votes to none with 14 absentions.[393] There has been controversy between the

developed countries and the developing countries over the right interpretation of the concept 'common heritage of mankind'. The United States for instance has argued that common heritage of mankind did not necessarily imply common property. In contrast to this position maintained by the United States and other industrialized countries, however, was the stance maintained by C. Pinto.[394]While talking about the concept of common heritage he said:

[393]M.Ravin, *op cit*, p.19.
[394]A delegate of Sri Lanka, before the Law of the Sea Workshop at the University of Hawaii in 1978.

> … that those minerals cannot be freely mined. They are not there, so to speak, for the taking. The common heritage of mankind is common property of mankind. The commonness of the 'common heritage' is a commonness of ownership and benefit. The minerals are owned in common by your country and mine and by all the rest as well. In their original locations, these resources belong in undivided and indivisible share to your country and to mine, and to all the rest to all mankind, in fact, whether organized as a State or not. If you touch the nodules at the bottom of the sea, you touch my property. If you take them away means to take away my property.[395]

Eventually, the concept became the principle of the international law and was encapsulated in the United Nations Convention on Law of the Sea. The Convention contains 58 articles on the management and control of resources in the seabed and subsoil thereof, which was known and called the 'Area', for the good of mankind as a whole.[396]

This principle of common heritage of mankind which as set forth in the 1982 Convention is really meaningful for all States, particularly to the developing countries which still lag behind in technological advancement and are generally strapped for funds to explore the resources embedded in the deep ocean floor. In addition and most

[395]Statement of Ambassador C. Pinto in the Law of the Sea Workshop, as quoted in M.Ravin, *opcit*, p.20.
[396]*Ibid*.

importantly, the Convention equally mandates/requires the industrialized countries that undertake the exploration of natural/ economic resources in the seabed areas to transfer their technical know-how in science and technology to the developing nations so that they too may benefit therefrom.[397] This indeed is one of such frantic efforts made by the present legal regime of the sea to balance States' interests in the economic resources of the sea.

The 'Area' is believed to have rich resources which are necessary for industrial purposes. Recently, study claimed that there are approximately 1.5 trillion tons of nodules in the Pacific Ocean alone.[398]According to the indication of eminent scientists and researchers who were invited to give a presentation on the nature and occurrence of these resources, these are cobalt rich ferromanganese crusts which occur throughout the global

oceans on sea mounts, ridges, andplateaus. The 'Area' also contains titanium, cerium, nickel, platinum, manganese, thallium, tellurium and other rare earth elements.[399] In accordance with the report of the Congressional Research Service of theUnitedStatesprepared for the Senate Committee in 1976, ocean manganesenodulescontainapproximately thirty elements including manganese, iron, silicon, aluminum, sodium, calcium, magnesium, nickel, potassium, titanium copper, cobalt, barium, lead, strontium, zirconium, vanadium, molybdenum, zinc, boron, yttrium, lanthanum, ytterbium, chromium, gallium, scandium, and silver.[400]

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[397]UNCLOS, Art. 144.
[398]United States Congressional Research Services, as quoted by M.Ravin, *op cit*.
[399]N. N.Nandan, 'Secretary General of International Seabed Authority Current Marine Environment Issue' as cited in M. Ravin, *op cit*.
[400]M.Ravin, *op cit*.

4.6.1 Exploitations of Economic Resource in the Area

The degree of wealth contained beneath the high seas has become more and more apparent in the recent years as a result of scientific and technological advances. Such scientific advances in the past few decades have actually revolutionalized the international community's knowledge and ability to search for marine mineral resources. In some cases, applied science has found ways to make some of these resources available to mankind

through the development of new technologies or the adaptation of existing ones for mining the mineral deposits concerned and processing them to recover the valuable products that they contain. For every mineral deposits, an ore body is generally defined as a mineral concentration (a mineral deposit) from which an element or a compound can be economically extracted under the existing legal, political and economic conditions. For mineral resources found in the international seabed area the 'Area', a legal framework has been provided for by the Convention. For polymetallic nodules, this framework and the Agreement relating to its implementation have been used to develop a prospecting and exploration code. For further development of this code, applied science (engineering) will have to provide a solution to the problem of economically viable mining and processing technologies.

It has been suggested that while this source of mineral wealth is of great potential importance to the developed nations possessing, or at least will soon possess the technical capacity to mine such nodules, it poses serious problems for developing States,

particularly those that are dependent upon the export earnings of a few categories of minerals.[401]

The 1982 Convention on the Law of the Sea under its Part XI declares the Area and its resources to be the common heritage of mankind as a whole and no State or natural or juridical person shall, acquire or exercise rights with respect to the minerals recovered from the Area except in accordance with Part XI of the Convention.[402] All activities in the Area including exploitation of the mineral resources are carried out for the benefit of mankind as a whole on whose behalf the International Seabed Authority (the Authority) established under the Convention shall act. The Authority is to provide for the equitable sharing of such benefits.[403] Activities in the Area are to be carried out in accordance with the provisions of Article 153 by the Enterprise (i.e. the Organ of the Authority established as its operating arm) and by State Parties or State Enterprises, or persons possessing the nationality of States Parties or effectively controlled by them, acting in association with the Authority.

An important aspect of the mineral resources in the seabed is that they may occurboth in maritime areas under the jurisdiction of coastal States or in the international seabed Area beyond the limits of national jurisdiction. However, none of these minerals are

commercially mined yet, but a considerable amount of commercial interest has been indicated in some of the deposits. What is essential before commercial exploration of

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[401]*Ibid*, p.561.

[402]UNCLOS, Art. 137 (3).

[403]*Ibid*,Art. 140.In order to control the activities of States and manage all resources in the 'Area', the United Nations Convention on the Law of the Sea vests exclusive rights in the International Seabed Authority (ISA), established under Section 4, Article 156 of the Convention. All States Parties to the Convention are *ipso facto* Members of the Authority.

these minerals could actually commence is that the profitability of a mining operation is established. The profitability, in turn, will depend upon a number of interrelated factors, including characteristics of the mineral deposits, suitable technology to mine it, technology for processing the ore obtained from the deposit to extract the products of economic value, market conditions as well as environmental considerations.

Currently, various stages are underway globally in some processes for prospecting and exploration combined with research and development on technology. At this time, it is still extremely difficult to ascertain when the requisite degree of geological assurance and of economic feasibility could be achieved to convert these potential resources to reserves, and therefore to start a viable mining operation. In fact, it has been argued that the Authority has made just little progress.[404] In 2000 for instance, the Authority adopted regulation on the exploitation of polymetallic nodules and in 2001 entered into exploration contracts with seven pioneer investors.[405] It is currently engaged in drafting regulations on polymetallicsulphides and cobalt rich crusts. It seems however that these seven contract holders do not yet have any immediate prospects or plans for exploitation.[406]

[404]D. J.Harris, *op cit*, p.495.
[405]<www.isa.org> accessed on 23 February 2014.
[406]D. J. Harris, *op cit*.

CHAPTER FIVE

NATIONAL JURISDICTION IN RELATION TO SPACE ABOVE STATES' TERRITORIAL WATERS

It is considered invaluable in this research work to, particularly under this chapter; make a detour to the States' jurisdiction in relation to the space above their territorial waters, due to the twin or identical provisions of the Law of Space which are analogous to the Law of the Sea. It is therefore apposite that a brief comparison with regard to States' jurisdictions in relation to space above their territories are made here, as quick allusion to this area of jurisdiction will serve our present purpose.

5.1 The Air Space

Variety of theories existed prior to the First World War with regard to the actual legal status of the air space above States' land and territorial waters. One of such theories viewed the air space as being entirely free, while another theory posited that, upon an analogy with the territorial sea, there existeda band of 'territorial air' appertaining to the State followed by a higher free zone. A third school was that all the airspace above a State was entirely within its jurisdiction, while a fourth approach tried to modify the third approach by positing that a right of innocent passage through the airspace for foreign civil aircraft existed.[407] There was a particular antagonism between the French theory of freedom of the airspace and the British theory of State sovereignty, although both of them agreed that the airspace above the high seas and *terrae nullius*was free and open to all.[408] It has been recognized that the outbreak of the First World War led to a general

[407]M. N. Shaw, *International Law* (5th edn.Cambridge: Cambridge University Press, 2004) p.463.
[408]*Ibid*.

awareness of the security implications of the use of the airspace and this changed the world view on the issue.

The approach that prevailed then, although, with little dissension, was based upon the extension of State sovereignty upwards into airspace. The approach was acceptable both from the defence point of view and in the light of evolving State practice regulating flights over national territory.[409]It was reflected in the 1919 Paris Convention for the Regulation of Aerial Navigation,[410] which recognized the full sovereignty of States over the airspace above their land and territorial sea.Article 1, Chicago Convention on International Civil Aviation, 1944 also provides that: "The contracting States recognize that every State has complete and exclusive sovereignty over the air space above its territory." Accordingly, the international law rules protecting sovereignty of State apply to the airspace as they do to the land below. The International Court of Justice in the popular *Nicaragua Case* [411] has noted that 'the principle of respect for territorial sovereignty is also directly infringed by the unauthorized over-flight of a State's territory by aircraft belonging to or under the control of the government of another State'. However, with regard to airspace above the high seas, the law provides otherwise. The general consensus regarding free access to air space above the high seas is in part indicated in agreements which either exclude 'sovereignty' over this space or make positive provision for its free use.[412] For instance, both the 1919 Convention on the Regulation of Aerial Navigation and the 1944 Chicago Convention provide for

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[409]*Ibid*, p.464.

[410]Art. 1. Each party however undertook to accord in peace time freedom of innocent passage to the private aircraft of the parties so long as they complied with the rules made by or under the authority of the Convention.

[411](1986) ICJ Reports 14,128.

[412]M. S. McDougal and W Michael Reisman, *International Law in Contemporary Perspective* (New York: The Foundation Press Inc., 1981) p.473.

sovereignty over airspace only above State territory, the latter, being stipulated to include the sea within territorial waters. The correct assumption from the above provisions is that beyond this area no State has the comprehensive, continuing, arbitral competence of 'sovereignty'.

One question that agitates the mind is whether there exists a similar treatment as regards sovereignty, between the airspace and the territorial sea as touching the rights of passage through the territorial waters. It questioned whether there existed a similar right of passage through the airspace above States. This issue had, of course, tremendous implications for the development of aerial transport and raised the possibility of some erosion of State exclusivity.[413] However, it is now accepted that no such right may be exercised in customary international law.[414] Aircraft may only traverse the airspace of States with the agreement of those States, and where that has not been obtained, an illegal intrusion will be involved which will justify interception, though not actual attack except in very exceptional cases.[415]

5.2 The Regime of Outer Space

The urge to transcend the heavens and explore the stars has always been a part of human consciousness. This is evidenced by the myths of numerous cultures that describe journeys

[413]M. N. Shaw, *opcit*, p.464.

[414]*Ibid*. It should be noted however, that Articles 38 and 39 of the Convention on the Law of the Sea, 1982 provide for a right of transit passage through straits used for international navigation between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone for aircraft as well as ships. Also, under Article 53 of the Convention, aircraft have a right of over flight with regard to designated air routes above archipelagic waters.

[415]*Pan Am Airways v The Queen* (1981) 2 SCR 565; 90 ILR, 213. The case explains further the issue of the exercise of sovereignty over the airspace above the high seas.

to celestial bodies.[416] Ways of transforming those myths into reality have been explored for some time. For instance, scientific discoveries of the seventeenth century, such as Johann Kepler's work on the mathematical laws governing the motion of bodies in orbit or IsaacNewton's research on gravity were fundamental to the technical aspects of travelling to space and remain relevant to this day.[417]

The modern space age began in the early twentieth century with technological developments in rocket and missile science.[418]As we noted earlier, fundamental principle of air law relates to the complete sovereignty of the subjacent State. This principle is however qualified by various multilateral and bilateral conventions which permit airliners to cross and land in the territories of the Contracting States under recognized conditions and in the light of the accepted regulations. There is also another qualification and one that substantially modifies the *usqueadcoelum*concept, according to which sovereignty extended over the airspace to an unlimited height.[419]This qualification centers upon the creation and development of the law of Outer Space.

The position today is that beyond the point separating airspace from outer space, States have agreed to apply the international law principles of *res communis*, so that no portion of outer space may be appropriated to the sovereignty of individual States. This position was made clear in a number of General Assembly Resolutions following the

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[416]For instance in one of the *Ngbo* myths, (in Ebonyi State), we were told by the elders of how the squirrel travelled to the outer space and hid his mother after he had deceived other animals that he had killed hismother in accordance with the collective decision of the entire animalkingdom. The squirrel killed a mother-lizard and presented her legs to other animals but hid his mother in the outer space from where she feeds him each time he comes back from the farm and is hungry.

[417]J. M.Wolff, *Peaceful Uses of Outer Space has permitted its Militarization-Does it also meanitsWeaponization?*(London: The European Institute of Economic and Political Science, 2003)p.5.

[418]*Ibid*.

[419]M. N. Shaw, *op cit*, p.479.

advent of the satellite era in the late 1950s.[420] For instance, United Nations General Assembly Resolution 1962 (XVII), adopted in 1963 and entitled the Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space, lays down a series of applicable legal rules which include the provisions to the effect that outer space and celestial bodies were free for exploration and use by all States on a basis of equality and in accordance with international law, and outer space and celestial bodies were not subject to national appropriation by claim of sovereignty, by means of use or occupation, or by any other means.[421]

Also, the Declaration on International Co-operation in the Exploration and Use of Outer Space adopted in the UN General Assembly Resolution 51/126, 1996, called for further international co-operation, paying particular attention to the benefit for and the interests of developing countries and countries with incipient space programmes stemming from such international co-operation conducted with countries with more advanced space capabilities.[422] Such resolutions constituted in many cases and in the circumstances, expressions of State Practice and *opinion juris*and were thus part of customary international law.[423]

The legal regime of outer space was further clarified by the signature in 1967 of the Treaty on Principles Governing the Activities of States in the Exploration and Use of

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[420]*Ibid*, p.481.

[421]Treaty on Principles Governing the Activities of States in the Exploration and use of OuterSpace, including the Moon and Other Celestial Bodies adopted by the UN General Assembly in(1999). It's Art. 11 gives a similar provision.

[422]Similar provision is also contained in "The Space Millennium: The Vienna Declaration on Space and Human Development, adopted by the Third United Nations Conference on the Exploration and Peaceful use of Outer Space (UNISPACE III), Vienna, 1999: available at<http://www.oosa.unvienna.org/unisp-3/>accessed on 27 February 2014.

[423]B. Cheng, 'United Nations Resolutions on Outer Space: "instant" International Customary Law'?(1965) 5 *Indian Journal of International law*, 23.

Outer Space, including the Moon and other Celestial Bodies.[424] The Treaty emphasizes that outer space, including the Moon and other Celestial Bodies, is not subject to national appropriation by any means and reiterates that the exploration and use of outer space must be carried out for the benefit of all countries. The wording of the preamble to the treaty will be apt here. It provides as follow:

> The States Parties to this treaty,
>
> **Inspired** by the great prospects opening up before mankind as a result of man's entry into outer space,
>
> **Recognizing** the common interest of all mankind in the progress of the exploration and use of outer space for peaceful purposes,
>
> **Believing** that the exploration and use of outer space should be carried on for the benefit of all peoples irrespective of the degree of their economic or scientific development,
>
> **Desiring** to contribute to broad international cooperation in the scientific as well as the legal aspects of the exploration and use of outer space for peaceful purposes,
>
> **Believing** that such cooperation will contribute to the development of mutual understanding and to

[424]Adopted by the General Assembly in its Resolution 2222 (xx), of 19 December 1996.

> the strengthening of friendly relations between States and peoples,
>
> … **Convinced** that a Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and other Celestial Bodies, will further the purposes and principles of the Charter of the United Nations.

The Treaty does not however, as such establish a precise boundary between the airspace and outer space as we will discuss soon in this work, but it provides the framework for the international law of outer space.

> Outer Space, including the Moon and other Celestial Bodies, shall be free for exploration and use by all States without discrimination of any kind, on a basis of equality and in accordance with international law, and there shall be free access to all areas of celestial bodies.[425]

Article IIof the Treaty provides that, "outer Space, including the Moon and other Celestial Bodies, is not subject to national appropriation by claim of sovereignty, by means of use or occupation, or by any other means".Despite and in contrary to the spirit

[425] *Ibid,* Art. 1(b).

of these clear provisions, in 1976, eight equatorial countries[426] claimed sovereignty over the geostationary

orbital arc above their territory. This claim by the equatorial countries attracted sharp oppositions from other countries, most of which were space power countries which reiterated the provision of the Treaty to the effect that Outer Space is free for use by all countries. This principle relates to the non-appropriation principle and is analogous to the right of innocent passage on the high seas.[427]

5.2.1 Definition and Delimitation of Outer Space

For the purpose of claiming sovereignty and exercising jurisdiction, the precise definition and delimitation of the outer space is necessary. When attempting to differentiate between permitted and prohibited activities in outer space, it is essential to have operational definition of the boundary between airspace (where certain activities are allowed) and outer space (where comparable activities are banned, restricted or otherwise regulated). Unfortunately however, there is as yet no known universally agreed precise legal, technical or political definition of either the boundaries separating airspace from outer space or of the term outer space itself.[428]

It has become apparent that the *usqueadcoelum*rule, which provides for States sovereignty over their territorial airspace to an unrestricted extent, was not viable where space exploration was concerned. To obtain the individual States' consents prior to the passage of satellite and other vehicles orbiting more than 100 miles above their surface would just prove cumbersome in the extreme and in practice, States have acquiesced in

[426]Brazil, Columbia, Congo, Equador, Indonesia, Kenya, Uganda and Zaire.

[427] Space law, policy and doctrine <www.au.af.mlau/awc/space/primer/space-law-policy- doctrinepdf> accessed on 23 February 2014.

[428] H. C.Harnsard, 'Legal Theories on the Spatial Demarcation Boundary Plane' <www.herts.ac uk/-data/assets/pdf-file/0010/...HLJ-v112-oduntan.pdf>accessed on 23 February 2014.

such traversing.[429] It is a trite observation today that there exists a great deal of difference between

the legal status of the airspace and that of outer space. In the former, States possess exclusive jurisdiction and in the later there can be no exercise of sovereignty and territorial jurisdiction.[430] The legal distinction between the airspace and outer space and the two bodies of law governing them is not only factual but ultimately necessary.

The concept of sovereignty, it would appear, has not risen above the bounds of the earth's airspace. It actually makes no sense in conventional terms to speak of sovereignty in outer space seeing that,*ab initio,*international legislation developed to govern outer space has been unequivocal on the prohibition of the application of State sovereignty in outer space. Ofparticular importance on this point are the earlier- mentioned Treaties- the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and other Celestial Bodies, 1967[431] and the Agreement Governing the Activities of the States on the Moon and other Celestial Bodies 1979.[432]

However, the concept of jurisdiction, on the other hand, applies to outer space and is recognized in the entire framework for regulation of man's activity wherever it occurs in the entire universe.[433] The concepts of 'province of mankind' and 'common heritage of mankind' have been developed in space law to govern outer space, thereby establishing

[429]M. N. Shaw, *opcit*, p.480.

[430]G.Odunta, 'The Never Ending Dispute: Legal Theories on the Spatial Demarcation Boundary Plane between Air space and Outer space'(2003) 1 *Hertfordshire Law Journal*, 64-84.

[431]Also known as the Space Treaty.

[432]Also known as the Moon Treaty or Moon Agreement,UN Doc.A/34/664 (1979).

[433]Examples of such provisions include, Article 8 of the Space Treaty, (1967), which states that a State party on whose registry an object launched into outer space is carried shall retain jurisdiction and control over it; Article 12 (1) of the Moon Treaty confers jurisdiction and control over astronauts who are nationals of the sending State and Article VIII of the Space Treaty, (1967) also confers jurisdiction on the State of registry irrespective of the nationality of all persons aboard the space vehicle.

outer space as an international public utility. Article 1 of the Space Treaty (1967) states that:

> The exploration and use of outer space, including the Moon and other Celestial Bodies, shall be carried out for the benefit and in the interests of all countries, irrespective of their degree of economic or scientific development, and shall be the province of all mankind.

Furthermore, Article II (I) of the Moon Agreement (1979) provides that "The Moon and its natural resources are the common heritage of mankind". Yet there is no clear guidance in any of these treaties as to where outer space begins. What remains to be archived by internationallawyers is to determine where exclusive sovereignty ends and where the province of all mankind begins.[434] The demarcation point is still an open question and unsettled issue in Air and Space Law. It is safe to argue that this point must exist somewhere in between the airspace, the atmosphere and outer space.[435]

It has been argued that, precisely where the boundary lies is difficult to say and will depend upon technological and other factors,[436] but figures between 50 and 100 mile above have been put forward.[437] The boundary problem involves a number of pertinent and distinct issues. For instance, boundaries might be set in space for many different

[434]G.Odunta, *op cit*.
[435]*Ibid*.
[436]M. N. Shaw, *op cit*.
[437]The UK has noted, for example, that 'for practical purpose the limit (between airspace and outer space) is considered to be as high as any aircraft can fly'(1999) 70 BYIL, 520.

purposes. For example, space-craft using nuclear fuels might be prohibited from operating below certain altitudes; launchers might be prohibited from discharging waste in certain layers of the atmosphere; space craft returning to earth or moving away from it might be required to control their flight in such a manner as may be directed by the super-adjacent State.[438]

There is a strong feeling by the author of this work that one of the major reasons for the exercise of sovereignty by States especially as it touches the air territory is for security and protection of the territory from undue exposure to the damaging consequences of the activities in the air by other States. On this note therefore, it is suggested here that in addition to the theories postulated by some international figures, another criterion upon which demarcation of airspace from outer space should be based is the direct impact/consequence of the space activity on the State above whose territory the activity is carried out. Following this reasoning therefore, theheight or point in the space from where the activities in the space must have lost any direct consequence or impact on the State concerned should be marked as the dividing line between the airspace and outer space.

5.3 Peaceful and Military Uses of Outer Space

Since the outer space, including the areas directly above States' territorial waters had been designed as an area beyond national jurisdiction and common heritage of mankind, it has been the original intention of the world community that outer space should be used for peaceful purposes only. Initially, the world community, including the space powers, urged that outer space should be used for peaceful purposes. For instance, in January

[438]See G.Oduntan, *op cit*, for varies theories/schools of thought on basis for demarcation of air space from outer space.

1957, even before *Sputnik* was launched, Ambassador John Lodge expressed on behalf of the United States the hope that 'future developments in outer space would be devoted exclusively to peaceful and scientific purposes'.[439] In his address to the United Nations General Assembly, he even went as far as suggesting that the testing of satellites and missiles be placed under international supervision (much as was the case with nuclear technology earlier).[440]

Further other moves to ensure that 'outer space be used exclusively for peaceful and scientific purposes and for the benefit of mankind', included the joint submission by four Western powers – Canada, France, the United Kingdom and the United States to the United Nations Disarmament Commission (UNDC), calling for a study on an inspection system that would assure that objects launched into outer space would be used exclusively for peaceful and scientific purposes. The submission was adopted by the General Assembly and became the first United Nations Resolution on outer space and the first time the phrase – 'exclusively for peaceful purposes' would be used in an authoritative United Nations text.[441]

Also, during the thirteenth session of the General Assembly held in 1958, a forum for the debate on 'Questions of the Peaceful Use of Outer Space' was provided. During this session, the term 'peaceful' was used as an antonym to 'military'. Sweden appealed to fellow Member States to 'safeguard outer space against any military use whatsoever',[442] and the Soviet Union put forward a proposal to ban the use of outer-space for military purposes. All these culminated in General Assembly adoption of Resolution

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[439]P. Jessup and H. Taubenfeld, *Controls for Outer Space and the Antarctic Analogy*(New York: Columbia University Press, 1959) p. 252.
[440]J. M. Wolff, *op cit*, p.6.
[441]United Nations General Assembly Resolution 1148 (XII) of 14 November, 1957.
[442]M. S. McDougal*et al*,*Law and Public Order in Space (*New Haven: Yale University Press, 1963) p.395.

1348 (XIII), which recognized the 'common aim' of humankind that outer space 'should be used for peaceful purposes only'.[443] Resolution 1348 established the *Ad hoc* Committee on the Peaceful Uses of Outer Space (COPUOS)of which its legal subcommittee issued a report in 1959 asserting that the United Nations Charter and the Statute of the International Court of Justice were not limited to the confines of the Earth, and that the countries of the world have established a practice, in principle, that Outer Space is, on conditions of equality, freely available for exploration and use by all, but in accordance with existing or future international law or agreements.[444] The implication of the development therefore is that, coastal States would exercise jurisdiction only on their territorial waters and airspace above these territorial waters and not the outer space above them.

The Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, (The Outer Space Treaty or OST) was concluded in the first years of space exploration, after Yuri Gagarin's historic flight and before Neil Armstrong's walk on the Moon. The OST which entered into force in 1967 prohibits the testing of weapons, the stationing of weapons of mass destruction (including nuclear weapons), the holding of military manoeuvres, or the establishment of military bases in space. The Partial Test-Ban Treaty entered into force in 1963 also prohibits nuclear tests and explosions in the atmosphere or in outer space.

Research however reveals that the OST does not cover some aspects such as the transit of nuclear weapons through space or nuclear weapons launched from Earth into space in order to destroy incoming missiles (such as some of the American or Soviet

[443]<http://www.oosa.unvienna.org/spaceLaw/spacelaw.htm> accessed on March, 2013.
[444]Report of the *Ad hoc* Committee on the Peaceful Uses of Outer Space, General Assembly document A/4141 of 14 July, 1959.

Missile defence systems originally permitted under the 1972 Anti-ballistic Missile Treaty). Nor does the OST address other weapons (such as Anti-Satellite Weapons (ASAT) or the placement of conventional weapons in space.

It is now trite that since the early days of the space era, the international community has strongly endorsed the use of outer space for 'peaceful' purposes. However, although the term itself appears in many United Nations documents and space law treaties, still, more than 47 years after the launching of *sputnik* I, the term 'peaceful' still lacks an authoritative definition. It is observed that the initial and widespread interpretation accorded to the term 'peaceful' in relation to outer space was 'non-military' and it seemed that that interpretation was accepted to both the United States and USSR. However, soon after the launching of the early artificial satellites, the United States began to change its original position in relation to the meaning of the term 'peaceful uses', claiming that the term means 'non-aggressive' rather than 'non-military' as earlier supposed.[445]The United States began to argue in accordance with this new view that all military uses of outer space were to be permitted and considered lawful provided they remain 'non-aggressive', according to Article 2(4) of the UN Charter, which prohibits "threat or use of force".

On the other hand, Soviet Union after several years of space era maintained its original position that 'peaceful' meant 'non-military' and that all military activities in outer space were non-peaceful and possibly unlawful. However, contrary to these claims, even during that period, the Soviets continued to place into orbit a growing number of

[445]McGill, *Peaceful and Military Uses of Outer Space: Law and Policy*(Canada: Montreal, 2005) p.3; I Vlasic, 'The Legal Aspects of Peaceful and Non-peaceful Uses of Outer Space' in B. Jasani (ed),*Peacefuland Non-peaceful uses of Space: Problems of Definition for the Prevention of an Arms Race*(New York: Taylor and Francis, 1991).

military payloads and grew increasingly dependent on space technology in their military planning.[446] Eventually however, the Soviet Union and other States sharing the original interpretation of the term 'peaceful' appeared to have accepted that outer space may be used for military purposes. [447] This change in position was summarized by a representative of a Western delegation in the *Ad hoc* Committee on the Prevention of an Arms Race in Outer Space (PAROS) of the Conference on Disarmament according to whom: "even though in some contexts 'peaceful' means 'non-military', any ambiguity has been clarified by State practice which had not been contradicted in any forceful manner by any State formally protesting military utilization of space.[448]

It is important here to draw a clear distinction between "militarization" and "weaponization" of outer space. If the position has been accepted that the outer space may be used for military purposes which indeed began with the launching of the earliest communications satellites serving military objectives, weaponization is generally understood to refer to the placement in orbit of weapon systems that could attack targets in space or on the Earth.[449] Although to this day there is no authoritative definition of the term 'space weapon' there exist some space-based devices that have indirectly a destructive capacity (for example, satellites serving GPS navigation of military aircraft and precision guided missiles).[450]Space-weapon has however been considered to mean a device stationed in outer space (including the moon and other celestial bodies) or in the earth or sea environment designed to destroy, damage or otherwise interfere with the

[446]McGill, *op. cit.*
[447]I. Vlasic, 'Space Law and the Military Applications of Space Technology' in N.Jasentulyiana (ed), *Perspectives on International Law* (Boston :Klwer Law International, 1995) p.385.
[448]UN Doc. CD/1165 of 12 August, 1992.
[449]McGill, *op cit.*
[450]*Ibid*.

normal functioning of an object or being in outer space, or a device stationed in outer space designed to destroy, damage or otherwise interfere with the normal functioning of an object or being in the earth environment. Satellites on their own do not have destructive capacity and their support of military missions is not considered weaponization of space.[451]In this context, a distinction is made between two categories of military assets: "force application", i.e., strike weapons, and "force support" (Communications, Command and Control, Sensor and Surveillance).[452]

It has been argued that the launching on 4 October 1957 by the Soviet Union of Sputnik, the first artificial satellite marked the beginning of an intensive/intense space rivalry between the USSR and the United States, which lasted throughout the Cold War. The launch of Sputnik was seen not only as scientific achievement but also as the trigger of a military revolution with extraordinary strategic consequences. Sputnik transformed the dream of space exploration into reality.[453] Four years later, Yuri Gagarin became the first human to see Earth from space and with this, human beings became space travelers. Less than ten years of Gagarin's flight, Neil Armstrong came up as first human being to walk on the Moon. Indeed, the launch of Sputnik marked the beginning of space exploration and with it the start of the debate surrounding the militarization of outer space.[454] However, every treaty enacted for the purpose of ensuring and enforcing peaceful use of outer space is binding on every State alike whether coastal or landlocked

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[451]S.Estabrooke, 'Opposing Weapons in Space', Ploughshares Monitor (2002). Online Project Ploughshares website http://www.ploughshares.ca/CONTENT/ MONITOR/MonsOza.htm/; www.e-parl/.../space.../Backgroundpaper%20Mc Gill%outer%20sp…> accessed on 23 February 2014.

[452]R. Johnson, 'Space Security: Options and Approaches' Paper Presented at 'Outer Space and Global Security' Conference, Geneva, 26–27 November 2002, online: Ploughshares Organization Website <http://www.ploughshare.ca/content/ ABOLISH%20 UNCS/outer space Conf02; books.google.com,ng/books?isbn=113701655> accessed on 23 February 2014.

[453]J. M. Wolff, *op cit*, p.6.

[454]*Ibid*; see also McGill, *op cit*pp. 4 –13 for Historical Evolution of Military Uses of Outer Space.

as no special rights are reserved for coastal States in the outer space above their territorial waters.

Despite lofty commitments, the world failed to maintain outer space for peaceful purposes only as originally intended. Militarization of outer space has been a *fait Accompli*since the beginning of the space exploration age. Until now, space objects have only served as force multipliers. Worse still, we are approaching the threshold of space weaponization. We have managed to transcend the heavens, a task long seen as impossible, yet we have done little to prevent the militarization of space. We have the opportunity and responsibility to prevent its weaponization for the common good of the entire human race.

This chapter has been devoted to the brief examination of the jurisdiction of States in relation to the space above their water territories, an area where both international law treaties and State practice have adopted analogous provisions and procedure to what obtains in the Law of the Sea. Thus, the space has been divided into segments as is the case with the sea for the purpose of determining national jurisdictional sphere and States claim of sovereignty. In the airspace for instance, the State can exercise sovereignty over its airspace so that no aerial operation or activity can be carried out in the air space of a State by another without prior consent and authorization of that State, except as otherwise agreed between the States concerned. The outer space, just like the high seas has been designated as a 'common heritage of mankind' and is therefore beyond State appropriation. However, unlike the high sea, the dividing line between the airspace and outer space has for a long time now proved elusive although different theories exist to that effect. Thus, the claim of sovereignty by eight Equatorial States over

the geostationary orbit of about 22,300 miles above their territories tends to alter the legal position of outer space which has almost crystallized into customary international law. This is quite disturbing. Yet, their claim is not altogether unfounded, hence the need for further demarcation of space into more segments, as in the case of the seas, where Equatorial States may exercise some limited jurisdiction over the geostationary orbit instead of complete sovereignty which they are now claiming.

CHAPTER SIX

STATE INTERESTS IN THE EXPLOITATION OF ECONOMIC RESOURCES BEYOND NATIONAL JURISDICTION

TheConvention[455] establishes an international legal regime for the world's seas. This comprehensive legal regime formed the basis of an international programme of action on the sustainable development of the resources and uses of the seas as laid out in the Convention. The United Nations Division for Ocean Affairs and the Law of the Sea (UNDOALS) of the Office of Legal Affairs has developed a programme of activities for the realization by States of benefits under the legal regime and the programme of action established by the Convention. One area where potential benefits assumed a critical role in the formulation of the legal regime in the Convention and its elaboration is that of marine mineral resources. The potential for the realization of benefits from these resources has expanded considerably both in areas within national jurisdiction and in the international area as a result of scientific discoveries.

It is trite now that exploitation of economic resources in the seas is basically the duty and activity carried out by States[456] as individuals are precluded from such undertaking. The author has already, in chapter one, considered those factors which attract States interests in the sea, we would therefore, list the classes of States as it relates to this work, before proceeding to claims and exploitation of these resources by States.

[455]The United Nations Convention on the Law of the Sea, (UNCLOS) 1982.

[456]The International Seabed Authority, being the organization saddled, by the Convention, with the responsibility of managing, controlling and administering the mineral resources of the international seabed area beyond national jurisdiction.

6.1 Classification of States

In this work, States are classified into different groups in relation to their positions in the uses of the sea and exploitation of economic resources in the sea. It is not however intended that an exhaustive discussion on the features of these States will be undertaken here. It would serve our present purpose here to present brief information about these classes of States. However, further effort will be made to explain the features and position of the landlocked developing States and geographically disadvantaged States in relation to their maritime neighbours in the next chapter.

6.1.1 Coastal States

Coastal States in its most precise definition can be said to mean those States which possess sea-coast. In other words, they are those States that have maritime belt with the Sea, Bay or Lake as the case may be. Examples of coastal States are Nigeria, United States, Cameroon, China, Thailand, Japan etc.

The rights and duties of coastal States as it relates to sea uses are adequately provided for in the 1982 Convention on the Law of the Sea. For instance, under the exclusive economic zone (EEZ) coastal States have the following rights and duties:

Rights:

- Sovereign rights to explore and exploit, conserve and manage the natural resource of the sea whether living or non-living.[457]
- Exclusive right to construct and establish artificial islands and installations.[458]

[457]UNCLOS, Art. 56 (1) (a).
[458]*Ibid*, Art. 56 (1) (b); Art.60 (1).

- Right to undertake scientific research
- Right to pass and enforce its laws for the purpose of conserving and managing living resources e.g. to inspect, arrest and institute proceedings against transgressors.[459]
- Right to protect their legitimate interests.[460]

Duties

- Conserve and manage natural resource of the sea.
- Protection and conservation of the marine environment.[461]
- Observe the rights and duties of other States.[462]
- Duty to comply with the provisions of the Convention.[463]
- Duty to give due notice to other States of the construction of an artificial islands and other installations.[464]
- To remove abandoned installation structures
- To give access to land-locked States to the surplus to allowable catch of living resources of the exclusive economic zones of coastal States of the same sub-region or region.[465]
- Duty not to discriminate against landlocked States in maritime ports.[466]
- Duty to ensure that living resources in the EEZ are not endangered by over exploitation

[459]*Ibid,* Art. 73.
[460]*Ibid,* Art. 125.
[461]*Ibid* Art. 56 (1) (a).
[462]*Ibid* Art 56 (2).
[463]*Ibid.*
[464]*Ibid,* Art. 60 (3).
[465]*Ibid,*Art. 69 (1).
[466]*Ibid,* Art. 131.

6.1.2 Land-locked States

In juxtaposing the two classes of States, it is found that they are directly opposed to each other. Land-locked State therefore means a State which has no sea- coast. Land-locked States are those States which are geographically cut off from the seas and its enormous resources. They are non-coastal States in the sense that they lack coastline. The United Nations Office of the High Representative for the Least Developed Countries, Land-locked Developing Countries (LLDCs) and Small Island Developing States has asserted that there are thirty-one land-locked developing Countries on the planet.[467] Some examples of land-locked States are Kazakhstan, Mongolia, Chad, Mali, Ethiopia, Afghanistan, Austria, and Czech.

6.1.3 Transit State

This means a State, with or without a sea-coast, situated between a land-locked State and the sea, through whose territory traffic in transit passes.[468]

Land-locked States and transit States may, by agreement between them include as means of transport pipelines and gas lines and other means of transport specifically mentioned in paragraph 1 of this Article 124 of the Convention. Examples of transit States are: United States, Canada, Eritrea, India, turkey, Chile etc.

Rights of landlocked States:

- Rights of access to and from the sea.[469]
- Right to participate, on equal basis, in the exploitation of the surplus of the living

[467]List of Land-locked Developing Countries, UN.ORG (2002).<http://www.un.org/special rep/oh.lls/lldc/list.htm> accessed on 1 may 2013.
[468]*Ibid*, Art. 124 (1) (a) & (b).
[469]*Ibid*, Art. 125 (1).

resources of the exclusive economic zones of coastal States of the same sub-region or region.[470]

- Right to exploit both living and non-living resources in the high seas
- Right not to be subjected to customs duties and other taxes not related to the transit.[471]

Duties of landlocked States:

- Mutual duty to cooperate in resolving difficulties that may occur by designating competent Authorities.[472]
- Duty to observe laws of coastal States passed in accordance with the Convention.[473]

6.1.4 Archipelagic State

Archipelagic State is defined as a State constituted wholly by one or more archipelagos[474] which may include other islands. The Convention provides that an archipelagic State may draw straight archipelagic baselines joining the outermost points of the outermost islands and drying reefs of the archipelago provided that within such baselines are included the main islands and an area in which the ratio of the area of the water to the area of the land, including atolls, is between 1 to 1 and 9 to 1.[475]

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[470] *Ibid*, Art.69.
[471] *Ibid*, Art. 127.
[472] *Ibid*, Art. 130 (3).
[473] *Ibid*, Art. 58 (3).
[474] Archipelago means a group of islands including parts of islands, interconnecting waters and other natural features closely interrelated that such islands, waters and other natural features form an intrinsic geographical, economic and political entity or which historically have been regarded as such.
[475] The rights and duties of archipelagic States are as provided in the Convention, Art. 47 (1)-(9).

Efforts by States comprising a number of islands to draw straight baselines around the other limits of their islands have generated a lot of problems. For instance, Indonesia in

particular has resorted to this method, against the protests of a number of States as the method tends to reduce areas previously considered as part of the high seas used as shipping lanes to the sovereignty of the archipelagic State concerned.[476] The guidelines on the rights and duties of archipelagic States are provided for in Article 47 paragraphs 1 to 9 of the 1982 Convention on the Law of the Sea.

6.1.5 Developing State

A particular country or State is tagged developing State to explain its level of development in terms of technology, infrastructure, politics and social development. States that are considered not advanced in these areas are said to be developing States. A country is also referred to as a developing State when it has a standard of living or level of industrialization or industrial production well below that possible with financial or technical aid; it means a country that is not yet highly industrialized.[477]

The question is, what is the position of developing States, and how are they recognized and considered in the law of the sea with regard to sea and its resources. Article 82 of the UN Convention on the Law of the Sea being a unique provision in international law has been motivated by a sense of international equity and established an international royalty whereby payments and contributions on the exploitation of non-living resources of the Outer Continental Shelf (OCS) are made by concerned States. This

[476] M. N. Shaw, *International Law* (5th edn, London: Cambridge University Press, 2004) p.502.
[477] Defining Developing Country <www.thefreedictionary.com/developingcountry- 39k>.accessed on 1 May 2013.

article in its paragraphs 3 and 4 graciously exempted particular developing States from the application of the obligation of making payments and contributions and accord all developing States special recognition in the distribution of the wealth so realized from the contribution.

6.1.6 Developed State

A State is considered as developed State when it is technically and technologically advanced, politically stabilized, economically buoyant and infrastructurallydeveloped. When a developed State is also a coastal State it has comparative advantage over other States.

6.1.7 Flag State

A flag State is the State whose flag a particular vessel or ship in the sea is flying. States are enjoined to effectively exercise their control and jurisdiction in administrative, technical and social matters over ships flying their flag.[478]

6.1.8 Geographically Disadvantaged States

These are States which lack exclusive economic zones (EEZs) and other relevant zones of the sea due to their geographical position to the sea. Geographically disadvantaged States have been defined *inter alia* by the Convention as, "…Coastal States, including States bordering enclosed or semi-enclosed seas, whose geographical situations make them dependent upon the exploitation of the living resources of the exclusive economic zones of other States…, and coastal States which can claim no exclusive economic zones of their own".[479] The above definition by the Convention suggests that a geographically disadvantaged State differs from a land-locked State. A State does not therefore qualify

[478]UNCLOS, Art. 94 (1). For the duties of flag States, see Art. 94(1) – (7) of the Convention.
[479]UNCLOS, Art. 70, para.2

as a geographically disadvantaged State merely because it is land-locked. Even though common sense would agree that land-locked States are geographically disadvantaged, the term

'geographically disadvantaged' is a mere creation of the law (Convention) which did not include land-locked States in this category.

6.2 Identifying Divergent States' Interest in the Sea

In addition to the traditional uses of the sea which were confined chiefly to navigation and fishing, the advance of technology in the 20th century, especially after the World War II, has made possible the exploration and exploitation of offshore resources by coastal States. This possibility triggered States' interests in the sea and its resources which interests are usually divergent in nature resulting in sea disputes.The progressive development and codification of the law of the sea which prompted States in some regions to unilaterally claim their maritime areas and the geographical circumstances in some of these regions as in the case of the South China Sea, do not allow coastal States to establish maritime jurisdiction to the maximum possible extent as recognized by the law of the sea without overlapping with others. These equally account for the divergent States' interests in the seas.

Divergent States' claiming interests or maritime clashes are capable of risking the safety and security of the sea lanes of communication through which some ninety percent of the world trade passes. Such clashes can heighten the risk that nations will eschew diplomacy and once again embrace arms buildups, particularly naval capabilities, and thereby in a twenty-first-century repeat the arms race existed prior to the First World War. Whether it is the prospect of a naval clash between China and Japan over the

*Senkaku*Islands in the East China Sea or a resumption of hostilities between Britain and Argentina over the Falklands, the possibility of new conflicts lies on the horizon.

6.2.1 Claiming Interests in the South China Sea

The South China Sea seems to be the most contested sea globally. The risk of conflict escalating from relatively minor events has increased in the South China Sea over the past two years with disputes now less open to negotiation or resolution.[480] Originally, the disputes arose after the Second World War when the littoral States-China and three countries of the Association of Southern Asian Nations (ASEAN), Indonesia, Malaysia and the Philippines, as well as Vietnam which joined later scrambled to occupy the Islands there.[481] If the disputes had remained strictly a territorial one, it could have been resolved through Chinese efforts to reach out to ASEAN and forge stronger ties with the region.

The risk of conflict in the South China Sea is significant.[482] The main nations currently pursuing their interests in the South China Sea are of course the surrounding States to the Sea including China, Taiwan, Vietnam, Malaysia, Brunei, Philippines, Singapore, Thailand and Cambodia including those external powers that have the capacity to project power in the area, mainly the United States, India, Japan - to a lesser extent Australia and South Korea, and in the past - Russia. These surrounding States have competing territorial claims, particularly overt rights to exploit the regions possibly

[480]L.Buszynski, 'The South China Sea: Oil, Maritime Claims, and U.S.-China Strategic Rivalry' (2012) *The Washington Quarterly*. <http://dx.doi.org/10.1080/0163660x.2012.66495> accessed in September 2012.
[481]*Ibid*.
[482]B. S. Glaser, *Armed Clash in the South China Sea* (East Asia: Council on Foreign Relations Press, 2012) p.I.

extensive reserves of oil and gas. Around the 1990s, access to the sea's oil and gas reserve as well as fishing and ocean resources began to complicate the claims in the region.[483] As the global energy demand has increased each claimant has devised strategies to exploit the sea hydrocarbon reserve leading to increase in the disputes, particularly between China and

Vietnam. It has been suggested however, that these energy disputes need not result in conflict, as they have been and could continue to be managed through joint or multilateral development regimes, for which there are various precedents although none of such is as complicated as the South China Sea case.[484]

However, now, the issue has gone beyond territorial claims and access to energy to freedom of navigation in the region which has become a contentious issue especially between the United States and China over the right of United States military vessels to operate in Chinas' two-hundred-mile exclusive economic zone (EEZ). The tensions are shaping and being shaped by rising apprehensions about the growth of China's military power and its regional intentions. China has embarked on a substantial modernization of its maritime paramilitary forces as well as naval capabilities to enforce its sovereignty and jurisdiction claims by force should the need arise. At the same time, it is developing capacities that would put the United States forces in the region at risk in a conflict, thus potentially denying access to the United States Navy in the Western Pacific.[485]

Bearing in mind the growing importance of the U.S. - China relationship, and the Asia - Pacific region more generally, to the world economy, the United States has a major interest in preventing any one of the various disputes in the South China Sea from

[483]L.Buszynski, *op cit*.
[484]*Ibid*.
[485]B. S. Glaser, *op cit*.

escalating militarily. However, among many conceivable contingencies in the area, one most dangerous one is the clash stemming from United States military operations within China's EEZ that provoke an armed Chinese response. This situation threatens United States interests and could potentially prompt the United States to use force.[486] The United States has maintained that nothing in the United Nations Convention on the Law of the Sea

(UNCLOS) or State Practice negates the right of military forces of all nations to conduct military activities in the exclusive economic zones without coastal States prior notice or consent. China on its own insists that reconnaissance operations undertaken without prior notification and without permission of the coastal State violates Chinese domestic law and international law. China routinely intercepts the United States reconnaissance flights conducted in its exclusive economic zone and periodically does so in aggressive manners that heightens the risk of an accident similar to the April 2001 collision of a U.S. EP-3 reconnaissance plane and a Chinese F-8 fighter jet near Hainan Island.[487] There is a genuine feartoday that a comparable maritime incident could be triggered by Chinese vessels harassing a US Navy Surveillance Ship operation in its exclusive economic zone such as occurred in the 2009 incidents involving The NSNS Impeccableand the NSNS Victorious.[488]In the main, the large growth of Chinese submarines has increased the danger of an incident, such as when a Chinese submarine collided with a US destroyer's towed Sonar array in June 2009. It has been observed that since neither US Reconnaissance Aircraft nor Ocean Surveillance Vessels are armed, the United States might be forced to respond to dangerous behaviour by Chinese planes or ships by

[486]*Ibid.*
[487]*Ibid.*
[488]*Ibid.*

dispatching armed escorts. This may lead to a miscalculation or misunderstanding resulting in a deadly exchange of fire, leading to further military escalation and precipitating a major political crisis. It has been argued that rising US - China mistrust and intensifying bilateral strategic competition would likely make managing such a crisis more difficultto resolve.[489]

Apart from the US - China clash in the South China Sea, the conflict between China and the Philippines over natural gas deposits, especially in the disputed area of Reed Bank, located eighty nautical miles away from Palawan presents another serious dilemma in the zone. Oil Survey Ships operating in Reed Bank under contract have reportedly been increasingly harassed by Chinese vessels. The United Kingdom-based forum Energy planned to commence drilling for gas in Reed Bank in 2012, which if it did would provoke an aggressive response from China.

Judging from the close tie between the United States and Philippines, it will be safe to argue that the United States could be drawn into a China - Philippines conflict. The United States in 1951 had mutual defense Treaty with the Philippines whereby it was stated that:

> Each Party recognizes that an armed attack in the Pacific Area on either of the Parties would be dangerous to its own peace and safety and declares that it would act to meet the common

[489]*Ibid*.

> dangers in accordance with its constitutional processes.[490]

American officials had insisted that Washington does not take side in the territorial dispute in the South China Sea and had refused to comment on how the United States might respond to Chinese aggression in the disputed waters. However, there exists an apparent gap between American views of US obligations and Manila's expectations. For instance, in mid-June 2011, a Filipino presidential spokesperson stated that in the event of armed conflict with China, Manila expected that the United States would come to its aid.

It has been suggested that with improving political and military ties between Manila and Washington, including a pending agreement to expand US access to Filipino ports and air fields to refuel and service its warships and planes, the United States would have a great deal at stake in a China-Philippines conflict.[491] Failure to respond would not only set back US relations with the Philippines but would also potentially undermine the credibility of the United States in the region with its allies and partners. On the other hand however, a US decision to dispatch naval ships to the area would likely risk a US - China naval confrontation.

Also of important note concerning the divergent States interests in the South China Sea is the disputes between China and Vietnam over Seismic surveys or drilling for oil and gas in the seabed. China has reportedly harassed Petro Vietnam Oil Survey Ships in the past that were searching for oil and gas deposits in Vietnam's exclusive economic zone. In 2011, in particular, Hanoi accused China of deliberately severing the

[490] *Ibid.*
[491] *Ibid.*

cables of an oil and gas survey vessel in two different instances. Although the Vietnamese did not retaliate, they did not back down either. Hanoi rather pledged to continue its effort to exploit new fields despite warning from Beijing.[492] It is apparent that the US-Vietnam relations could embolden Hanoi to be more confrontational with China on the South China Sea issue.

The United States might be interested in the conflict between China and Vietnam, though that may be less likely than the clash between china and the Philippines. In the event of any provocation, the United States might choose to dispatch naval vessels to the area to signal its interest in peace and stability of the region. Vietnam and other nations in the region could in such circumstances be compelled to request US assistance. Should the United States become involved, subsequent actions by China or miscalculation among the forces present could result in the exchange of fire. Or, any attack by China on vessels or rigs operated by an American company exploring or drilling for hydrocarbons could without delay involve the United States, especially if American lives were endangered or lost.[493] It however seems that the relations between China and Vietnam has thawed which led to the October 2011 China and Vietnam agreement outlining principles for resolving their maritime issues.The effectiveness of the agreement remains to be proved, but tensions appear to be diffused presently.

There are some important interests shared by all these countries contesting over resource in the South China Sea which are expected to provide a basis for cooperation among them: secure sea lines of communication, repression of piracy, the maintenance of fish stocks, production and marketing of energy from resources in or under the sea under

[492]*Ibid*.
[493]*Ibid*.

solid legal framework. There are however some interests that naturally separate nations each from the other which are applicable to these nations struggling over South China Sea. For instance, each coastal State wants naturally to get as large an exclusive economic zone (EEZ) and continental shelf as possible. Each wants its fishermen to be able to catch as much fish as possible over and above other nations. Also, each State wants to deny its

adversaries naval access to area near its coasts. States generally want security of sea lines of communication not just from pirates, but also from rival States' navies. Governments want oil companies to invest in oil exploration and production on their own continental shelf instead of other nations' in order to gain revenue. Governments want to gain status and prestige both at home and abroad through shows of force and a visible presence on contested Islands.

South China Sea dispute is strategic and in all ramifications, stands out in the committee of nations today due to some notable reasons: firstly, it involves several States in the Asia region with a web of convoluted national interests; secondly, the strategic location of the South China Sea is another factor that marks and makes the South China Sea dispute special. It has been observed that the South China Sea is one of the most strategic water ways in the world[494] all over. The sea links Northeast Asia and the Western Pacific to the Indian Ocean and the middles-east. Situated at the crossroad of Europe, West Asia and India on one side, and Japan and China on the other, together with abundant wealth of natural resources, the South China Sea is of vital commercial and

[494]H.Djalal, 'South China Sea Disputes' in M H Norquist and J N Moroe (eds), *Security Flashpoints: Oil, Islands, Sea Access and Military Confrontation,* (1997) p.109.<www.stimson.org/images/uploads/research-pdfs/cbmapspratly.pdf>accessed on 8 December 2014.

strategic significance to the States of the region. The manner in which the States of the SCS region perceive the importance of the South China Sea to their national interests has a significant influence on their positions with regards to a resolution of this particular sea dispute[495] The United States' interest and indirect involvement in the SCS has made it strategic as well and this has equally influenced the positions of most of the States to the dispute in one way or the other.

The dilemma facing the countries around the South China Sea is that on the one hand they would both certainly benefit in a general sense from resolving their disputes over maritime delimitation, so this is a joint interest, but each State might be losing some maritime territory in the zero sum games that is inevitable as part of negotiation towards conflict resolution. It seems that Vietnam and Malaysia have fully understood that it is strongly in their national interest to resolve their dispute on the basis of the law of the sea. It is expected therefore that they should become proactive players towards this end even though it may be quite difficult for Vietnam to accept one particular concession so necessary to achieve this end namely to give up its claims to the Chinese occupied *Paracel* Islands. For Indonesia, Singapore, Thailand and Cambodia it is expected that since they themselves do not have claims in the most disputed areas, they may be less interested in solutions that divide most of the South China Sea into national exclusive economic zones, and be more tempted to advocate for formulas for joint development zones, in which they might hope to play a part. The Philippines should be expected to share the interest of Malaysia and the Vietnam in a resolution based on the law of the sea, but unfortunately, many of its leading politicians failed to see it that way since they have embraced the both legally and realistically unsustainable idea that the archipelagic State

[495]D. M. Nguyen, *op cit*, p.10.

of the Philippines can at the same time claim sovereignty over an affiliate archipelago in the South China Sea, called the *Kalaya'an.* It is worthy of note that this same kind of illusion has for a long time prevented China and Taiwan from playing a constructive role in moving towards resolution of the disputes over maritime delimitation in the South China Sea. Research reveals that for the past half century, China has included on all of its maps a stapled line around virtually the whole of the South China Sea, which for the uninformed viewer must seem to indicate a Chinese claim to the whole area inside it, not just the reefs and islands, but the seabed and the sea itself as well.

In concluding this discourse, it must be stated categorically that the United States has these leading interests in the South China Sea- the freedom of navigation and the maintenance of peace and stability in the region. It is important to state also that the assertion of navigational freedom in the South China Sea by the United States runs counter to China'snational interests in the area, as China has consistently claimed absolute sovereignty over its exclusive economic zone there. These differences must be analyzed perhaps under the UNCLOS and resolved amiably. This is essential in the light of a conflict resolution perspective since it is difficult to imagine any progress towards a resolution of the disputes if China does not assume a proactive, perhaps even a leading role in the saga. But, before this can happen, China has to decide, just as Malaysia and Vietnam have apparently done, that it is in its best interest to resolve the disputes in the South China Sea on the basis of international law.

6.2.2 Claiming Interests in the Bay of Bengal

Both Bangladesh and Myanmar had been having divergent claiming interests in the Bay of Bengal since earlier than 1974.[496] What was in dispute was the delimitation of the maritime boundary between the two countries, Bangladesh and Myanmar in the Bay of Bengal with respect to the territorial sea, the exclusive economic zone and the continental shelf.

Prior to the institution of these proceedings before the International Tribunal for the Law of the Sea (ITLOS) in 2010, the two countries had been involving themselves in discussions and negotiations on the delimitation of the maritime boundary between them from 1974 to 2010.[497] Eight rounds of talks took place between 1974 and 1986 and six rounds between 2008 and 2010.

During the second round of talks, held in Dhaka between 20 and 25 November 1974, the heads of the two delegations, on 23 November, 1974 signed the 'Agreed minutes' between the Bangladesh Delegation and the Burmese Delegation regarding Delimitation of the maritimeboundary between the two countries commonly referred to as 'the 1974 Agreed Minutes'.

On the resumption of the talks in 2008, at the first round held in Dhaka from March 31 to April 1 2008, the heads of delegations on April 1 2008, signed the 'Agreed Minutes' of the Meeting held between the Bangladesh Delegation and the Myanmar Delegation regarding the delimitation of the Maritime Boundaries between the two countries referred to as 'the 2008 Agreed Minutes'. However, in the summary of discussions signed by the heads of the delegations at the fifth round, held in Chittagong

[496]Judgment of the International Tribunal for the Law of the Sea (ITLOS) in *Bangladesh v Myanmar* (1 March, 2012) Case N0 16, 21.
[497]*Bangladesh v Myanmar, Supra*.

on the 8 and 9 January 2010, it was noted that Bangladesh had already initiated arbitration proceedings under Annex VIIto the 1982 Convention.

Adetailed discussion on the proceedings and judgment of the Tribunal on this case is made in chapter seven of this work.

6.2.3 Maritime Boundary Claims in the Gulf of Thailand[498]

The Gulf of Thailand is also located in the South China Sea (Pacific Ocean), surrounded by countries of Malaysia, Thailand, Cambodia and Vietnam. The North tip of the Gulf is the Bight of Bankok at the mouth of the Chao Phraya River. The Gulf covers roughly 320,000 square kilometers. The line from Cape Bai Bung in Southern Vietnam to the city of Kota Baru on the Malaysian coast defines the boundary of the gulf. The Gulf of Thailand is relatively shallow; the mean depth is 45 meters, and the maximum depth only, 80 meters.[499]

The Gulf is said to contain some oil and large degree of natural gas resources.[500] The countries bordering the Gulf have not resolved their overlapping, divergent maritime boundary claims up to the present day. For instance, Cambodia which is the South East Asia borders the Gulf of Thailand between Thailand and Vietnam. The country was under French protectorate for a period of approximately one century. France left behind the vague land border and maritime boundary lines. Brevie *line*, for example was drawn by Jules Breviewho was General Governor at the time, which divided the islands in the Gulf

[498] M.Ravin, *Maritime Boundaries And Dispute Settlement Mechanism* (Germany: Nippon Foundation, 2005) p. 29.
[499] *Ibid*.
[500] Columbia University Press, <www.cc.columbia.edu/cu/cup> accessed in September 2012.

of Thailand well closed to Cambodia and Vietnam's border and other points of land borders.[501]

Even before and after gaining independence from France, Cambodia never gave up its protest against what it calls unjust transfer of its land and islands to Vietnam by France. Moreover, along with its protest, negotiations with Vietnam on the dispute were also undertaken but they never reached an agreement.

Even recently, in its efforts to settle the border disputes, the Royal Government of Cambodia has established Supreme National Border Council headed by former King Norodom Sihanouk. A few months later the Council was dissolved and the National Border Committee led by Prime Minister Hunsen was established. This indicates Cambodia's intention to settle the border disputes with its neighboring countries. In October 2005,

Cambodian delegation led by Prime Minister Hunsen, travelled to Vietnam to Sign a Supplementary Agreement on Border Issues. The Agreement later headed to the National Assembly for ratification and was to be signed by His Majesty king NorodomSihamony. Unfortunately however, the Treaty did not mention about maritime boundary.[502]

Malaysia is one of the adjacent States in the Gulf of Thailand. It shares maritime boundary with Thailand in the South western part of the Gulf of Thailand. Fortunately, some of the maritime disputed areas between Malaysia and Thailand have been peacefully resolved by agreement between the two countries in accordance with Article 33 of the United Nations Charter. Both Malaysia and Thailand agreed that the unsettled

[501] *Ibid.*
[502] *Ibid.*

areas be put under the joint developing area and to continue their negotiation on maritime delimitation.

Thailand shares land territory with Cambodia, Laos, Myanmar and Malaysia and maritime boundary with Cambodia and Vietnam in the Gulf of Thailand with Myanmar in the Indian Ocean, and with Malaysia in the Andaman Sea and the Gulf of Thailand.[503] Thailand has been having maritime issues with Cambodia and Vietnam, which are on the process of negotiation. Both Countries have overlapping claims in their maritime borders.

Vietnam on its own has joint land border with Cambodia, Laos and China, and sea border with Cambodia and Thailand in the Gulf of Thailand with China in the Gulf of Tong kin. Vietnam's boundary with Cambodia stems from the negotiation between France and Cambodia in the 19th century and from the decree issued by Governor General of French colonization in Indochina several parts of land border and adjacent maritime boundary have not been settled, and the sovereignty over some Islands in the Gulf of Thailand has been

claimed by both Vietnam and Cambodia. Vietnam is a Party to the 1982 United Nations Convention on the Law of the Sea. All these States that border South China Sea including Brunei, Malaysia, Myanmar, Indonesia, Laos, china, Philippines, Thailand, Vietnam, and Singapore are also parties to UNCLOS. However, Cambodia and Thailand have signed UNCLOS but are yet to ratify the Treaty.

6.2.4 Russian National Interests and the Caspian Sea[504]

[503] *Ibid*.

[504] T. L. Thomas & J. Shull, 'Russian National Interests and the Caspian Sea' (2000) 4 *Journal of International Affairs (JIA)*, I.

The Caspian Sea, which is located on Iran's Northern border and surrounded by Azerbaijan, Kazakhstan and Turkmenistan, sharing a border with the south-west corner of Russian territory, has formed the epicenter of a collision of regional, national and business issues. These include questions among the littoral States over demarcation of the sea, route diversification for oil pipelines, State interests, investor concern over political and ethnic stability, and the role of international agreements.

From Russian perspective, the Caspian Sea is of particular interest or concern due to a host of interests that must be protected, among which are- Geo-strategic interests: Russia does not want to lose control in the area but rather to remain strong and wield power within and control over all the commonwealth of Independent States (CIS), and ensure the security of its southern flank.[505] In Russian point of view, the greatest challenge it faces in the Caspian Sea is the potential expansion of Chechen authority into Dagestan at Russia's expense, thereby severely restricting Russia's direct access to the sea safe Astrakhan.

-EconomicInterests: Russia wants to maintain and ensure that cash flows in the form of Western capital will continue from Central Asia and Siberian oil fields, and that cash flows are not redirected out of Russia into the Caspian region. Another economic concern here is the issue of sovereign rights over the body of water itself.

-Ecological Interests: It has been suggested that developing safe ecological norms for the exploitation of both hydrocarbons and finishing resources, especially the protection of the Caspian sturgeon stock that produces 80-90 percent of the World's finest

[505]*Ibid*.

caviar[506] are of paramount concern. This feeling is especially acute due to the severe meteorological conditions (extremely strong and unpredictable storms) that occur in the North Caspian Sea Region.[507]

Russia expresses a strong feeling that the Caspian Sea is the focus of many vital concerns that will affect not just regional and world stability but also investors' confidence in Russia if not properly handled. The lineup of players in the area from Russia and the region underscores this view. Political battle over the Caspian Sea began with the confrontation in April 1994 among Azerbaijan, Britain and Russia. Russia viewed a pending agreement between the UK and Azerbaijan as an infringement of its national interests in the area. The situation was even exacerbated when in November 1994; the Azerbaijan International Operating Company's (AIOC) plan to develop three oil fields located near the Centre of the Caspian including the Azeri, Chirag and Guneshli fields was ratified by the Azeri Parliament. To the present day, Caspian Sea remains an area where various States manifest their divergent interests.

6.2.5 Undefined Maritime Boundaries between China and Japan

China's increasing demand for oil in the recent years and Japan's perennial heavy dependence on imported oil drive the two countries to explore for sources of oil supply, and the potential oil deposits in the East China Sea has emerged as a desired source.[508] However, there is presently a great difficulty in any attempt to develop the potential oil deposits in the East China Sea. This is due to the fact that the boundary lines between the

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[506] *Ibid*.
[507] *Ibid*.
[508] M. Masahiro, *Law of the Sea Issues and the Prospects for Joint Development* (Japan: Aichi University Press, 2012) 1.

continental shelf areas appertaining to the two countries remain undefined as a result of the conflicting territorial claims to the *Senkaku* Islands around which the potentially oil rich sea area lies. So, the overlapping claims of China and Japan over the East China Sea present another good example of divergent State interest in the sea, worthy of mention in this research work.

Basically, jurisdiction over a sea area derives from sovereignty over the land territory facing it. The point of departure in discussing offshore oil exploration or exploitation is who owns a given land territory facing the sea, whether it is a continent or an island.[509] Only when the answer to such question became clear as to who owns the land territory, will it become possible to delimit the sea area adjacent to it. Research reveals that Japan had had sovereignty over the *Senkaku*Islands over a long period of time before China began to assert its sovereignty over them in the early 1970s.[510] The Japanese Government has argued through it officers that Japan has maintained its undisputed sovereignty over the islands for so long a period that there is no territorial dispute with China over the islands.

A series of geological surveys conducted in the Yellow and East China Seas under the auspices of the Committee for Co-ordination of Joint Prospecting for Mineral Resources in Asia Offshore Areas (CCOP) of the United Nations Economic Commission for Asia and the Far East (ECAFE) in October - November, 1968 reportedly showed promising signs of oil reserves in the sea areas around the *Senkaku* Islands. Spurred by the finding of this research, South Korea began to lease Sea-bed areas for exploration in the north-eastern part of the East China Sea which overlapped some Japanese oil

[509]*Ibid*.
[510]*Ibid*, p.2.

Company's interests.[511] When Japan and South Korea, together with Taiwan were negotiating as to how the maritime boundaries should be delimited in the East China Sea, involving the overlapping claim areas, China made its first official protest in its morning radio broadcast on 4 December 1970. In February 1971 China repeated its protest during which it called for the Japanese-Chinese "Memorandum of Understanding" trade negotiations. It made a further protest on 30 December 1971 where it published a number of historical or legal grounds for its claim to the *Senkaku*Islands. In its claim to the islands, China postulates the following historical grounds: first, the Ryukyu kingdom (now *Okinawa*) had tributary relations with China from the 14th to the mid-19th century, and China sent investiture missions to Ryukyu to legitimize new kings some twenty times during the period in question. These missions used the *Senkaku* Islands as navigational aids and some of their reports referred to the Islands by that name;secondly, in the mid-16th century, the Ming dynasty established a coastal defence system against the then active Japanese pirates or smugglers (*Wako*in Japanese). The documents and maps concerning this system included the *Senkaku* Islands within the coastal defense area of China; thirdly, fishermen from China

fished in the Sea areas surrounding the Islands from ancient times and used them for shelter in bad weather; and fourthly, Empress Dowager TsuHsi issued an imperial edict in 1893 to award three of the islands to a person for collecting medical plants there.[512]

The Japanese position is, by contrast, based more on the modern rules of international law on the acquisition of territory, although it does not altogether deny the relevance of historical grounds.

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[511]*Ibid*.

[512]M. Yoshiro, 'International Law of Territorial Acquisition and the Dispute over the *Senkaku*(Diaoyu) Islands' (1997) 4 *Japanese Annual of International law*, 11.

6.2.6 The Maritime Boundary Dispute between Cameroon and Nigeria[513]

Nigeria and Cameroon are adjacent States, with a land border that stretches to the sea in the South on the Gulf of Guinea. The two countries formerly had some dispute over the area of the sea beyond the limits of their respective territorial seas. They had divergent claims as to the extent of each State's jurisdiction over the exclusive economic zone and continental shelves respectively.

Both countries decided to submit this dispute to the International Court of Justice for peaceful determination. In their pleadings, both States asked the Court *inter alia*, to delimit a "single maritime boundary" beyond the limits of territorial sea that would divide both the continental shelves and exclusive economic zone of the two States. The Court, while entertaining the suit stated that both Nigeria and Cameroon were parties to the United Nations Convention on the Law of the Sea, 1982. Accordingly, the relevant provisions of the Convention were applicable to the dispute between them particularly, Articles 74 and 83 thereof, which concern delimitation of the continental shelf and the exclusive economic zone between States with opposite or adjacent coasts.[514] While reacting to the written pleadings by both countries, which prayed the Court and requested that, the delimitation of the maritime areas should be effected by a single line,the Court had an occasion to recall its earlier judgment in a similar case concerning *Maritime Delimitation and Territorial Question between Qatar and Bahrain*[515]where it stated that:

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[513]*Cameroon v. Nigeria* (October 10 2002) ICJ Reports. General List N0. 94.

[514]Para.1 of those Articles provides that such delimitation must be effected in such a way as to "achieve an equitable solution".

[515](2001)ICJ Rep. para. 173.

> The concept of a single maritime boundary does not stem from multilateral treaty law but from State practice, and … finds its explanation in the wish of States to establish one uninterrupted boundary line delimiting the various-partiallycoincident-zones of maritime jurisdiction appertaining to them….

The Chamber formed by the Court in the maritime dispute between *Canada and the United States (Delimitation of the Maritime Boundary in the Gulf of Maine Area)*[516] noted that the determination of such a line "can only be carried out by the application of a criterion, or combination of criteria, which does not give preferential treatment to one of the zones to the detriment of the other, and at the same time is such as to be equally suitable to the division of either of them".

The ICJ noted while deciding this case that the geographical configuration of the maritime areas that the Court was called upon to delimit was a given one. According to the Court, it was not an element open to modification by the Court but a fact on the basis of which the Court must effect delimitation. According to the Court, although certain geographical peculiarities of maritime areas to be delimited may be taken into account by the Court, this is solely as relevant circumstances, for the purpose, if necessary, of adjusting or shifting the provisional delimitation line.[517]

The Court held that it did not deny the submission by Cameroon that the concavity of the coast line may be a circumstance relevant to the delimitation, as was

[516](1984)ICJ Reports, para.194.
[517]*Cameroon v. Nigeria, supra*. 295.

held by the Court in *the North Sea Continental Shelf Cases*[518]and as was also so held by the Arbitral Tribunal in the case concerning *the Delimitation of the Maritime Boundary between Guinea and Guinea-Bissau,*[519] decisions on which Cameroon relied in its submissions. The Court nevertheless stressed that this can only be the case where and when such concavity lies within the area to be delimited. The ICJ, while rejecting the submission made by Cameroon in this respect noted that the sectors of coastline relevant to the present delimitation exhibited no particular concavity. Thus, it refused to consider that the configuration of the coastlines relevant to the delimitation represented a circumstance that would justify shifting the equidistance line as Cameroon requested.[520]

On Cameroon's argument on the effect of islands, the Court agreed that islands had been sometimes taken as a relevant circumstance in delimitation when such islands lay within the zone to be delimited and fell under the sovereignty of one of the parties. The Court however found that in the present case, *Bioko* Island which Cameroon relied on, in its submission was subject rather to the sovereignty of Equatorial Guinea, a State which

was not part of the proceedings. The Court also found that the effect of *Bioko* Island on the seaward projection of the Cameroonian coastal front was an issue between Cameroon and Equatorial Guinea and not between Cameroon and Nigeria, and so it was not relevant to the issue of delimitation before the Court.[521]

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[518] *Federal Republic of Germany.Netherlands, Federal Republic of Germany v. Denmark* (1969) ICJ Reports.

[519] In the above case, the Court of Arbitration applying customs, deviated from the equidistance line because Guinea, the middle State on a concave coastline, would have suffered inequality.

[520] *Cameroon v. Nigeria, supra*. 297.

[521] *Supra,* para 299.

The ICJ also acknowledged, as it earlier noted in the *Gulf of Maine Case*[522]and in the *Maritime Delimitation in the Area between Greenland and Jan Mayan Case*[523]that a substantial difference in the length of the parties' respective coastlines may constitute a factor to be taken into consideration in order to adjust or to shift the provisional delimitation line. The Court held that in the present case, the relevant coastline of Cameroon was not longer than that of Nigeria and so there was no reason to shift the equidistance line in favour of Cameroon on this ground.[524]

The Court, after due considerations of the submissions by the parties to the dispute decided that the equidistance line represented an equitable result for the delimitation of the area in respect of which it had jurisdiction to give a ruling. The Court gave judgment based on the equidistance principle which it considered most appropriate to achieve equitable solution in the case.

The divergent claims which lead to the maritime dispute between Nigeria and Cameroon had been laid to rest since October 10 2002 through the instrumentality of the ICJ and the two countries are now in cordial relationship.

6.2.7 Maritime Border Dispute between Kenya and Somalia

Unlike the *Cameroon v. Nigeria case* which has been settled and laid to rest by the International Court of Justice, the maritime boundary dispute between Kenya and her embattled State neighbor Somalia is still on-going. The row between the countries over their maritime border has just been recently handed over to the International Court of

[522]*Supra*, para 336.
[523](1993) ICJ Reports, 34, para.68.
[524]*Cameroon v. Nigeria, supra*.301.

Justice for determination.[525] The two coastal States are having disagreement over the location of their boundary line in the Indian Ocean. The stand-off between Kenya and Somalia could deter multinational oil companies from exploring and exploiting economic resources (oil and gas) offshore the area. This, just like so many other sea disputes around the world today will have telling effects on the economy of both countries. Though Kenya wanted direct talks with Somalia, Magadishu, Somalia's representative in the dispute reportedly said that negotiation had failed before.[526] Kenya, East Africa's acclaimed largest economy[527] was desirous of resolving the maritime border dispute with Somalia in order for it to expand its oil and gas exploration in the area. It therefore lodged a claim with the United Nations for the boundary to run parallel with lines of latitude in the Indian Ocean. The Kenyan Senior Geologist in the Ministry of Energy, FelixMutunguti, reportedly said the line should run a similar border as "with Tanzania to the South Coast".[528]

Kenya which has attracted explorers including France's Total SA (FP) and Anadarko Petroleum Corp (APC) of the United States of America is headed to become the first oil exporter in East Africa. However, the dispute with its unstable neighbor (Somalia) has delayed exploration and sour relations and might even lead to war if not carefully managed. It is hoped however that the International Court of Justice will resolve the row

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[525]<www.iiste.org/journals/index.php/IAGAS/article....p.1.> accessed on 30 October 2014; see also
'Kenya v. Somalia-Contentious Cases' www.**icj**-cij.org/docket/index.php?p1=3&p2=3&case=161 accessed on 19 June 2016.

[526]*Ibid.*

[527] www.Bloomberg.com/…/Kenya-expects-to-resolve-somalia-maritime-border…<accessed on 30 October 2014

[528]*Ibid.*

between the two countries and bring to an end the constant clashes in the zone.

One way to avoid these divergent interests and overlapping claims from escalating into full-fledge sea disputes is to encourage States with competing and conflicting maritime claims to have their disputes settled by impartial arbitration, especially when the question of who has the right to exploit undersea resources is at stake. Bangladesh and Myanmar have already adjudicated their maritime border via the tribunal process supported by the United Nations Convention on the Law of the Sea, while Nigeria and Cameroon have settled their maritime divergent claims by the help of the International Court of Justice. Chile and Peru are also using the older process-utilizing the International Court of Justice at The Hague to provide a definitive ruling over where the lines should be drawn.

6.3 Effects of Divergent States' Interests in the Sea on International Trade, Economy, Peace and Security

There exists an inseparable relationship between the divergent States' interests/claims in the seas we discussed above and international trade, economy, peace and security. The effects of these constant divergent interests in the sea maintained by States which often escalate into full-fledged sea disputes are tremendous on the international trade and world economy. Such rifts between States also pose serious security threats to the international community as several of them had in the past and even at the present degenerated to military clashes in the seas thereby ruffling the hitherto cordial relationships between the States involved.

The relationship between divergent States' interests in the sea, international trade and economy, peace and security are so interwoven. One thing often leads to another. In

the first place, these divergent claims hamper sustainable economic growth, progress in trade as well as peaceful co-existence amongst States. Theystagnateboth States and International prosperity through stunt economic growth, as conflict or intense security competition would always divert scarce resources away from development, reduce trade by threatening the security of sea-lane and reduce cross-border investment. This represents the case with Kenya which cannot host foreign companies[529] which are desirous of establishing business in Kenya, due to maritime dispute with Somalia.

These divergent claims especially where they have escalated to sea disputes, will either drastically reduce or entirely stop the exploitation of the economic resources in the troubled zone thereby leaving the resourcesavailable for exploitation untapped. During disputes, States involved place priority on security of their territory than exploration and exploitation of the resources in the sea. More so, insecurity and uncertainties such disputes generate usually deter companies and States from investing in the zone.

The South China Sea Dispute represents a variety of these cases. Territorial sovereignty and jurisdictional claims by the neighbouring States to the South China Sea used to be the major disagreement in the area. The disputes have now degenerated to the issue of navigational freedom which exists mainly between the United States of America and China. While US argue that all countries enjoy high seas freedom including freedom of navigation, beyond coastal State's twelve nautical miles territorial sea over which coastal States exercise sovereign rights, China has a different interpretation of the coastal States' rights over the exclusive economic zone. These differences have constituted a serious threat to the US access to the South China Sea.The effect of these overlapping

[529]France's Total SA (FP) and Anadarko Petroleum Corp. (APC) of the United States of America.

territorial claims amongstStates of the South China region and the perceived threat to the US access to the

South China Sea is very significant in the world economy because of the economic dynamism of the region based on extensive regional and international trade in the zone.

Bearing in mind the growing importance of the relationship amongst States especially with regards to their interests in the seas, States are advised here to be more pragmatic and to develop the required political will in their bit to settle sea disputes using the dispute settlement mechanisms under the UNCLOS. This would guarantee international peace and securityand as well, enhance sustainable growth and development of the world economy.

Currently, tensions are mounting in the Persian Gulf and the Strait of Hormuz as Iran has threatened to block the passage of oil tankers through the Strait of Hormuz, in response to the Western powers import bans on Iranian oil and the further warnings of other sanctions against Iran because of its nuclear programme.[530]The United States in turn has increased its naval presence in the Strait of Hormuz, ostensibly in an exercise of its transitrights of passage under the Law of the Sea.[531]

It is estimated that one-fifth of the world's oil and ninety percent of Persian Gulf Oil is transported through the Strait of Hormuz. Meanwhile, Iran could blockade the Strait by laying mines across it, which, according to experts could be completed within a

[530]N. Oral, 'Transit Passage Rights in the Strait of Hormuz and Iran's Threat to Block Passage of Oil Tankers'
<www.peacepalacelibrary.nl/.../transit-page-rights-in-the-strait-of-hormuz...> accessed on 8 December, 2014.
[531]*Ibid*.

matter of hours.[532] Closing the Strait would send oil prices skyrocketing due to its strategic position, and in this period of serious economic distress in Europe and US, this could severe long-term impact on economic recoverywith potential of spreading globally affecting the world economy.

6.4 Balancing States Interests and Common Interests in the Sea

It has become clear from the foregoing that the sea holds strong attractions to States due to the several uses to which it can be put. States of the world are present in the seas to explore and exploit the sea for economic, political and military purposes. Sometimes, States use the high seas to make a show of strength off the coast of other States.[533] The 1982 Convention on the Law of the Sea on its Article 88 limits the seas to peaceful purposes. However, the United Kingdom Government takes the view that rocket and other weaponstestings on the high seas do not contravene this provision.

It will be proper at this juncture to juxtapose the freedom enjoyed by States as it relates especially to the high sea uses with that of common interests, in order to strike a balance between such freedom and the common interest of mankind in the sea. This is especially because whatever affects the seas negatively will invariably affect the entire mankind. For instance, in 1954, radiation from hydrogen bomb test conducted by the United States on the high seas in the area of the *Eniwetok* Atoll in the Trust Territory then administered by the United State reportedly caused the death of a Japanese fisherman and caused injury to other Japanese fishermen, to some inhabitants of the *Rongelap* Atollwithin the territory and to some United States nationals. The tests took place in a danger zone, within which shipping vessels were warned not to go, of 50,000 square

[532]*Ibid*.

[533]D. J. Harris, *Cases and Materials on International Law* (6th edn, London: Sweet and Maxwell, 2004) p.435.

miles. Both the Japanese fishing vessel concerned and the Rongelap Atoll were outside this zone. They were however affected because the force of the explosion had been miscalculated and because of a sudden change of wind. The United States was made to give medical and other assistance and paid monetary compensation, which covered personal injuries and economic

loss occasioned by the contamination of Japanese fishing catches and was expressly stated to be *ex gratia.*[534] When the United States wanted to conduct another test series later in 1958, it took the following legal position.

> The high seas have long been used by nations of the world for naval manoveures, weapons tests, and other matters of this kind. Such measures no doubt result in some inconveniences to other users of the high seas but they are not proscribed by international law.[535]

When the United States announced its plan to conduct these tests in 1958, Japan quickly stated that it was greatly concerned and expressed the view that the United States Government has the responsibility to compensate for economic losses that may result from the establishment of a danger zone and for all losses and damages that may be inflicted on Japan and its people as a result of the nuclear tests. Japan while asserting this opinion did not however make any express reference to international law.

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[534]This is a Latin word meaning 'by favour'. It is most often used in legal context. When something has been done *ex gratia*, it has been done voluntarily, out of kindness or grace or as a favour, not compelled by legal right or obligation.

[535]*Ibid*, p.436.

A proposal by the then USSR which was conducting most of its nuclear tests in Siberia, to amend what later become Article 2 of the High Seas Convention[536] to make nuclear testing in the high seas a violation of the Convention was not voted upon at Geneva; instead the Conference adopted the proposal of India that the matter should be referred to the General Assembly 'for appropriate action'.[537] In 1963, the Nuclear Test Ban

Treaty was signed and came into force. The Treaty prohibits the testing of nuclear weapons, *inter alia*, on the high seas. However, France, not being a Party to the Treaty continued to conduct tests in South Pacific until 1973 when it completed its final series of tests in the atmosphere.[538] The 1972 and 1973 tests became the subject of protests by several States which eventually culminated in the *Nuclear Tests Cases.*[539]

The cases were taken off the Court's list without a decision being given on the merits when, France announced that it would not conduct further tests after 1973. Despite the position of the applicant States to the contrary, the Court found that their claims no longer had any object. The applicant States, particularly Australia implored the Court for a declaration that the carrying out of further nuclear tests in the South Pacific was not consistent with international law.

Apart from the danger emanating from nuclear weapons tests to individuals and peoples of the world, the environmental hazards attendant upon the discharge of wastes into the seas constitutes another area of common interest. Pollution of the sea may be caused by the discharge of oil, biological and vegetable refuse, and chemical and radio-

[536]Now Art.87, 1982 Convention (UNCLOS).
[537]Resolution on Nuclear Tests on the High Seas, 1958 Sea Conference Records, vol. 11, p.24.
[538]D. J. Harris, *op cit*.
[539]*Australia v France* (1974) ICJ Rep. 253; *New Zealand v France* (1674) ICJ Rep. 457.

active wastes.[540] The principal danger is posed by persistent oils, which include crude oil and diesel and lubricating oils which spread speedily across the surface in a thin film as the volatile elements evaporate, leaving an emulsion which does not readily disperse. It has been revealed that oil pollution result from accidental spillage, but the greater quantity of it is the produce of deballasting and cleaning of tanks.[541] Risks of oil pollution also come from spillage or leakage from runaway wells during offshore oil drilling operations. The dangers to marine life from oil pollution are of paramount importance to the entire human race, but there is additional loss from the damage to tourist facilities and the cost of cleaning, and the further hazards of fire risk.[542]

The concept of the freedom of the sea is not an absolute one: it follows that such freedom may not be exercised in a way as to degrade the like freedom of others to use the sea. Every State has a legal interest in the maintenance of the qualified freedom of the seas, from which it follows that it has an interest in ensuring that freedoms such as freedom to fish are not in fact degraded by the exercise of the freedom to discharge waste into the sea and to use the seas in other legitimate ways. No wonder, the International Law Commission, in its commentary to draft article 2 of the Geneva Convention had stated that, "States are bound to refrain from any act which might adversely affect the use of the high seas by nationals of other States," adding that the freedom was to be exercised 'in the interests of all entitled to enjoy it' that is, in the interests of the entire international community.[543] Sequel to this, there is currently urgent call for international mechanisms

[540]D. P. O'Connell, *The International Law of the Sea* (Oxford: Clarendon Press, 1984) p.984.
[541]*Ibid*.
[542]*Ibid*.
[543]ILC Ybk, (1956) p.278.

for controlling of deliberate discharge of oil, and minimizing the effects of, and allocating liability for, accidental discharge either from ships, or offshore wells.

6.5 Barriers to Seabed Development

Seabed development as stated here envisages proper and adequate managerial control of the seabed (Area) and its economic resources for maximal utilization. The development of the seabed would create an enabling environment for the harnessing of the resources embedded therein. Unfortunately however, certain factors constitute barriers to seabed development and exploitation of the economic resources in the Area. Some of these barriers include:

6.5.1 Scientific and Technical Barriers

For instance, the current state of scientific knowledge regarding the process of mineral accretion and concentration does not allow or guarantee accurate prediction of the full extent of the mineral wealth of the seabed. Scientists are constantly surprised at the vast amounts of new seabed resources that are being discovered. For example, the scientific community was taken by surprise when in 1979, polymetallic sulfides were discovered, and when cobalt resources were found.[544] Even where seabed resources have been thoroughly analyzed, as in the case of petroleum and manganese nodules, there are still major technical barriers to extracting them. The ocean floor is a series of hills and canyons lying 3,000 to 5,000 meters beneath the ocean's surface, and varying in make-up between ooze and a brittle crust.[545] It has been stated that the pressure at such depths is tremendous.This actually makes the oceans 'not only a difficult environment in which to

[544]D.Bandow, 'Developing the Mineral Resources of the Seabed' (1982) vol.2, No.3 *Cato Journal*, 796.
[545]*Ibid*.

work but also an unpredictable one'.[546] This unpredictability equally extends to the ocean's surface, which is often subject to constant change.

Despite the difficult environment however, there are some major breakthrough as it concerns technological barriers to seabed development. For example, petroleum exploration and extraction has steadily advanced thereby allowing exploitation of deeper and deeper fields. Between 1947 and 1978, offshore drilling platforms went from capacities

of 20 feet to 1,000 feet, and significantly drilling activity has moved from ordinary shallow coastal waters to far more inhospitable climes, such as Alaska and the North Sea.[547] With this trend, the implication is that the Outer Continental Shelf, possessing most of the known oil reserves, is fully within the reach of current technology.

The trend toward deeper drilling seems likely to continue, especially with further technical improvements potentially extending drilling to the deep seabed. Seismic reconnaissance makes exploration cheaper at sea than land, and is reportedly accurate up to 5,000 feet.[548] The introduction and use of robots, deep saturation diving, mobile drilling and underwater well heads extend the reach of potential development of the Area.[549]

Research has revealed that the technical problems encountered in the recovery of other minerals do vary. For instance, mining minerals on the bed of the continental margin, particularly in the area where the sea depths are just hundreds as against thousands of feet, is not difficult. In fact, companies have been mining tin, phosphorite,

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[546]'Mining Deep Sea-Bed Minerals' UN Doc. DPI/DESI NOTE/587 (August 17, 1981) p.1.
[547]D.Bandow, *op cit*, p.797.
[548]*Ibid*.
[549]E.Gullion, 'Introduction: New Horizons at Sea,' in Developing the Mineral Resources of the Seabed p.2 <www.cato.org/pubs/journal/ci2n3/ci2n3-7pdf> accessed on 23 February 2014.

sand and gravel including other heavy metals offshore for many decades. Offshore sand and gravel mining has actually proved to be second only to oil and gas in value to industrialized States especially the United States.[550] The deposits are thick and abundant and can be transported to shore by dredge or pipeline. Other minerals such as titanium sands, zicon and monazite, salt, magnesium, lime mud and shells, pearl and sulfur are mined in coastal areas around the world.[551] One effective mining tool is the 'seagoing, self-propelled, trailing suction hydraulic hopper dredge'. The dredge collects materials off the seabed, and either transports them to open-water disposal sites or directly pumps through a discharge piping system to a shore disposal site. Other systems are said to be merely theoretically possible, including a continuous-line bucket system.

Developing manganese nodules proves so difficult. The nodules must be mined, lifted to the surface, transported to shore, and processed. This task requires a mining operation quite different from that on land. Economist Ross Eckert has observed that:

> The mining of nodules requires the development of entirely new deep-ocean technologies. Efficiencies are uncertain since there is no previous experience with comparable systems. Reliable methods must be developed for a variety of difficult tasks: Surveying areas by remote sensors and evaluating samples having high moisture content; collecting deposits from the ocean floor on a continuing basis at depths of up to three miles and lifting them to the surface;

[550]D.Bandow, *op cit.*
[551]*Ibid*.

> developing viewing systems that permit the mining machinery to be observed in operation and reveal any obstacles lying in the paths of dredge sweeps; developing structural materials that are resistant to corrosion and fatigue; eliminating waste materials such as silt and soil from the nodules at sea before ores are transported to shore for processing; and extracting metals without the use of conventional processes.[552]

The actual mining and lifting of the nodules has been the most serious barrier in this aspect. The transportation and processing steps require something extraordinary. Although transportation would be by ship, the selection of processing technology is still yet unresolved. While five different processing techniques are being considered, only two are apparently being extensively tested. The technology to be used will not be chosen until some pilot operations are established, specific deposits surveyed, and the metals to be recovered decided upon.[553]

The basic capacity of several different collection systems has been demonstrated, and miners theoretically could proceed to develop commercial mining operation. However,

a lot of work remains to be done to satisfy and convince the skeptics that commercial feasibility on a large scale and a long-term basis have been proven. Study has shown that

[552]J. K.Amsbaugh and J. V.Voort, 'The Ocean Mining Industry: A Benefit for Every Risk?' (1982) 25 *Oceanus*, 22.
[553]D.Bandow, *op cit*, p.798.

some bankers in particular are not yet ready to lend money for nodule mining due to doubts over the collection technology.[554]

There are three distinct systems which may be used to collect and lift nodules to the surface from the seabed. The first is hydraulic mining, which relies on a mining vehicle connected to a mother ship to operate on the seabed. The bottom miner is the most complex aspect of the system. It may be self-propelled. The Ocean Minerals Company has tested

one that uses two Archimedes-type Cylinders, towed by the lift pipe, or remains stationary with a rotating arm connected to a movable carriage to crush and collect nodules. The moving models require significant additional work for sensing, steering and monitoring. There is every likelihood that the self-propelled mode would be a more efficient miner, but is more complex; the towed miner requires greater coordination between ship and vehicle.[555] The stationary model is most expensive, and was developed in tandem with the Glomar Explorer in trying to recover a Sunk Soviet submarine. But its techniques might be adaptable to one of the mobile units.[556]In either case, the nodules collected would be lifted to the surface through a pipe connected with the mother ship. The nodules could be mixed with water and pumped to the surface or sucked upward in slurry form by the injection of compressed air. Both methods have been tested and both have various advantages and disadvantages.

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[554]General Accounting Office (GAO), 'Impediments to US Involvement in Deep Ocean Mining Can Be Overcome' (February 3, 1982) p.32.<gao.justia.com.GAOReport.department of state1982february> accessed on 23 February 2014.

[555]D.Bandow, *op cit*, p.799.

[556]*Ibid*.

A cheaper collection system is the continuous line bucket system, which is essentially a line with dredge of buckets attached.[557] The line is rotated, causing a constant stream of buckets to scoop up nodules, carry them to the surface, empty the nodules into a ship, and then return to the seabed again. Research has revealed that, the AFERNOD, the French Consortium, and SEDCO, the Japanese Consortium have apparently tested this method successfully. However, it is still difficult to control the buckets, and to prevent the line from tangling.[558] It has however been observed by just few observers that the system could be commercially feasible while several others are still sceptic about its feasibity. For example, Conrad Welling, the Manager of Ocean Mining for Lockheed Missiles and Space Co., has stated that the system has had only 'very limited success'.[559]

Modular mining is another system. This system employs a number of free swimming mining units. These units collect minerals from the seabed, transport them to the surface ship and there unload their cargo, and again return to the seabed.

Among these systems, the most experimented has been the hydraulic system. The technology itself is fairly advanced; the next stage being a pilot programme, which Lockheed's Welling estimates is a multi-year, two stage process involving between three hundred and six hundred US dollars.[560] It has been noted that establishing the first commercial deep seabed mining operation will probably require between 1 billion and

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[557]*Ibid.*

[558]*Ibid.*

[559]C. Welling, 'The Massive Technology for Ocean Mining' (1980) *Stockton's Port Soundings*, p.9; 'Seabed Mineral Resources Development: Recent Activities of the International Consortia' UN Doc.ST/ESA/107 (1980).

[560]D.Bandow, *op cit.*

1.5 billion of the US dollars to fully develop, purchase and set up the required technology, and annual costs could run as much as 400 million dollars.[561]

The technology necessary for mining other deep seabed minerals such as polymetallic sulfides which lie up to 8,500 feet below the ocean surface is still less advanced. There is still a tangle among scientists as touching the exact state of the technology for mining sulfides. For instance, Malahoffof the National Ocean Survey (NOS) says that most of the technology necessary to mine them already exists, but National Oceanic and Atmospheric Administration (NOAA's) Rona contends that the minerals discovered some years back now are too deep to be reached by current technology, and are instead, resources for the future.[562] The point however, is that, the technical knowledge gained from the extensive research on manganese nodule mining can be applied to mining sulfides, and this could prove very useful. According to Congressional Research Services (CRS), "while the mining system would not be identical, other aspects such as ship operating and construction costs, processing and transportation may be comparable with that of manganese nodule mining".[563]

It has been argued in fact, that, the sulfides ultimately should be easier to recover because the minerals are more highly concentrated, closer to shore and not as deeply situated.[564]

6.5.2 Economic Barriers

[561]C. Welling, 'Ocean Mining Systems' (1979) *Mining Congress Journal*, 30.
[562]D.Bandow, *op cit*, p.800.
[563]*Ibid*.
[564]R. Brooks, 'the Law of the Sea Treaty: Can the US Afford to Sign'? (1982) *The Heritage Foundation*, 19.

It is safe to argue that currently, the most important barrier to mineral development of the seabed is economic. If seabed mining promises to generate sufficient capturable profits, entrepreneurs will have an incentive and enthused to undertake the necessary investments in exploiting the resources. For instance, World Offshore Production was estimated to have been 10 billion US dollars in 1972 and 30 billion dollars in 1980.[565] Oil production has continually extended further away from shore as oil prices have risen and the cost of the drilling technology fallen. This means that the potential of deep-sea oil drilling does exist. However, its economic viability depends largely on the future movement of energy prices, and on expected after-tax profits.[566]

Research reveals that companies have been mining hard-mineral resources up to the continental margin for decades. The world annual value of hard-mineral production was 1 billion dollars in 1979 and roughly 4 billion dollars in 1980.[567] For the United States, most production is of sand and gravel. However, recent studies commissioned by the United States Geological Service (USGS) have concluded that phosphorite mining off the shore/coasts of Georgia and California is economical, in spite of past instability in the phosphorite market. Moreover, even metals, such as gold, platinum and gemstones, which currently seem not worth mining, may become attractive and profitable as market conditions change and technologies improve.

The economic potentials for mining manganese nodules are less clear because deep seabed mining is significantly different from surface mining. In contrast however, the economic potential of offshore oil drilling has been relatively established and easy to

[565]D.Bandow, *op cit.*
[566]*Ibid.*
[567]*Ibid*.

determine since it is simply an extension of existing capabilities.[568] It has been argued that investors have been moving slowly into deep seabed mining. Still the tens of millions invested over the past few years constitute an insignificant proportion of the total investment necessary to get a mine site into commercial operation. Judgments as to the likely costs, as well as likely mineral prices will ultimately determine the future pace of investment with regard to exploitation of economic resources in this area which lies beyond national jurisdiction.

Most industry analysts concur that initial costs will be substantial, as much as 1.5 billion. These costs could arise easily once practical mining problems are encountered. Few instances are: the type and composition of nodules to be collected and the nature of ocean terrain on which they lie. This might require specific equipment modification to fit specific mine sites.

The most important minerals contained in the nodules are nickel, copper, cobalt and manganese. Copper is most widely used, but cobalt is the most expensive and has the most sensitive strategic role. It is produced primarily by one of the world's more unstable countries, the Democratic Republic of Congo (DRC),[569] formerly known as Zaire.

The 1978 Angolan invasion was believed to have caused temporary cobalt price increase of up to 630 percent.[570]Several other trace metals, such as molybdenum and vanadium, could become by-products rather than waste depending on their market price and the economics of the particular processing technology.

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[568]*Ibid*.
[569]*Ibid* p.801.
[570]C. R. Tinsley, 'United States' Interests in the Law of the Sea: Review and Analysis', A Paper Presented to
AEI Conference on 19th October, 1981.

Facts gathered through this research reveal that nickel will contribute about 70 percent of the ocean mining industry's revenues. The demand for nickel is likely to grow only mostly in the years to come, thereby limiting seabed development. However, increased markets for copper, cobalt and manganese could influence the ultimate success of the industry by providing a profitable margin.[571]

Against the backdrop of the fact that there exists a great deal of uncertainties surrounding future metals markets, world economic growth, and economic performance of seabed mining, the most honest assessment is probably that provided by the (Congressional Research Services) CRS, when it states that, "At this point no one really knows whether the initial deep seabed mining ventures will be economically viable".[572] Many observers however believe that in time it can be. For instance, Economist Jim Johnston estimated that exploitation of seabed resources would yield annual benefits to American Consumers on the order of 100 million dollars annually by 1980 and 1 billion dollars by the end of the century.[573] According to Lawyer Fredrick Arnold, its long-term profitability is 'ensured' by its 'cost and strategic advantage'.[574]Study shows that even at the mineral prices which prevailed in 1970, deep sea mining was very nearly profitable, given the technological developments and forecasted costs of such mining, including substantial profit to compensate for risk. Since that time, the prices of those minerals have risen sharply, while the estimated costs have not kept the pace. Thus, it is very likely that deep seabed mining could be profitable today.

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[571]F. L. La Que, 'Different Approaches to International Regulation of Exploitation of Deep Ocean Ferromanganese Nodules' (1978) 15, *3 San Diego Law Review,* 483 – 484.

[572] D. Bandow, *op cit*, p.802.

[573]J. Johnston, 'The Economics of the Common Heritage of Mankind' (December 1979 – January 1980) *13 Marine Technology Society Journal*, 26, 29.

[574]F. Arnold, 'Towards a Principled Approach to the Distribution of Global Wealth: An Impartial Solution to the Dispute Over Manganese Nodules' (1980) 17, *3 San Diego Law Review*, 565.

Given the world-wide recession and consequent slump in metal prices the demand by States and enterprises to exploit mineral resources in the seabed may likely be adversely affected. However, as the world economy revives, metal prices are expected to increase. Moreover, as the more economical land-based mineral lodes are mined out, such as those in Canada which virtually provide half of the world's nickel, prices will rise even more, providing the needed incentives for seabed mining.[575] Thus, although current economic conditions may not be propitious for the industry, in the long-run the economic incentives should be sufficient to encourage development.

The economic studies with regard to economic benefits of mining deep seabed are equivocal. A US Geological Survey sponsored study of mining on the Blake Plateau, east of Jacksonville, Florida, estimated a possible return on seabed mining of between 28 and 32 percent. In contrast however, C.R. Tinsley, Vice President of the Mining Division for Continental Bank of Chicago has estimated a return on investment of only 12.5 percent to 15 percent, which he noted was less than then current interest rates.[576]

Given the high risks involved in seabed mining, the actual returns on investment must needs be very large. It has been observed that the initial generation of seabed mining will be very risky.[577] The industry is capital intensive, and will require a long pay back. The market risk of seabed mining is substantial: Even if production costs remain stable, once the nodules are raised and processed, demand may still fall because of new

[575]The more economical land-based nickel deposits are being mined out, and the quality of the remaining ore is steadily falling. New deposits will become deeper and more expensive to extract. This is not just the only case for nickel. Land-based manganese or deposits could conceivably be mined out. And the concentration of copper in seabed nodules has ranged up to 100 times the percentage in land-based ores.

[576]C. R. Tinsley, *op cit.*

[577]D.Bandow, *op cit*, p.803.

land discoveries and more accessible ocean discoveries, technological advances, or economic slumps.[578]

Against this backdrop therefore, it has been observed that for seabed mining to hold some attraction for investments, a rate of return should be as high as 30 percent.

The economic viability of mining the polymetallic sulfide and cobalt deposits is also somewhat unclear. It seems that till date, too little is known of marine polymetallic sulfide deposits to project their economic significance. However, the existence of nodule mining technology at a cost that could make manganese nodule mining competitive is a suggestive of the fact that sulfide deposits may eventually be economical to mine. It is also hoped that future sulfide mining costs will most likely be lower because as earlier pointed out; the minerals are more concentrated and easier to reach.

6.5.3 Legal Barriers

It is quite unfortunate that laws regarding the exploitation of the resources of the seabed also constitute one of the barriers which affect the economics of seabed mining. These laws may be the ones enacted by various States regarding exploitation of economic resources within their coasts or the UNCLOS. To some States, resources found within their continental margin, whether oil, and or manganese nodules, the legal barrier is primarily the restrictive leasing policies. In the United States for instance, oil and gas leasing offshore is said to have been severely limited. While leasing for hard minerals has been restricted even more.[579] It follows therefore that after other economic incentives for developing seabed mining exist, there remains a need for government policies to allow and permit such development.

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[578]*Ibid*.

[579]R. J. Lee, 'How Uncle Sam Keeps US All Energy Poor' (1981) *Libertarian Review*, 26.

As noted above, development of seabed mining has been limited by States' practices. Though very few States out-rightly oppose development per se, many are very concerned about environmental impact of mining. Thus, States' practices toward potential seabed mining vary from cooperation to overtly hostile.

The present legal regime of the sea (UNCLOS III) also restricts Continental Shelf mineral development. For instance, Article 82 of the Convention mandates revenue sharing for the exploitation of mineral resources, primarily oil and gas which lie under the States' continental shelves beyond 200 nautical miles. The percentage of the tax begins at one percent in year six, and increases to seven percent by year twelve.

It has been observed that Article 82 of the Convention on the Law of the Sea is the most important international regime governing the oceans.[580]. The Article covers wide range of issues including navigational rights, protection of the marine environment, and relevant to this work, jurisdiction over living and non-living marine resources. The negotiation leading to the adoption of the Convention was quite long and complex. One particular topic seriously debated at the Conference was the extent to which a coastal State's continental shelf will reach. This was eventually set at up to 200 nautical miles from the State's coastline. However, through a complex assessment mechanism, the continental shelf can be extended up to a total of 350 nautical miles from the coastline if the coastal State can show that, "the natural prolongation of its submerged land territory to the outer edge of its continental margin extends beyond the 200-nautical mile distance

[580]Issues Associated with the Implementation of Article 82 of the United Nation Convention on the Law of the Sea, Technical Study No. 4. <URL:http//www.isa.org.jm> accessed in April 2012.

criterion".[581] The area between the 200 nautical miles limit and the border of the total claim is called the Outer Continental Shelf (OCS) or Extended Continental Shelf (ECS).

The resources that occur on the world's continental margins may include oil, natural gas, gas hydrates, manganese nodules, sand, titanium, thorium, iron, nickel, copper, cobalt, gold and diamonds, the value and size of which is unknown. The potential OCS claims cover a large section of the seabed. For comparison, Outer Continental Shelf (OCS) claim could be in excess of 15 million square kilometers, while the world's exclusive economic zones (the water column within 200 nautical miles of the coast) are estimated at approximately 85 million square kilometers, and the 'Area' consists of around 260 million square kilometers.[582]

The potential extension of coastal States' continental shelves to 350 nautical miles erodes the size of the Area and the resources available to landlocked States especially developing ones among them. It was as a result of this that Article 82 of the Convention was introduced as a *quid pro quo*. Article 82 is a unique provision in international law motivated by a sense of international equity and fairness. It establishes an international 'servitude' in the form of a 'royalty' consisting of payment and contributions to be made by the coastal States to the Authority for the exploitation of the non-living resources of the Outer Continental Shelf. Article 82 however carries many ambiguities and uncertainties in part because of its novelty, the difficult compromise behind it and unanswered questions about the mechanisms of implementation.[583]

Both the International Seabed Authority (ISA) and the State that exploit the non-living resources of their Outer Continental Shelf (OCS) are saddled with the

[581] *Ibid.*
[582] *Ibid.*
[583] *Ibid*.

responsibility of implementing the above article. Payments and contributions are to be made annually by the OCS States at the rate of 1 percent on the value or volume of all production, commencing on the sixth year of production, increasing by 1 percent per year until the rate reaches 7 percent by the twelfth year, and thereafter remaining at 7 percent.[584] The ISA then disburses those payments and contribution to States Parties on the basis of equitable sharing criteria, taking into consideration the interest and needs of developing States, particularly the least developed and the landlocked among them.

Article 82 is a complex provision. It contains a rough and untested formula to determine payments and or contribution. The uniqueness and complexity of Article 82 therefore demands careful consideration of the obligation, principles and criteria for distribution of benefits, procedural aspects, the role of the Authority, the role of OCS States, and economic and temporal issues. The Convention provides little guidance to the Authority on how Article 82 might be implemented. Moreover, it is only the provision in the Convention setting out an international royalty concerning an activity within national jurisdiction. The above situations associated with implementation of Article 82 including the complexity of the article, the mandate for OCS States to make payments and contributions for activities within their national jurisdiction and also the fees paid for licenses and exploitation of resources in the Area constitute what we refer to as legal barriers.

We observe that the payment of these fees and taxes raise further the already high cost of recovery of petroleum from the seabed. The disincentive effect of this situation is significant in the development of the seabed and the world economy. For instance, it has been stated that if the world supply of oil shrank by just five percent, world oil consumers

[584]Ibid, Art. 82 (2).

would conceivably be paying a third of a billion dollars more.[585] Article 76 of the Convention equally constitutes a barrier to seabed development. The requirements it places on the OCS States to meet before they can exploit the economic resources deposited in their outer continental shelves are enormous and can hardly be fulfilled by developing, coastal States. Paragraphs 7-9 of the article provide that:

> 7. The coastal State shall delineate the outer limits of its continentalshelf, where that shelf extends beyond 200 nautical miles from the baselinesfrom which the breadth of the territorial sea is measured, by straight lines notexceeding 60 nautical miles in length, connecting fixed points, defined bycoordinates of latitude and longitude.
> 8. Information on the limits of the continental shelf beyond200 nautical miles from the baselines from which the breadth of the territorialsea is measured shall be submitted by the coastal State to the Commission onthe Limits of the Continental Shelf set up under Annex II on the basis ofequitable geographical representation. The Commission shall makerecommendations to coastal States on matters related to the establishment ofthe outer limits of their continental shelf. The limits of the shelf

[585]D. Bandow, *op cit*, p.804.

> establishedby a coastal State on the basis of these recommendations shall be final andbinding.
>
> 9. The coastal State shall deposit with the Secretary-General of theUnited Nations charts and relevant information, including geodetic data, permanently describing the outer limits of its continental shelf. TheSecretary-General shall give due publicity thereto.

Many coastal States, especially developing States find it difficult to meet up with these requirements and where this is the case, the implication is that the resources in this zone cannot be exploited neither by the coastal States nor any other States. This no doubt constitutes serious barrier to the development of the seabed area.

It has been argued that, by far the greatest obstacle to deep seabed mining is the Convention itself.[586] For instance, the Convention creates an International Seabed Authority, ruled by a one-nation, one-vote Assembly and a 36-member council, with a mandate to regulate deep seabed mining. A subsidiary body, the Enterprise, was established to mine the seabed for the Authority, while being subsidized by the industrialized States. The Authority would be empowered to deny access to seabed, limit mineral production, mandate the transfer of technology and redistribute revenue to developing and disadvantaged States.[587]

[586]*Ibid*.
[587]UNCLOS, Art. 144.

By imposing a regulatory scheme on an otherwise free market, the Convention is believed to have threatened or rather threatens seabed development.[588] The implication is that the Convention will likely breed inefficiency and cause development costs to increase, which will decrease seabed mining activity. Some proponents of the Convention, while admitting that it has created some unnecessary obstacles to seabed development however believe that such obstacles are minor, or at the time, remediable. One especially burdensome requirement of the treaty is that contracts for development must be approved by a legal and technical commission, the membership of which could be stacked by opponents of seabed mining.[589] They could have plenty of excuses to reject private miners' request for permission to mine. A company seeking to mine in the seabed would first have to gain an exploration contract, survey two potential mine sites at its own expense, and give way for the Authority to choose one for the Enterprise to mine. After that, the company

would have to apply for a production authorization, which could be denied if the Authority decided to award the remaining mine site to a competing private company, a developing country, or even conceivably the Enterprise.[590]The request could be turned down on the condition that allowing mining would violate the so-called "anti-density" restriction on the number of sites per country in a geographical area or the 'anti-monopoly' limit on the total number of contracts awarded to any particular country.

[588]D.Bandow, *op cit*, p. 807.
[589]L.Torreh-Bayouth, 'UNCLOS III: The Remaining Obstacles to Consensus on the Deep sea Mining Regime (1979) 16 *Texas International Law Journal*, 103.
[590]D.Bandow, *op cit*, p.808; UNCLOS, Annex III, Arts 8 and 9. Note: Production Policies of the Authority are detailed in Article 151 of the Convention.

Finally, mining would be disallowed if the added production would break the overall limitation on mineral production.[591]

It has been suggested that the Preparatory Investment Protection Resolution, passed in April 1982, would guarantee the access to mining that the Law of the Sea Treaty lacks.

However, the resolution only grandfathers seabed mining companies into the treaty and not out of it. Hence, they still would be subject to all of the vagaries of the treaty.[592]The resolution also imposes financial obligations on the companies being protected. And, though the resolution guarantees existing consortia priority in getting production authority, it only applies to a limited number of companies – four Western private consortia plus the USSR, Japan, France and India – that have already made some investments.[593] New entrants could not avail themselves to even its limited protections, and the latter four countries are placed on an equal pedestal with the four Western Consortia even though their investment activities used to be minimal.[594]

Research reveals that the fundamental goals of the Authority with regard to development of the seabed, instead of encouraging mining, discourage it. For example, Article 150 of the Convention directs the Authority to promote 'orderly and safe development', 'rational management', 'just and stable prices remunerative to producers', and 'the protection of developing countries from the adverse effects of mining'. Article 151 formalizes the bias against mineral development when it stated explicitly setting a production ceiling and providing for commodity agreements. How severe the restriction

[591]*Ibid.*
[592]*Ibid.*
[593]*Ibid*.
[594]*Ibid.*

is likely to be in practice is a matter of debate and depends on mineral market prices.[595] The implication is that the enforcement of the production ceiling will limit not only production, but also the number of mine sites.

In accordance with Article 5 of Annex III to the Convention, private companies, as a precondition to receive a production authorization are required to obligate themselves to sell their proprietary seabed mining and processing technology to other operators, and to transfer such technology to the Enterprise and developing States. Theoretically, transfer can be forced only if the Enterprise is unable to purchase the technology, and compensation is provided for. In reality, the provision creates a forced sale, thereby making it impossible for private business to negotiate a fair deal. The provision also provides no effective redress for unauthorized disclosure of secrets. It would affect technology used to mine other minerals in the Area, and would include technology that has broader use, such as those for offshore oil and gas development. The term 'technology' in the provision is left undefined, and would be taken to include navigational, computational, and communications equipment, as well as the very essence of engineering skill.[596]With this provision, there would be no patent protection and the implication is that incentives for technological innovation would be sharply reduced. Consequently, some equipment suppliers have made it categorically clear that they would not provide equipment to seabed mining companies under such regulations.[597]

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[595]*Ibid*.

[596]*Ibid*, p.810.

[597]R.Legatski, 'Testimony before the Sub-committee on Oceanography, Committee on Merchant Marine and Fisheries' (22 October, 1981) pp. 3–7.<archive.org/stream/m/…/draftenvironmentoonati-djvu.txt>accessed on 23 February 2014.

Indeed, the mere threat of invoking these articles is enough to place private business in a great disarray/disadvantage, which is why businessmen have reacted with something akin to apoplexy. This is so because, proprietary technology is their private heritage, not that of the United Nations or foreign governments.

Private miners are grossly discriminated against by the provisions of the Convention relating to the development of the seabed. For instance, they have to prospect a site for the Enterprise and transfer their technology to it on demand. Moreover, the Enterprise is subsidized by the developed countries such as US to cover 25 percent and is exempted from taxes and payments to the Authority.[598] These competitive disadvantages extend to Article 152 of theConvention, which grants special consideration for developing States and particularly to landlocked and geographically disadvantaged States which comprise a good number of States in the United Nations. This disadvantage is further exacerbated by the taxes and fees on private miners. Miners face an application fees, annual fee, production charge and/or royalty charges, the total of which would be very large.

Finally, even if private miners were not disadvantaged by these provisions and they believe that over the estimated 20 – 25-year life of the mine-site, they could recoup their investment in the face of an uncertain minerals market, they would also have to accept the risk that their investment might be prematurely terminated. This view is drawn from the fact that Article 155 of the Convention provides for a Review Conference to convene 15 years after the commencement of commercial mining under the Convention, and allows a three-fourths majority to amend the relevant provision where every effort to

[598]D.Bandow, *op cit.*

reach consensus by the Review Conference has failed with dissenting nation only able to denounce the treaty as a whole and withdraw.[599]

These provisions both in isolation and in their combined effect create political and legal climate hostile to private investment in the Area thereby restricting the usefulness of the investment as they make it unattractive. The implication is that it will be difficult, if not impossible, for companies to raise the money necessary to mine.

The Convention also places a moratorium on mining polymetallic sulfides and cobalt deposits. Mining for these resources, which are potentially more accessible than manganese nodules, must wait until a different set of rules and regulations are adopted to cover them, which could never be.[600] The Convention requires the adoption of such rules and regulations within three years, but any State opposing seabed development which sat at the Council could, and probably would, block them by preventing their approval by unanimous consent. Since there is nothing to force the Authority to adopt rules and regulations, mining of these resources would likely remain forbidden indefinitely, despite this known fact that the mineral resources on the seabed are of great value if they can be economically developed. Hence, in a bit to create a regime that will foster redistribution of international wealth with special consideration to developing States, the Convention has inadvertently discouraged deep seabed mining.

It is arguable that the above-noted seabed development barriers have serious adverse effects not only on the economic developments of the various individual States, but also on the global economy. This argument stems from the fact that in this globalization era, what affects one or two States invariably affects the whole world. The

[599]UNCLOS, Art.155 (1) – (5).
[600]*Ibid*.

development of the seabed in a sustainable manner would create an enabling environment for the harnessing of theeconomic resources therein thereby allowing or generating viable economic base for individual States and the world community. The effects of these barriers to the development of the seabed is that, a large portion of the natural resources embedded in the seabed which are available for exploitation remain unexploited thereby hampering the economic growth and improvement of the various State nations.

As the world population increases and the natural resources deposits on the surface of the Earth wane and diminish, the world's demand and dependent on the economic resources of the sea are on the increase. Unless and until these barriers are overcome[601] to allow for optimum exploitation of these economic resources in the seabed of the high sea, it would greatly affect States and world economic growth. This would ultimately most likely lead to a severe global economic recession than ever experienced.

6.6 Alternative Seabed Development Strategies

Due to the stringent measures and procedures laid down by the relevant articles of the Convention with regards to exploration and exploitation of the seabed resources, it became necessary to create some alternative arrangements which would allow seabed development to proceed. Part XI of the Convention which deals primarily on the exploration and exploitation of the seabed resources is obviously adverse to the interests

[601]This can be done through the establishment of special scientific research centers on the State, sub-regional,
regional and international level aimed at gaining adequate scientific knowledge regarding the process of mineral accretion and concentration in the seabed. Various States should review their laws and regulations
in this respect with a view to re-couching the relevant sections that constitute barrier to the development of the seabed. Relevant articles of the UNCLOS especially articles 76 and 82 should be reviewed to this effect to allow for unfettered development of the seabed of the high seas.

of developed States especially the United States. This has led to the non-ratification of the entire Convention by the United States till date.[602]Creating alternative arrangements became one and the only possible course of action for such States since it is obvious that mining the seabed is economically beneficial, yet it is unlikely to proceed without some sort of legal system either to compete or complement the Convention.

The United States in particular objected to Part XI of the Convention on several grounds, contending that the Convention was unfavourable to American economic and security interests. The United States claimed that the provisions of the Convention were not free-market friendly and were designed to favour the economic systems of the Communist States. The United States argued that the International Seabed Authority established by the Convention might become a bloated and expensive bureaucracy, due to a combination of large revenues and insufficient control over what the revenue could be used for.[603]

One option would be to seek to amend the treaty. But the best opportunity to have done so seems to have passed. That was in September 1982, when the Conference met to approve technical changes recommended by the so-called Drafting Committee. It is also conceivable that an agreement could have been reached before December 1982, when the treaty was ready for signature. However, both those dates passed and no fundamental amendments were made. Those States that object to Part XI of the Convention therefore are afraid while they feel that it is very unlikely today for them to gain any significant

[602]United States non-ratification of the UNCLOS: <en.wikipedia.org/wiki/United States. Convention –on-the…. > accessed on 17 September, 2013.
[603]*Ibid*.

change in the Convention. Even if changes were still possible, they would undoubtedly fall far short of the package necessary to make the Convention acceptable to them.[604]

Those States which felt aggrieved by the provisions of the Convention thought that a better plan would be to create a system, one based on free enterprise and minimal regulation. Doing so would rely on individual nations to extend the 'propertization' or 'enclosure' of the ocean to create seabed mining regimes that recognize property rights in seabed resources. Such a system would not preclude some sort of compromise measure involving profit-sharing with Third World Countries, joint ventures, equity participation, or whatever. This will help to limit international opposition to such a separate system.[605]

It is argued that under such arrangement the system need not be governmentally created because it would evolve naturally. Private individuals and companies here would now possess a right to mine the deep seabed under the doctrine of freedom of the high seas: The resources are *res nullius*, owned by no one, and can be collected by whoever expends the labour and capital to do so.[606] The proponents of this arrangement argue that the sheer abundance of the resources provides enough for many miners thereby making poaching and claim-jumping unnecessary. The physical characteristics of the terrain require extensive surveying and exploration to avoid damage to delicate mining equipment and to efficiently collect the nodules, making it just as cheap to find a new site.

There are of course, many historical examples of people implementing the *lockean*notion of establishing property rights with those who identify resources and mix

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[604]D.Bandow, *op cit*, p.813.
[605]*Ibid*.
[606]J. Murphy, 'The politics of Manganese Nodules: International Considerations and Domestic Legislation' (1979) 16 *San Diego Law Review*, 536 - 541.

their labour with them. 'As much as a man tills, plants, improves, cultivates and can use the produce of, so much is his property'.[607] The American West developed in this way, with government institutions and legal order only following informal economic order. Civil law was entirely absent during the California Gold Rush, but traditional miners' law arose. By mutual agreement among the miners title was derived from the first locator, and continuity of work sufficed to maintain persistence of ownership.[608] Even at the international level, a similar result occurred with The Spitsbergen Archipelago, where a multinational treaty recognized the rights of those individuals who had previously occupied and used the land.[609]

The truth however is that today even America cannot invest or explore the deep sea beyond their national jurisdiction without such rights being institutionalized by means of some legal system. In the absence of some legal regime, it appears that seabed mining would be limited to areas within national jurisdiction. This is probably true today simply because of the existence of the Law of the Sea Treaty. Were there no conflicting international regime, American companies and those of other industrialized States might be willing to venture forth because of the current belief in the realities of seabed mining. But, because of the fear of facing competing and hostile international system, America canvasses for a countervailing legal protection. Industry leaders have made it clear that they prefer no treaty to the current one, which guarantees that virtually no mining would be undertaken.

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[607]R. Goldwin & J. Locke, *History of Political Philosophy* (2nd edn, Chicago: University of Chicago Press, 1981) p.462.

[608]T. Anderson and P. Hill, 'The Evolution of Property Rights: A Study of the American West' (1975) 18 *Journal of law and economics*, 168 -179.

[609]L. F. E. Goldie, 'A General International Law Doctrine for Seabed Regimes' (1973) 7 *International Law Journal*, 807 – 811.

Legal recognition of title to mine sites could be granted unilaterally by the US government through legislation similar to the Deep Seabed Hard Minerals Acts of 1980. This Act was specifically designed as an interim measure and was passed to encourage exploration of the seabed before the Convention was signed, when the Act was to be superseded.[610] However, though the legislation helped to keep the American deep seabed mining industry alive as the treaty was being negotiated, virtually no one believes that the Act as it now stands can support a mining industry.[611]

It has been suggested that the Act could be amended to eliminate the prohibition of mining through 1988 and to transform it into a permanent system. It could be amended to reflect the differences between mining manganese nodules and polymetallic sulfides.[612]

Amended legislation would clearly establish legal tenure and Americans, and other nations arguably, would respect such a system because it would be more viable than that theoretically established by the Convention.[613] However, opinion is sharply divided over whether such a unilateral system would be adequate to encourage development of the seabed. In the past, the proponents of the Convention feared that a unilateral American system would succeed, but currently, they argue that it would not; opponents of the Convention are also split in their opinion on the issue.[614] Former Ambassador Elliot Richardson has been on both sides of the divide. He now claims that only the Law

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[610]D.Bandow, *op cit*, p.815.

[611]F. P.Willsey, 'The Deep Seabed Hard Minerals Resources Act and the Third United Nations Conference on the Law of the Sea: Can the Conference Meet the Mandate Embodied in the Act?'(1981) 18 *San Diego Law Review*, 510.

[612]D.Bandow, *op cit*, p.816.

[613]*Ibid*.

[614]*Ibid*; M.Molitor, 'The US Deep Seabed Mining Regulations: The Legal Basis for an Alternative Regime' (1982) 19 *San Diego Law Review*, 608.

of the Sea Treaty can guarantee seabed mine sites, but he told Congress in 1978 that "Seabed mining can and will go forward with or without a treaty…. We have the means to protect our ocean interests…. And we will protect those interests if a comprehensive treaty eludes us".[615]

Fears have been expressed however that non-mining States would respond to such unilateral American legislation with boycotts of mineral resources, sabotage, expropriation of assets, and lawsuits in the International Court of Justice. It is thought that the threat of such actions, if thought likely to occur, would obviously make lenders sceptic and uncomfortable loaning money to private seabed mining companies.[616] It was argued however, in that same place that such actions are unlikely to occur. Boycotts would hurt those boycotting, particularly Cash-Poor Third World Nations. Boycotts are therefore likely only if crucial issues are at stake, and there is no evidence that anyone in the Third World, aside from a few international lawyers, diplomats and propagandists, believes the Convention is crucial. As for the International Court of Justice, it has been argued that the Court is political and has been routinely ignored.[617]If America minesites cannot be challenged in a meaningful way despite Third World claims to ownership of the seabed, a legally unsupported adverse opinion of the ICJ would not change matters.

A greater security of tenure that could be provided through an agreement on a system to allow resource development among the most likely seabed mining nations has been suggested. One form of agreement, such as the proposed Reciprocating States

[615]D.Bandow, *op cit.*
[616]*Ibid.*
[617]*Ibid*.

Agreement (RSA), would build upon domestic legislation. The RSA, envisioned between the United States, England, West Germany, France, and Japan, would resolve differences on national legislation with regard to mining claims. Such an agreement was drawn up in early 1982,[618] and was nearly signed, but technical problems and the imminent final Law of Sea Treaty Conference led to a breakdown.[619]

Since the RSA was designed to provide an interim system until the treaty itself came into force, and for the fact that the treaty has disappointed most of the industrialized States particularly the provisions of Part XI, most supporters of such an agreement now envision its expansion into a mini treaty, creating a permanent seabed mining system apart and separate from the Law of the Sea Convention. Under this arrangement, the core members of such a treaty would be the potential seabed mining nations, but non-seabed mining nations could also join. They would be able to participate in joint ventures or corporate consortia. Mining would be regulated not by an international bureaucracy, but by the respective nations sponsoring the individual mining companies.

The above arrangements have been criticized on two grounds: The first is that they are unattainable, since the other industrialized nations will likely sign and ratify the Convention rather than a separate treaty with the United States for that matter. Some might sign the Convention, because they believe it would give them better colour of title, others will sign to ensure or establish friendly relations with the Third World, and other still will sign to gain benefits from other sections of the treaty, including navigation. Supporters of the Convention have equally argued that West Germany has a special

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[618] *Ibid*.

[619] 'Agreement Concerning Interim Arrangements Relating to Polymetallic Nodules of the Deep Seabed', Draft document, (1982) <sedac.ciesin.org/entri/texts/acrc/polyNod.txt.html>accessed on 23 February 2014.

incentive to sign since the International Tribunal for the Law of the Sea (ITLOS)was to be based in Hamburg, giving Germany new international legitimacy. Today, Germany is signatory to the Convention. Many reasons were adduced however, by the proponents of the RSA and mini-treaty, why some industrialized nations might join the United States.[620]

The regime for the Deep Seabed was not only opposed by the United States who voted against the adoption of the Convention in 1982, but by the UK which declared unequivocally that it would not sign the Convention until satisfactory regime for the deep seabed mining was established[621]. Concern was particularly expressed regarding the failure to provide assured access to seabed minerals, lack of a proportionate voice in decision-making for countries most affected, and the problems that would result in not permitting the free play of market forces in the development of seabed resources.[622]

These developments led to the enactment of domestic legislation by many States with the aim of establishing an interim framework for exploration and exploitation of the seabed pending an acceptable international regime for the seabed. For example, The UK Deep Sea Mining (Temporary Provisions) Act 1981 provides for the granting of exploration licenses (but not in respect of a period before I July 1981) and exploitation licenses (but not for a period before 1 January 1988).[623] The Act also provides for a Deep Sea Mining Levy to be paid by the holder of an exploitation license into a Deep Sea Mining Fund. The funds were to be paid over to an international organization for the deep seabed if an agreement to create this has come into force for the UK.[624] However, where this has not occurred within ten years, the fund will be wound up and paid into a

[620]D.Bandow, *op cit*, p. 818.
[621]M. N. Shaw, *International Law* (5th edn, Cambridge: Cambridge University Press, 2004) p. 563.
[622]*Ibid*.
[623]*Ibid*.
[624]*Ibid*.

Consolidated Fund. Section 3 (1) of the Act provides that countries with similar legislation may be designated as 'reciprocating countries', which would allow for mutual recognition of licenses.[625]

A 1982 Agreement[626] called for consultations to avoid overlapping claims under national legislations and for arbitration to settle any dispute, while a 1984 Agreement[627] provides that no party shall issue an authorization in respect of an area included in another application properly filed and under consideration by another party or within an area claimed in another application filed in conformity with national law and the instant Agreement before 3 April 1984 or earlier than the application or request for registration and which is still under consideration by another party; or within an authorization granted by another party in conformity with the instant Agreement.

The Preparatory Commission, however, adopted a declaration in 1985 wherein it stated that any claim, agreement or action regarding the Area and its resources undertaken outside the Commission itself, which is incompatible with the 1982 Convention and its related resolutions, 'shall not be recognized'.[628] Nevertheless, the Agreement on the Resolution of Practical Problems with respect to Deep Sea Mining Areas was signed in

1987 between Belgium, Italy, the Netherlands, Canada and the USSR, to which were attached Exchanges of Notes involving the USA, UK and the Federal Republic of

[625]A number of countries adopted similar, unilateral legislation e.g. The US in 1980; West Germany in 1981; USSR in 1982; France in 1982; Japan in 1983; and Italy in 1985. See *ibid*, footnote 351.

[626]The 1982 Agreement Concerning Interim Arrangements Relating to Polymetallic Nodules of the Deep Seabed: France, Federal Republic of Germany, UK, US, (1982) 21 ILM, p.950.

[627]Provisional Understanding Regarding Deep Seabed Mining (Belgium, France, Federal Republic of Germany, Italy, Japan, Netherlands, UK, US) (1984) 23 ILM p.1354.

[628]Law of the Sea Bulletin, No. 6 (October 1985) p.85 <www.un.org/depts/los/doalos.../Los Bulltins/Bulletin-reportorypdf> accessed on 23 February 2014.

Germany.[629] The agreement constitutes an attempt to prevent overlapping claims as between States within the Convention system and other States with regard to the Clarion-Clipperton Zone of the North Eastern Equatorial Pacific where France and USSR already had overlapping claims.[630]

6.7 Part XI and the 1994 Agreement on Implementation of the Seabed Provisions of the Convention on the Law of the Sea[631]

Part XI of the Convention provides for a regime relating to minerals on the seabed beyond the jurisdiction of any State. The part establishes an International Seabed Authority (ISA) to authorize seabed exploration and mining and collect and distribute the seabed mining royalty.[632] Many industrialized States, especially the United States objected to the provisions of Part XI of the Convention on several grounds, arguing that the Convention was unfavourable to their 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.

The Convention was adopted in 1982. 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.[633] The Preparatory Commission was also established to prepare for the

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[629]M. N. Shaw, *op cit*, pp.564 –565.
[630]*Ibid*, p.565.
[631]B. H.Oxman, 'The 1994 Agreement and the Convention' (1994) 88 *AJIL*, 687; L B Sohn, 'International Law Implications of the 1994 Agreement' (1994) *AJIL*, 699; D H Anderson, 'Further Efforts to Ensure Universal Participation in the United Nations Convention on the Law of the Sea' (1999) 43 *ICLQ*, 886.
[632]UNCLOS, Art.157. Details of the Authority may be found at <http://www.isa.org.jm/en/default.htm> Accessed on February 23, 2014.
[633]United States non-ratification of the UNCLOS, *op cit*.

eventual coming into effect 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. Also, in addition to this, the decline of socialism and the fall of communism in the late 1980s had removed much of the support for some of the contentious Part XI provisions.[634]

Due to the positions taken by developed States with regard to the 1982 Convention particularly Part XI, wide consultations were begun in 1990 between signatories and non-signatories including the United States, over the possibility of modifying the Convention in order to pacify the developed countries and allow them join the Convention. The consultations therefore represented attempts to ensure the universality of the 1982 Convention system and prevent the development of conflicting deep seabed regimes. The consultations/negotiations resulted in the 1994 Agreement on the implementation of the 1982 Conventionwhich was adopted as a binding international convention. The 1994 Agreement on implementation mandates 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.[635]

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[634] *Ibid*.
[635] *Ibid*.

The State Parties undertake in Article 1to implement Part XI of the 1982 Convention in accordance with the Agreement. By Article 2,the Agreement and Part XI are to be interpreted and applied together as a single instrument and, in the event of any inconsistency; the provisions in the former document will prevail. States can only express their consent to become bound by the Agreement if they at the same time or previously express their consent to be bound by the Convention.[636] This made it impossible to have conflicting systems in operation with regard to the seabed mining. In its Article 7 the Agreement also provides for provisional application, in case it had not come into force on 16 November 1994 (the date on which the Convention came into force).[637] The Agreement was thus able to be applied provisionally by States that had consented to its adoption in the General Assembly, unless they had otherwise notified the depository (the UN Secretary-General) in writing; by States and entities signing the Agreement, unless they had otherwise notified the depository in writing; by States and entities which had consented to its provisional application by so notifying the depository in writing; and by States which had acceded to the Agreement.[638]

The Annex to the Agreement carefully addressed a number of issues raised by developed States. In particular, it provides that all organs and bodies established under the Convention and Agreement are to be cost-effective and based upon an evolutionary approach, taking into account the functional needs of such organs or bodies; a variety of institutional arrangements are detailed with regard to the work of the International Seabed

[636]M. N. Shaw, *op cit*.
[637]The Agreement came into force on 28 July, 1996, being thirty days after the date on which forty States had established their consent to be bound under procedures detailed in articles 4 and 5.
[638]M. N. Shaw, *op cit*.

Authority.[639]It equally provides that the work of the Enterprise is to be carried out initially by the Secretariat of the Authority and the Enterprise shall conduct its initial deep seabed mining operations through joint ventures that accord with sound commercial principles;[640]that decision-making in the Assembly and Council of the Authority is to comply with a series of specific rules.[641]The Annex stated further that the Assembly upon the recommendation of the Council may conduct a review at any time concerning matters referred to in Article 155 (1) of the Convention, notwithstanding the provisions of that article as a whole;[642] and that transfer of technology to the Enterprise and developing State is now to be sought on fair and reasonable commercial terms on the open market through joint-venture arrangements.[643]

Modifications to the provisions of Part XI were thus negotiated, and an amending agreement was finalized in July 1994. The United States signed the Agreement in 1994 and recognizes the Convention as general international law, but has not yet ratified it at this time. The Convention entered into force in November 1994 with the requisite sixty ratifications.[644]

On 1 February 2011, the Seabed Dispute 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

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[639]The Agreement on Implementation of the Seabed Provisions of the Convention on the Law of the Sea, S. I.

[640]*Ibid*, s. 2.

[641]*Ibid*, s. 3 (10) & (15).

[642]*Ibid*, s. 4.

[643]*Ibid*, s. 5. The Implication here is that the provisions in the Convention on the mandatory transfer of technology do not apply again. See s. 5 (2). Note also that provisions in the Convention regarding production ceiling and limitations, participation in commodity agreements, etc are not to apply. S. 6 (7).

[644]R.Rufe, 'Statement before the Senate Committee on Foreign Relations' (October 21, 2012)<en.wikipedia.org/wiki/united-states-non-ratification-of-the-UNCLOS> accessed on February 23, 2014.

Sponsorship of Activities in the Area in accordance with Part XI of the Convention and the 1994 Agreement.[645] 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 Republic 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 treaties, and Principle 15 of the UN Rio Declaration.[646]

[645] *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) Case No.17.

[646] 'International Tribunal on the Law of the Sea Finally Renders Advisory Opinion Establishing that the Precautionary Principle is Incorporated within UNCLOS Law' (March 22, 2011) *ITSSD Journal on the UN Law of the Sea Convention*.

CHAPTER SEVEN

EVALUATION OF THE COMMON-IDENTIFIED CONSTRAINTS LIMITING LANDLOCKED, GEOGRAPHICALLY DISADVANTAGED AND DEVELOPING STATES' PARTICIPATION IN THE EXPLOITATION OF SEA RESOURCES

7.1 Characteristics and Scope of Challenges facing Landlocked Developing States.

Research has revealed that land-locked developing States, especially those of Africaand Asia[647] face major challenges and disadvantages. Their geographical location not only cuts them off from sea resources, it limits their access to sea-borne and international trade. Owing to geography and other related attributes, landlocked countries are confronted with a range of special constraints that inhabit their full participation in reaping the resources of the sea and be part of globalization process. Today, due generally to globalization and the resulting economic integration, all countries of the world have become part of a 'global village'. It has been argued that such integration of world economies has proven to be a powerful means for countries to promote economic growth and development and to reduce poverty.[648] The increasing importance of the World Trade Organization (WTO) and the concept of free trade it has endorsed mean that, in order to survive, all countries must be able to compete in the world market. Although not specifically mentioned in any

[647]For example, over two centuries ago, Adam Smith suggested that the inland parts of Africa and Asia were the least developed areas of the world and that due to the difficulty of trade in those areas, they would not benefit from the gains to specialization of their coastal neighbours. Two hundred years latter, the Human Development Report 2002 paints a stark picture for the land-locked countries of the world. T Snow *et a*l, 'Country Case Studies on the Challenges Facing Land-locked Developing Countries' (2003) Human Development Report Office, 2. <www.unmillenniumproject.org/documents /JH051P003TP> accessed on 12 April 2013.

[648]K.Uprety 'The Transit Regime for Landlocked States'< www.weds.world bank .org/external/default/ wds
content service/wdsp p.3 > accessed on 1 may 2013.

instrument, it has been suggested that from an equity stand point this implies that if they are to become full-fledged partners in international free trade, all countries of the world should be assured of the same level of access to the international market, on the equal terms.[649] Yet not all countries have an equal level of privilege to enter the market; one reason being geography. All landlocked States, because they do not possess a coastline, lack direct access to marine resources and therefore suffer generally because their export trade cannot be competitive.

What are the specific challenges facing landlocked developing States? Research has revealed that there are a variety of problems confronting countries simply because they do not have access to the sea. While it is not intended in this work to cover the full spectrum of these challenges, the recurring themes discovered through research are outlined below, which themes tend to fall under two broad categories; (i) those themes relating to poor infrastructure, poor resources and poor co-ordination- that is physical and administrative challenges that limit transportation through transit nations; and (ii) those themes relating to

political burdens where landlocked States are compromised due to their political relation with their transit neighbour or due to political unrest, particularly civil war in their transit neighbour.

7.1.1 Transportation Challenges

(i) Lack of Access to the Sea

[649] *Ibid*.

It is safe to argue that free access to the sea is the key to international trade. The challenges facing landlocked States are therefore invariably linked to the question of transit: goods originating in landlocked States directed toward the coasts or entering landlocked States from the sea, must traverse the territories of bordering countries. In other words, their geographical location means that the principal access of these States to the principal maritime ways is always indirect; they are obliged to rely on transit through the territory of other States.[650] Landlocked States have to rely on transit countries for access to the sea, ports and international markets. This singular challenge weighs heavily on whatever interests landlocked, developing States might have with regard to sea resources, and constitutes the reason why, by and large, coastal States and or regions tend to be more developed than inland ones.

(ii) Total Dependence upon Infrastructure Levels in Transit States:

Landlocked States are completely dependent on their transit neighbours' infrastructure to transport their goods to and from ports.[651] This infrastructure can be weak for many reasons, including lack of resources, mis-governance, incessant conflict and natural disasters. These weak infrastructures in turn can impose direct costs on trade passing through a transit country and thus limit the ability of landlocked States products to compete favourably in global markets. The relative impact of weak surrounding infrastructure is particularly sever on the least developed landlocked countries that mainly export primary commodities with low value to cost ratios rather than high value products or services. Weak transit infrastructure also limits the return to investment on

[650] *Ibid*.

[651] M. L. Faye *et al*, 'The Challenges Facing Landlocked Developing Countries' (March 2004) *5 Journal of Human Developmen*t, 43.

landlocked countries' internal infrastructure since market opportunities are constrained.[652]

Research has shown that the challenges faced by landlocked States as a result of poor transit infrastructure are most acute in Eastern Africa. Burundi, for example, which boasts of a relatively good internal road network, is severely constrained by the surrounding infrastructure of its transit neighbours. For instance, the most direct route to the sea from Burundi is through Tanzania to *Dar esSalaam*along what is known as Central Corridor, but infrastructure levels on this route are reportedly so poor that Burundi's primary transit route still follows the more distant to Mombasa, known as the Northern Corridor. When the latter was closed as a result of political reasons in the 1990s, an alternative transit route to Durban via *Mpulungu* on Lake Tanganyika was quickly investigated and used.[653] The very fact that this route was even considered covering a distance of nearly 4500km with several border crossings and modal changes highlights the severity of the transit challenges confronting Burundi, one of the World's poorest countries.[654]

Similar transit neighbour infrastructure challenges also exist in Western Africa landlocked Countries. For instance, the Central African Republic does not have a dependable all-weather route to the sea. Its corridor through Cameroon is often impassable during the rainy seasons, due to poor condition of Cameroonian roads. Its only other route/corridor through the Democratic Republic of Congo (DRC) travels on the *Oubangui* River which is impassable during the dry season owing to low water levels.

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[652]*Ibid*, p.44.
[653]*Ibid*.
[654]*Ibid*.

This corridor is also currently impassable due to the ongoing crisis in the Democratic Republic of Congo (DRC).

(iii) Fees and Direct Costs due to High Administrative Burden

High administrative burden due to transit across the borders of the transit countries constitutes another serious challenge facing landlocked countries with respect to gaining access to sea resources. These add significantly to the shipping costs. Understandably, to transit a country, there exist a host of direct transit and customs charges, some of which must be paid upfront and some *en route*. Apart from this, international transit requires burdensome paperwork and bureaucratic procedures that are costly to deal with and place a high administrative burden on shippers. Border crossings equally cause in addition to the direct fees and costs of high administration, passing through border points of foreign nations imposes long delays on transit traffic. It is a common knowledge that the time delays and the variability of time in transit are of a greater concern to traders than direct coasts, as they hinder the ability to meet delivery contracts without large inventory stocks.

(iv) Transit Transport Issues in Landlocked and Transit Developing States

As noted earlier, efficient transit transport is crucial for landlocked nations. However, due to their lack of territorial access to sea ports, these States have to rely heavily on the transport goods by land through one or more of their transit States neighbours.

Some of the major factors influencing the transit transport systems of landlocked developing States are as highlighted below.

a. Availability and Quality of Infrastructure

Several regional and sub-regional networks provide transport infrastructure linkages to and through the landlocked countries of Asia for example. These include the Asian Highway Railway and the Trans-Asian Railway (TAR).[655] Examples of sub-regional transport networks include the Association of Southern East Asia Nations (ASEAN) Highway; the Priority road network in North-East Asia; the Economic Cooperation Organization (ECO) transport network; and the International Road Network of the Commonwealth of Independent States (CIS).[656]Even though the basic infrastructure for transit transport exists, the 'missing links' in the networks continue to constrain route choice, while insufficient capacity on some corridors and the poor quality of the infrastructure add costs and time to the transit process. As a result of this, some landlocked States tend to rely heavily on one or a limited number of transit corridors, despite the choice of possible alternative competing routes.

In addition, there is lack of infrastructure facilities such as Inland Container Depots (ICDs), particularly at border crossings, to support logistics activities such as the consolidation and distribution of goods and speedy, secure transshipment between road and rail services. Overall foreign direct investment is less attracted to these countries as destinations, making the task of funding infrastructure development that much more difficult for them.[657]

b. Limited Choice of Routes

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[655]Economic and Social Commission for Asia and the Pacific: Landlocked Developing Countries Series, No. 1, p.4. <www.unescap.org/ttdw/publictions.TFS-pubs/.../pub-2270-fulltext.pdf> accessed on 19 January, 2014.

[656]*Ibid*.

[657]*Ibid*.

In many cases, transit transport can become more efficient by encouraging the development of alternative routes, not only within one transit country but also through different countries. When a transit transport route passes through the territory of another country, the

carriage of traffic along the route is possible only when the transit country grants to the other the right of transit through its territory, usually under specific conditions. Given that sovereign States have exclusive jurisdiction over transportation within their territories, the transit rights along with any limits on themare often created when sovereign States voluntarily enter into bilateral, multilateral or international agreements and or conventions. In most cases, landlocked States are bound by such agreements in their choice of transit routes.

However, landlocked States may be able to strengthen their bargaining position in the negotiation of transit agreements by demonstrating the value of the transit business provided to its neighbours, taking into account not only the direct costs involved but also income generated through additional multiplier effects. Transit States can also benefit from a clearer appreciation of the contribution the sale of transit services makes to their national income.

c. Transport Facilitation and Border Crossing Issues

For most regional[658] Member States to the UNCLOS, transit transport is most heavily constrained by delays and costs incurred at border crossings.[659] Time-consuming border crossing and customs procedures, complicated non-standard documentation, poor organization and a lack of skills in the transport sector are some of the major contributory

[658]African and Asian regions in particular.
[659]*Ibid*, p.5.

factors. Overlapping obligations brought about by several bilateral, trilateral and sub-regional agreements, and the lack of harmonized legal regime for transit transport, including arrangements for transit fees, further complicate the complexity of the transit transport process. Unfortunately, consistent information isolating the causes of these constraints and quantifying the cost and time they add to the transit process, as well as their impact on the economies of landlocked States is not available to policy makers. Another factor which leads to significant increase in the cost of transit transport for landlocked States is the return of empty containers to points of origin, a reflection of the present imbalance in trade of landlocked States and the lack of logistics facilities near borders.[660]

For transit transport issue to be effectively addressed, a pragmatic, comprehensive approach is required, which would involve relevant government ministries, agencies and the private sector; yet several landlocked States and their transit neighbours have not established facilitation boards or committees to address the point. As a result, the essential coordination and cooperation needed for effective action has been seriously constrained. Sometime, landlocked States have not demonstrated leadership to their transit neighbours in prioritizing and addressing transit transport issues domestically.[661]

d. The Transit Transport Agreements

As a first step toward establishing transit routes and in keeping with the provision of Article 125 of the Convention, landlocked States have traditionally developed bilateral transit agreements with neighbouring transit States to overcome their geographical constraints. Such bilateral transit agreements have been developed in the broader context

[660] *Ibid*.
[661] *Ibid*.

of historical, political, economic and cultural ties. Landlocked States need such agreements not only with their immediate neighbours, but also with all other transit States en-route to and from the sea.

Thus, in some cases where transit transport involves more than two States, separate bilateral agreements that may contain mutually incompatible provisions are likely to impede rather than facilitate transit transport. Transit transport therefore involves issues and problems that should ideally be dealt with through multilateral agreements. In the Economic and Social Commission for Asia and the Pacific (ESCAP) region for instance, a growing number of trilateral, quadrilateral and sub-regional agreements have emerged.[662] They include the ASEAN Framework Agreement on the Facilitation of Goods in Transit;[663] the GMS Agreements for Facilitation of Cross-border Transport of People and Goods; the

Transit Transport Framework Agreement of Economic Cooperation Organization (ECO); and the Transport Corridor Europe-Caucaus-Asia (TRACECA), being developed with the support of the European Community's TACIS Programme.[664] These are usually framework

agreements that lay out broad goals and policy directions but leave potentially contentious details to be worked out through separate protocols and annexes.

From the above discourse, we therefore advocate the need for cross-border cooperation among concerned States to facilitate transit rights of landlocked States. As compared with sea or air transportation, transport by land generally requires coordination

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[662]*Ibid*.

[663]The full text of this agreement can be found at <http://www.aseansec.org/8872.htm>accessed on 23 February 2014.

[664]Economic and Social Commission for Asia and the Pacific, *op cit*, p.6.

and harmonization of a wider range of potentially conflicting issues. Over land transit is usually subject to the national sovereignty of each transit State and can therefore exist only within the parameters and concessions that each State is prepared to make. Since transit transport involves the use of transport infrastructure and vehicles in moving goods and natural persons across national boundaries, issues relating to all these factors need to be addressed if efficient transit transport is to be made possible.

As far as infrastructure is concerned, key issues are the harmonization of technical and operational standards and requirements along international routes under various modes, as well as user charges for the infrastructure. For vehicles, the key issues include commercial operating rights, vehicle registration, vehicle technical standards traffic rules and signage, driving licenses, third party liability and temporary importation of vehicles for the purpose of carrying goods and people across national frontiers. The movement of goods requires facilitation of customs procedures and various kinds of inspection of goods, people and plants, as well as regimes for special categories of goods like perishable and dangerous goods. With regard to natural persons, key issues involve passport, visas, border permits, health inspections, personal effects and currency.

It has been observed that, while adjustment and development of transport infrastructure in a coordinated manner is critical to ensure technical compatibility of national transport systems, coordination in the management and control of traffic and user information is a key to optimizing infrastructure use. The absence of streamlined legal and administrative systems for international border crossing has its negative impacts. For instance, discriminatory road charges, restrictive traffic quotas, restrictions on the use of foreign trucks and the amount of time needed for police, customs and

security clearance of vehicles and drivers are some of the factors that directly influence transport operator's choice of route. The inability to deal with these and other essential factors adequately results in the loss of the potential income generated by transit States to alternative routes. But, where alternative routes are not available, the implication is that landlocked States will be forced to face such rigours.

7.1.2 Political Challenges

Political relationship between landlocked countries and their transit neighbour countries constitutes another challenge facing landlocked countries in relation to their access to, and exploitation of sea resources. The chance of landlocked countries' access to the sea depends strongly on their political relations with transit countries. If a landlocked country and its transit neighbour are in conflict, either militarily or diplomatic, the transit neighbour can easily block borders or at least adopt regulatory impediments to passage (transit). It has been contended that even when there is no direct conflict, landlocked countries are extremely vulnerable to the political vagaries of their transit neighbor countries.[665]

It is useful here to distinguish between two different types of political challenges as it illustrates the range of problems that face landlocked countries. The first is the problem of a lack of negotiating power that landlocked countries face when negotiating for rights of access with their transit neighbours. This lack of rights of access can be at their most extreme during military conflict with a transit neighour. The second political problem is civil conflict within the transit country.

[665] *Ibid*.

(i) Diplomatic Relationship between Landlocked Countries and their Transit Neighbours

Notwithstanding the existence of legal basis for rights of landlocked countries' transit as contained in the United Nations Convention on the law of the sea (1982) stating that:

> Landlocked States shall have the right of access to and from the sea for the purpose of exercising the rights provided for in this Convention including those relating to the freedom of the high seas and the common heritage of mankind. To this end, land-locked States shall enjoy freedom of transit through the territory of transit States by all means of transport.[666]

In practice, the rights of access must be specifically agreed upon with the transit neighbour[667] and is determined by the relationship between the countries.

The developing landlocked countries usually have little negotiating power over their transit neighbours when negotiating transit routes. While the landlocked country is usually dependent upon its transit neighbour, in most cases, the neighbour does not need

[666]United Nations Convention on the law of the sea (UNCLOS) 1982, Art. 125(1).

[667]*Ibid*, Art.125 (2) and (3). The article provide that: the term and modalities for exercising freedom of transit shall be agreed between the landlocked States and transit States concerned through bilateral, sub-regional or regional agreement; furthermore, "Transit States, in the exercise of their full sovereignty over their territory, shall have the right to take all measure necessary to ensure that the rights and facilities provided for in this Part for landlocked States shall in no way infringe their legitimate interest.

its landlocked country and may view a landlocked country's demand for transit as an infringement on its own sovereignty.[668]

What can be distilled from the foregoing is that, although right of access is given to the landlocked country, it is conditioned by the need for the transit country to grant such right. Whether a transit country can legally deny the right is a question to be discussed in another forum, but in practice such right is determined by the relationship between the landlocked country and its transit neighbour.

Ethiopia for instance has suffered immensely from conflict with its transit neighbour, Eritrea. War between the two countries restricted Ethiopia's access to the Eritrea Port of *Assab* where three-quarters of Ethiopian trade (75%) passed through duty-free until 1997.[669] Currently, there has been a major shift of Ethiopia's trading routes, away from *Assab* to the port of Djibouti which now handles the large majority of Ethiopian trade. The Djibouti corridor is however, hampered by a poorly functioning rail road and limited port facilities.[670]

It needs be stressed here that relations with neighbouring countries need not be in violent conflict to constitute a challenge to a landlocked country's economy as the transit country may capitalize on its advantage over landlocked country to influence landlocked country's political decisions. For instance, India, Nepal's sole transit neighbour, reportedly blocked the border between the two countries in 1990, an action cited as a major cause of the overthrow of the Nepalese *Panchayet* government. Moreover, between

[668]T. Snow *et al*, *op cit*.
[669]K.Uprety, *art cit*, p.45.
[670]*Ibid*.

2001 and 2002, India instituted significant trade restrictions on Nepal during the negotiation of a bilateral trade agreement which were alleged to have been instituted to extract concession in negotiations.[671] While alternative routes are being investigated through Kenya, Sudan and Somalia the routes are characterized by very low infrastructure levels, and in the case of Somalia, also internal civil conflict.[672]

These represent extreme cases of lack of political power due to *landlockedness*. Most landlocked countries may have alternative trade routes through other transit neighbours. However, there are still circumstances where trade can be locked or severely restricted by transit nations. Sanctions were easily placed upon Burundi by its transit neighbours in 1996.[673] Bolivia had had severe difficulties transiting through Chile due to poor political relations that have lasted over 100 years.[674]When political tensions result in military conflict between the landlocked States and their transit neighbour, the effect can be quite acute. For instance, Armenia is currently blocked by Turkey following the occupation of *Kelbadiar* (Azerbaijan) by ethnic Armenian forces. Meanwhile, the alternative routes through Georgia and Iran are restricted due to geographic obstacles such as mountains and relatively poor infrastructure.[675]

(ii) Vulnerability to Civil Conflict within Transit Nations

Even when a landlocked country has good relations with its transit neighbour and the core transit infrastructure is sound; it must still rely on peace and stability within the transit country. When transit country suffers from civil war, transit routes can be

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[671]*Ibid*.
[672]T. Snow *et al*, *op cit*, p.14.
[673]A. B. Dinar, 'Great Lakes' UN DHA IRIN Weekly Round-up 13, May 1996, p.21.
[674]T. Snow *et al*, *op cit*, p.13.
[675]N.Tavitan, *The Block of Armenia by Turkey: None of your Business*? (Geneva: Forum of Armenian Association of Europe, 2001)<www.unmillenium.project.org/document/JHD051P003TP.pdf> accessed on 19 January, 2014.

damaged or closed which may result in re-routing of major trade corridor or in the extreme case, a stoppage of transit.

Research has revealed that the landlocked countries of Western Africa have been particularly affected by transit neighbour's internal conflicts. This has made it difficult for these countries and others in the similar position to access the sea and its resources especially as part of the beneficiaries of the 'common heritage' concept.[676] For instance, while Mali has been recognized for its recent political stability and commitment to democracy, its economy has suffered incommensurately as a result of regional conflict and instability. Each of Mali's coastal neighbours has experienced some forms of violent civil conflict in the past decade, often making transport routes impassable. Togo, for example, was devastated by violent political protests and deep internal conflict in the early 1990s; Algeria was involved in a bloody civil war for much ofthe same decade; Ghana suffered

from ethnic violence between 1993 and 1994; Sierra Leone's decade-long civil war has just been quelled recently and come to a tenuous settlement; Guinea on its own has been bedeviled by series of coups and rebel wars; Liberia has spent greater part of the decade in violent civil wars which have threatened to spillover into neighbouring countries, thereby jeopardizing regional stability even further; finally and most importantly for Mali, Cote d' Ivoire has recently reeled into a devastating political crisis which continues to deepen and had had severe effects on Mali's most important corridor to the sea.[677]

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[676]In a whole, Africa has fifteen landlocked countries, and all face certain challenges. Botswana, Burkina Faso, Burundi, Chad, Central African Republic, Ethiopia, Lesotho, Malawi, Mali, Niger, Rwanda, Swaziland, Uganda, Zambia and Zimbabwe have no coastline and are without easy access to maritime trade. B R Hutchinson, 'Land-locked States and the Law of the Sea: Economic and Human Development Concerns' (2012). <http://works.be press .com/benjamin-hutchinson/1> accessed on 14 May, 2013.

[677]T. Snow *et al*, *op cit*, p.14; K.Uprety, *op cit*, p.45.

Also, landlocked countries of Southern Africa, most especially Malawi, have suffered significantly from the surrounding civil wars in Mozambique, Namibia and Angola. Coupled with poor infrastructure levels in Namibia and Tanzania, most of the Southern African Development Country's (SADC) trade has been forced to use longer North-South Corridors, largely relying upon the port of Durban in South Africa. The unavoidable rerouting costs Malawi heavily. While Malawi's traditional rail routes the ports of Beira and Nacal have been recently reopened, infrastructure damage from the war has thus far limited their use.[678]

7.2 Theory Based on the Freedom of Transit[679]

Since the evolution of international law relating to access to and from the Sea by landlocked States is based on a variety of concepts and practices, there exists a great disparity of doctrinal sources, and there has been much theoretical controversy over the nature and basis of international law as it applies to landlocked States. Simply put, however, the problem associated with free access to the sea rests at the juncture of two principles of law namely, sovereignty of a State and freedom or rather right of transit to the sea by landlocked States. Several interesting theories derived therefrom, all rooted in international law; provide the basis for laws relating to landlocked States. We deem it necessary in this work to make a succinct detour to the discussion of these doctrines.

The right of transit differs from the right of entry and sojourn in a given State. Worldwide commerce also requires the transit of goods through State. The eminent French Jurist P. Reuter once noted that the problem of transit specifically concerns communication (transit) by land mainly for countries that are geographically

[678]*Ibid*.
[679]K.Uprety, *op cit*, p.28.

disadvantaged by lack of all or certain types of access to the sea.[680] It has been emphasized that the problem of free access to the sea of countries deprived of coast was one of the aspects of important problems concerning freedom of transit which relate to the fundamental economic interests and compromise the juridical guarantees for the countries concerned.

Views and opinions are however divided about whether there is a general duty on the part of transit States to grant the right of transit through their national territory to neighbouring landlocked State which suffers from an unfavourable geographical position. Those who oppose this idea defend their position/theory with the argument that freedom of transit is subordinate to the fundamental principle of State sovereignty. Transit cannot therefore, according to this theory violate the sovereignty of the coastal State. According to the proponents of this theory, the exercise of the transit right is subject to approval by the coastal State, which has sole and unfettered authority to grant passage or act otherwise. Leading international lawyers like McNair and Hyde believe that the transit right of landlocked States is not a principle recognized by international law, but rather a right governed by agreements concluded between transit States and their landlocked States neighbours. This thesis which has been defended by a number of transit States argues that the transit rights lie on the consent of the transit State. During the 1950s International Conference, the Pakistan delegate declared that a transit State is not under obligation at all to grant to others the privilege of transit upon its territory.[681]

On the other hand however, there is another school of thought which suggests that the theory of the economic interdependence of States offers an important juridical basis

[680]I Seidl – Hohenvelden, 'International Economic Law' (1999) *3 Kluwer Law International*, 107.
[681]Declaration of the Delegate of Pakistan in Acts of the United Nations Conference on the Law of the Sea, (A/CONF 13/43, 1958).

for recognizing transit rights. The supporters of this view argue that placing transit rights arbitrarily within the sovereignty of transit States thereby allowing them to block passage of goods and persons is restricted by treaties in such a way that absolute denial of such rights seems obsolete. Over the past six decades, jurists have definitely tilted towards the view that States whose economic life and development depend on transit can legitimately claim it.[682] Such dependenceis most evident in the case of landlocked States.

According to Lauterpacht, certain States may legitimately claim "the right of transit" when there exists two fundamental conditions. First, the State claiming the right of

transit must be capable of providing the merits and necessity of the right. Second, the exercise of the right must not cause disturbance or prejudice to the transit State. He concludes that the Covenant of the League of Nations, the Barcelona Convention and similar instruments recognize the principle of free transit. They require transit States "to negotiate and conclude, on reasonable bases transit agreements".[683]

For Charles de Visscher, freedom of transit implies that a means of transport that is obliged to use foreign territory to traverse the distance separating its departure point from its destination should not encounter, within this obligatory crossing of an intermediary State, any obstacle, charge, or difficulty that would have been avoided if the travel were completed entirely within the same State.[684] This view is in tandem with the provisions of Article 127 (1) and (2) of the Convention which provide that:

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[682]K.Uprety, *op cit*, p.29.

[683]E.Lauterpacht 'Freedom of Transit in International Law' (1958 - 59) *44 Transactions of the Grotius Society*, 332.

[684]C. de Visscher, Droit International *de* Communications, II *Coursa l'Institute des Hautes Etudes internationals de Paris (1921 - 1923).*

1. Traffic in transit shall not be subject to any customs duties, taxes or other charges except charges levied for specific services rendered in connection with such transit.
2. Means of transport in transit and other facilities provided for and used by landlocked States shall not be subject to taxes or charge higher than those levied for the use of means of transport of transit State.

Despite these clear provisions, landlocked States, especially developing ones are still often at the mercy of the bureaucracy, customs procedures and the quality of the services and infrastructure of their neighbouring transit States. For instance, landlocked States incur transit charges paid to transit States for using their facilities and services. These include port charges, road tolls, forwarding fees, customs duties and transit quota restrictions. For example, on certain transport routes in Africa, there are an unjustifiable high number of road blocks and check points, causing undue delay and inflation of transport costs. These barriers are also a violation of existing International Conventions as well as bilateral and regional cooperation agreements promoting freedom of transit.

Freedom of transit through the territory of a transit neighbouring State may be considered a matter of convenience by a coastal State, but for the landlocked State, it is a question of survival. This is because without such freedom, it will be entirely cut off from the fortunes in the sea. Therefore, the landlocked State can legitimately demonstrate

necessity and oblige the transit State to conclude agreement.[685] It is therefore possible to argue from the foregoing that under certain conditions, the grant of transit right for landlocked States is an obligation of the State of passage, independent of all international agreements. Thus, it seems that the freedom of transit is not a right that any State can exercise in other transit States without their prior consent. To be eligible to claim this right, the claiming State must fulfill certain eligibility criteria which include *inter alia* merits and necessity. The criteria are considered fulfilled by landlocked States specifically due to their

geographical position and economic dependence, which combined to create a presumption in their favour with regard to right of transit.

In the *Right of Passage Case*[686] decided earlier before the emergence of the 1982 Convention, the International Court of Justice (ICJ) concluded that, with regard to private persons, civil officials, and goods in general, there existed a practice allowing free passage between the enclaves and the littoral. In that case, Portuguese government had asked the ICJ to declare:

> 1. that Portugal was the holder or beneficiary of a right of
> passage between its territory of Dama'o (Littoral Darna'o) and its enclaves of Dadra and Nagar-Aveli and between the latter, and

[685]This is the basis upon which Nepal had asked India to conclude a transit agreement after the Treaty of 1960 expired. See AdmritSarup, 'Transit Trade of Landlocked Nepal' (1972) *2 International and Camp.L.Q.*, 287.

[686]The Right of Passage over Indian Territory Case, *Portugal v India* (1957 - 1960) ICJ 266.

2. that this right comprised the faculty of transit for persons and goods, including armed forces, without restrictions or difficulties and in the manner and to the extent required by the effective exercise of Portuguese sovereignty in the territories.

The Portugal argued that India had prevented and continued to prevent the exercise of this right, thus committing an offense to the detriment of Portuguese sovereignty over the enclaves and violating India's international obligations. It therefore asked the Court to adjudge that India should put an immediate end to this situation by allowing Portugal to exercise the right of passage as claimed.[687]

The right of access to and from the sea derives from the principle of freedom of the seas and its resources. The legitimacy of the rights of landlocked States to free access to the sea has been emphasized by many international writers for whom the high seas and the Area are a property the use of which is common to all. The right to freely access the sea must belong to all members of the international community including those without a seacoast**.** A.H. Tabibi, a member of the International Law Commission (ILC) had emphasized a strict correlation between the right of innocent passage on land and by sea stating that, "recognizing the right of innocent passage in favour of landlocked States is the only means to render the principle of the freedom of the seas and the concept of common heritage effective for them". Extension of the right of innocent passage on the territory of coastal States as a logical consequence of the principles of freedom of the seas and the equality of States is therefore advocated here. This idea could be supported

[687]For facts and merits of the case, see S Rosenne, *The World Court: What It is and How It works* (The Hague: MartinusNijhoff Publishers, 1995) pp.114 – 135; K Uprety, *op cit*, p.34.

by the doctrinal authority of Grotius, who in his theory on the freedom of the high seas seemed to have envisaged extension of the right of innocent passage in connection with the relations between neighbouring properties based on the doctrine of necessity.

In the whole, the high seas and seabed, as a public international domain, must be accessible to all. It is therefore possible to conclude that the principle of free access and right of transit to and from the sea derives from the principle of freedom of the high seas and the concept of common heritage. If the rights of transit and freedom of access to and from the sea by landlocked States cannot be guaranteed by the International Law of the Sea, then freedom of access to the high seas and the principle of common heritage of the resources in the Area beyond national jurisdiction would be deprived of their universality. If right of access of landlocked States were not guaranteed for them, freedom of the high seas would simply be rendered meaningless.

It would therefore be useful to lay down the principle that any State that does not have any frontier contiguous to the sea may obtain, *stricto jure* as a landlocked State,access to the sea by establishing in its favour a "servitude[688] of passage" grafting its right onto the State whose territory constitutes an obstacle to access.

7.3 The United Nations Convention on the Law of the Sea and Landlocked Developing States

[688]International Servitude means a right based on an agreement between two or more States, by which the territory of one State is subjected to the permanent use of another State for a specified goal. See J. G. Starke, *Introduction to International Law* (7th edn, London: Butterworths, 1992) p.239; Oppenheim defined "Servitude" as "those exceptional restrictions made by treaty on the territorial supremacy of a State by which a part or the whole of its territory is in limited way made perpetually to serve a certain purpose or interest of another State". See R. Jennings and A Watts (eds) *Oppenheim's International Law* Vol. 1 (9th edn, Longmans, 1992) pp.670 – 671. A corollary to this in domestic law is the easement of access which is the "right of ingress and egress to and from the premises of a lot owner to a street appurtenant to the land of the lot owner."

Sequel to the above-noted constraints and challenges limiting landlocked State's access and full participation in sea activities, the international community has paid special attention to the situation of landlocked developing States and the vulnerability they entail. The international community has taken cognizance, and in part addressed some of the constraints these countries face through a number of international legal instruments and a plethora of political and normative instruments. For instance, the former Secretary-General to the United Nations, Mr. Kofi Annan, on international support to the landlocked developing Countries and Least Developed Countries once emphasized that:

> The development of the least developed countries is an ethical imperative for the international community. It
>
> requires painstaking effort, commitment, resolve and forbearance on both sides. I renew this pledge on behalf of the United Nations: We will continue to walk beside you on your Journey.[689]

The preamble of the United Nations Convention on the Law of the Sea equally recognizes the necessity to take into account the interests and needs of mankind as a whole and, in particular, the special interests and needs of developing countries, whether coastal or landlocked. In the course of the last century, through the constructive and concerted efforts of both landlocked and transit States, there has been considerable improvement in the situation of the landlocked States especially through the

[689]A. K.Chowdhury, *United Nations Secretary-General and High Representative for the Least Developed Countries, Landlocked Developing Countries and Small Island Developing States*,(Cotonu: Benin, 2006) p.4.

instrumentality of the United Nations Conventional on the Law of the Sea, 1982. The Convention, through its essential and relevant provisions makes attempt to mitigate the plights of landlocked developing States and as well protect and promote their interests in the sea and the resources therein.

On equal note, the Convention has a general and universal orientation; it regulates all parts and virtually all uses of the seas/oceans. It is a comprehensive and complex document that covers issues ranging from a State's rights over foreign ships in its territorial waters to who controls minerals at the bottom of the ocean. It deals with the landlocked States in brief terms. The rights of access to and from the sea are outlined in detail in Articles 124-132 of the Convention. Article 125 (i) provides *inter alia*that landlocked States shall have the right of access to and from the sea for the purpose of exercising the rights provided for in the Convention including those relating to the freedom of the high seas and the common heritage of mankind.

An important feature of the Convention is the common heritage concept which it projects. The concept reflects the belief that resources in certain areas of the sea beyond national jurisdiction or sovereignty should not be exploited only by those few States whose commercial enterprises or geographical proximity enable them to do so. Rather, in the thinking of the Convention, such resources constitute the common heritage or holding of mankind, to be used/exploited for the benefit of all States. Although application of the term and aspects of its substantive content to any particular area still requires elaboration by individual treaties, the Convention provides for exploitation of the resources of the seabed by both private enterprises as well as Member States. Since the mineral resources of the Area are considered a common heritage of mankind, those who exploit the

resources have to pay fees for their licenses and activities in the Area. The revenue is globally apportioned with particular emphasis on the needs of developing States and landlocked States (since the latter have no other way to benefit from marine resources). The benefits are to be shared equally among all States, whether coastal or landlocked.[690] To regulate this aspect, the Convention envisaged an International Seabed Authority (ISA) whose duty it will be to administer the mining of economic resources in the seabed of the high seas. Article 137 of the Convention specifically stipulates that no State shall claim or exercise sovereignty or sovereign rights over any part of the seabed or its resources, nor shall any State or natural or juridical person appropriate any part thereof. Article 131 provides that "ships flying the flag of landlocked States shall enjoy treatment equal to that accorded to other foreign ships in maritime ports." Article 130 provides that:

1. Transit States shall take all appropriate measures to avoid delays or other difficulties of a technical nature in traffic in transit
2. Should such delays or difficulties occur, the competent authorities of the transit States and landlocked States concerned shall cooperate towards their expeditious elimination.

Article 140 (1) of the Convention provides that:

> Activities in the Area shall… be carried out for the benefit of mankind as a whole, irrespective of the

[690]UNCLOS, Art. 136; S.Hohenvelden, 'International Economic Law' (1999) *3 Kluwer law international*, 107.

> geographical location of States, whether coastal or landlocked, and taking into particular consideration the interests and needs of developing States and of peoples who have not attained full independence or other self-governing status recognized by the United Nations in accordance with General Assembly Resolution 1514(xv) and other relevant General Assembly resolutions.

Article 144 mandates the International Seabed Authority to encourage the transfer of scientific knowledge and technology to the developing States to enable them participate fully in the exploitation activities in the seabed.

Article 69 of the Convention has also provided for the right of landlocked States although couched in a similar way as that of article 125. The article states that:

> 1. Landlocked States shall have the right to participate on an equitable basis, in the exploitation of an appropriate part of the surplus of the living resources of the Exclusive Economic Zones of coastal States of the same sub-region or region, taking into account the relevant economic and geographical circumstances of all the States concerned and in conformity with the provisions of this article and of articles 61 and 62

> 2. The terms and modalities for such participation shall be established by the States concerned through bilateral, sub- regional or regional agreements, taking into account…[691]

Pursuant to Article 148:

> The effective participation of developing States in activities in the Area shall be promoted as specifically provided for in this Part, having due regard to their special interests and needs, and in particular to the special needs of the landlocked and geographically
>
> disadvantaged among them to overcome obstacles arising from their disadvantaged location, including remoteness from the Area and difficulty of access to and from it.

The contents of the above articles have to a great extent helped to assert the right of landlocked States to access to and from the sea. However, the effectiveness of these provisions with regard to landlocked developing States' accessibility to the sea is a question which leaves much to be desired. Indeed, to characterize the resources in an area of the ocean floor designated to be beyond the limits of national jurisdiction as the common heritage of mankind and yet tactically deny landlocked and other geographically disadvantaged States a share in them by restricting their access thereto is to preach one

[691]UNCLOS, Art. 69(1) and (2).

thing and practice the very opposite. It has been argued on this basis that the rights offered by these provisions are highly theoretical as the majority of the landlocked States cannot yet effectively participate in this common heritage.[692] Moreover, the advent of the Outer Continental Shelf (OCS) regime with the potential extension of coastal State's continental shelves to 350 nautical miles from its coastline erodes the size of the Area thereby reducing the resources available to landlocked developing States.

It is worthy of note however here that, while the landlocked developed States are not exempted from most of these challenges facing landlocked developing countries as discussed above, they are in better position due to their economic viability and political influence to tackle and overcome most of the challenges on their own. Though, efforts have been made at international level to secure sea access for landlocked countries, notably through Part X (Articles 124-132) of the current United Nations Convention on the Law of the Sea, as shown from the above discourse, the reality of implementing such measures still presents some great difficulties.[693] It has been identified that the particular needs and problems of landlocked developing States have been a subject of discussion in various international fora for many years now.[694] However, in spite of several initiatives by these countries, both at the national and international level, and by the international community, including the provisions of the Convention, to overcome these particular problems, the challenge that these countries still face continue to be formidable.

For example, Article 125 of the Convention which provides for the right of access of landlocked countries seems not to have taken adequate care of the problem of access.

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[692]K.Uprety, *op cit*, p.92.

[693]Global Framework for Transit Transport Cooperation Between Landlocked and Transit Developing Countries and the Donor Community, United Nations, TD/B/42 (1) / 11-TD/B/LDC/AC. I/7<http://www.un.org/special rep/pdf> accessed on 1 May, 2013.

[694]*Ibid*.

Paragraph 2 of the article informs upon the principle laid down by paragraph 1 by asserting that, "the terms and modalities for exercising freedom of transit shall be agreed between the landlocked States and transit States concerned through bilateral, sub-regional or regional agreements". It has been recognized that these localized bilateral, sub-regional and regional agreements effectuated between landlocked States and transit coastal States, while given theoretical support by the Convention, are on a practical level still subject to the predispositions and capacities of the States entering into the contract.[695]

While transit agreement between various individual landlocked countries and their adjacent coastal State neighbours may be similar to one another, there is no minimum standard for such agreements, although they are both subject to 'mutual accord'.[696] Since it is true that the negotiating power of all States is dependent in part, upon the degree of economic power exercisable by an effective government, majority of the landlocked developing countries are at an even further disadvantage than that presented by mere geography. This reality presents serious predicament for many landlocked developing countries. With minimal or ineffective access to ports and maritime shipping routes, these countries may lack the economic capacity/muscle to negotiate agreements by which to make greater and effective access to the sea and its resources. Unlike the case in the right of innocent passage through the territorial waters of coastal States as provided for under Articles 17 of the Convention,[697] there is no

[695]K.Uprety, 'Right of Access to the Sea of Landlocked States: Retrospect and Prospect for Development' (1995) *1 J. NT'L LEGAL STUDY*, 21, 67.

[696]*Ibid*.

[697]Subject to this Convention, ships of all States, whether coastal or landlocked enjoy the right of innocent passage through the territorial sea. In this case, no prior agreements nor consent or authorization of

recognized international customary right of transit on land. The terms and modalities for exercising freedom of transit through the transit countries must therefore be specifically agreed upon by both countries concerned

either through bilateral, sub- regional or regional agreement, otherwise Article 125 remains dormant; while the provision of Article 125 used mandatory language in relation to access and transit rights, its effect was that landlocked States did not have self-executing right to access,a situation which has almost made nonsensical of Article 125 of the Convention to landlocked developing countries. The same weakness is also found in Articles 69and70 of the Convention. For instance, in its paragraph 2 Article 69 provides that the terms and

modalities for landlocked States' participation in the exploitation of surplus of the living resources of the exclusive economic zones of their coastal neighbours shall be established through bilateral, sub-regional or regional agreements.

Although landlocked developing countries (LLDCs) had a distinct voice during the drafting of the United Nations Convention on the Law of the Sea 1982,and made strides towards gaining an 'equitable' stake in sea resources,[698] there is still much to be done today to establish and strengthen the means by which they are able to gain access to the sea. For instance the United Nations has asserted that:

> Landlocked and transit States have taken a number of initiatives to coordinate transit transport operations as

coastal State is required to make the provision of this article exercisable. The right under this article is automatic provided the rights and interests of the coastal States are not infringed at the course of passage.

[698]For instance, the group of Landlocked and Geographically Disadvantaged States (LLGDs)comprising of both developed and developing Sates was one of the most active groups during the Third UN Conference on the Law of the Sea. Their objective at that time was to forestall a partition of oceanic resources through widespread extensions of coastal State jurisdiction and to ensure that their legitimate rights and interests-including access to the sea and its resources are reflected in the Convention.

> an integral part of formal bilateral and sub-regional transit agreements or *ad hoc*consultative agreements. The implementation of these coordination arrangements, however, remains generally weak because of the lack of effective monitoring and enforcement mechanisms.[699]

The problems faced by landlocked developing countries lead to underdevelopment, backwardness and in extreme cases, acute poverty. Despite international awareness of the problems that these countries face, they still suffer systematically from the unilateral decisions made by their transit neighbouring States, and are generally marginalized in the world economy. Study shows that, despite the relative success of landlocked countries in Europe, considerable problems still remain for the landlocked developing countries of Asia, South America and Africa.

The International Law of the Sea does not provide for the right of landlocked developing countries in such a way as to clarify and concretize those rights on a practical level.[700] For instance, while bilateral, sub-regional and regional arrangements may in a true sense consist of notable efforts to provide for the unique needs and interests of landlocked developing countries, there seems to be an insufficient international surveillance and enforcement system to guarantee that State to State or regional arrangements/agreements actually work in practice.

The reality of interdependence between States in today's world means that the disadvantages and constraints limiting landlocked developing countries access to sea

[699]B. R. Hutchinson, *op cit*.
[700]*Ibid*.

resources can generally be mitigated through the efforts of the international community as a whole even though certain responsibilities can be carried out in national and regional level towards achieving this goal.

7.4 Issues Associated with the Implementation of Article 76 of the United Nations Convention on the Law of the Sea by Developing Countries

It needs be stressed here that there exists a great deal of difference between landlocked developing State and developing State. This is because, while some developing States are landlocked, a good number of them are coastal States. Therefore, issues associated with the implementation of Article 76 of this Conventionas this work intends to highlight affect coastal developing States as against landlocked developing States.

Article 76 of the United Nations Convention on the Law of the Sea 1982provides on the continental shelf of coastal States. In its paragraph I it provides:

> 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 from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance.
>
> Information on the limits of the Continental Shelf beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured shall

> be submitted by the coastal State to the Commission on the Limits of the Continental Shelf set up under Annex II on the basis of equitable geographical representation. The Commission shall make recommendations to coastal States on matters related to the establishment of the outer limits of their continental shelf. The limits of the shelf established by a coastal State on the basis of the recommendation shall be final and binding.
>
> The coastal State shall deposit with the Secretary-General of the United Nations charts and relevant information, including geodetic data, permanently describing the outer limits of its continental shelf. The Secretary- General shall give due publicity thereto.[701]

The stringent requirements for scientific evidence to substantiate outer continental shelf (OCS) entitlement place developing States at a severe disadvantage. Most of these developing States lack means of expertise to collect, interpret and present the necessary data sets as required by the article unaided. States Parties to the Law of the Sea have recognized the continuing difficulties faced by the developing States especially the Small Island Developing States (SIDS) in complying with the outer continental shelf (OCS) submissions deadline. Relaxation of submission timing for developing States as some suggest, will be mere palliative and could mitigate but not resolve these difficulties. This could require a radical review and overhauling of the implementation processes of Article

[701]UNCLOS, Art. 76 (8) and (9).

76 of the United Nations Convention on the law of the sea (UNCLOS) and related articles.

The complexity of the issues to be investigated and costs involved in compiling a credible submission are just enormous. Implementation of Article 76 of the Convention requires collection, assembly, and analysis of a body of relevant hydrographic, geological and geophysical data in accordance with the provisions outlined in the Scientific and Technical Guidelines. The complexity, scale and the cost involved in such programme though varying from State to State according to the different individual geographical and geophysical circumstances require such enormous amount of resources which developing States can rarely afford.[702]

Despite the fact that Small Island Developing States (SIDSs) have large ocean areas rich in resources such as fisheries, oil and gas, minerals, renewable energy, many of these States are unable to benefit from the existence of these resources as a result of inadequate technical and management capacity.[703]

The above excerpts illustrate the difficulties facing developing States especially Small Island Developing States some of which have low lying coasts that have continental shelves extending beyond 200 nautical miles. Delineation of the outer limit of the continental shelf as required by the Article especially where this requires ship borne investigations to complement pre-existing archive data, can be prohibitively expensive. In a complex case, the subsequent data processing and the preparation, presentation and defence of a submission might even be comparable with that of data acquisition. Both

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[702]Statement to the 18th States Parties to the Law of the Sea Meeting by Kenyan Delegation, (13-20 June 2008) < http//:www.un.org/smallislands 2005/pdf/sids- strategy pdf> accessed on 16 May, 2013.

[703]L. Walker and S. Lucia, 'Small Island Developing States and the Mauritius Strategy' (2008) <http://www.globaloceans.org/globalconferences/2006/pdf/WSSD-MDGAssessment SIDS.pdf> accessed on 16 May, 2013.

these activities require a significant input from international experts. The adequate legal, scientific and technical capabilities and the national research facilities needed to undertake this delineation task is seriously lacking in the category of developing States.

In most cases, the delimitation of an Outer Continental Shelf is such a complex process that requires a range of abilities and resources that cannot be provided by individuals and singular institution. Typically, this is only met by the establishment of several working groups that specialize in different tasks according to discipline. Such groups may be constituted formally or informally and their composition would vary from State to State. However, for most part, they consist of teams that assume various and distinct responsibilities including legal and diplomatic oversight; bathymetric mapping and

interpretation; geo-scientific mapping and interpretation; documentation and data management; administrative and support functions; etc. Several correspondents have testified to the problems faced in assembling such capabilities.[704] Lack of capacity and technical know-how has contributed immensely to the inability of developing States to utilize marine resources found within their national jurisdiction and beyond national jurisdiction. For instance, Benin Republic which has been adjudged one of the Word's Least Developed Countries (LDC) is said to be tremendously handicapped by a lack of qualified personnel, of technical means and of the technology needed to collect the necessary data as required by Article 76. Given such limitations, there is high risk that developing States will not be able to participate fully in this process and may be sidelined, not being part of the benefits accruing to Outer Continental Shelf States.

[704]Statement to the 18th States Parties to the Law of the Sea Meeting by Kenyan Delegation, *art cit*.

For successful implementation and compliance with the provision of Article 76 of this Convention, certain primary skill sets must be called into play during the implementation of almost any Article 76 programme. Many of these skill sets are complementary and as a rule, some individuals can be identified who are capable of serving in more than one capacity. Other skills may be the province of specialists who alone can provide expertise in their specialized fields. From the perspective of human resources, a significant aspect of managing an outer continental shelf project is the orchestration of a variety of team members who can bring their respective skills and energies to bear on tasks as and when required. To complicate the matters, the mix of these skill sets and designated operatives will in all likelihood evolve through the life of the project as it advances through

its successive stages, and as staff turnover or altered circumstances require adjustments in team size and composition.

Some of these skill sets are acquired through formal education, while others may be developed through on-the-job experience that has accumulated during previous task assignments. Their provenance notwithstanding, the list of these skills implies the existence of a cadre of experts who are qualified, available, and prepared to devote themselves to a project that could be expected to last several years.

From infrastructure and institutional requirements, certain administrative and organizational arrangements are needed to be implemented for the orderly and efficient development of the Outer Continental Shelf Submission. These include but are not limited to:policy and planning decisions, funding arrangements, institutional

commitment, infrastructure development, qualified agencies and organizations, and advanced technical facilities.

Study has revealed that developing States in widely-separated parts of the world have similar national programmes on implementation of Article 76 of the Convention.Such programmes indicate a persistent pattern of administrative un-readiness, inadequate and indeterminate policies, conflicting national priorities, inadequate funding, insufficient manpower and scarce technical resources. Individuals also operating within the countries who are familiar with their national 'Article 76' programme paint an unsettling picture of conditions which are not conducive to the timely and effective implementation of Article 76.[705] It is therefore unrealistic as yet to expect the majority of developing States, especially

the Small Island Developing States to attain the full range of skill noted above, required for the implementation of Article 76 of the Convention. Nor are they likely to put in place in the foreseeable future the necessary dedicated infrastructure and institutional arrangements such implementation demands.

Way Forward

It has become apparent from the foregoing that developing countries generally lack technical, infrastructure, institutional and human resources required for successful implementation of Article 76 of the Convention. It is therefore recommended that relevant

[705]I. Russell, 'UNCLOS Article 76- Implementation by Smaller Developing States Entitlement, Evidence, Expertise and Expense' (2008).<icussell@seaconsult.fsnet.co.UK> accessed on16 May, 2013.

United Nations Agencies such as United Nations Environmental programme (UNEP) should render support to these countries especially in the areas of delimitation of the exclusive economic zones (EEZs) and implementation of Article 76 of the Convention. Also, the Commonwealth Secretariat, which has many Small Island Developing States, Least Developed States and other developing States in its membership should initiate and intensify assistance in UNCLOS matters and co-sponsor training courses in the implementation of Article 76 with the United Nations Division for Ocean Affairs and the Law of the Sea (DOALOS).

Technical assistance rendered by the Commission on the Limits of Continental Shelf (CLCS) experts should go beyond mere advice, but include financial support for the collection and use of bathymetric, geological, and geophysical observations. These factors are particularly problematic because under the present circumstances, most developing States possess only limited data sets and to all intents and purposes it is incapable of meeting the very cost of chartering a seismic vessel with associated technology.

Research has identified that many developing States, especially the small ones face chronic difficulties in addressing their maritime problems. There is need therefore, for capacity-building to offset the lack of financial, technical and human resources to deal with those problems. There is strong evidence that developing States are becoming increasingly aware of their need to solve their maritime problems and explore and exploit their marine resources maximally and efforts are being directed to this end. In so doing however, an integrated ocean use and management, especially in sub-regional and regional level, is advocated. This will help developing States not only to exploit marine

resources within their jurisdiction but also share equitably in the exploitation of resources beyond the limits of national jurisdiction.

7.5 Geographically Disadvantaged States and Resources in the Exclusive Economic Zone under the Convention

One of the unanticipated effects in the present legal regime of the sea involves the interaction between two innovative concepts under the Convention. These concepts include the exclusive economic zone (EEZ) jurisdiction and the legal status of geographically disadvantaged States. While applying either of these concepts alone will prove challenging, their interaction will further compound matters considerably. For example, while evaluating a State's claim that it is geographically disadvantaged is difficult, this difficulty is convoluted by the existence of the exclusive economic zone regime.

While arguments in favour of a share of marine resources for States with limited access to the sea have been canvassed for centuries,[706] the emergence of EEZ jurisdiction exacerbates the problem for a host of States which would otherwise have no legitimate basis for asserting geographically disadvantaged status and its attendant rights. In fact, the effect of exclusive economic zone jurisdiction can lead to startling results, for it is the presence of adjacent exclusive economic zone jurisdiction that can change apparently unrestricted Coastal States into geographically disadvantaged States.

[706]These arguments have been urged most often on behalf of landlocked States, but as the above discussion indicates, the theory behind the arguments applies equally to geographically disadvantaged States. For a wide-range examination of the assertions of landlocked States from the 15th century B.C. to the present, see S. P.Menefec, 'The Oar of Odyssius: Landlocked and Geographically Disadvantaged States in Historical Perspective' (1992) *1 California Western International Law Journal*, 23.

One of the major innovations under the Convention was the idea that the geographical conditions which can significantly prevent a State's access to the sea resources can create a special legal status. That such geographical conditions should give rise to special legal status/rights was purely the result of the weight of numbers at the Conference. At this juncture, the interest of the landlocked States in access to and participation in the sea resources were shared by States with very limited sea access namely the geographically disadvantaged States. The combination of these two groups, one easily defined, the other very vague and difficult to define, resulted in a very powerful voting block[707] during treaty negotiations. As negotiations developed, the power of the geographically disadvantaged and landlocked States coalesced as did a group of coastal States with interests contrary to those of geographically disadvantaged and landlocked group. At last however, the coastal States group numbered half of the Conference participants.

The sharpest point of contention between these two groups was over the exclusive economic zone jurisdiction concept. While many of the geographically disadvantaged States together with landlocked States quite understood the interests and position of the developing nations that belonged to the coastal State group, the geographically disadvantaged States and landlocked States group nonetheless saw the 200 nautical mile exclusive economic zone as an intolerable obstacle to their effective access to the sea resources. The major reason the concept of exclusive 200 nautical mile coastal zone caused such concern has been traced to the fact that about 90 percent of the living resources harvested from the sea are located within the coast.[708] As negotiations

[707]J. K.Sebenius, *Negotiating the Law of the Sea* (Cambridge: Harvard University Press, 1982) p.13.
[708]C. C. Joyner, 'Ocean Fisheries, US Interests, and the 1982 Law of the Sea Convention' (1995)

progressed, the geographically disadvantaged and landlocked States came to the consideration that access to the sea resources was their legal right. Those rights were eventually crystallized in the final treaty text, particularly in Articles 69and 70 of the Convention. In a general term, Part V of the Convention (Articles 55 to 75)provides that the Exclusive Economic Zone is an area of ocean space beyond a coastal State's territorial sea the breadth of which is limited to 200 nautical miles from the State's baseline and within which the coastal State has exclusive rights to all resources of any economic value.

While the concept of the exclusive economic zone sounds simple, agreement on it was not. For, although more than 100 States supported the principle of a 200 nautical miles, exclusive economic zone, those States that possess short coastline (geographically disadvantaged States) were opposed to the idea. Before an agreement could be reached, the nagging question of what benefits would have to be given to geographically disadvantaged

and landlocked States had to be settled. The solution to this situation however came in form of Articles 69 and 70 of the Convention which give these States a right of access to: "the surplus of the living resources of the exclusive economic zones of the coastal States of the same sub-region or region …."[709] The above provision notwithstanding, what is not without some difficulty is often, how to determine which States are really geographically disadvantaged so as to claim the aforementioned rights.

7*Georgetown International Environmental Law Review*,749,751<https://www.dur.ac.uk/ibru/publications/download/?id=106> accessed on 19 January, 2014.

[709]Articles 69 (1) and 70 (1) are identical in their wording.

While special rights are afforded to those States that are either landlocked or geographically disadvantaged, the Convention does not provide an easy means of determining such States especially in the case of geographically disadvantaged States. This task is further complicated by the emergence and/or existence of exclusive economic zones which can create geographically disadvantaged States where none would exist if no exclusive economic zone were created. This complication resulted due to the fact that both exclusive economic zone jurisdiction and special legal rights for geographically disadvantaged States were novel concepts which were developed without sufficient consideration as to how they might really affect one another. That failure of proper foresight gave rise to unanticipated developments which are apparent upon a detailed examination of several provisions of the Convention especially in an attempt to define and classify the types of States recognized under the Convention.

7.5.1 Reconciling the Concepts of Geographically Disadvantaged States and the Exclusive Economic Zone (EEZ)

Article 70 Paragraph 2 of the Conventionhas defined "geographically disadvantaged States" as:

> … Coastal States, including States bordering enclosed or semi-enclosed seas, whose geographical situations make them dependent upon the exploitation of the living resources of the exclusive economic zones of other States in the sub-region or region for adequate supplies of fish for the nutritional purposes of their

> populations or parts thereof, and coastal States which can claim no exclusive economic zones of their own.

By the terms of the above definition, geographically disadvantaged States are divided into States having no exclusive economic zone and States whose 'geographical situation' makes them dependent on other State's exclusive economic zone.

The first category of geographically disadvantaged States (i.e. those with no exclusive economic zone) can only apply in two exceptional circumstances namely:

1. an otherwise landlocked State which possesses an oceanic 'rock' which, as defined by Article 121 of the Convention,does not generate an exclusive economic zone but does generate a territorial sea and therefore must have a 'coast',[710] and
2. a State, which due to boundary lines drawn as a result of the presence of other States, does not possess an exclusive economic zone.

Research has revealed that seven States currently exhibit both 1and 2 characteristics. They

are Bahrain, Cameroon, Iraq, Jordan, Kuwait, Singapore and Zaire.[711] Among these States, Bahrain is the only island nation that does not possess exclusive economic zone whatsoever due to the presence of neighbouring exclusive economic zone jurisdictions.[712]

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[710]The possession of a mid-ocean rock, as defined by Article 121, by an otherwise landlocked State would render such State a coastal State without EEZ. Article 121 (3) of the Convention states that "Rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf."

[711]J. E. Bailey, 'The Unanticipated Effects of Boundaries: The Exclusive Economic Zone and Geographically Disadvantaged States under UNCLOS III' p. 89 <www.books google.com.ng/books?isbn=3463109466> accessed on 8 December, 2014.

[712]*Ibid*.

The definition of the second category of geographically disadvantaged States, which are those whose geography makes them dependent on other States' exclusive economic zones, is far more complex to construe.

Another limiting aspect of the definition of geographically disadvantaged State is worthy of note. First, to be counted in this category, aState will not need be completely zone-locked or EEZ-deprived. It will suffice only if such State suffers as a result of propinquity of neighbouring States exclusive economic zones;[713] second, such State must be dependent on

living rather than energy resources in the neighbouring States' exclusive economic zones; third, the living resources in question are limited to fish; fourth, dependence on those fish stocks must be nutritional rather than economic; fifth, such dependence only extends to exclusive economic zones in that particular region or sub-region; finally, that nutritional dependence must arise solely out of the State's 'geographical situation'.[714] Any State which claims geographically disadvantaged status and desires to be entitled to the legal rights with regard to the living resources of the exclusive economic zones must first of all meet the above descriptions.

In the main, geographically disadvantaged States are States the size of whose exclusive economic zones makes them dependent on the living resources of other State's exclusive economic zones. Thus, the dominant factor in characterizing a State as geographically disadvantaged State is the size of its exclusive economic zone, not necessarily its geography per se. The explanation agrees with the provision of Article 70

[713]J. E. Bailey, *op cit.*
[714]*Ibid*.

(2) of the Convention which specifically classifies coastal States lacking an exclusive economic zone as geographically disadvantaged States.

Distinguishing the two concepts of geographically disadvantaged States and landlocked States is very important in this analysis. Though, often uttered in the same breath as though they are essentially identical, the concepts of geographically disadvantaged States and landlocked States are clearly different.[715] The concepts are however two aspects of one problem. They both are concerned with the right to exploit, and allocation of resources found in the exclusive economic zones. Proper construction of Article 70 (2) of the Convention **s**hows that, geographically disadvantaged States are granted their status solely as a result of the size of their exclusive economic zone, not of the size of, or presence or absence of a coastline. This explains why Cameroon, which has virtually no exclusive economic zone due to the presence of *Bioko* Island(an offshore possession of Equatorial Guinea) but which possesses a coastline of almost 200 miles, can nevertheless legitimately claim geographically disadvantaged status.[716] Landlocked States, on the other hand, are granted their special status solely on the basis that they lack a coast rather than an exclusive economic zone.[717]

7.5.2 Can an Island be 'Geographically Disadvantaged'?

[715]*Ibid.*
[716]*Ibid.*
[717]IF lack of an EEZ were the determining factor common to both types of States, there would be no need distinguishing between geographically disadvantaged States and landlocked States; both types of States would have been referred to as geographically disadvantaged States, or EEZ disadvantaged States.

The notion, or concept of geographically disadvantaged States centers on the realization that if landlocked States are accorded special consideration because of their lack of access

to the sea, then there is no logical reason why States whose access to the sea are severely restricted should not also receive special consideration. The argument is that, if such consideration is not granted to these geographically disadvantaged States, then having severely restricted access to the sea ends up being worse than having no access at all.[718] Thus, the idea of an island nation being a geographically disadvantaged State would seem absurd prima facie. The question being, how can a nation surrounded by the sea be considered disadvantaged in terms of its access to the sea. The answer to the question however becomes obvious when one moves from the consideration of merely geographical situation/geography to a consideration of the effect of extended zones of marine jurisdiction.

Article 70 of the Conventionspecifically includes as geographically disadvantaged those States bordering enclosed or semi-enclosed seas. The phenomenon of enclosure or semi-enclosure includes not only areas of the ocean space restricted by land, but also areas of ocean space that are restricted by exclusive economic zones.[719] The provision of Article 122 lends credence to the above conclusion. It provides that:

> … 'enclosed or semi-enclosed sea' means a gulf, basin or sea surrounded by two or more States and connected to another sea or the ocean by a narrow outlet or consisting entirely or primarily of the territorial seas

[718]J. E. Bailey, *op cit*, p.90.
[719]*Ibid*.

and exclusive economic zones of two or more coastal States.

The above definition emphasizes on the restrictions created by sea zones, thus supporting the idea that an island nation may legitimately claim geographically disadvantaged status if its access to the open ocean is restricted by the presence of neighbouring exclusive economic zones.

For example, one would hardly think of Cuba as a geographically disadvantaged State since its access to the sea is apparently unrestricted. However, when one considers the effect of exclusive economic zones generated by the presence of neighbouring States, Cuba is virtually zone-locked, possessing a very constricted exclusive economic zone. Cuba's potential exclusive economic zone is therefore restricted by the presence of the Unite States to the north; the Bahamas to the northeast; Haiti and Navassa Island (a US possession) to the southwest; and Mexico to the west.[720] With this situation, only a narrow slice of the Gulf of Mexico to the northwest allows for full extension/stretch of Cuba's exclusive economic zone up to 200 nautical miles.

This situation is not unique to Cuba alone. At least twenty island nations in the Caribbean[721] and South Pacific[722] are in similar circumstances. The island nations of Cyprus and Malta can, based on the above discussion validly claim geographically

[720] *Ibid.*

[721] Antigua and Barbuda, Barbados, Cuba, Dominica, The Dominican Republic, Grenada, Haiti, Jamaica, Saint Kitts and Nevis, Saint Lucia, St. Vincent and Trinidad and Tobago all appear to have a reasonable basis to claim geographically disadvantaged status due to the limiting effects of neighbouring States' EEZs.

[722] Fiji, The Republic of Palau, the Solomon Islands, Tongo,Tuvalu, Vanuatu and Western Samoa all appear to also have legitimate claims to geographically disadvantaged status including Kiribati and Nauru.

disadvantaged status by virtue of their location in the Mediterranean, a semi-enclosed sea. The effect of

the neighbouring exclusive economic zone jurisdictions in these circumstances (limiting access to the sea resources) tends to defeat the very reason behind the creation of exclusive economic zone jurisdiction assuring and maximizing coastal State access to the sea resources. These situations therefore provide a powerful factual basis for applying the concept of geographically disadvantaged States to island nations.[723] It will be right to say then that island nations whose access to sea resources is limited by adjoining States' jurisdictions possess the classic characteristics of geographically disadvantaged States.

There are two common failings identifiable with issues concerning island nations. First, they cannot benefit from any permitted seaward extension of jurisdiction such as the exclusive economic zone, and second, the seaward extension of neighbouring States' jurisdiction restricts their ability to enjoy the resources of the sea that would ordinarily be available to them. These States are unable, under the Convention, to extend their limits to any significant extent that may be permitted namely 200 nautical miles zone. Secondly, extension of national jurisdiction by neighbouring States to the new allowable limit of 200nautical miles could transform adjacent high seas areas into areas of national jurisdiction. This not only could operate to curtail the fishing rights of these island nations under the freedom of fishing on the high seas, but where such national zones affect the sea-bed resources, they would equally diminish the extent of seabed resources which would be available to them under the concept of common heritage of mankind.

Since the factual circumstances of certain island nations fit precisely the circumstances anticipated by Article 70 of the Convention, and since the Convention

[723]J. E. Bailey, *op cit.*

does not bar the application of Article 70 to island nations, the logical and irresistible conclusion

is that island nations can indeed be geographically disadvantaged. However, the problem of determining when a nation is truly geographically disadvantaged remained to be solved.[724]

Since there is no known standard size for an exclusive economic zone, it seems difficult if not impossible to determine when a State's geographical situation results in an exclusive economic zone that is significantly impaired so as to enable that State claim geographically disadvantaged status under Article 70 of the Convention. However, a closer examination of the definition of geographically disadvantaged State in the above article, paragraph 2 – coastal States with no exclusive economic zone whatsoever – implies that a geographically disadvantaged State is one whose exclusive economic zone is radically impaired by the presence of other States' zones of marine jurisdiction. Where this situation holds sway, the State concerned can validly claim geographically disadvantaged status and be entitled to the accompanying rights provided under Article 70 (1) of the Convention.

Essential to any claim of geographically disadvantaged status is a showing of the limiting effects of neighbouring political boundaries particularly exclusive economic zones.[725] Also, essential to any viable resolution of such claim is an objective means of determining the threshold question of whether a State's jurisdiction is sufficiently impaired by the presence of adjacent States' areas of jurisdiction. Achieving both

[724]*Ibid.*

[725]Article 70 of the Convention's reference to "geographical situation" must be viewed as referring to restrictions on a State's boundaries and maritime zones.

objectively and predictability is possible by considering the percentage of incursion by the adjacent exclusive economic zone jurisdictions. Thus, the evaluation of all claims to geographically disadvantaged status would rest on a comparison of a State's potential exclusive economic zone size to its actual exclusive economic zone size.[726] The analysis begins by determining

the size of a nation's exclusive economic zones when all the adjoining exclusive economic zones are ignored. Next, the potential exclusive economic zone is compared with the actual exclusive economic zone to determine how much of that nation's potential exclusive economic zone is actually impaired or limited by the presence of other nation's jurisdiction. To achieve uniformity and certainty in States' claims regarding geographically disadvantaged status, the application of a formula such as the following:

> any State whose potential exclusive economic zone (i.e. the area that State could claim if there were no adjacent impinging exclusive economic zone) is reduced more than 50 percent by the presence of other States' jurisdictions should be considered a potentially [727] geographically disadvantaged States[728]

would be apposite. This does not however mean that a State's exclusive economic zone must be virtually eliminated to make that State eligible to claim geographically

[726]J. E. Bailey, *op cit.*

[727]States with these characteristics would be potential geographically disadvantaged States since Article 70 only grants that status to States that either totally lack EEZ or whose EEZ were severely constricted thereby making them dependent on the living resources of neighbouring States' EEZs. Thus, a State that establishes that its EEZ is sufficiently restricted must also demonstrate that by that it is now dependent on nearby EEZs.

[728]The formula was suggested in J. E. Bailey, *op cit*, p.92.

disadvantaged status. Those States whose exclusive economic zones are severely impaired imply that the restriction of their exclusive economic zone must be closer to total elimination then a mere minimal incursion.

It has been observed that one of the remarkable achievements of the present legal regime of the sea (UNCLOS III) is the peaceful creation and establishment of new political

boundaries in the sea. This was done in order to avoid future conflicts over the ownership and rights of exploitation of sea resources. Yet, one of the obvious failings of the Conference is the lack of foresight regarding what the interaction between the boundaries created by a novel mode of jurisdiction, the exclusive economic zone, and a novel legal status for coastal States, geographically disadvantaged, should look like.

It sounds incredible that, while the legal content of both concepts were developed and woven together even in the same Part of the Convention, their interaction was completely ignored. Indeed, the approach to the exclusive economic zone concept was one of either intentional ambiguity [729] or unforgivable ignorance. [730] One inevitable encounter is the difficulties of applying the new boundaries of the exclusive economic zone even in a peaceful process dominated by the consensus procedure under UNCLOS

[729] SatyaNandan of Fiji, who participated in the negotiations at UNCLOS III has been quoted as saying that several of such ambiguities in the EEZ portions of the treaty were intentional. If this statement is true, then the result of such maneuvering merely shifted determination of those ambiguities from the ongoing negotiations to a time after the treaty had entered into force. See J E Bailey, *op cit*, p.94, footnote 26.

[730] A Nigerian Ambassador to UNCLOS III, A M Bage during his tenure (1985-1989) as Nigerian representative to the United Nations Law of the Sea Conference in Kingston, Jamaica has also been quoted as saying that, while the nations negotiated a 200NM EEZ, no one had any idea of how an EEZ would either enrich or deprive various nations because no one took the effort to discern the effects of these new boundaries by drawing those potential boundaries on a map. See *ibid*, Footnote 47.

III. The establishment of political boundaries still remains the most difficult of international activities.[731]

7.6 Enhancing Landlocked and Developing Countries' Participation in Exploitation of Economic Resources of the Sea

What can be distilled from the above discourse is that efficient transit transport is very crucial for landlocked nations. Due generally to their lack of territorial access to seaports

and prohibitive cost of air freight, landlocked countries have to rely heavily on the transport of goods by land through one or more neighbour countries. Owing to their geographical and other related attributes, Landlocked Developing Countries (LLDCs) are confronted with a range of special constraints that inhibit their full participation in the activities in the sea especially in the 'Area', and the global process. The additional costs incurred together with problems of distance make imports expensive and render exports less competitive thereby putting landlocked countries at a very serious disadvantage in the issue of interest in the sea and global economy in general. Some of the major factors which influence the transit transport systems of landlocked countries have already been highlighted. Each of the landlocked countries is disadvantaged by its lack of territorial access to and distance from the sea.

It was against this backdrop that the two enabling provisions as enshrined in Part XI of the Convention were made. Firstly, Article 148 of the Conventionpromoted the effective participation of developing States in seabed mining activities in the 'Area' having regard in particular to the special needs of those landlocked among them to

[731]J. E. Bailey, *op cit*, p. 93.

overcome obstacles arising from their disadvantaged location including remoteness from the 'Area' and difficulty of access to and from it; secondly, Article 60 (2) (k**)** considered problems of a general nature arising for developing States that were due to their geographical location, particularly for landlocked States. In this regard however, there had been no discussion on the implementation of such two provisions in the meetings of the International Seabed Authority (ISA) Assembly.

However, *landlockness* and its attendant constraints should not be viewed as a destiny for those States it adversely affects, rather as a challenge which can be overcome through concerted efforts both on national, regional and international level. To rid these constraints and enhance landlocked developing countries' participation in activities in the sea, especially in the area beyond national jurisdiction, the options highlighted hereunder might be helpful.

i. Beginning at the international level, the landlocked States should be made eligible for election to the ISA Council under the following three 'groups': Group C for major net exporters of minerals, such as Uganda and Zambia; Group D for countries with special interests, which included landlocked and developing States; and Group E with a view to ensure equitable geographic representation.[732]

ii. International Seabed Authority (ISA) should, in keeping with their mandate to adopt rules that will ensure equitable sharing of financial and other economic benefits from seabed mining, offer training programme opportunities in

[732]'UNCLOS and Landlocked Developing Countries: Practical Implication'Power point presentations by experts (United Nations Headquarters, New York, June 2012) <http://www.unohrlls.org/en/orphan/968/> accessed on 24 May, 2013.

particular for nationals of developing countries to boost their capabilities in participating in the activities in the Area.

iii. While landlocked countries need the cooperation of their neighbouring countries in developing countries, in area of developing efficient transit transport and access to the sea, they equally need to demonstrate their commitment to improve the transit process through the formulation and implementation of a clear and consistent national policy. It is very important that landlocked

countries coordinate among themselves, ensure representation at any international meetings and articulate their common interests and positions with one voice. Landlocked countries, especially developing ones among them should develop and implement nationally integrated transit transport policy and promote regionally coordinated initiatives to improve transit transport systems in the region where they are.

iv. Since violent conflicts either within transit nations or between transit nations and the landlocked nations have been identified as one of the major challenges limiting landlocked developing countries' access to the sea, and in view of the fact that many African countries have at one time or the other experienced violent conflicts, it behooves landlocked developing countries of Africa and other regions in similar situations to promote national and regional peace at all times. Armed conflicts do not only create internal disorder as people tend to assume, they often also spill over into other countries in the region and

thereby blocking chances of access to the sea by landlocked States.To eschew violent conflicts and ensure peaceful co-existence, certain measures have to be adopted by the governments of the regions where landlocked developing States situate. The measures include but not limited to the following:

(a) **Creating a culture of Democracy, Good Governance, Good Policy and Tolerance**[733]

This would involve the creation of organs of civil society with particular mandate to carry out mass education for both the government and the masses in the concept and practice of democracy, good governance and tolerance; the establishment of forums and mediums which would allow governments to interact with the various sectors of the populace, particularly in the design and implementation of public policies.[734] No doubt, armed conflicts and wars constitute serious thorns in the flesh of developing States especially the African community. These have adverse effects on both political and socio-economic well-being of the States in these regions. It subsequently renders nugatory the effect of Article 125 of the Convention as it naturally makes the right of transit provided for in the Convention inaccessible by the States concerned. Peace and peaceful co-existence among the States in these regions are indispensible therefore; if landlocked States would effectively access the sea. Democracy has to be the centerpiece of a sustainable peace, hence governments of the concerned States and regions are advised here to create, entrench and adhere to the culture of democracy and good governance in their public policies to achieve this lofty purpose.

[733]F. O. Agama, 'A Critical Analysis of Pacific Settlement of International Disputes in Africa', An LLM Thesis presented to the Faculty of Law UNIZIK on 24th June, 2010, p.259.
[734]*Ibid*.

Also, the relevant provisions of the United Nations Charter and several decisions and advisory opinions of the International Court of Justice (ICJ) and even the International Tribunal for the Law of the Sea (ITLOS) have revealed that the present international legal system as a whole is on the crusade for a peaceful international society. But, this cannot be achieved without the efforts of the governments towards consolidating democratic rules in their respective regions. One central truth here is that, without effective democratic governments, efforts to achieving peace and peaceful relationships among nations are ultimately doomed to

failure. This will subsequently, at the long run, affect the peace of the State and limit landlocked States' chances of access to the sea by transit through the war-torn transit State neighbours.

Having determined that problems of governance constitute a major cause of conflict which ultimately culminate in constraining landlocked States' right of access to and from the sea in the developing countries, delegates from concerned States at the United Nations General Assembly must be able to work out and agree on the best fundamental principles that should govern intra-state and inter-state relations.[735] For example, certain standards of behavior and principles should be recognized and held sacred, like those governing devolution of powers or power-sharing; the status of the opposition in any government; the issue of what actually constitutes good governance; the role of military in governance; civil/military relations; the need for effective separation of powers amongthe three arms of government; the need to have an independent judiciary for impartial

[735]*Ibid*.

dispensation of justice; de-emphasis on ethnic and tribal differences and equitable sharing of national resources especially in African region where these are adjudged root causes of conflicts.

(b) **Development of National and Regional Security Doctrines**[736]

Development of national and regionalsecurity doctrines will help to promote predictability and transparency in inter-state relations, and will ultimately rid suspicions amongst the leaders of States in the region. For example, it was alleged that there was strong suspicion that Chad was connected to the armed activities in the Southern Sudan (Dafur)a few years back.[737] Development and encouragement of such doctrines will minimize, if not eliminate such suspicions and thereby reduce chances of conflicts within and between landlocked States and their transit State neighbours.

(c) Teaching of Non-military Values in Schools: Teaching of non-military values in schools and colleges will minimize the propensities and tendencies to violence and readiness to resort to war which currently characterize most developing States. This approach will inculcate the virtue of tolerance and forgiveness in the citizenry.

(d) Construction of a Constructive Conflict-Resolution: where violent conflicts had already erupted, proper techniques and strategies for alternative conflict management and resolution method need to be adopted. Settlement techniques such as arbitration and mediation could be made more attractive to the people.

[736]*Ibid*, p.272.
[737]*Ibid*.

Arbitration has been a means of settling conflicts between individuals as well as groups and States especially in primitive African traditional setting. When arbitration or arbitral proceedings are well conducted and the people are taught to value this means of settling disputes, it can help in many ways in peaceful resolution of disputes. Mediation and good offices is also another trusted method of ensuring peace and peaceful co-existence amongst States.

(e) Promotion of Norms of Good Governance

This can be done by utilizing what we call Peer Pressure Mechanism (PPM) to challenge and influence leaders and governments of States in the concerned region to take their cue from other governments that are performing well.

On the whole, we strongly believe that if the problems of armed conflicts and violence are solved by means of the above approaches, the challenges faced by landlocked developing States while attempting to gain access to and from the sea in realization of the provisions of Article 125 of the Convention will be almost half way solved. This is because it is in the atmosphere of peace and tranquility that other factors limiting landlocked developing States' rights of transit can be effectively tackled. Also, friendly relations among States will create atmosphere of mutual love and trust which will culminate in selfless and sacrificial negotiation where each party does not insist on their points. Peaceful co-existence between and among the lanlocked countries and their transit neighbours within the region is therefore crucial for their unhindered access through the neighbouring transit countries to the sea.

v. It is also advocated here that for landlocked countries to participate equitably in the activities in the sea, especially in the 'Area' and share equitably as joint heirs of the common heritage concept with respect to the wealth of the sea as provided by the Convention, the provision of Article 125 (2) & (3**)** should be revisited. The Article should be reviewed and couched in a way to make it self-executory. As things are presently, the Article has given unfettered powers to transit States which are at liberty to determine what their legitimate interests should mean. Whether therefore the Article shall be operative or not depends largely at the whims and caprices of the transit States. To couch the Article as advocated in this work will help the landlocked developing countries to pursue, promote and protect their interests in the sea as co-owners of the economic resources of the sea.

vi. As the international community through the International Seabed Authority Council offers opportunities for training to developing countries as advocated in this work, it is necessary to stress that developing countries on their own should demonstrate commitment in capacity-building and human development especially in the areas of science and technology to quality for marine mining operations. Developing States which possess sea coasts should equally join in this capacity-building and human development to ensure maximal utilization of sea resources in their coasts especially the Outer/Extended Continental Shelf States. This will create avenue for successful national programmes on the implementation of Article 76 of the Convention. This will consequently entitle them to the right to exploit the resources deposited in their outer continental shelf.

vii. To enhance transit infrastructure and subsequently landlocked countries' access to the sea, there is a need to develop transport and information & Communication Technology (ICT) infrastructure and, in particular, completion of the 'missing links' in transport network. This would improve transit transport and could also enable landlocked countries to provide transit transport services to neighbouring countries. An integrated approach is therefore needed to balance competing priorities in the development of road, rail and other infrastructure. While alternative transit routes are important, volume and economies of scale contribute to the reduction of unit costs. The availability of a choice of routes will allow the trade and transport industries to select the most effective route on a commercial basis.

Governments of landlocked developing countries should also encourage private sectors by creating conducive environment for them to provide and manage infrastructure facilities along transit corridors.

It is hoped that the contents of this recommendation will contribute to a better understanding of transit transport issues and thereby assist both landlocked and transit developing States in formulating effective policies to enhance their transit transport systems and processes to facilitate landlocked countries' access to the sea. This in turn will pave way and grant these countries the needed opportunity to partake effectively in the exploration and exploitation of sea resources.

CHAPTER EIGHT

SETTLEMENT OF SEA DISPUTES

In a world where so many people live side by side, and where their interests often collide, disputes are inescapable in its true sense. Disputes are therefore an inevitable part of international relations and it is hardly deniable that, among international disputes, territorial and territorial-related disputes are the most complicated ones. Undoubtedly, these disputes have constituted the primary source of the growing tension in relations among States which is likely to escalate into armed conflicts or eventful wars when they are not settled amicably and peacefully.[738] The sanctity of territorial and maritime issues to the peoples of the world generally has made sea disputes extremely difficult to resolve. Furthermore, many of these disputes as is the case in the South China Sea are further convoluted by historical, cultural, political, military and economic phenomena. Nevertheless, States are enjoyed under international law, to settle their international disputes by peaceful means and in conformity with the principles of justice and international law so that international peace, security and justice will not be breached or endangered.[739]

The United Nations Convention on the law of the sea, commonly referred to as the constitution for the oceans, was considered as one of the most successful of the codifications and progressive developments of international law made by the United Nations since the end of the World War II. The Convention has set out an international

[738]T. Forsberg, 'Explaining Territorial Disputes: From Power Politics to Normative Reason' (1996) 33, *6 Journal of Peace Research*, 443.
[739]The Charter of the United Nations, San Francisco (1945) Arts.1 and 2.

legal order within which all activitiesin the seas must be carried out.[740] As a comprehensive legal framework for the law of the sea, the Convention has elucidated the rights and obligations of all States.

The settlement of disputes mechanism contained in Part XVof the Convention, which is characterized by the compulsory procedures entailing binding decisions, has made the Convention unique among major law-making treaties and one of an extremely small number of global treaties that prescribe mandatory jurisdiction for disputes arising from interpretation and application of its terms.[741] For instance, Article 279 of the Convention expresses the fundamental obligation to settle disputes peacefully in accordance with Article 2 (3) of the United Nations Charter and using the means as indicated in Article 33 of the Charter. The parties are however allowed to choose methods other than those specifically stated/specified in the Convention.[742]For instance, States of the European Union have reportedly agreed to submit fisheries disputes among Member States to the European Court of Justice under the European Economic Community (EEC) Treaty.[743]Article 283 of the Conventionprovides that:

> 1. When a dispute arises between States Parties concerning the interpretation or application of this Convention, the Parties to the dispute shall proceed expeditiously to an exchange of views regarding its settlement by negotiation or other peaceful means.

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[740]D. M. Nguyen, *Settlement of Disputes under the 1982 United Nations Convention on the Law of the Sea;Tthe Case of the South China Sea Dispute* (New York: UN-Nippon Foundation, 2003) p.3.
[741]*Ibid*.
[742]United Nations Convention on the Law of the Sea (UNCLOS) 1982, Art. 280.
[743]M. N. Shaw, *International Law* (5th edn, Cambridge: Cambridge University Press, 2004) p.568.

> 2. The Parties shall also proceed expeditiously to an exchange of views where a procedure for the settlement of such a dispute has been terminated without a settlement or where a settlement has been reached and the circumstances required consultation regarding the manner of implementing the settlement.

Article 284 provides to the effect that the Parties may resort, if they wish, to conciliation procedures, in which case a Conciliation Commission will be established, whose report will be non-binding.[744] When no settlement is reached by means freely chosen by the Parties, the compulsory procedure laid down in Part XV, section 2 in the Convention becomes operative.[745] Upon signing, ratifying or acceding to the Convention or at anytime thereafter, a State may choose one of these following means of dispute settlement: the International Tribunal for the Law of the Sea (ITLOS) under Annex VI, the International Court of Justice (ICJ), an Arbitration Tribunal under Annex VII, or a special arbitral tribunal under Annex VIII for specific disputes.[746]

It has been recognized as a notable achievement by the Convention, the provision as a general rule for the compulsory judicial settlement or arbitration of disputes that may arise under the Convention, at the behest of just one of the parties to the dispute. There are

[744]UNCLOS, Annex V, S.1.
[745]*Ibid*, Arts.286 and 287.
[746]i.e. relating to fisheries, protection and preservation of the marine environment, marine scientific research, or navigation, including pollution from vessels and by dumping. See *ibid.* Art. 1, Annex VIII.

however, some exceptions to the obligation to submit a dispute to one of these dispute settlement mechanisms in the absence of a freely chosen settlement procedure by the parties. Article 297for instance provides that dispute concerning the exercise by a coastal State of its sovereignty or sovereign rights or jurisdiction in the exclusive economic zone may only be subject to the compulsory settlement procedure in particular cases.[747] The Convention provides that while disputes concerning marine scientific research shall be settled in accordance with section 2 of the Convention, the coastal State is not obliged to accept the submission to such compulsory settlement of any dispute arising out of the exercise by the coastal State of a right or discretion to regulate, authorize and conduct marine scientific research on its continental shelf or in its exclusive economic zone or a decision to order suspension or cessation of such research.[748] Similarly, while generally disputes with regard to fisheries shall be settled in accordance with section 2, the coastal State shall not be obliged to accept submission to the compulsory settlement of any dispute in relation to its sovereign rights with respect to the living resources in the exclusive economic zone or their exercise, including its discretionary powers for determining the allowable catch, its harvesting capacity, the allocation of surpluses and conditions establishedinits conservation and management laws and regulations.[749] There

[747]For example, when there is an allegation that a coastal State has acted in contravention of the provision of the Convention in regard to the freedom and rights of navigation, over flight or the laying of sub marine cables and pipelines, or in regards to other internationally lawful uses of the sea specified in article 58; or when it is alleged that a State in exercising these freedoms, rights or uses has acted in contravention of the Convention or of laws or regulations adopted by the coastal State in conformity with the Convention and other rules of international law not incompatible with the Convention; or when it is alleged that a coastal State has acted in contravention of specified international rules and standards for the protection and preservation of the marine environment which are applicable to the coastal State and which have been established by the Convention or through a competent international organization or diplomatic conference in accordance with the Convention.

[748]UNCLOS, Art. 297(2).

[749]*Ibid,* Art. 297 (3). In such a case, the dispute in certain cases will be submitted to the compulsory conciliation provisions under Annex V, Section 2. See further on this, Art.29 7(3) (b).

exist about three known situations with regard to which States may opt out of the compulsory settlement procedures.[750]

The Convention also provides for a Sea-bed Dispute Chamber of the International Tribunal for the Law of the Sea (ITLOS).[751]The Sea-bed Disputes Chamber is established as an expert body of the International Tribunal for the Law of the Sea, which has a vital role in settling disputes concerning activities in the deep seabed mining being an area beyond the limits of national jurisdiction. The judges who serve in the Chamber are drawn from among those of the Tribunal who shall represent the principal legal system of the world and assure the equitable geographical distribution. To ensure equitable geographical representation, the Tribunal adopted the proposal of the first election of the members as follows:

i. three judges are nationals of the African Group;

ii. three judges are nationals of Asian Group;

iii. three judges are nationals of Latin American and Caribbean Group;

iv. two judges are nationals of Western European and other States Group; and

v. one judge is a national of State Member of Eastern European Group.[752]

[750]Disputes concerning delimitation and claims to historic waters, disputes concerning military and law enforcement activities, and disputes in respect of which the Security Council is exercising its functions. Art.298 (1).

[751] The Chamber is established under Annex VI, Section 4 of the Convention.

[752]M.Ravin, *Maritime Boundaries and Dispute Settlement Mechanisms* (Germany: 2005) p.73. <http://www.un.org/depts/los/nippon/unnf-programm-home/fellows-pages/fellows-papers/mom>accessed on 17 June, 2013.

Pursuant to Article 188 of the Convention, all inter-state disputes concerning the exploitation of the international seabed are to be submitted only to the Seabed Disputes Chamber.

Since the Convention on the Law of the Sea came into effect, it has made prominent contributions to the strengthening of peace, security, cooperation and friendly relations among all nations in conformity with the fundamental principles of justice and equal rights. The Convention has equally played an important role in promoting economic and social advancement of all peoples of the world, in accordance with the prime purpose and principles of the United Nations as embodied in the Charter of the United Nations, as well as for the sustainable development of seas.[753] Such contributions made by the Convention have always been recognized and highly appreciated by the States and international community.[754]

8.1 Meaning of Sea Dispute

The meaning and definition of dispute are just the same whether it is a maritime or land dispute. Although meaning of dispute does not constitute our major concern in this work, it is all the same important to elucidate the term 'dispute' since a clear understanding of the term will help in appreciating our discussions on settlement of disputes under the UNCLOS.

The obligation of peaceful settlement of disputes as embodied in the Charter of the United Nations applies to 'dispute', not to all disagreements between States. The mechanisms dealing with the peaceful settlement of disputes require in the first place the

[753]D. M. Nguyen, *op cit*.
[754]United Nations Resolution A/Res/59/24 <http://www.un.org/Docs/journal/asp/ws.asp?=A/RES/59/24> accessed on 19 January 2014.

existence of a dispute.[755] It has been argued that a mere divergence of views or a sense of injury does not necessarily mean that a dispute exists.[756]

In actual practice, the existence of a dispute may be in doubt and may in itself be disputed. At times, the existence of a dispute is denied in order to contest the jurisdiction of an international court or tribunal, in cases of international disputes since the existence of dispute should be proved to confer jurisdiction on an international court or tribunal, it became necessary that meaning of dispute be given.

The definition of dispute has been the subject of consideration by the international court, but the reference by the Permanent Court of International Justice (PCIJ) in the *MavrommatisPalestine Concession (Jurisdiction) Case*[757]to "a disagreement over a point of law or fact, a conflict of legal views or interests between two persons" constitutes an authoritative indication of a dispute. The definition of a dispute may appear superfluous at first sight. Everyone may think he knows the meaning of a dispute and one may presume he will recognize a dispute when he sees it,[758] but in actual practice, this is not so.

The existing definitions have done little to clarify the questions that arise in this context. Apart from the definition offered by the Permanent Court in the above Case of *MavrommatisPalestine*, 'dispute' as a term has been severally defined as "a conflict or controversy, especially one that has given rise to a particular lawsuit".[759] Dispute has also

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[755]The UN Charter, Art. 33(1); The International Centre for Settlement of Investment Dispute (ICSID) (1966), Art.25(1) both stipulate the existence of a legal dispute should be a requirement for the exercise of jurisdiction.

[756]L.Henkin*et al*, *International Law: Cases and Materials* (2nd edn, Minnesota: West Publishing Co., 1987) p.568.

[757]*Greece v Britain* (1924) PCIJ, Series A, No. 2, p.11.

[758]F. O. Agama 'A Critical Analysis of Pacific Settlement of International Disputes in Africa', an LLM Thesis Presented to the Law Faculty, UNIZIK on 24th June, 2010, pp.4 – 5.

[759]B. A. Garner (ed), *The Black's Law Dictionary* (7th edn, St. Paul Minn. West Publishing Co. 1999) p.485.

been defined as "a conflict or controversy: a conflict of claims or rights; an assertion of a right, claim or demand on one side, met by contrary claims or allegations on the other side".[760] Dispute has also been defined as the subject of litigation; the matter for which a suit is brought and upon which issue is joined, and in relation to which jurors are called and witnesses examined.[761] Elsewhere in the *case of Attorney-General, Abia State v. Attorney-General, Federation,*[762] it was defined as "acts of argument, controversy, debate, claims as to rights, whether in law or fact, varying opinions, whether passive or violent or any disagreement that can lead to public anxiety or disquiet". What can be distilled from the foregoing is that a dispute would involve a degree of specificity and contestation. According to International Case Law and Commentary, the term 'dispute' is a technical term. As a result therefore, in a plethora of cases, the failure of an applicant to show the existence of a dispute has been a ground for rejecting cases brought to the International Court and its predecessor, the Permanent Court.[763]

It is pertinent to note here however, that lack of appearance or response by a party to the demands or claims of the other does not *ipso factor*[764] affect the existence of a dispute between them. This was the decision of the International Court of Justice (ICJ) in the *Headquarters Agreement Case*, where the Court referred to the *TehranHostages Case.*[765] The Court considered it and concluded that there was no obstacle to the

[760]H. C. Black, *Black'sLaw Dictionary* (5th edn, St. Paul Minn. West Publishing Co., 1997) p.424.
[761]F. O. Agama, *op cit*, p.6.
[762](2007) 6 NWLR pt.1029, 1128.
[763]Examples are found in the followings: *Electricity Company of Sofia*, (1939) PCIJ Series A/B, No 77, 64, 83; *Northern Cameroon Case*, (1963) ICJ, 33–34; *Nuclear Tests Cases* (*Australia and New Zealand v France*) (1974), ICJ 260, 270-271.
[764]Latin word meaning, 'by that fact'.
[765]United States Diplomatic and Consular Staff in Tehran Judgment. *United States v Iran* (1980) ICJ Reports p.24.

existence of a dispute and hence to its jurisdiction in the lack of response to the claims of the United States on the part of Iran. The Court stated that:

> Iran, which did not appear in the proceedings before the Court, had acted in such a way as, in the view of the United States, to commit breaches of the conventions, but, so far as the Court was informed, Iran had at no time claimed to justify its actions by advancing an alternative interpretation of the conventions, on the basis of which such actions would not constitute such a breach. The Court saw no need to enquire into the attitude of Iran in order to establish the existence of a 'dispute'; in order to determine whether it had jurisdiction ….[766]

Investment Tribunals have similarly noted that lack of response by a party to the demand or claim of other does not necessarily affect the existence of a dispute between them.[767]

What can be deduced from the foregoing is that, ordinarily, a dispute will be characterized by a certain amount of communication demonstrating opposing demands and denials. This view was apparently captured by the PCIJ in the *MavrommatisCase*[768]when it referred to a dispute as "a conflict of legal views or of

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[766]Applicability of the obligation to Arbitrate under section 21 of the United Nations Headquarters Agreement of June 1947, Advisory Opinion, ICJ Reports 1988, p.28, Para. 38 <www.refworld.org/dociid/3ae6b6722c.html> accessed on 23 February 2014.

[767]*Tradeze v Albania*, Decision on Jurisdiction (24th December 1996), 5 ICSID Reports, 60, 61; *APPL v Sri Lanka*, Award (27th June 1990), 4 ICSID Reports, 251.

[768]*Supra*.

interests between two persons". It is pertinent to mention here that a mere acknowledgement of the other side's position

unaccompanied by a remedy or even a simple failure to respond as discussed above, will not exclude the existence of dispute. The decisive criterion for the existence of dispute therefore is not an explicit denial of the other party's position but a failure to accede to its demands.

There is an authority that a disagreement is not a dispute if its resolution would not have any practical effect on the relations of the parties thereto. In the *Northern Cameroon Case,*[769] the International Court was faced with a disagreement on the interpretation of a United Nations Trusteeship Agreement, that was no longer in force. Neither did the applicant in the case make any claim for reparation. In declining to adjudicate the claim, the Court made the following statement:

> The Court's judgment must have some practical consequences in the sense that it can affect existing legal rights or obligations thus removing uncertainty from their legal obligations. No judgment on the merit in this case would satisfy these essentials of the judicial function.

Also, in the *Nuclear Tests Case,*[770] brought by Australia and New Zealand against France, the majority of the Court considered that French government statements that the tests have ceased meant that a dispute between the parties no longer existed. On the

[769]*Supra*.
[770]*Supra*.

contrary however, four dissenting judges noted in the case that the claims and legal grounds advanced by the applicants were rejected by the French government on the legal grounds. They therefore argued that, "these circumstances in themselves suffice to quality the present dispute as a dispute in regard to which the parties are in conflict as to their legal rights and as a 'legal dispute' …."

Sea dispute and its settlement procedures which is the core focus of our present discussion in this chapter falls under the class of dispute referred to as 'international dispute'. International dispute refers to a specific disagreement, between two or more States, that reaches a point of sufficient definition and clarity where the use of certain established means of dispute settlement under international law, such as negotiation, mediation, conciliation, arbitration and adjudication might be utilized in resolving the dispute. It is a dispute between two or more States, the continuance of which may endanger the maintenance of international peace and security.

Maritime boundary disputes which are regarded as a main source of disputes in the Law of the Sea are, by their nature, broadly considered as those disputes relating to the delimitations of the sea areas over which the coastal States can exercise jurisdiction with regard to exploitation of the resources therein and in conformity with international law in

general and the law of the sea in particular. Following the extension of the exclusive economic zone to 200 nautical miles and the broadening of the continental shelf, it is estimated that more than one-third of world oceans which was traditionally considered as the high seas would fall within coastal States jurisdiction. As the national jurisdiction of coastal States over maritime area/space expanded relatively in parallel with the evolution

of the law of the sea, in line with the words of Hudgson, "every coastal State in the world will eventually have to negotiate, at least one maritime boundary with at least one neighbour",[771]and disputes about delimitation are the price coastal States will have to pay for the extension of their jurisdiction over the seas.[772]

Such disputes may arise as a result of delimitation of maritime boundaries; dispute concerning the exercise of rights and duties of coastal States and other international actors in maritime zones of national jurisdiction and disputes relating to activities in the 'Area'.

Delimitation of sea areas would necessarily have an international aspect, since it cannot be dependent merely upon the will of coastal States as expressed in its domestic laws. The establishment of limits at sea no doubt is a unilateral act as only the coastal State is competent to undertake it, however, the validity of such limits depends squarely upon other States' recognition and international law. Thus, delimitation of maritime boundaries takes on two related meanings: in the first instance, delimitation as it pertains to the establishment and definition of maritime zones to which States are ordinarily entitled under the provisions of the law of the sea convention; secondly, as it pertains to the delimitation of marine space between neighbours in areas where claims overlap.[773]

One way to avoid hostilities and armed conflict in the high seas is to encourage States with competing and conflicting maritime claims to have their disputes settled using any of the dispute settlement procedures provided for by the present legal regime of the sea. However, encouraging States with maritime disputes to settle their disputes through

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[771]R. D.Hudgson and R W Smith, 'Boundary Issues Created by Extended National Maritime Jurisdiction' (1979) 69, *Geographical Review*, 423.

[772]R.Logoni, 'Interim Measures Pending Maritime Delimitation Agreements' (1994) 78, *2 AJIL*, 863.

[773]*Ibid*, p.19.This constitutes one of the major causes of the sea disputes currently in South China Sea region.

these procedures is only one part of preserving peace on the high seas. Beyond that, it must be ensured that 'might does not make right' and that the proper claims of small States who lack extensive military might to protect their offshore domains are not undermined or usurped by those who wield stronger conventional capabilities. To build and strengthen the required trust between nations in this regard, the respect for accepted norms cannot be selective. Everyone needs to know everyone else will adhere to the same principles and rules.

8.2 State Practice Concerning Settlement of Sea Disputes and Maritime Boundary Delimitation

Traditionally, the maritime zones over which States may exercise sovereignty have been grouped into three successive categories: internal waters, territorial sea, and the contiguous zone. This reflected the struggle between conflicting trends of thought in the law of the sea that emerged in the seventeenth century: freedom of the sea and the dominion of the sea. The former trend was represented by Hugo Grotius, a Dutch author who defended the freedom of the sea, while the latter was propagated and supported by a British author, John Seldon, who argued for the right of States to extend their jurisdictions over the sea.[774] The Law of the Sea, therefore, has always been in the middle, attempting to balance these conflicting forces. However, since the seventeenth century, the freedom of the high seas doctrine had prevailed in the Law of the Sea.[775] Consequently, the national jurisdiction of coastal States was limited to a narrow belt of the sea along a State's coastline: the territorial sea, prior to the development of other juridical zones of the sea as canvassed in this work.

[774] *Ibid*.

[775] L. B.Sohn and J. E. Noyes, *Cases and Materials on the Law of the Sea* (Washington: Transnational Publishers, 2003) pp.2–3.

It is obvious from the discussions on the identified sea disputes,[776] especially as touching South China Sea dispute and East China Sea dispute between China and Japan, that the stakes are high, the issues in concentration are very much entangled, and the positions of the parties are widely apart and hopelessly entrenched. The question therefore is, under such circumstances, what are the chances of a peaceful settlement of the dispute? Well, as most of these States are Member States to the United Nations, they are required to settle their disputes by peaceful means under Article 2(3**)** of the United Nations Charter. On the same note, Article 279 of the United Nations Convention on the Law of the Sea enjoins all States Parties to the Convention to settle their dispute concerning the interpretation or application of the provisions of the Convention by peaceful means. The same article makes a reference to the means of peaceful settlement suggested in Article 33(1**)** of the United Nations Charter, which include negotiation, inquiry, meditation, conciliation, arbitration, judicial settlement, etc. Furthermore, under Article 280 of the Convention, the parties may settle their disputes by "any peaceful means" they may choose.

Considered as the most important development in the settlement of international disputes since the adoption of the United Nations Charter and the Statute of the International Court of Justice,[777] the settlement of dispute mechanism provided under the Convention is aimed at contributing to the maintenance and strengthening of international peace and security. It does this through the reaffirmation of the obligation of the States Parties to settle their disputes arising from the Convention by peaceful means in conformity with international law and justice.

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[776]Especially see 5.2 of this work.

[777]A. E. Boyle, 'Dispute Settlement and the Law of the Sea Convention: Problems of Fragmentation and Jurisdiction' (1997) 46, *1 The International and Comparative Law Quarterly*, 37.

Therefore, in settling sea disputes, the Convention grants freedom to the States Parties concerned to settle their dispute through negotiation or other diplomatic means they considered most appropriate or suitable to them. Parties may, in case there is no settlement between them, lodge request to the Court or Tribunal having jurisdiction over their dispute for assistance in settling the issues. According to Article 287 of the Convention, one State has the right to choose one or more of the following means for settling their disputes concerning the interpretation and application of the Convention:

i. The International Tribunal for the Law of the Sea (ITLOS)
ii. The International Court of Justice (ICJ)
iii. An Arbitration Tribunal Constituted in accordance with Annex VII
iv. A Special Arbitration Tribunal constituted in accordance with Annex VIII.

State practice regarding the settlement and delimitation of maritime boundaries could be grouped into four categories:

A. The Provision of International Laws

The Convention is the international legal document that all States, whether coastal or landlocked, use as a yardstick and fundamental basis in creating national laws and regulations which govern their maritime zones.[778]It contains a set of international rules and regulations over the use of the sea, the provision concerning the disputes settlement, including the establishment of the International Tribunal for the Law of the Sea.[779] It

[778]M.Ravin, *op cit*, p.48.
[779]UNCLOS, Arts. 279 – 299.

equally contains other substantive rules for various sea zones and some articles on the right of access to and from the sea by the landlocked States.

After the establishment of the Convention on the Law of the Sea, coastal States gave their serious concentration on the maritime boundary. They claimed their maritime boundary and adopted their national laws and regulations in compliance with the international laws. In some cases, however, the claims of these States overlap, especially among the States whose coastlines are opposite or adjacent to each other and the sea is narrow, and therefore not wide enough to accommodate each State's claim. This is always the case with gulf, bay, or strait bordering two or more States. In the case of Gulf of Thailand, for example, the widest distance from mainland to mainland is about 300 nautical miles[780] and every State claims their continental shelf and exclusive economic zone of 200 nautical miles from their baselines. So, what can be done to settle these overlapping areas?

i. Regarding the delimitation of the territorial sea, Article 15 of the Convention states that where the coast of two States are opposite or adjacent to each other, neither of the two States is entitled, failing agreement between them to the contrary, to extend its territorial sea beyond the median line every point of which is equidistance from

the nearest point on the baselines from which the breadth of the territorial sea of each of the two States is measured. It further states that the provision of this paragraph shall not apply, where it is necessary by reason of historic title or other

[780]M. Ravin, *op cit.*

special circumstances to delimit the territorial sea of the two States in any way which is in variance with the provision.

ii. Regarding the delimitation of the continental shelf, Article 83 of the Conventionprovides *inter alia* that the delimitation of the continental shelf between States with

opposite or adjacent coasts shall be effected by agreement on the basis of international law as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution. If no agreement can be reached within a reasonable period of time, the States concerned shall resort to the procedures provided for in Part XV.

In line with these international law provisions, many coastal States have issued their national legislations, concluded the agreements establishing their maritime boundaries and settled maritime disputes through International Courts or Tribunal and arbitrations. Based on the relevant provisions of the Convention, there are some relevant factors which the parties concerned, courts or arbitrations could put into consideration in the delimitation of maritime boundary between the opposite or adjacent coasts.

i. **Median line and equitable principles:**

The boundary in lakes, straits, gulfs, bays and territorial sea between States with opposite coasts had generally, but not always, followed the median line. In the case of States with adjacent coasts, the boundary line had been varied and had followed a perpendicular line from the terminal point of the land boundary at sea, or a perpendicular to the general

direction of the coastline, or a latitude or a longitude, or an equidistance line modified to remove the distorting effect of small islands or coastal projections.[781]

Underthe present legal regime of the sea,[782] the median line and equidistance method is a general rule although it could be modified in exceptional cases due to the presence of special circumstances. Median line has been defined as "the line every point of which is equidistance from the nearest point or points on opposite shore"[783] The *North Sea Continental Shelf*[784] Judgments initiated the equitable principles to maritime delimitation. This doctrine has thereafter been restated and further crystallized in all subsequent decisions and also in bilateral treaty practice of the respective parties to the disputes concerned. In the *North Sea Continental Shelf Case*,the ICJ wrote "… the notion of equidistance as being logically necessary in the sense of being an inescapable *apriori*accompaniment of basic continental shelf doctrine is correct".[785] Also, in the *United Kingdom and France Continental Shelf Arbitration*, the Court noted with clarity that, "… the appropriateness of the equidistance method … is a function or reflection of the geographical and other relevant circumstances of each particular case".[786]

ii. **Special Circumstances:**

As provided in Article 15 of the Convention, the median line shall apply unless there exists a reason of historic title or special circumstances. Based on this clause, the questions could arise as to what the special circumstances are. The following factors of

[781]M.Ravin, *op cit*, p.60.
[782]UNCLOS, Art.15. This is equivalent to the provision of Art. 6 of the Geneva Convention, 1958.
[783]*Ibid*.
[784]*Federal Republic of Germany v Netherlands, Federal Republic of Germany v Denmark* (1969) ICJ Reports 3.
[785]M.Ravin, *op cit*, p. 64.
[786]*Ibid*.

special circumstances might be considered in the delimitation of an equitable maritime boundary:

a. Geographical consideration[787]

b. Geological consideration[788]

c. Geomorphologic consideration[789]

d. Historic Consideration

e. Environmental ecological consideration

f. Socio-economic consideration[790]

g. Conduct of State and estoppels[791]

h. Prevention of potential dispute[792]

i.Simplification of boundary lines.

The attitudes of the international courts and arbitrations relating to the delimitation of overlapping areas over the continental shelf or exclusive economic zone have been that the decision of equitable solutions always considered the relevant or special circumstances of the shelf. For instance, the dispute on jurisdiction over continental shelf between Guinea and Guinea – Bissau,[793] was decided on the basis of equity with regard to all circumstances, the significant of the shelf for the parties in dispute, and the configuration of the continental shelf. In the *Land and Maritime Boundary dispute*

[787]*North Sea Case, Germany v. Denmark* (1969) ICJ Rep. 1; Gulf of Maine Case between *Canada and the United States*(1984) ICJ Rep.
[788]*Tunisia v. Libya* (1982) ICJ Rep. 6. The Court refused to apply this consideration even though the parties invoked it in their submissions.
[789]*Supra.*
[790]*Guinea v. Guinea-Bissau* (1985) 25 ILM 2..
[791]*Tunisia v. Libya, supra.*
[792]*Supra.*
[793]*Guinea v Guinea – Bissau* (1985) 77 ILR, 635.

between Cameroon and Nigeria,[794] the ICJ was asked, *inter alia* to delimit a "single maritime boundary" beyond the limits of the

territorial sea that would divide both the continental shelves and exclusive economic zones of the two States. Cameroon and Nigeria are adjacent States, with a land border extending to the sea in the south on the Gulf of Guinea. Both States are Parties to the Convention and as such the relevant provisions of the Convention are applicable, and in particular Articles 74 and 83 thereof which concern delimitation of the continental shelf and exclusive economic zone between States with opposite or adjacent coasts. After a full consideration

of the case, the International Court of Justice found that the equidistance line represents an equitable result for the delimitation of the area in respect of which it has jurisdiction to give a ruling.[795]

In another case between Turkey and Greeceover the continental shelf in the Aegean Sea, where there is large number of islands, mostly belonging to Greece, the International Court of Justice in 1978 considered such as a dispute in connection with the discovery of oil and gas deposits in the north western part of the Aegean Sea. Both sides claimed the rights to explore and exploit the oil and gas in the same areas. Turkey proceeded from the fact that the continental shelf also of islands, in its view, partially overlaps the Turkish shelf. The dispute was decided also on the basis of the principles of equity and regard to the significance of the shelf for the parties in dispute.[796]

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[794]*Cameroon v Nigeria* (2002) ICJ, General List N0. 94.

[795]For further detail on *Cameroon v Nigeria*, see D J Harris, *Cases and Materials on International Law* (6th edn, London: Sweet & Maxwell, 2004) pp.484–489; (October 10, 2002) ICJ Reports, General List N0. 94.

[796]*Ibid*; AAKovaler, 'Contemporary Issues of the Law of the Sea<http://journals.cambridge. org/abstract-so 165070x05232837> accessed on 17th June, 2013.

The use of median line or principle of equidistance to delimit maritime boundary between the opposite or adjacent States as stated in the United Nations Convention on the Law of the Sea, and as already adopted and used in previous judicial decisions may be acceptable to the parties in dispute. However, in order to get just and acceptable boundary, it demands experiences and serious consideration of the tribunal, court or arbitration involved in the delimitation, and good commitment of the parties with respect to the existing international law and regulations.

B. Maritime Delimitation by Agreement

The agreement on the delimitation of maritime boundary is the first step that States

concerned are encouraged to take before referring their cases to the international court or arbitration under the contemporary regime. Coastal States are given a suitable period of time to negotiate the maritime boundary delimitation. In practice, many agreements have been made between opposite or adjacent States in which some are in form of maritime boundary delimitation and others as joint development agreement.

Regarding boundary settlement/agreement, the following are on record: France and Spain Agreement of 29 January 1974 on the delimitation of the continental shelf in the Bay of Biscay; Italy and Yugoslavia Agreement of 8 January 1968 on the delimitation of the

continental shelf on the Adriatic Sea; Thailand and Myanmar Agreement on the delimitation of the maritime boundary between them in the Andaman Sea on 25 July 1980; Russia (the then Soviet Union) and the United States Agreement of 1st June 1990

on the delimitation of maritime boundary extending from the Bering Sea through the Bering Strait to the Arctic Ocean.[797]

In the case of Joint Development Agreement (JDA), the idea of establishing maritime boundary through joint development offshore came after the judgment of the International Court of Justice in the *North Sea Continental Shelf Case.*[798] At that time, the Court referred to the possibility of the parties' decision on "a regime of joint jurisdiction, use, or exploitation for the zone of overlap or any part of them". The idea has indeed met the purpose of coastal States that focus on the advantages of the economic resources in the sea rather than the limitation of the maritime zone. It plays crucial role in settling maritime disputes in the absence of agreement on maritime boundary delimitation among States with opposite or adjacent coastlines. In doing this, the States concerned may define an area for joint development in addition to the boundary delimitation, across or beyond the boundary line for some practical reasons. In following theidea, many coastal States have eased tensions over their overlapping maritime boundary claims. Both Japan and Republic of Korea Agreement of 30 January 1974; Australia and Indonesia Treaty of 11 December

1989 and Bahrain and Saudi Arabia Agreement of 22 February 1958 concerning the overlapping area over the oil field have utilized the idea of joint development as espoused in *North Sea Continental Shelf Case.*[799]

C. Maritime Boundary by the Decision of International Courts or Arbitrations

[797]M.Ravin, *op cit*, p.53.
[798]*Federal Republic of Germany v Denmark, Federal Republic of Germany v Netherlands* (1969) *Supra.*
[799]Detail in M.Ravin, *op cit*, p.54.

As noted previously, to bring maritime boundary dispute or any sea disputes to the courts or arbitrations is the very last resort that States Parties concerned shall do in case the dispute defies any attempts to settle it by agreement between the parties. Also, as noted earlier, States Parties are given the liberty to choose usually through declaration when or anytime after ratifying the Convention, which settlement institution to refer their dispute – The International Court of Justice (ICJ), International Tribunal for the Law of the Sea (ITLOS) or Arbitration.

i. Settlement through the International Court of Justice (ICJ)

The International Court of Justice (ICJ) is established under the Charter of the United Nations as the principal judicial organ of the United Nations. Although it is a principal organ of the United Nations, the International Court of Justice does not enjoy automatic competence to deal with disputes involving all Member States of the United Nations. It can only assume jurisdiction and deal with cases if the States involved have accepted its jurisdiction. It is apparent that some States have been unwilling or at least reluctant to accept the jurisdiction of the Court, although some other States have shown willingness to submit to the jurisdiction of the Court. In the light of such differences in the attitudes of States to the Court, the drafters/draftsman of the Convention on the Law of the Sea did not consider it realistic to make the Court the sole forum for the settlement of sea disputes in connection with the Convention. As a result, they made recourse to the Court one of the various possible options available to States Parties wishing to rely on the Court

accepting its jurisdiction to make binding decisions on disputes in which they are involved.[800]

On 11 September 1992, the International Court of Justice delivered a decisive ruling on a case between Hondurasand El Salvador concerning the Gulf of Fonseca.[801] The International Court ruled *inter alia* that the Gulf of Fonseca is a historic bay, the waters whereof having previously since 1821 been under the single control of Spain, and from 1821 to 1839 of the Federal Republic of Central America, were thereafter succeeded to and held in sovereignty by the Republic of El Salvador, the Republic of Honduras and the

Republic of Nicaragua, jointly, and continue to be so held … but excluding a belt as at present established, extending 3 miles from the littoral of each of the States, such belt being under the exclusive sovereignty of the coastal State. The Court went on to decide that the water at the central portion of the closing line of the Gulf is subject to the joint entitlement of all the three States of the Gulf unless and until a delimitation of the relevant marine area is effected. In deciding the case, the Court stressed that entitlement to territorial sea, continental shelf and exclusive economic zone seaward of the central portion of the closing

line appertains to the three States of the Gulf, El Salvador, Honduras and Nicaragua, and that any delimitation of the relevant maritime areas must be effected by agreement in accordance with international law.

In another case between the United States and Canada concerning the delimitation of the maritime boundary in the Gulf of Marine area, the International Court of Justice

[800]Art. 296 of the Convention states that a decision of a court or tribunal having jurisdiction under the Convention "Shall be final and shall be complied with by all the parties to the dispute".
[801]*Honduras v El Salvador* (1992) ICJ Report.

(ICJ) rendered a decision on 12 October 1984.[802] In that case, the two parties requested the Court to determine the course of a single maritime boundary dividing their continental shelf and 200 miles exclusive fisheries zone from point A to a point to be determined by the

Court within an area bounded by three lines (triangle shown on the map). The main economic stake was the right to fish in the waters above Georges Bank. The map shows the line drawn by the Court, as well as those claimed by the parties. The segment A – B became the bi-sector of the angle formed by the two lines drawn from the two basic coastlines of Canada and United States in the region, namely the line from Cape Elizabeth to the International boundary terminus and the line from that latter point to Cape Sable.[803]

The International Court of Justice has in fact contributed immensely in the building and development of the international law of the sea through its decisions in plethora of sea dispute cases submitted to it for determination and settlement. The Court had ruled variously in the following cases: the *Corfu Channel Case*,[804] the *Fisheries Case*,[805]*the North Continental Shelf Case*,[806] the *Fisheries Jurisdiction Cases*[807]andthe *Jan MayenCase*.[808]The

[802]*United States v Canada* (1984) ICJ Report, p.246.
[803]*Supra*, para.213.
[804]*UK v Albania* (1949) ICJ Reports, 4.
[805]*UK v Norway* (1951) ICJ Reports, 116.
[806]*Federal Republic of Germany v Netherlands, Federal Republic of Germany v Denmark* (1969) ICJ Reports 3.
[807]*UK v Islands, Federal Republic of Germany v Iceland* (1974) ICJ Reports, 3 & 179.
[808]*Denmark v Norway* (1993) ICJ Reports, 38.

Court's judgments in these cases have undoubtedly played a crucial role in the progress of the codification and progressive development of certain rules and principles of the law of the sea which today are mainly embodied in the 1982 Convention.

ii. Settlement through the International Tribunal for the Law of the Sea (ITLOS)

The International Tribunal for the Law of the Sea (ITLOS) is one other major standing international judicial body to which States Parties may submit their maritime/sea disputes for settlement. The Statute of the Tribunal is contained in Annex VI to the 1982 Convention, which is an integral part of the Convention.[809]The Tribunal has its seat at Hamburg and came into force in 1996.[810] The ITLOS has 21 Judges, elected for nine years terms of office and who must be of "recognized competence in the field of the law of the sea".[811] With regard to jurisdiction, the Tribunal has jurisdiction to decide cases on their merits, order provisional measures in cases brought before it or in cases to be decided by an arbitration tribunal, pending the establishment of the tribunal.[812] ITLOS also has jurisdiction in prompt release cases and in some deep sea-bed cases.[813]

The Tribunal was created because, as stated above, some States were not showing the willingness to accept the jurisdiction of the International Court of Justice without reservation. The need was therefore felt at the Conference during which the Convention was adopted to establish another Tribunal which would be available to the States which might wish to have recourse to alternative court or tribunal.

The ITLOS has a special organ called The Seabed Dispute Chamber of the ITLOS. The Sea-bed Dispute Chamber is considered as an innovative feature of the

[809]UNCLOS, Art. 318.
[810]D. J. Harris, *op cit*, p.503.
[811]The Statute of the International Tribunal for the Law of the Sea, Art.2(1).
[812]UNCLOS, Art. 290. Note: Provisional Measures are legally binding. Art. 290 (6).
[813]*Ibid*, Art. 292 and Arts.187–188 respectively.

dispute settlement regime of the Convention. The Chamber, though is part of the Tribunal, has an independent mandate and competence on its own right. Its jurisdictions are set out in the body of the Convention (Part XI, section 5, Articles 186 - 191) as well as in the Statute of the Tribunal Annex VI to the Convention. Article 187 of the Convention states that the Chamber "shall have jurisdiction … in disputes with respect to activities in the Area falling within the following categories:" These categories are specified in paragraphs (a) to (f) of the Article and include:

(a) disputes between States Parties concerning the interpretation orapplication of this Part and the Annexes relating thereto;

(b) disputes between a State Party and the Authority concerning:

i. acts or omissions of the Authority or of a State Party alleged tobe in violation of this Part or the Annexes relating thereto or of rules, regulations and procedures of the Authority adopted in accordance therewith; or

ii. acts of the Authority alleged to be in excess of jurisdiction or amisuse of power;

(c) disputes between parties to a contract, being States Parties, theAuthority or the Enterprise, State enterprises and natural or juridical persons referred to in article 153,paragraph 2(b), concerning:

i. the interpretation or application of a relevantcontract or aplanof work; or

ii. acts or omissions of a party to the contract relating to activitiesin the Area and directed to the other party or directlyaffecting its legitimate interests;

(d) disputes between the Authority and a prospective contractor who has been sponsored by a State as provided in article 153,paragraph 2(b), and has duly fulfilled the conditions referred to in Annex III, article 4, paragraph 6, and article 13, paragraph 2, concerning the refusal of a contract or a legal issue arising in the negotiation of the contract;

(e) disputes between the Authority and a State Party, a State Enterprise or a natural or juridical person sponsored by aState Party as provided for in article 153, paragraph 2(b),where it is alleged that the Authority has incurred liability as provided in Annex III, article 22;

(f) any other disputes for which the jurisdiction of the Chamber isspecifically provided in this Convention.

Since its inception in 1996, the Tribunal had had no fewer than 15[814] cases submitted to it. These cases are broadly grouped into three categories:

i. Cases dealing with the prompt release of ships and their crews;
ii. Cases involving request for provisional measures in disputes submitted to arbitration; and
iii. Cases on merits.

In some of the cases brought before the Tribunal, the parties sought for prompt release of vessels. In all these related cases, the issue was on the arrest of vessels for infringement of fisheries regulations in the exclusive economic zones. In *Grand Prince Case*,[815] the Tribunal decided that it lacked jurisdiction because of irregularities associated with the registration of the ship by the authorities of the flag State.

The *Saiga Case*[816] falls under the group of prompt release of vessels even though many other aspects of the law of the sea were decided in the case. The *Saiga* was an oil tanker owned by a Cypriot Company, managed by a Scottish Company, and Chartered to a Swiss Company. Having formerly been registered as a Maltese Ship, its six months certificate of provisional registration as a St. Vincent and Grenadines Ship expired on September 12, 1997; a permanent Vincentian certificate was issued on November 28, 1997. The *Saiga'*s work was to sell gas oil as bunker to fishing vessels off the West African

[814] J. J. Jesus, 'International Tribunal for the Law of the Sea', A Lecture delivered during the 61st Session of the International Law Commission at Geneva, on 15th July, 2009. The Tribunal has however decided more cases since 2009. *Bangladesh v Myanmar* for example, was decided in 2012.

[815] *Belize v France* (2001) ITLOS <http://www.worldcourts.com/itlos/eng/decisions/2001-03- 21 Belize-v-France pdf> accessed on 17th June, 2013.

[816] *St. Vincent and the Grenadines v Guinea*, (1999) ITLOS 120 ILR, 143.

Coast. On October 27, 1997, the *Saiga* supplied gas oil to Senegalese and Greek flag fishing vessels in the Guinean exclusive economic zone about 22 miles from the nearest point to the land, a Guinean island. On October 28, while *Saiga* was stationed outside the Guinean exclusive economic zone waiting for other fishing vessels, it was boarded and arrested by Guinean patrol boats and taken to *Convaky*, Guinea, where the tanker and its crews were detained. But, on December 4, 1997, at the request of St. Vincent and the Grenadines, the Tribunal gave its judgment under Article 292 of the 1982 Convention, wherein it ordered the prompt release of the *Saiga*and its crews on the posting of a reasonable bond. The Tribunal decided*inter alia* that Guinea violated the rights of St. Vincent and Grenadines under the Convention in arresting the *Saiga,* and detaining the *Saiga* and its crew members, prosecuting and convicting its master and in seizing the *Saiga*and confiscating its cargo. It also decided that in arresting the *Saiga,* Guinea acted in contravention of the provisions of the Convention on the exercise of the right of hot pursuit and thereby violated the rights of St. Vincent and the Grenadines. The Tribunal finally awarded a cost of Two Million One Hundred and Twenty Three Thousand Three Hundred and Fifty Seven US Dollars to be paid as compensation by Guinea to St. Vincent and Grenadines.

The *Saiga* Caseactually touched a number of the law of the sea issues, including the nationality of ships, the genuine link requirement, the right of hot pursuit and the exclusive economic zone regime. Deciding on the question of nationality of ships and genuine link requirements, the Tribunal confirmed that under the present legal regime of the sea,[817] the criteria for nationality is left to the flag State, which may grant the nationality to ship even though it lacks much or any connection with it, and that this

[817]UNCLOS, Art.91.

nationality will be recognized in international law for the purpose of protecting the ships under the 1982 Convention.

Although the "genuine link" requirement in Article 94(2**)** may have had its inspiration in the *NottebohmCase*[818]which has held that a State may only offer diplomatic protection for a national who is an individual where there is a genuine connection between the two, the "genuine link" requirement for ships does not connote the same limiting effect. Instead, the purpose of the requirement is to "secure more effective implementation of the duties of the flag State".[819] In the *Monte ConfurcoCase*,[820] the International Tribunal had the opportunity to re-emphasis the summary of the meaning of "reasonable bond" under Article 73 (2) of the 1982 Convention and developed in its jurisprudence as follows:

> The Tribunal considers that a number of factors are relevant in an assessment of the reasonableness of bonds or other financial security. They include the gravity of the alleged offences, the penalties imposed or imposable under the laws of the detaining State, the value of the detained vessel and of the cargo seized, the amount of the bond imposed by the detaining State and its form.

Requests for orders of the release of the arrested vessels that have not been released promptly upon the posting of a reasonable bond where this is required by the 1982

[818]*Liechtenstein v Guatemala*, (1995) ICJ Reports, 4.
[819]*St. Vincent and the Grenadines v Guinea*, *Supra*.
[820]*Seychelles v France* (2002) <www.itlos.org(judgments)> accessed on 19 January 2014.

Convention[821] such as that made by St. Vincent and the Grenadines at the early stage of the case, have been made more frequently to the Tribunal, thereby constituting the bulk of the Tribunal's work so far.[822] The second category involves cases where a process of arbitration was instituted under the Convention and one of the parties requested the Tribunal to prescribe provisional measures pending the constitution of the arbitral tribunal. The first here was a joinder of two cases resulting from the initiation of arbitration proceedings by Australia and New Zealand against Japan in respect of the fishing for Southern blue-fin tuna in the waters of Australia and New Zealand and in the adjacent high seas area.[823] These three countries had been cooperating in the fishery for over fifteen years since 1993 on the basis of a trilateral agreement and had agreed on quotas binding on them all. After 1997, they had been unable to agree any longer on binding measures and in 1999 New Zealand and Australia sought legal remedies. The Tribunal decided to set provisional measures and established as a binding measure the quotas which had prevailed in the recent past, referring to the need to act with prudence and caution to avert further deterioration of the tuna resources.

The second on record in this category and one of the most recent cases before the Tribunal, was brought by Ireland against the United Kingdom to seek a provisional measure to prevent the United Kingdom from instituting a disputed method of reprocessing

spent nuclear fuel at its Sellafield plant, as so-called mixed oxide fuel or *Mox*. Ireland argued that the plant would increase marine pollution of the Irish Sea and beyond in the

[821]UNCLOS, Art. 73(2).
[822]B. H.Oxman and V. P.Bantz (2002) *AJIL*, 219 <Books.googlecom.ng/books?isbn=900412138528> accessed on 23 February 2014.
[823] M.Ravin, *op cit*.

course of marine transportation of the fuel. The Tribunal however, did not accede to Ireland's main request in the short period before the arbitral tribunal would be constituted.

It however did decide to require the parties to cooperate and to enter into consultations to exchange information concerning the risks or effects of the proposed activities and in devising ways to deal with them.[824]

The third category involves those cases submitted to the Tribunal for full treatment of the merits. The first here was an offshoot of the first case on the prompt release of a ship, when the flag State, St. Vincent and the Grenadines, and the coastal State Guinea, decided to bring to the Tribunal the question of legality of the arrest of the ship involved, the *saiga*. The Tribunal decided that the arrest which was effected outside Guinean jurisdiction was an illegal application of the right of hot pursuit and had moreover been carried out with excessive use of force. The Tribunal awarded damages in the total of 2.1 million US Dollars for the Ship-owner, Charterer and Members of the crew.

The most recent decision by the Tribunal came on 14 March, 2012 concerning the maritime boundary dispute between Bangladesh and Myanmar, in the Bay of Bengal.[825] This Bangladesh-Myanmar case constitutes about the first maritime boundary dispute brought before the ITLOS. Previously, the Tribunal had only, handled relatively minor cases, mainly associated with fishing.[826] That was why international lawyers and

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[824]G.Eiriksson, 'Settlement of Dispute II: International Tribunal for the Law of the Sea', (UnitedNations, 25–26 September, 2002) p.6. <http: //www.un.org/depts/los/nippon/unnff-programme-home/fellows-pages/fellows-papers/mom.> accessed on 6th September, 2012.

[825]*Bangladesh v Myanmar* (14 March, 2012) ITLOS, Case No. 16, pp. 9-150 particularly pp. 147-149.

[826]S. Bateman, 'Solving Maritime Disputes: The Bangladesh – Myanmar Way', (2012)<www.rsis.edu.sg.>accessed on 27th May, 2012.

geographers watched Bangladesh – Myanmar case with keen and pulsating interest to see how ITLOS would handle the matter and what the outcome might be.

Bangladesh and Myanmar have long had a boundary dispute in the part of the Bay of Bengal where valuable hydrocarbon reserves reportedly exist. During 2008 – 2009, there were several clashes in the same area between the naval forces of the two countries. However, situation normalized when shortly after these events, the two countries agreed to take their dispute to the ITLOS. India and Bangladesh have also taken like positive step by agreeing to take their maritime boundary dispute in the Bay of Bengal to international arbitration.[827]

On 14 March, 2012, the Tribunal delivered its judgment in the said dispute concerning delimitation of the maritime boundary between Bangladesh and Myanmar in the Bay of Bengal. The Tribunal decided on an adjusted equidistant line as the boundary between the two countries. This was rather more in favour of Bangladesh than a median or equidistant line between the boundaries proposed by each of the two countries would have been.[828]

The strategic position of the case and the judgment which emanates from it deserves that serious and detailed attention is paid to it here. As a result, we decide to import a detailed report of the judgment into this work.

A. Composition of the Tribunal

[827] *Ibid.*
[828] *Ibid*.

The Tribunal consists of twenty-one judges including the president, vice-president and two-judge*ad hoc* with the Registrar.[829]

The People's Republic of Bangladesh was represented by H.E. MsDipuMoni, Minister of Foreign Affairs, as Agent*;* Mr. Md. KhurshedAlam, Rear Admiral (Ret'd),

Additional Secretary, Ministry of Foreign Affairs, as Deputy Agent*; and* H.E. Mr. Mohamed MijraulQuayes, Foreign Secretary, Ministry of Foreign Affairs, H.E. Mr.MosudMannan, Ambassador of the People's Republic of Bangladesh to the Federal Republic of Germany, Mr.PayamAkhavan, Professor of International Law, McGill University, Canada, Member of the Bar of New York, United States of America, Mr. Alan Boyle, Professor of International Law, University of Edinburgh, Member of the Bar of England and Wales, United Kingdom, Mr. James Crawford, S.C., F.B.A., Whewell Professor of International Law, University of Cambridge, United Kingdom, Member of the Bar of England and Wales, United Kingdom, Member of the Institut de droit international, Mr. Lawrence H. Martin, Foley Hoag LLP, Member of the Bars of the United States Supreme Court, the Commonwealth of Massachusetts and the District of Columbia, United States of America, Mr. Lindsay Parson, Director, Maritime Zone Solutions Ltd., United Kingdom, Mr. Paul S. Reichler, Foley Hoag LLP, Member of the Bars of the United States Supreme Court and the District of Columbia, United States of America, Mr.Phillippe, Q. C., Professor of International Law, University College London, Member of the Bar f English and Wales, United Kingdom,*as Counsel and*

[829] These are: PresidentJesus; Vice-President Turk; JudgesMarotta Rangel, Yankov, Nelson, ChandrasekharaRao, Akl, Wolfrum, Treves, Ndiaye, Cot, Lucky, Pawkak, Yanai, Kateka, Hoffmann, GaoBouguetaia, Golitsyn, Paik; Judges ad hoc Mensah, Oxman; and Registrar Gautier.

Advocates; Mr. Md. GomalSarwar, Director General, Ministry of Foreign Affairs, Mr. Jamal Uddin Ahmed, Assistant Secretary, Ministry of Foreign Affairs, MsShahanara Monica, Assistant Secretary, Ministry of Foreign Affairs, Mr. M. R. I. Abedin, Lt. Cdr., System Analyst, Ministry of Foreign Affairs, Mr. Robin Cleverly, Law of the Sea Consultant, United Kingdom Hydrographic Office, United Kingdom, Mr. Scott Edmonds, Cartographic Consultant, International Mapping, United States of America, Mr. Thomas Frogh, Senior Cartographer, International Mapping, United States of America, Mr. Robert W. Smith, Geographic Consultant, United States of America, *as Advisers;* Mr. Joseph R. Curray, Professor of Geology, Emeritus, Scripps Institution of Oceanography, University of California, United States of America, Mr. Hermann Kudrass, Former Director and Professor (Retired), German Federal Institute for Geosciences and Natural Resources (BGR), Germany, *as Independent Experts*; MsSolèneGuggisberg, PhD Candidate, International Max Planck Research School for Maritime Affairs, Germany, Mr.Vivek Krishnamurthy, Foley Hoag LLP, Member of the Bars of New York and the District of Columbia, United States of America, Mr.BjarniMárMagnússon, PhD Candidate, University of Edinburgh, United Kingdom, Mr. Yuri Parkhomenko, Foley Hoag LLP, United States of America, Mr.RemiReichhold, Research Assistant, Matrix Chambers, London, United Kingdom, *as Junior Counsel.*[830]

The Republic of the Union of Myanmar on their part was represented byH.E. Mr.Tun Shin, Attorney General, *as Agent;* MsHlaMyoNwe, Deputy Director General, Consular and Legal Affairs Department, Ministry of Foreign Affairs, Mr.Kyaw San, Deputy Director General, Attorney General's Office of the Republic of the Union of Myanmar, *as Deputy Agents*; andMr. Mathias Forteau, Professor, University of Paris

[830]*Bangladesh v Myanmar, supra, pp. 5-6.*

Ouest, Nanterre La Défense, France, Mr.Coalter Lathrop, Attorney-Adviser, Sovereign Geographic, Member of the North Carolina Bar, United States of America, Mr. Daniel Müller, Consultant in Public International Law, Researcher, Centre de droit international de Nanterre (CEDIN), University of Paris Ouest, Nanterre La Défense, France, Mr. Alain Pellet, Professor, University of Paris Ouest, Nanterre La Défense, France, Member and former Chairman of the International Law Commission, Associate Member of the *Institut de droit* international, Mr. Benjamin Samson, Researcher, Centre de droit international de Nanterre (CEDIN), University of Paris Ouest, Nanterre La Défense, France, Mr.EranSthoeger, LL.M., New York University School of Law, United States of America, Sir Michael Wood, K.C.M.G., Member of the English Bar, United Kingdom, Member of the International Law Commission, *as Counsel and Advocates*; H.E. Mr. U. Tin Win, Ambassador Extraordinary and Plenipotentiary of the Republic of the Unionof Myanmar to the Federal Republic of Germany, Mr. Min Thein Tint, Captain, Commanding Officer, Myanmar Naval Hydrographic Center, Mr.ThuraOo, Pro-Rector of the Meiktila

University, Myanmar, Mr.MaungMaungMyint, Counselor, Embassy of the Republic of the Union of Myanmar to the Federal Republic of Germany, Mr.KyawHtin Lin, First Secretary, Embassy of the Republic of the Union of Myanmar to the Federal Republic of Germany, MsKhinOoHlaing, First Secretary, Embassy of the Republic of the Union of Myanmar to the Kingdom of Belgium, Mr.MangHauThang, Assistant Director, International Law and Treaties Division, Consular and Legal Affairs Department, Ministry of Foreign Affairs,Ms Tin MyoNwe, Attaché, International Law and Treaties Division, Consular and Legal Affairs Department, Ministry of Foreign Affairs,

MsHéloïse Bajer-Pellet, Lawyer, Member of the Paris Bar, France, Mr. Octavian Buzatu, Hydrographer, Romania, Ms Tessa Barsac, Master, University of Paris Ouest, Nanterre La Défense, France, Mr. David Swanson, Cartography Consultant, United States of America, MrBjørnKunoy, Doctoral Candidate, Université Paris Ouest, Nanterre-La Défense, France, Mr. David P. Riesenberg, LL.M., Duke University School of Law, United States of America, *as Advisers*.[831]

B. Factual Background of Bangladesh and Myanmar[832]

The maritime area to be delimited in the present case lies in the northeastern part of the Bay of Bengal. This Bay is situated in the northeastern Indian Ocean, covering an area of approximately 2.2 million square kilometres, and is bordered by Sri Lanka, India, Bangladesh and Myanmar. Bangladesh is situated to the north and northeast of the Bay of Bengal. Its land territory borders India and Myanmar and covers an area of approximately 147,000 square kilometers.

Myanmar is situated to the east of the Bay of Bengal. Its land territory borders Bangladesh, India, China, Laos and Thailand and covers an area of approximately 678,000 square kilometer.[833]

C. Procedural History of the Bangladesh/Myanmar Case

The Minister of Foreign Affairs of the People's Republic of Bangladesh, by a letter dated 13 December 2009, notified the President of the Tribunal that, on 8 October 2009, the Government of Bangladesh had instituted arbitral proceedings against the Union of

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[831] *supra*, pp.7-8.

[832] The overview sketch- map depicting the regional geography of these States is captured on page 20 of the Judgment.

[833] *Bangladesh v Myanmar*, *supra*, paras. 33-35.

Myanmar (now the Republic of the Union of Myanmar[834]) pursuant to Annex VII of the United Nations Convention on the Law of the Sea. The aim of this suit is "to secure the full and satisfactory delimitation of Bangladesh's maritime boundaries with … Myanmar in the territorial sea, the exclusive economic zone and the continental shelf in accordance with international law". This letter was filed with the Registry of the Tribunal on 14 December 2009.

By the same letter, the Minister of Foreign Affairs of Bangladesh notified the President of the Tribunal of declarations made under article 287 of the Convention by Myanmar and Bangladesh on 4 November 2009 and 12 December 2009, respectively, concerning the settlement of the dispute between the two Parties relating to the delimitation of their maritime boundary in the Bay of Bengal. The letter stated:

> given Bangladesh's and Myanmar's mutual consent to the jurisdiction of ITLOS, and in accordance with the
> provisions of UNCLOS Article 287(4), Bangladesh considers that your distinguished Tribunal is now the only forum for the resolution of the parties' dispute.

On that basis, the Minister of Foreign Affairs of Bangladesh invited the Tribunal "to exercise jurisdiction over the maritime boundary dispute between Bangladesh and Myanmar"

The declaration of Myanmar stated thus:

[834]*Supra*, para.18.

> In accordance with Article 287, paragraph 1, of the 1982 United Nations Convention on the Law of the Sea (UNCLOS), the Government of the Union of Myanmar hereby declares that it accepts the jurisdiction of the International Tribunal for the Law of the Sea for the settlement of dispute between the Union of Myanmar and the People's Republic of Bangladesh relating to the delimitation of maritime boundary between the two countries in the Bay of Bengal.

The declaration of Bangladesh stated:

> Pursuant to Article 287, paragraph 1, of the 1982 United Nations Convention on the Law of the Sea, the Government of the People's Republic of Bangladesh declares that it accepts the jurisdiction of the International Tribunal for the Law of the Sea for the settlement of the dispute between the People's Republic of Bangladesh and the Union of Myanmar relating to the delimitation of their maritime boundary in the Bay of Bengal.[835]

[835] *Supra*, paras.3-4.

In view of the above-mentioned declarations, and the letter of the Minister of Foreign Affairs of Bangladesh dated 13 December 2009 referred to in paragraphs 1 and 2 of the judgment, the case was entered in the List of cases as Case No. 16 on 14 December 2009. On that same date, the Registrar, pursuant to Article 24, paragraph 2, of the Statute of the Tribunal,[836] transmitted a certified copy of the notification made by Bangladesh to the Government of Myanmar. By a letter dated 17 December 2009, the Registrar notified the Secretary-General of the United Nations of the institution of proceedings. By a note

*Verbale*dated 22 December 2009, the Registrar also notified the States Parties to the Convention, in accordance with article 24, paragraph 3, of the Statute.

By a letter dated 22 December 2009, the Minister of Foreign Affairs of Bangladesh, acting as Agent in the case, informed the President of the Tribunal of the designation of Mr. Md. KhurhedAlam, Additional Secretary, Ministry of Foreign Affairs, as the Deputy Agent of Bangladesh. By a note *verbale* dated 23 December 2009, the Ministry of Foreign Affairs of Myanmar informed the Tribunal of the appointment of Mr.Tun Shin, Attorney General, as Agent, and MsHlaMyo New, Deputy Director General, Ministry of Foreign Affairs, and Mr.NyanNaing Win, Deputy Director, Attorney General's Office, as Deputy Agents. Subsequently, by a letter dated 24 May 2011, the Agent of Myanmar informed the Tribunal that Myanmar had appointed Mr.Kyaw San, Deputy Director General, AttorneyGeneral's Office, as Deputy Agent in place of Mr.NyanNaing Win.[837]

[836]Hereinafter referred to as "the Statute".
[837]*Supra*, p.11, para.7.

In the other vein, by a letter dated 14 January 2010, the Ambassador of Myanmar to Germany transmitted a letter from the Minister of Foreign Affairs of Myanmar of the same date, in which Myanmar informed the Registrar that it had "transmitted the Declaration to withdraw its previous declaration accepting the jurisdiction of ITLOS made on 4 November 2009 by the Minister of Foreign Affairs of Myanmar, to the Secretary-General of the United Nations on 14th January 2010". On the same date, the Registrar transmitted a copy of the aforementioned letters to Bangladesh.

In a letter dated 18 January 2010 addressed to the Registrar, the Deputy Agent of Bangladesh stated that Myanmar's withdrawal of its declaration of acceptance of the Tribunal's jurisdiction did "not in any way affect proceedings regarding the dispute that have already commenced before ITLOS, or the jurisdiction of ITLOS with regard to such proceedings". In this regard, Bangladesh referred to article 287, paragraphs 6 and 7, of the Convention.

Consultations were held by the President with the representatives of the Parties on 25 and 26 January 2010 to ascertain their views regarding questions of procedure in respect of the case. In this context, it was noted that, for the reasons indicated in paragraph 5, the case had been entered in the List of cases as Case N0. 16. The representatives of the Parties concurred that 14 December 2009 was to be considered the date of institution of proceedings before the Tribunal.[838]

In accordance with articles 59 and 61 of the Rules of the Tribunal,[839] the President, having ascertained the views of the Parties, by Order dated 28 January 2010, fixed the following time-limits for the filing of the pleadings in the case: 1 July 2010 for

[838]*Supra*, para.10.
[839]Hereinafter referred to as "the Rule".

the Memorial of Bangladesh and 1 December 2010 for the Counter-Memorial of Myanmar. The Registrar forthwith transmitted a copy of the Order to the Parties. The Memorial and the Counter-Memorial were duly filed within the time-limits so fixed.

Pursuant to articles 59 and 61 of the Rules, the views of the Parties having been ascertained by the President, the Tribunal, by Order dated 17 March 2010, authorized the submission of a Reply by Bangladesh and a Rejoinder by Myanmar and fixed 15 March 2011 and 1 July 2011, respectively, as the time-limits for the filing of those pleadings. The Registrar forthwith transmitted a copy of the Order to the Parties. The Reply and the Rejoinder were duly filed within the time-limits so fixed.

Since the Tribunal did not have on the bench a member of the nationality of the Parties, each of the Parties availed itself of its right under article 17 of the Statute to choose a judge *ad hoc*. Bangladesh, by its letter dated 13 December 2009 referred to in paragraph 1, chose Mr. Vaughan Lowe and Myanmar, by a letter dated 12 August 2010, chose Mr. Bernard H. Oxman to sit as judges *ad hoc* in the case. No objection to the choice of Mr. Lowe as judge *ad hoc* was raised by Myanmar, and no objection to the choice of Mr.Oxman as judge *ad hoc* was raised by Bangladesh, and no objection appeared to the Tribunal itself. Consequently, the Parties were informed by letters from the Registrar dated 12 May 2010 and 20 September 2010, respectively, that Mr. Lowe and Mr.Oxman would be admitted to participate in the proceedings as judges *ad hoc*, after having made the solemn declaration required under article 9 of the Rules.[840]

However, by a letter dated 1 September 2010, Mr. Lowe informed the President that he was not in a position to act as a judge *ad hoc* in the case. Consequent upon this, by a letter dated 13 September 2010, pursuant to article 19, paragraph 4, of the Rules, the

[840] *Supra*, p.11, para.13.

Deputy Agent of Bangladesh informed the Registrar of Bangladesh's choice of Mr. Thomas Mensah as judge *ad hoc* in the case, to replace Mr. Lowe. Since no objection to the choice of Mr.Mensah as judge *ad hoc* was raised by Myanmar, and no objection appeared to the Tribunal itself, the Registrar informed the Parties by a letter dated 26 October 2010 that Mr.Mensah would be admitted to participate in the proceedings as judge *ad hoc*, after having made the solemn declaration required under article 9 of the Rules.

On 16 February 2011, the President held consultations with the representatives of the Parties regarding the organization of the hearing, in accordance with article 45 of the

Rules. By a letter dated 22 July 2011 addressed to the Registrar, the Consul-General of Japan in Hamburg requested that copies of the written pleadings be made available to Japan. The views of the Parties having been ascertained by the President, the requested copies were made available, pursuant to article 67, paragraph 1, of the Rules, by a letter dated 22 August 2011 from the Registrar to the Consul-General of Japan.

By a note *verbale* dated 15 August 2011, the Embassy of Myanmar in Berlin informed the Registry that the name of the country had been changed from the "Union of Myanmar" to the "Republic of the Union of Myanmar" as of March 2011.

The President, having ascertained the views of the Parties, by an Order dated 19 August 2011, fixed 8 September 2011 as the date for the opening of the oral proceedings. Prior to the oral proceedings however, at a public sitting held on 5 September 2011, Mr. Thomas Mensah Judge *ad hoc* chosen by Bangladesh, and Mr. Bernard H. Oxman, Judge

ad hoc chosen by Myanmar, made the solemn declaration required under article 9 of the Rules.[841]

In accordance with article 68 of the Rules, the Tribunal held initial deliberations on 5, 6 and 7 September 2011 to enable judges to exchange views concerning the written pleadings and the conduct of the case. On 7 September 2011, it decided, pursuant to article 76, paragraph 1, of the Rules, to communicate to the Parties two questions which it wished them specially to address. These questions read as follows:

> 1. Without prejudice to the question whether the Tribunal has jurisdiction to delimit the continental shelf beyond 200 nautical miles, would the Parties expand on their views with respect to the delimitation of the continental shelf beyond 200 nautical miles?
> 2. Given the history of discussions between them on the issue, would the Parties clarify their position regarding the right of passage of ships of Myanmar through the territorial sea of Bangladesh around St. Martin's Island?[842]

On 7 September 2011, the President held consultations with the representatives of the Parties to ascertain their views regarding the hearing and transmitted to them the questions referred to in paragraph 21 of the judgment.

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[841] *Supra*, pp. 13-14 paras.19-20.
[842] *Supra*, para. 21.

Prior to the opening of the oral proceedings, on 7 September 2011, the Agent of Bangladesh communicated information required under paragraph 14 of the Guidelines concerning the Preparation and Presentation of Cases before the Tribunal. The Agent of Myanmar on its own communicated information required under paragraph 14 of the Guidelines concerning the Preparation and Presentation of Cases before the Tribunal on 9 September 2011 and additional information on 14 September 2011.

From 8 to 24 September 2011, the Tribunal held 15 public sittings. At these sittings, the Tribunal was addressed by the following:

*For Bangladesh:*H.E. MsDipuMoni,Mr. Md. KhurshedAlam,as Agent and Deputy Agent*;* H.E. Mr. Mohamed MijraulQuayes, MrPayamAkhavan,Mr. Alan BoylMr. James Crawford, Mr. Lawrence H. Martin, Mr. Lindsay Parson, Mr. Paul S. Reichler, Mr.Philippe Sands, as Counsel and Advocates.

For Myanmar: H.E. Mr. Tun Shin, as Agent; Mr. Mathias Forteau,Mr.Coalter Lathrop, Mr. Daniel Müller, Mr. Alain Pellet, Mr. Benjamin Samson, Mr.EranSthoeger, Sir Michael Wood, as Counsel and Advocates.[843]

In the course of the oral proceedings, the Parties displayed a number of slides, including maps, charts and excerpts from documents, and animations on video monitors. Electronic copies of these documents were filed with the Registry by the Parties. The hearing was broadcast over the internet as a webcast. And, Pursuant to article 67, paragraph 2, of the Rules, copies of the pleadings and the documents annexed thereto were made accessible to the public on the opening of the oral proceedings.

In accordance with article 86 of the Rules, verbatim records of each hearing were prepared by the Registrar in the official languages of the Tribunal used during the

[843]*Supra*, pp.14-15, para. 25.

hearing. Copies of the transcripts of such records were circulated to the judges sitting in the case and to the Parties. The transcripts were made available to the public in electronic form.

President Jesus, whose term of office as President expired on 30 September 2011, continued to preside over the Tribunal in the present case until completion, pursuant to article 16, paragraph 2, of the Rules. In accordance with article 17 of the Rules, Judges Yankov and Treves, whose term of office expired on 30 September 2011, having participated in the meeting mentioned in article 68 of the Rules, continued to sit in the case until its completion. Judge Caminos, whose term of office also expired on 30 September 2011, was prevented by illness from participating in the proceedings.[844]

D. Submissions of the Parties

In their written pleadings, the Parties presented the following submissions:

> In its Memorial and its Reply, Bangladesh requested the Tribunal to adjudge and declare *inter alia* that "the maritime boundary between Bangladesh and Myanmar in the territorial sea shall be that line first agreed between them in 1974 and reaffirmed in 2008...."[845]

[844] *Supra*, p.16, para. 30.
[845] *Supra*, p.16, para. 31.

In its Counter-Memorial and its Rejoinder, Myanmar requested the Tribunal to adjudge and declare that "the single maritime boundary between Myanmar and Bangladesh runs from Point A to Point G" as indicated in the table presented before the Tribunal.

In accordance with article 75, paragraph 2, of the Rules of the Tribunal, the following final submissions were presented by the Parties during the oral proceedings:

On behalf of Bangladesh, at the hearing on 22 September 2011:

> On the basis of the facts and arguments set out in our Reply and during these oral proceedings, Bangladesh requests the Tribunal to adjudge and declare that:
>
> (1) The Maritime boundary between Bangladesh and Myanmar in the territorial sea shall be that line first agreed between them in 1974 and reaffirmed in 2008.
>
> The coordinates for each of the seven points comprising the delimitation are those set forth in our written Submissions in the Memorial and Reply;
>
> (2) From Point 7, the maritime boundary between Bangladesh and Myanmar follows a line with a geodesic azimuth of 215° to the point located at the coordinates set forth in paragraph 2 of the Submissions as set out in the Reply; and

(3) From that point, the maritime boundary between Bangladesh and Myanmar follows the contours of the 200-M limit drawn from Myanmar's normal baselines to the point located at the coordinates set forth in paragraph 3 of the Submissions as set out in the Reply.

On behalf of Myanmar, at the hearing on 24 September 2011:

> Having regard to the facts and law set out in the Counter-Memorial and the Rejoinder, and at the oral hearing, the Republic of the Union of Myanmar requests the Tribunal to adjudge and declare that:
>
> 1. The single maritime boundary between Myanmar and Bangladesh runs from point A to point G, as set out in the Rejoinder.…
> 2. From point G, the boundary line continues along the equidistance line in a south-west direction following a geodetic azimuth of 231° 37' 50.9" until it reaches the area where the rights of a third State may be affected.[846]

E. Brief History of the Negotiations between the Parties

[846] *Supra*, p.17, para. 32.

Prior to the institution of these proceedings, negotiations on the delimitation of the maritime boundary were held between Bangladesh and Myanmar from 1974 to 2010. Eight

rounds of talks took place between 1974 and 1986 and six rounds between 2008 and2010. During the second round of talks, held in Dhaka between 20 and 25 November 1974, the heads of the two delegations, on 23 November 1974, signed the "Agreed Minutes between the Bangladesh Delegation and the Burmese Delegation regarding the Delimitation of the Maritime Boundary between the Two Countries".[847]

On the resumption of the talks in 2008, at the first round held in Dhaka from 31 March to 1 April 2008, the heads of delegations on 1 April 2008, signed the "Agreed Minutes of the meeting held between the Bangladesh Delegation and the Myanmar Delegation regarding the delimitation of the Maritime Boundaries between the two countries" referred to as "the 2008 Agreed Minutes".

In the summary of discussions signed by the heads of the delegations at the fifth round, held in Chittagong on 8 and 9 January 2010, it was noted that Bangladesh had already initiated arbitration proceedings under Annex VII to the Convention.

F. Subject-matter of the dispute

The dispute as earlier stated concerns the delimitation of the maritime boundary between Bangladesh and Myanmar in the Bay of Bengal with respect to the territorial sea, the exclusive economic zone and the continental shelf.

G. Jurisdiction of the Tribunal

[847]This is popularly referred to as "the 1974 Agreed Minutes" see *Supra*, p.17, para. 32.

Bangladesh observed that the Parties have expressly recognized the jurisdiction of the Tribunal over the dispute, as reflected in their declarations made under article 287. It equally stated that "the subject-matter of the dispute is exclusively concerned with the provisions of the UNCLOS and thus falls entirely within ITLOS jurisdiction as agreed by the parties".[848] Bangladeshasserted also that its "claim was based on the provisions of UNCLOS as applied to the relevant facts, including but not limited to UNCLOS Articles 15, 74, 76 and 83" and that "these provisions relate to the delimitation of the territorial sea, exclusive economic zone and continental shelf, including the outer continental shelf beyond 200"[849] metric system.

Bangladesh stated also that the Tribunal's jurisdiction to delimit the maritime boundary between Bangladesh and Myanmar in respect of all the maritime areas in dispute, including the part of the continental shelf beyond 200 nautical miles from the baselines

from which the breadth of the territorial sea is measured (the continental shelf beyond 200 nm) is recognized under the Convention and concluded that the Tribunal's jurisdiction in regard to the dispute between Bangladesh and Myanmar is plainly established.

Myanmar on its side noted that the two Parties in their declarations under article 287, paragraph 1, of the Convention accepted the jurisdiction of the Tribunal to settle the dispute relating to the delimitation of their maritime boundary in the Bay of Bengal. It stated that the dispute before this Tribunal concerned the delimitation of the territorial

[848] *Supra*, p.22, para.41.
[849] *Supra*, para.42.

sea, the exclusive economic zone and the continental shelf of Myanmar and Bangladesh in the Bay of Bengal.

Myanmar went ahead to state that it never disputed that, "as a matter of principle, the delimitation of the continental shelf, including the shelf beyond 200 nautical miles, could fall within the jurisdiction of the Tribunal". However, it submitted that "in the presentcase, the Tribunal did not have jurisdiction with regard to the continental shelf beyond 200 nautical miles".[850] In this regard Myanmar contended that, even if the Tribunal were to decide that it has jurisdiction to delimit the continental shelf beyond 200 nm, it would not be appropriate for the Tribunal to exercise that jurisdiction in the present case.

The Tribunal in response to this development noted that Bangladesh and Myanmar are States Parties to the Convention. Bangladesh ratified the Convention on 27 July 2001 and the Convention entered into force for Bangladesh on 26 August 2001. Myanmar ratified the Convention on 21 May 1996 and the Convention entered into force for Myanmar on 20 June 1996. The Tribunal observedfurther that Myanmar and Bangladesh, by their declarations under article 287, paragraph 1, of the Convention, quoted in

paragraphs 3 and 4 (of the Tribunal's judgment), accepted the jurisdiction of the Tribunal for the settlement of the dispute between them relating to the delimitation of their maritime boundary in the Bay of Bengal and that these declarations were in force at the time proceedings before the Tribunal were instituted on 14 December 2009.

Pursuant to article 288, paragraph 1, of the Convention and article 21 of the Statute, the jurisdiction of the Tribunal comprises all disputes and all applications

[850] *Supra*, para.45.

submitted to it in accordance with the Convention. In the view of the Tribunal, the present dispute entails the interpretation and application of the relevant provisions of the Convention, in particular articles 15, 74, 76 and 83 thereof. The Tribunal further observed that the Parties agreed that the Tribunal has jurisdiction to adjudicate the dispute relating to the delimitation of the territorial sea, the exclusive economic zone and the continental shelf within 200 nautical miles from the baselines from which the breadth of the territorial sea is measured.

Accordingly, the Tribunal concluded even in line with our expectations that it has jurisdiction to delimit the maritime boundary between the Parties in the territorial sea, the exclusive economic zone and the continental shelf within 200 nautical miles. The Tribunal however deferred its opinion with regard to the issue of its jurisdiction with respect to the delimitation of the continental shelf beyond 200nautical miles to paragraphs 341-394 of the judgment.

H. Applicable Law

Article 23 of the Statute of the Tribunal states that: "The Tribunal shall decide all disputes and applications in accordance with article 293" of the Convention. Article 293, paragraph 1, of the Convention states as follow: "A court or tribunal having jurisdiction under this section shall apply this Convention and other rules of International Law not incompatible with this Convention".

The Parties agreed that the applicable law is the Convention and other rules of international law not incompatible with it. Articles 15, 74 and 83 of the Convention establish the law applicable to the delimitation of the territorial sea, the exclusive economic zone and the continental shelf, respectively. As the present case relates, *inter*

alia, to the delimitation of the continental shelf, article 76 of the Convention is also of particular importance.

The Tribunal really examined the provisions of articles 15, 74, 76 and 83 of the Convention in the relevant sections of the Judgment relating to the delimitation of the territorial sea, the exclusive economic zone and the continental shelf.

And while reacting to arguments of both Parties on the appropriate method of delimiting maritime boundary, the Tribunal observed in paragraph 264 of its judgment that, while coastal States are entitled to determine their base points for the purpose of delimitation, the Tribunal is not obliged, when called upon to delimit the maritime boundary between the parties to a dispute, to accept base points indicated by either or both of them. The Tribunal may establish its own base points, on the basis of the geographical facts of the case. As the ICJ stated in the *Black Sea* case:

> in … the delimitation of the maritime areas involving two or more States, the Court should not base itself solely on the choice of base points made by one of those Parties. The Court must, when delimiting the continental shelf and the exclusive economic zones, select base points by reference to the physical geography of the relevant coasts.[851]

I. Continental Shelf beyond 200 Nautical Miles: Jurisdiction to Delimit the Continental Shelf in Its Entirety

[851]Maritime Delimitation in the Black Sea *Romania* v *Ukraine* (2009) Judgment, ICJ Reports, p. 61,
at p. 108, para. 137).

One of the important issues raised in this present case by the Parties thereto was whether the Tribunal has the jurisdiction to delimit the continental shelf in its entirety. That is to say, does the Tribunal have jurisdiction to delimit the continental shelf between the two States in the Bay of Bengal both within and beyond 200nm.While the Parties were in agreement that the Tribunal was requested to delimit the continental shelf between them in the Bay of Bengal within 200 nm, they disagreed as to whether the Tribunal has jurisdiction to delimit the continental shelf beyond 200 nm and whether the Tribunal, if it determined that it has jurisdiction to do so, should exercise such jurisdiction.

As pointed out in paragraph 45 of the judgment, Myanmar did not dispute that "as a matter of principle, the delimitation of the continental shelf, including the shelf beyond 200 nm, could fall within the jurisdiction of the Tribunal". However, it raised the issue of the advisability in the present case of the exercise by the Tribunal of its jurisdiction with respect to the delimitation of the continental shelf beyond 200 nm.

Myanmar stated in its Counter-Memorial that the question of the jurisdiction of the Tribunal regarding the delimitation of the continental shelf beyond 200 nm in general should not arise in the present case because the delimitation line, in its view, terminated well before reaching the 200 nm limit from the baselines from which the territorial sea is measured. At the same time Myanmar submitted that "even if the Tribunal were to decide that there could be a single maritime boundary beyond 200 nm*quod non*, the Tribunal would still not have jurisdiction to determine this line because any judicial

pronouncement on these issues might prejudice the rights of third parties and also those relating to the international seabed area".[852]

Myanmar further submitted that "as long as the outer limit of the continental shelf has not been established on the basis of the recommendations" of the Commission on the Limits of the Continental Shelf (CLCS) "the Commission", "the Tribunal, as a court of law, cannot determine the line of delimitation on a hypothetical basis without knowing what the outer limits are". It argued in this regard that:

> A review of a State's submission and the making of recommendations by the Commission on this submission is a necessary prerequisite for any determination of the outer limits of the continental shelf of a coastal State 'on the basis of these recommendations' under article 76 (8) of UNCLOS and the area of continental shelf beyond 200 nm to which a State is potentially entitled; this, in turn, is a necessary precondition to any judicial determination of the division of areas of overlapping sovereign rights to
>
> the natural resources of the continental shelf beyond 200

[852] *Bangladesh v Myanmar, supra,* p. 103, para.344.

> nm.… To reverse the process..., to adjudicate with respect to rights the extent of which is unknown, would not only put this Tribunal at odds with other treaty bodies, but with the entire structure of the Convention and the system of international ocean governance.[853]

In support of its position, Myanmar referred to the Arbitral Award in the *Case concerning the Delimitation of Maritime Areas between Canada and France*[854]of 10 June 1992, which stated: "it is not possible for a tribunal to reach a decision by assuming hypothetically the eventuality that such rights will in fact exist".

Myanmar asserted that in the *Case Concerning Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea Case*[855] the ICJ declined to delimit the continental shelf beyond 200 nm between Nicaragua and Honduras because the Commission had not yet made recommendations to the two countries regarding the continental shelf beyond 200 nm.

During the oral proceedings Myanmar clarified its position, stating, *inter alia*, that in principle it did not question the jurisdiction of the Tribunal. The Parties accepted the Tribunal's jurisdiction on the same terms, in accordance with the provisions of article 287, paragraph 1, of the Convention, "for the settlement of dispute … relating to the delimitation of maritime boundary between the two countries in the Bay of Bengal".

853*Supra*, pp. 103-104, para.345.
854*Canada v France* (1992), ILM Vol. 31,p.1145, at p.1172, para. 81.
855*Nicaragua* v *Honduras* (2007) Judgment, ICJ Reports, p. 659, at p. 735 para.253.

According to Myanmar, the only problem that arose concerned the possibility that the Tribunal might in this matter exercise this jurisdiction and decide on the delimitation of the continental shelf beyond 200nm.

Myanmar further observed that if the Tribunal,

> nevertheless were to consider the application admissible on this point – *quod non* – you could not but defer judgment on this aspect of the matter until the Parties, in accordance with Article 76 of the Convention, have taken a position on the recommendations of the Commission concerning the existence of entitlements of the two Parties to the continental shelf beyond 200 nm and, if
>
> such entitlements exist, on their seaward extension – i.e., on the outer (not lateral, *outer*) limits of the continental shelf of the two countries.[856]

Bangladesh in the contrary was of the view that the Tribunal was expressly empowered by the Convention to adjudicate disputes between States arising under articles 76 and 83, in regard to the delimitation of the continental shelf. As the Convention draws no distinction in this regard between jurisdiction over the inner part of the continental shelf, i.e., that part within 200 nm, and the part beyond that distance, according to Bangladesh,

[856] *Bangladesh v Myanmar, supra*, p.105, para.349.

delimitation of the entire continental shelf was covered by article 83, and the Tribunal plainly has jurisdiction to carry out delimitation beyond 200 nm.

Also, in responding to Myanmar's argument that "in any event, the question of delimiting the shelf beyond 200 nm did not arise because the delimitation line terminated well before reaching the 200 nm limit", Bangladesh stated that "Myanmar's argument that

Bangladesh has no continental shelf beyond 200 nm was based instead on the proposition that once the area within200 nm is delimited, the terminus of Bangladesh's shelf falls short of the 200 nm limit". Bangladesh contended that "this can only be a valid argument if the Tribunal first accepted Myanmar's arguments in favour of an equidistance line within 200 nm. Such an outcome would require the Tribunal to disregard entirely the relevant circumstances relied upon by Bangladesh".

With reference to Myanmar's argument regarding the rights of third parties, Bangladesh stated that a potential overlapping claim of a third State cannot deprive the Tribunal of jurisdiction to delimit the maritime boundary between two States that are subject to the jurisdiction of the Tribunal, because, third States are not bound by the Tribunal's judgment and their rights are unaffected by it. Bangladesh pointed out that so far as third States are concerned, a delimitation judgment by the Tribunal is merely *res inter aliosacta* and that this assurance was provided in article 33, paragraph 2, of the Statute.

Bangladesh also observed that Myanmar's contention "with regard to the international seabed area disregards its own submission to the CLCS, which makes clear that the outer limits of the continental shelf *vis-à-vis* the international seabed are far

removed from the maritime boundary with Bangladesh". Bangladesh observedfurther that with respect to the potential areas of overlap with India, Myanmar accepted that even if the Tribunal cannot fix a tripoint between three States, it can indicate the "general direction for the final part of the maritime boundary between Myanmar and Bangladesh", and that doing so would be "in accordance with the well-established practice" of international courts and tribunals.[857]

In summarizing its position on the issue of the rights of third parties and the jurisdiction of the Tribunal, Bangladesh stated that:

> 1. The delimitation by the Tribunal of a maritime boundary in the continental shelf beyond 200 nm does not prejudice the rights of third parties. In the same way that international courts and tribunals have consistently exercised jurisdiction where the rights of third States are involved, ITLOS may exercise jurisdiction, even if the rights of the international community to the international seabed were involved, which in this case they are not.
>
> 2. With respect to the area of shelf where the claims of Bangladesh and Myanmar overlap with those of India, the Tribunal need only determine which of the two Parties in the present proceeding has the better claim, and effect a delimitation that is only binding on

[857] *Supra*, paras.350-354.

> Bangladesh and Myanmar. Such a delimitation as between the two Parties to this proceeding would not be binding on India.[858]

Bangladesh observed that there is no conflict between the roles of the Tribunal and the Commission in regard to the continental shelf and that, to the contrary, the roles are complementary. Bangladesh also stated that the Tribunal has jurisdiction to delimit boundaries within the outer continental shelf and that the Commission makes recommendations as to the delineation of the outer limits of the continental shelf with the Area, as defined in article 1, paragraph 1, of the Convention, provided there are no disputed claims between States with opposite or adjacent coasts.

Bangladesh added that the Commission may not make any recommendations on the outer limits until any such dispute is resolved by the Tribunal or another judicial or arbitral body or by agreement between the parties, unless the parties give their consent that the Commission review their submissions. According to Bangladesh, in the present case, "the Commission is precluded from acting due to the Parties' disputed claims in the outer continental shelf and the refusal by at least one of them (Bangladesh) to consent to the Commission's actions".

Bangladesh pointed out still that if Myanmar's argument were accepted, the Tribunal would have to wait for the Commission to act and the Commission would have to wait for the Tribunal to act. According to Bangladesh, the result would be that, whenever parties are in dispute in regard to the continental shelf beyond 200 nm, the compulsory procedures entailing binding decisions under Part XV, section 2, of the

858 *Supra*, para. 355.

Convention would have no practical application. Bangladesh added that, "in effect, the very object and purpose of the UNCLOS dispute settlement procedures would be negated. Myanmar's position opens a jurisdictional black hole into which all disputes concerning maritime boundaries in the outer continental shelf would forever disappear".

Summarizing its position, Bangladesh stated that in portraying recommendations by the Commission as a prerequisite to the exercise of jurisdiction by the Tribunal Myanmar set forth a "circular argument" that would make the exercise by the Tribunal of its jurisdiction with respect to the continental shelf beyond 200nm impossible, which is inconsistent with Part XV and with article 76, paragraph 10, of the Convention.

It was at this juncture that the Tribunal interjected just to consider whether it has jurisdiction to delimit the continental shelf beyond 200 nm.

Article 76 of the Convention embodies the concept of a single continental shelf. In accordance with article 77, paragraphs 1 and 2, of the Convention, the coastal State exercises exclusive sovereign rights over the continental shelf in its entirety without any distinction being made between the shelf within 200 nm and the shelf beyond that limit. Article 83 of the Convention, concerning the delimitation of the continental shelf between States with opposite or adjacent coasts, likewise does not make any such distinction.

In this regard, the Tribunal noted that in the *Arbitration between Barbados and Trinidad and Tobago*[859] the Arbitral Tribunal decided that:

[859]Decision of 11 April 2006, RIAA, Vol. 27, p. 147, at pp. 208-209, para. 213.

> the dispute to be dealt with by the Tribunal includes the outer continental shelf, since … it either forms part of, or is sufficiently closely related to, the dispute … and … in any event there is in law only a single 'continental shelf' rather than an inner continental shelf and a separate extended or outer continental shelf.

For the foregoing reasons, the Tribunal found that it has jurisdiction to delimit the continental shelf in its entirety. The Tribunal thereafter considered whether, in the circumstances of this case, it is appropriate to exercise that jurisdiction. It first addressed Myanmar's argument that Bangladesh's continental shelf cannot extend beyond 200 nm because the maritime area in which Bangladesh enjoys sovereign rights with respect to natural resources of the continental shelf does not extend up to 200 nm.

The Tribunal noted emphatically that this argument cannot be sustained, given its decision, as set out in paragraph 339 of the judgment, that the delimitation line of the exclusive economic zone and the continental shelf reaches the 200 nm limit.

The Tribunal latter turned to the question of whether the exercise of its jurisdiction could prejudice the rights of third parties. In its argument, the Tribunal observed that, as provided for in article 33, paragraph 2, of the Statute, its decision "shall have no binding force except between the parties in respect of that particular dispute". Accordingly, the delimitation of the continental shelf by the Tribunal cannot prejudice the rights of third parties. Moreover, it is established practice that the direction of the seaward segment of a maritime boundary may be determined without indicating its

precise terminus, for example by specifying that it continues until it reaches the area where the rights of third parties may be affected.

In addition, as far as the Area is concerned, the Tribunalobserved further that, as is evident from the Parties' submissions to the Commission, the continental shelf beyond 200 nm that is the subject of delimitation in the present case is situated far from the Area. Accordingly, the Tribunal, by drawing a line of delimitation, will not prejudice the rights of the international community.

The Tribunal also examined the issue of whether it should refrain in the present case from exercising its jurisdiction to delimit the continental shelf beyond 200 nm until such time as the outer limits of the continental shelf have been established by each Party pursuant to article 76, paragraph 8, of the Convention or at least until such time as the Commission has made recommendations to each Party on its submission and each Party has had the opportunity to consider its reaction to the recommendations. In its decision, the Tribunal pointed out that the absence of established outer limits of a maritime zone does not preclude delimitation of that zone. Lack of agreement on baselines has not been considered an impediment to the delimitation of the territorial sea or the exclusive economic zone notwithstanding the fact that disputes regarding baselines affect the precise seaward limits of these maritime areas. However, in such cases the question of the entitlement to maritime areas of the parties concerned did not arise.

The Tribunal painstakingly considered the issue as to whether it is appropriate to proceed with the delimitation of the continental shelf beyond 200 nm given the role of the Commission as provided for in article 76, paragraph 8, of the Convention and article 3, paragraph 1, of Annex II to the Convention.

It found that pursuant to article 31 of the Vienna Convention, the Convention is to be interpreted in good faith in accordance with the ordinary meaning of its terms in their context and in the light of its object and purpose. As stated in the *Advisory Opinion of the Seabed Disputes Chamber*, article 31 of the Vienna Convention is to be considered "as reflecting customary international law".[860]

The Convention sets up an institutional framework with a number of bodies to implement its provisions, including the Commission, the International Seabed Authority and this Tribunal. Activities of these bodies are complementary to each other so as to ensure coherent and efficient implementation of the Convention. The same is true of other bodies referred to in the Convention.

The right of coastal State under article 76, paragraph 8, of the Convention to establish final and binding limits of its continental shelf is a key element in the structure set out in that article. In order to realize this right, the coastal State, pursuant to article 76, paragraph 8, is required to submit information on the limits of its continental shelf beyond 200nm to the Commission, whose mandate is to make recommendations to coastal State on matters related to the establishment of the outer limits of its continental shelf. The Convention stipulates in article 76, paragraph8, that the "limits of the shelf established by coastal State on the basis of these recommendations shall be final and binding".

Thus, the Commission plays an important role under the Convention and has a special expertise which is reflected in its composition. Article 2 of Annex II to the

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[860] *Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area Request for Advisory Opinion submitted to the Seabed Disputes Chamber*, (1 February 2011) para. 57.

Convention provides that the Commission shall be composed of experts in the field of geology, geophysics or hydrography. Article 3 of Annex II to the Convention stipulates that the functions of the Commission are, *inter alia*, to consider the data and other materials submitted by coastal Statesconcerning the outer limits of the continental shelf in areas where those limits extend beyond 200 nm and to make recommendations in accordance with article 76 of the Convention.

There is a clear distinction between the delimitation of the continental shelf under article 83 and the delineation of its outer limits under article 76. Under the latter article, the Commission is assigned the function of making recommendations to coastal States on matters relating to the establishment of the outer limits of the continental shelf, but it does so without prejudice to delimitation of maritime boundaries. The function of settling disputes with respect to delimitation of maritime boundaries is entrusted to dispute settlement procedures under article 83 and Part XV of the Convention, which include international courts and tribunals.

There is nothing in the Convention or in the Rules of Procedure of the Commission or in its practice to indicate that delimitation of the continental shelf constitutes an impediment to the performance by the Commission of its functions.[861]

Article 76, paragraph 10, of the Convention states that "the provisions of this article are without prejudice to the question of delimitation of the continental shelf between States with opposite or adjacent coasts". This is further confirmed by article 9 of Annex II, to the Convention, which states that the "actions of the Commission shall not

[861] *Bangladesh v Myanmar, supra,* p.111, para.377.

prejudice matters relating to delimitation of boundaries between States with opposite or adjacent coasts".

It is further noted that just as the functions of the Commission are without prejudice to the question of delimitation of the continental shelf between States with opposite or adjacent coasts, so the exercise by international courts and tribunals of their jurisdiction regarding the delimitation of maritime boundaries, including that of the continental shelf, is without prejudice to the exercise by the Commission of its functions on matters related to the delineation of the outer limits of the continental shelf.

Several submissions made to the Commission, beginning with the first submission, have included areas in respect of which there was agreement between the States concerned effecting the delimitation of their continental shelf beyond 200 nm. However, unlike in the present case, in all those situations delimitation has been effected by agreement between States, not through international courts and tribunals. In this respect, the Tribunal notes the positions taken in decisions by international courts and tribunals.

The Arbitral Tribunal in the *Arbitration between Barbados and the Republic of Trinidad and Tobago*[862] found that its jurisdiction included the delimitation of the maritime boundary of the continental shelf beyond 200 nm. The Arbitral Tribunal, in that case, did not exercise its jurisdiction stating thatin the *Caribbean Sea Case*,[863]the ICJ declared that, "as will become apparent, however, the single maritime boundary which the Tribunal has determined is such that, as between Barbados and Trinidad and Tobago, there is no single maritime boundary beyond 20nm".

862*Decision of 11 April 2006*, *RIAA, Vol. 27*, p. 209, para.213.

863 *Nicaragua v Honduras, supra,* p. 242, para. 368.

In the *case concerning Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea*[864] ICJ declared that:

> The Court may accordingly, without specifying a precise endpoint, delimit the maritime boundary and state that it extends beyond the 82nd meridian without affecting third-States rights. It should also be noted in this regard that in no case may the line be interpreted as extending more than 200 nm from the baselines from which the breadth of the territorial sea is measured; any claim of continental shelf rights beyond 200 miles must be in accordance with Article 76 of UNCLOS and reviewed by the Commission on the Limits of the Continental Shelf established thereunder.

The Tribunal observed that the determination of whether an international court or tribunal should exercise its jurisdiction depends on the procedural and substantive circumstances of each case.

Pursuant to rule 46 of the Rules of Procedure of the Commission, in the event that there is a dispute in the delimitation of the continental shelf between States with opposite or adjacent coasts, submissions to the Commission shall be considered in accordance with Annex I to those Rules. Annex I, paragraph 2, provides:

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[864] *Ibid,* p.659, at p.759, para. 319.

> In case there is a dispute in the delimitation of the continental shelf between opposite or adjacent States, or in other cases of unresolved land or maritime disputes, related to the submission, the Commission shall be:
>
> (a) Informed of such disputes by the coastal States making the submission; and
>
> (b) Assured by the coastal States making the submission to the extent possible that the submission will not prejudice matters relating to the delimitation of boundaries between States.

Paragraph 5 (a) of Annex I to the same Rules further provides:

> 5. (a) In cases where a land or maritime dispute exists, the Commission shall not consider and qualify a submission made by any of the States concerned in the dispute. However, the Commission may consider one or more submissions in the areas under dispute with prior consent given by all States that are parties to such a dispute.

In the present case, Bangladesh informed the Commission by a note *verbale* dated 23 July 2009, addressed to the Secretary-General of the United Nations, that, for the purposes of rule 46 of the Rules of Procedure of the Commission, and of Annex I thereto,

there was a dispute between the Parties and, recalling paragraph 5 (a) of Annex I to the Rules, observed that:

> given the presence of a dispute between Bangladesh and Myanmar concerning entitlement to the parts of the continental shelf in the Bay of Bengal claimed by Myanmar in its submission, the Commission may not "consider and qualify" the submission made by Myanmar without the "prior consent given by all States that are parties to such a dispute".

Taking into account Bangladesh's position, the Commission deferred consideration of the submission made by Myanmar.[865]

The Commission also decided to defer the consideration of the submission of Bangladesh,

> in order to take into account any further developments that might occur in the intervening period, during which the States concerned might wish to take advantage of the avenues available to them, including provisional arrangements of a practical nature as outlined in annex I to the rules of procedure.[866]

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[865] Statement by the Chairman of the Commission on the progress of work in the Commission, CLCS/64 of 1 October 2009, p. 10, paragraph 40 <www.un.org.searchoceansandlawof theseasite> accessed on February 23, 2014.

[866] *Ibid*.

The consequence of these decisions of the Commission is that, if the Tribunal declines to delimit the continental shelf beyond 200 nm under article 83 of the Convention, the issue concerning the establishment of the outer limits of the continental shelf of each of the Parties under article 76 of the Convention may remain unresolved. The Tribunal noted that the record in this case affords little basis for assuming that the Parties could readily agree on other avenues available to them so long as their delimitation dispute is not settled.

A decision by the Tribunal not to exercise its jurisdiction over the dispute relating to the continental shelf beyond 200 nm would not only fail to resolve a long-standing dispute, but also would not be conducive to the efficient operation of the Convention. Also, in the view of the Tribunal, it would be contrary to the object and purpose of the Convention not to resolve the existing impasse. Inaction in the present case, by the Commission and the Tribunal, two organs created by the Convention to ensure the effective implementation of its provisions, would leave the Parties in a position where they may be unable to benefit fully from their rights over the continental shelf[867] by reaping those economic resources which fall within their national jurisdictions.

The Tribunal therefore observed that the exercise of its jurisdiction in the case could not be seen as an encroachment on the functions of the Commission, inasmuch as the settlement, through negotiations, of disputes between States regarding delimitation of the continental shelf beyond 200 nm is not seen as precluding examination by the Commission of the submissions made to it or hindering it from issuing appropriate recommendations.

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[867] *Bangladesh v Myanmar, supra,* p. 115, para. 392.

For the foregoing reasons, the Tribunal concluded that, in order to fulfill its responsibilities under Part XV, section 2, of the Convention in the present case, it had an obligation to adjudicate the dispute and to delimit the continental shelf between the Parties beyond 200 nm. Such delimitation is without prejudice to the establishment of the outer limits of the continental shelf in accordance with article 76, paragraph 8, of the Convention. It states that the delimitation of the continental shelf beyond 200 nm in this case entails the interpretation and application of both article 76 and article 83 of the Convention.

The Tribunal, after exhaustive deliberations delivered the following judgment:

(1) Unanimously,

Foundthat it has jurisdiction to delimit the maritime boundary of the territorial sea, the exclusive economic zone and the continental shelf between the Parties.

(2) By 21 votes to 1,

Foundthat its jurisdiction concerning the continental shelf includes the delimitation of the continental shelf beyond 200 nm;

Hoffmann, Gao, Bouguetaia, Golitsyn, Paik; Judges *Ad Hoc*Mensah, Oxman; Against: JudgeNdiaye.

(3) By 20 votes to 2,

Foundthat there was no agreement between the Parties within the meaning of article 15 of the Convention concerning the delimitation of the territorial sea;

FOR: PresidentJesus; Vice-PresidentTürk; JudgesMarotta Rangel, Yankov, Nelson, ChandrasekharaRao, Akl, Wolfrum, Treves, Ndiaye, Cot, Pawlak, Yanai, Kateka, Hoffmann, Gao, Golitsyn, Paik; Judges*Ad Hoc*Mensah, Oxman; Against: JudgesLucky, Bouguetaia.

This was against the argument of Bangladesh.

(4) By 21 votes to 1,

Decidedthat starting from point 1, with the coordinates 20° 42’ 15.8” N, 92° 22’ 07.2” E in WGS 84 as geodetic datum, as agreed by the Parties in 1966, the line of the single maritime boundary shall follow a geodetic line until it reaches point 2 with the coordinates 20° 40’ 45.0” N, 92° 20’ 29.0” E. From point 2 the single maritime boundary shall follow the median line formed by segments of geodetic lines connecting the points of equidistance between St. Martin’s Island and Myanmar through point 8 with the coordinates 20° 22’ 46.1” N, 92° 24’ 09.1” E. From point 8 the single maritime boundary follows in a northwesterly direction the 12 nm envelope of arcs of the territorial sea around St Martin’s Island until it intersects at point 9 (with the coordinates 20° 26’ 39.2” N, 92° 9’ 50.7” E) with the delimitation line of the exclusive economic zone and continental shelf between the Parties;

FOR: PresidentJesus; Vice-PresidentTürk; JudgesMarotta Rangel, Yankov, Nelson, ChandrasekharaRao, Akl, Wolfrum, Treves, Ndiaye, Cot, Pawlak, Yanai, Kateka, Hoffmann, Gao, Bouguetaia, Golitsyn, Paik; Judges *Ad Hoc*Mensah, Oxman; Against: Judge Lucky.

(5) By 21 votes to 1,

Decidedthat, from point 9 the single maritime boundary follows a geodetic line until point 10 with the coordinates 20° 13' 06.3" N, 92° 00' 07.6" E and then along another geodetic line until point 11 with the coordinates 20° 03' 32.0" N, 91° 50' 31.8" E. From point 11 the single maritime boundary continues as a geodetic line starting at an azimuth of 215° until it reaches the 200 nm limit calculated from the baselines from which the breadth of the territorial sea of Bangladesh is measured;

FOR: PresidentJesus; Vice-PresidentTürk; JudgesMarotta Rangel, Yankov, Nelson, ChandrasekharaRao, Akl, Wolfrum, Treves, Ndiaye, Cot, Pawlak, Yanai, Kateka, Hoffmann, Gao, Bouguetaia, Golitsyn, Paik; Judges*Ad Hoc*Mensah, Oxman; 149 Against: Judge Lucky.

(6) BY 19 votes to 3

Decidedthat, beyond that 200 nm limit, the maritime boundary shall continue, along the geodetic line starting from point 11 at an azimuth of 215° as identified in operative paragraph 5, until it reaches the area where the rights of third States may be affected.

FOR: PresidentJesus; Vice-PresidentTürk; JudgesMarotta Rangel, Yankov, Nelson, ChandrasekharaRao, Akl, Wolfrum, Treves, Cot, Pawlak, Yanai, Kateka, Hoffmann, Bouguetaia, Golitsyn, Paik; Judges*Ad Hoc*Mensah, Oxman; Against: JudgesNdiaye, Lucky, Gao.[868]

As is often the case with international settlement of maritime boundary disputes, there was no outright "winner" or "loser" with the ITLOS judgment in the present case. Though the Foreign Minister of Bangladesh, Dr. DipuMoni, has claimed the judgment as

[868]For the above decisions, see *supra*, pp. 147-149.

a victory for her country; it is very likely that Myanmar might also claim a "win" as it received a much larger share of the relevant area, while St. Martin's Island was not given full weight in the delimitation, as had been argued by Bangladesh.

In strategic terms, the ITLOS judgment in Bangladesh – Myanmar dispute is an international limelight and a positive development not only for the region but for States Parties involved in sea disputes in other regions. It solves a major source of tension in the Bay of Bengal, and shows that with political will, maritime disputes can be settled peacefully using any of the settlement procedures provided for under the Convention.

It seems however, that the disputes in other regional seas, particularly those in the South China Sea may not be going to international arbitration or court soon. These disputes are more complex with intractable aspects that militate against them being taken to arbitration in the foreseeable future.

iii. Arbitration as a Promising Alternative to Dispute Settlement under the Law of the Sea

During the Conference at which the Convention was adopted, it was also considered that some States might not consider the International Tribunal for the Law of the Sea (ITLOS) acceptable as a compulsory forum for the settlement of all their disputes. This is particularly so in the case of those States which object in principle to a mandatory obligation to submit their disputes to an international judicial body. To cater for the interests of such States, it was decided to provide other alternative procedures which would give States Parties a greater measure of choice in the composition of the bodies to

which their disputes might be submitted.[869] The alternative procedure provided for in the Convention involves the use of arbitration or arbitral tribunals whose membership will, at least in part, be determined by the parties to the particular dispute. Parties to the Convention which do not wish to use either the International Court of Justice (ICJ) or the International Tribunal for the of the Sea (ITLOS) can agree to submit their disputes for settlement by arbitral tribunals whose members will be selected by the parties to the particular disputes, in the manner provided for that purpose in the Convention.[870]

Two different types of arbitration provided for under the Convention are:

i. arbitration in accordance with Annex VII to the Convention; and

ii. special arbitration pursuant to Annex VIII to the Convention.

Arbitration under Annex VII to the Convention is a comprehensive procedure which is available to deal with disputes arising in connection with the provisions of the Convention as a whole;[871]whereas special arbitration under Annex VIII is restricted to specific categories of disputes, namely those relating to fisheries, the protection and preservation of the marine environment, marine scientific research and navigation including pollution from vessels and by dumping.[872] In each case however, the dispute is submitted to an arbitral tribunal selected in the manner provided for in the relevant Annex, for peaceful settlement.

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[869]The dispute settlement procedures of the Convention is said to be flexible in that parties have options as to
the appropriate means and fora for settlement of their disputes; and comprehensive in that the bulk of the Convention's provisions can be enforced through binding mechanisms; and accommodating of matters of vital national concern in that they exclude certain sensitive categories of dispute from binding dispute settlement.

[870]UNCLOS, Art. 287 (1).

[871]Annex VII to UNCLOS, Art. 1.

[872]Annex VIII to UNCLOS, Art. 1.

Against the backdrop, there exist numerous benefits which accompany peaceful settlement of disputes, particularly maritime disputes. States with maritime disputes are therefore encouraged to explore the spectrum of opportunity of resolving their dispute afforded by the existing Convention on the Law of the Sea. All the countries around the South China Sea which are having overlapping claims in various parts of the sea have ratified the Convention except Taiwan which does not yet enjoy a status as an internationally recognized State, but has made its own declaration in support of UNCLOS. These countries and other countries with maritime disputes should take their cue from

Cyprus which has followed the rules enshrined in the Convention in settling its maritime boundary disputes. In 2003, the Island nation settled its maritime border with Egypt and proceeded, in 2007, to demarcate the line with Lebanon and in 2010 to reach an agreement with Israel. This removed any doubts as to the legitimacy of its claim to the so-called *Aphrodite natural gas field*, which is located off of the Southern Coast of the Island, adjacent to Israel's Leviathan gas field. The Aphrodite field, which is estimated to contain some two hundred billion cubic meters of natural gas,[873] could not only ensure the energy independence and security of Cyprus, but if developed in conjunction with other fields in both the Cypriot and Israeli zones, it will also set up the island as a net exporter of energy, particularly to Europe which is currently in need of new energy supplies.[874]

8.3Challenges Facing Dispute Settlement Mechanism under the UNCLOS

[873]N. K.Gvosdev, 'Battle for the High Seas', (2012)<http://nationalinterest.org/commentary/battle-the-high-seas-7559> accessed on 17th June, 2013.
[874]*Ibid*.

From the above discussion, it is evident that, normally, the overlapping territorial claims to sovereignty and maritime boundaries ought to be resolved through acombination of customary international law, Adjudication before the International Court of Justice or the InternationalTribunal for the Law of the Sea, or arbitration under Annex VII of the United Nations Convention for the Law of Sea. Unfortunately, this has not always been the case, especially with maritime disputes between major powers. The above international institutions for settlement of maritime disputes have been criticized as ineffective players in achieving international peace and security largely because of their perceived inability to control State behaviours in this line. Scholars have blamed the International Court of Justice in particular for its jurisdictional architecture, which is based entirely on consent.[875] Although, compulsory jurisdiction system of dispute settlement has been developed under the UNCLOS the fact remains that some area of sea disputes, especially those directly affecting States sovereignty and their actions within the area of jurisdiction continue to require consent of both States. Anything less than a clear indication of consent by the defendant State in a given case may run serious non-compliance risks.[876]

Additionally, the absence of the political will on the side of the major powers[877] to submit to any of the dispute settlement mechanisms provided for under the UNCLOS, and the interwoven nature of most of these disputes constitute a great challenge in the settlement of dispute under the UNCLOS.One frequently-cited sea dispute today is the

[875]A. P.Llamzon, 'Jurisdiction and Compliance in Recent Decisions of the ICJ'(2013) *The European Journal*
of International Law vol. 18, N0 5, p.1.
[876]*Ibid*.
[877]K. Julian, 'Goodbye UNCLOS Dispute Settlement? China Walks Away from UNCLOS Arbitration with the Philippines' < opinion juri.org/…goodbyeunclosdisputesettlement…> accessed on 23 October 2014

South China Sea (SCS) dispute. With its overlapping jurisdictional claims and territorial dispute over groups of Mid-ocean Island, arising from the divergent interests of the neighbouring States, the South China Sea dispute is regarded as one of the most complex disputes in the East Asia and the world at large. The South China Sea (SCS) dispute and the likes constitute dangerous sources of potential conflict,[878] which could turn into serious international conflicts[879] if they are not properly managed and settled. The South China Sea dispute is complicated by many factors including the fact that it involves a number of claimants, and the economic and strategic nature of the area. The dangers posed by these disputes have long attracted the attention of the international community including the United States, and several attempts have been made to investigate the real causes of the disputes as well as to introduce possible solutions thereto. Such complexity of situation has made the South China Sea dispute more vulnerable to armed conflict. In fact, several armed conflicts have actually occurred as a result of the disputes,[880] yet the parties to the dispute are not showing readiness to settle it. Recently in 2013, China walked away and rejected arbitration under Annex VII of the United Nations Convention on the Law of the Sea with the Philippines,[881] a situation which has dealt a heavy blow to the future of dispute settlement under the UNCLOS. The question however is, what will the Philippines do in this situation? to continue with the Annex VII arbitration without China or forbear? The option open to Philippines in this situation was to ask the President of the International Tribunal for the Law of the Sea (ITLOS) to appoint all four

[878]S. Snyder, 'The SCS Dispute Prospects for Preventive Diplomacy', Special Report No. 18 of the United States Institute of Peace <http://usip.org/pubs/specialreport/early/snyder/south- china-sea/.html> accessed on 27 May, 2013.

[879]M.Bennet, 'The People's Republic of China and the Use of International Law in the Spratly Islands Disputes' (1992) 28 *Stanford Journal of International Law*, 425.

[880]S. G. Samuel and B. B. de Mesquita, 'Accessing the Dispute in the SCS: A Model of China's Security Decision Making' (2001) 38, *3 International Studies Quarterly*, 381.

[881]K. Julian, *op cit*.

remaining arbitrators for the Annex VII tribunal. Once the President of ITLOS has done so, the duly constituted arbitration tribunal may act even without China's participation. Any award issued by the tribunal in this situation will not be entirely meaningless as it must have at least, little impact on China. Such award may not stop China much, but an award that undermines the legality of China's claimswould certainly be better than not to have at all. However, it is not nearly as much as it would have been if China had played ball and lost.

China, while rejecting Annex VII arbitration had argued among other things that they have "undisputable sovereignty" over the South China Sea. A statement which has confused the international community as to whether China by this statement meant that South China Sea is a territorial sea or that they have general economic rights similar to an exclusive economic zone.[882] It is worthy of note here that the UNCLOS which China has ratified, by and large does not support historically based claims, which are precisely the type China periodically asserted. For example, on September 4 2012, China's Foreign Minister Yang Jiechi, told the United States Secretary of State Hillary Clinton, that there was "plenty of historical and jurisprudence evidence to show that China has sovereignty over the islands in the South China Sea and adjacent waters".[883]

By these conducts of China and its subsequent walk away from the UNCLOS arbitration with the Philippines, China was thumbing its nose at the UNCLOS and this has dealt a serious, near fatal blow to the UNCLOS dispute settlement system, at least in its ability to resolve serious dispute involving major powers. The UNCLOS arbitration was unable to restrain China in any significant way. At least, China did not think it will

[882]*Ibid.*

[883]M. Malik, 'Historical Fiction: China's South China Sea Claims<seaissue.org/category/lawunclos>accessed on 23 October 2014.

pay serious costs to walking away, which was why it was willing to accept the equivalent of a default judgment.

From the perspective of the United States, the China-Philippines episode is a cautionary tale. On the one hand, it suggested that those critics of the UNCLOS worried about the impact of Annex VII arbitration tribunals need not fear them all that much. On the other hand, the episode should put an end to the always silly argument that the US needed to join UNCLOS in order to use it against China. The United States argued that that was never going to work learning from the ample evidence in the China-Philippines saga.

Despite the above challenges however, the dispute settlement mechanism under the UNCLOS remains a vital tool in resolving inter-state maritime disputes and a force for world public order. In whatever shade and facet, from the entire gamut of our discussion on dispute settlement under the UNCLOS, it may rightly be concluded that the dispute settlement procedures in the present legal regime of the sea possesses many undeniable

merits; although it does, as a matter of fact have some shortcomings. It is, for instance, flexible in that it makes it possible for States to choose from a reasonable wide spectrum of options; but it is comprehensive in that it ensures that, for the most part, its provisions can be enforced by means of mandatory procedures which result in binding decisions. The regime is equally "user-friendly" in the sense that it takes due account of, and accommodates the legitimate concerns of States which wish to exclude issues of vital and sensitive national interest from the ambit of the mandatory judicial procedures. In sum, the present legal regime of the sea advances the principle of the rule of law in

international relations, while taking into cognizance the necessary limits of that principle in a world of sovereign States, most of which are still conscious and jealous of their sovereign rights and prerogatives. It may, of course, rightly be argued by the purists that the regime does not after all have "enough teeth" because it does not subject every possible dispute to the compulsory judicial process. Such argument will be correct. However, it is equally true to say that anything more radical than what obtains now would probably not have been acceptable to many of the States which have acceded to the 1982 Convention and its dispute settlement regime. The Convention has, through its multifaceted dispute settlement procedures and other relevant provisions, addressed the problems arising from divergent States interests in the sea and its resources. This it did by first stating clear-cut divisions of the sea zones, apportioning rights and duties of each State whether coastal or landlocked with regard to those zones, and ensuring through the decisions of these dispute settlement institutions that every State is given their rights. This does not however cancel the fact that the relevant articles of the Convention failed to adequately address some salient issues especially as it relates to the interests of landlocked, geographically disadvantaged States and particularly, the island nations whose fate was not considered with the effect of the emergence of the exclusive economic zone which now transfers the areas of the high seas hitherto enjoyed by these nations to coastal States.

CHAPTER NINE

CONCLUSION AND RECOMMENDATIONS

Governments of all nations should have common interest in fostering the efficient exploitation of ocean resources since it has become apparent that these resources generate income for all nations to share. In the beginning of this research work, an attempt was made to estimate the value of the wealth of the sea. Although no reliable estimates of global ocean wealth exists, such attempt can however be assumed to be significant. The ocean could now produce products worth at least 200 billion dollars or 5 percent of the world income.[884] The annual value of fisheries and hydrocarbon products was estimated 160 billion dollars. Deep sea bed mining of manganese nodule has been assumed to contribute annual value of more than 10 billion dollars.[885] The contribution of these industries, particularly of hydrocarbon, has increased with time and, especially as new uses of the seas develop.

World national product is maximized by allowing the most efficient producers to produce the most valuable products wherever it is cheapest. The ideal regime would not favour land-based production of foodstuffs, energy or mineral resources over production from the sea, or vice versa. Nor would it favour production in any particular area of the sea over another area. Such regime would only discriminate between firms on grounds of efficiency rather than nationality.[886]These rules have not however been followed bythe Convention.

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[884]F. G. Adams, 'The Law of the Sea Treaty and the Regulation of Nodule Exploitation' (1980) 2, *1 Journal of policy modeling*.
[885]M. Wijkman, 'UNCLOS and the Redistribution of Ocean Wealth' in R. Falk *et a*l (eds), *International Law A Contemporary perspective*(Washington DC: White view Press, 1985) p.589.
[886]*Ibid*.

It has been argued that, without effective mechanisms for redistribution of income from sea resources, each country will continue the attempt to obtain a larger share of the sea resources for itself, even at the expense of some inefficiency. The United Nations Convention on the Law of the Sea, 1982 negotiations were characterized by the coastal States attempts and agitations to enclose any sea space that might have some future value. This is as a result of the fact that countries are not required to pay for an increase in the share of the sea wealth or resources. Apparently, exclusive ownership has become attractive as growing world population and advances in marine technology have increased the value of these resources States amass from the sea. The big winners are coastal, broad-margin States and land-based producers of nodule ores, among which are some of the richest countries in the world, while the biggest losers are non-coastal/landlocked developing countries which are net consumers of nodule ores. Among these are some of the world's poorest countries. This is contrary to the spirit and purpose, as well as the declared goal of the Conference which gave birth to the Convention relating to redistribution of sea resources to the poorer countries.

Of particular concern here is how the regime proposed for fisheries, offshore hydrocarbons and the resources of the deep seabed will effect efficiency in production and will redistribute income between nations particularly the distribution of income between developed and developing countries. Articles 69 and70 of the Conventionallegedly modify the fishing rights of coastal States and allow landlocked States and geographically disadvantaged States to harvest an appropriate part of the surplus of the living resources of

the exclusive economic zones of coastal States of the same sub-region or region.[887] The articles also obligate coastal States to negotiate with developing, landlocked and geographically

disadvantage States in the same region or sub-region to establish "equitable arrangements" which would allow them participate in the exploitation of the living resources of the coastal States exclusive economic zone,[888]even when the coastal State has the capacity to harvest the whole allowable catch.

These concession by coastal States are, however, more apparent than real.[889] This is because, the coastal State alone is empowered by the relevant Articles to singlehandedly determine the size of the allowable catch and of its harvesting capacity. The coastal States can also unilaterally determine the size of the surplus they are required to share with landlocked and geographically disadvantaged States neighbours. They can set that surplus at zero, if they so wish. Moreover, even though the coastal State may be obligated to allow developing landlocked and geographically disadvantaged States to participate in harvesting the allowable catch, Article 62 (4) (a)allows the coastal State to charge foreign fishing vessels a fee for this purpose/privilege. Thus, in spite of Articles 69 and 70,the coastal States will enjoy (or dissipate) all the rents from the world's major fishing grounds.[890]

Out of the enormous income generated from the rents from fishing ground, landlocked and geographically disadvantaged States have not been awarded equitable share. It is estimated that at least, a total of 1.2 billion dollars is to be redistributed

[887]UNCLOS, Arts.69 (1) and 70 (1).
[888]*Ibid*, Arts.69 (3) and 70 (4).
[889]M. Wijkman, *op cit*, p.591.
[890]*Ibid*.

annually to coastal States, of which the developed States would gulp the major part. The losers are land-distance fishing fleets and those fishermen who historically have fished in waters that now are declared "foreign".[891]

However, whether this redistribution of income is fair or not is a matter of divided opinion. While coastal States claim ownership of the fishing stocks by right of proximity, landlocked and geographically disadvantaged States stress that this resource too should be part of the common heritage in which they have a share. Undeniably, it seems that the Convention fails to compensate those fishing nations that lose historical rights and favour currently rich coastal States over poor ones, and coastal States over others.

Income generated from the payment or contribution made by Outer Continental Shelf (OCS) States as mandated by Article 82 of the 1982 Conventionfor exploiting resources beyond 200 nautical miles in their continental shelves are also meant for redistribution among international community particularly to developing States. The question is, has this provision bettered the lot of the developing States especially the landlocked and geographically disadvantaged among them? Two major factors tend to reduce the amount of recoverable income through the provisions of Article 82. First, developing States which are net importers of hydrocarbons (mineral resources) produced from their continental shelf are exempted from making such payment or contribution in respect of that mineral resources, for redistribution. Second, the tax rate may be high enough to discourage production in the so-called Mixed Rights Zone in the foreseeable future. Deposits in these zones are in deep waters far off the coasts and as a result, will be the last to be exploited. It follows therefore that well-head tax revenue i.e. income to be generated from payments or contributions by Outer Continental shelf States(OCSSs),

[891]*Ibid.*

available for distribution to the developing States may materialize only in the distant future, if at all.

A laudable provision of the Convention concerning redistribution of sea resources is also contained in Article 140 paragraph 2 which provides that:

> The Authority shall provide for the equitable sharing of financial and other economic benefits derived from the activities in the Area through any appropriate mechanism on a non-discriminatory basis, in accordance with article 160 paragraph 2 (f) (i).

The above article encourages equitable redistribution of sea resources among nations on non-discriminatory basis, taking into special account the interests and needs of landlocked developing States and other geographically disadvantaged States. The extent to which the article is realizable still left much to be desired. This is because it is also subject to the same fate with Article 82, seeing that its relevance depends on when activities in the area begin to yield the expected fruit. Especially so here is that the rights of access of landlocked States particularly developing ones among them, to the sea is still to a large extent a matter of the opinion and decision of their transit States neighbours.

It is believed that the manganese nodules in the Area contain *inter alia* nickel, copper, cobalt and manganese. The most controversial task of the Conference has been to design an institution to regulate the exploitation of these deposits "for the benefits of

mankind as a whole… and taking into particular consideration the interests and needs of the developing countries ….”[892]

Negotiations over the seabed regime naturally arrayed nations of the world into two major parallel groups according to their national interest in the sea. Developing countries were arrayed in a cohesive group against most developed market economies, with each side offering proposals reflecting its dominant economic and ideological interests. The developing States wished the establishment of an International Seabed Authority (ISA) with extensive powers to regulate seabed mining. The developed countries on their own, believing in the collective efficiency of the market economy and free enterprise, wished to limit the power of the ISA. In their view, it should only register claims to mine sites and if claims competed, the Authority should auction the site to the highest bidder. Competitive bidding would ensure that the most efficient firms would mine the seabed and also that the Authority would maximize both the welfare of consumers as a group and ocean rents.[893]

Eventually, a compromise between these opposing views emerged at the fifth session in form of “parallel system” by which national firms, private and public may mine the seabed alongside the Authority’s Enterprise. An applicant for mining rights must prospect and delineate two mine sites, and upon granting mining rights the Authority keeps one of the sites for its Enterprise or assigns it to a developing country. The question which surrounds the power of the Authority to tax bothnational firms and the Enterprise as well as the question of who controls the Authority and thereby ultimately the Enterprise remains to be settled. It has been identified that the preferential

[892]UNCLOS, Art. 140.
[893]M. Wijkman, *op cit*, p.595.

treatment for the Authority's Enterprise relative to the national seabed mining firms as contained in the Convention distorts competitive condition and reduces the efficiency of the seabed mining industry as a whole.

The designing of a management regime for ocean resources that is both efficient and fair in terms of satisfying the divergent States interests in the sea is difficult. Nevertheless, the potential economic value of the sea resources suggests that it is well worth the effort. The provisions of the Convention do not readily ensure that sea values will be fully realized or fairly distributed. Under the regimes proposed for fisheries, hydrocarbons and seabed mining

the most efficient firms will not necessarily be allowed to exploit the resources and the most economic resources will not necessarily be exploited first.[894]As in domestic politics where considerations of efficiency are often sacrificed to achieve greater equity, the negotiations at UNCLOS III have been constrained by considerations of political feasibility. However, the resource regimes of the Convention allow inefficient use of resources without redistributing income from the world's richer to its poorer countries.

9.1 Research Findings

This research work had general interest in the seas and exploitation of economic resources embedded therein, but with particular focus on how the present legal regime of the sea has solved the nagging problem of divergent States interests in the sea. In the course of this research, several observations/findings were made in relation to relevant Articles of the Convention. Some of these Articles failed to take due cognizance of the

[894]*Ibid*, p.599.

conditions and interests of the developing, landlocked and geographically disadvantaged States including also, the island nations.

In the first place, we find that the stringent requirements for scientific evidence for a State to substantiate Extended Continental Shelf (ECS) entitlement as contained in Article 76 of the Convention place developing coastal States at a very serious and severe disadvantage. Most of these States lack means and expertise to collect, interpret and present the necessary data sets required under the article unaided. State Parties to the United Nations Convention on the Law of the Sea (SPLOS) have recognized the continuing difficulties faced by developing States in complying with the Extended Continental Shelf (ECS) submissions deadline.

The complexity of the issues to be investigated and cost involved in compiling a credible submission are enormous. Implementing Article 76 of the Convention requires collection, assembly and analysis of a body of relevant hydrographic, geological and geographical data in accordance with the provisions outlined in the Scientific and Technical Guidelines. The complexity, scale and cost involved in such programme, though varying from State to State according to the different geographical and geophysical circumstances require enormous amounts of resources which developing States apparently lack.

Despite the fact that many developing States especially the Small Island Developing States (SIDS) have large ocean areas rich in resources such as fisheries, oil and gas, minerals and renewable energy, many of them are unable to benefit from the existence of these resources within their coast as a result of inadequate technical and management capacity.

The above excerpts illustrate the difficulties which the governments of developing States face, some of which have low lying coasts that have continental shelves extending beyond 200 nautical miles. Delineation of the outer limit of the continental shelf, especially where this requires ship-borne investigation to complement pre-existing archive data, can be prohibitively expensive. In a complex situation the subsequent data processing and the preparation, presentation and defence of a submission might even be comparable with that of data acquisition. Both activities require a significant input from international experts which developing States cannot sponsor unaided. The legal, scientific and technical capabilities together with the national research facilities needed to undertake the delineation task underArticle 76 of the Conventionis conspicuously inadequate in developing States. Still, the extent and adequacy of external affordable advice and assistance that these developing States can call upon is apparently low.

The difficulties faced by these disadvantaged coastal States in acquiring and analyzing the data sets for Extended Continental Shelf delineation are manifest. These include obtaining full compliance by institutions from developed countries with the UNCLOS provisions relating to marine scientific research. Moreover, efforts to meet the requirements of continental margin delimitation might distort priorities for other more pressing societal concerns or relevant marine scientific endeavours of the State concerned. Yet, failure to implement Article 76may imply that coastal State concerned will lose its rights of claim to the resources deposited in its outer continental shelf and thereby forfeit same to the general interest of common heritage of mankind.

Relaxation of these requirements and submission timing will only mitigate but not resolve these difficulties. Thus as advocated in this work, this situation requires a radical

review of the implementation of the Article and related articles. The reason being that, as noted above, non-compliance with the provision of Article 76disqualifies a developing State as an Outer Continental Shelf State and disentitles such State from the benefits therefrom, thereby putting it in a serious disadvantage when compared to developed States.

The extension of the coastal States' jurisdiction beyond 200 nautical miles by Article 76 has been perceived by landlocked States as a major threat to their interests as this reduces drastically the area of the sea hitherto designated as common heritage of mankind in favour of coastal States. In an attempt to pacify the yearnings of these landlocked developing States, Article 82 of the Conventionwas established.

Secondly, in the course of this research work it was found that the present legal regime of the sea while establishing what we may call new political boundaries in the seas, produced several unanticipated effects. One of such effects involves the interaction between two innovative concepts: the Exclusive Economic Zone jurisdiction given to coastal States and the Jurisdiction and the Legal Status given to landlocked and other geographically disadvantaged States.

While arguments in favour of a share of marine resources for States with limited access to the sea have been advanced for centuries, the existence of exclusive economic zones jurisdiction exacerbates the problem for a host of States which are termed either landlocked or geographically disadvantaged. Article 69 of the Convention which provides for the rights of landlocked State in particular in relation to exclusive economic zone of the sea gives landlocked States the right to participate on equal basis, in the exploitation of an appropriate part of the surplus of the living resources of exclusive

economic zone of coastal States of the same sub-region or region. Paragraph 2 of the article however states that the terms and modalities of such participation shall be established by the States concerned through bilateral, sub-regional or regional agreements. Article 70 of the Conventionmakes similar provisions with regard togeographically disadvantaged States in respect of their rights to participate and share in the economic resources of the exclusive economic zone of their coastal State neighbours.

The Convention not only gives coastal States exclusive rights to determine the allowable catch of the living resources in their exclusive economic zone, but also provides that coastal States shall determine its capacity to harvest the living resources of the exclusive economic zone.[895] It is only when the coastal State does not have the capacity to harvest the entire allowable catch that other States are given access to the surplus allowable catch.

The effects of the provisions of the Articles are telling on landlocked and geographically disadvantaged States. This is because, whether or not bilateral, sub-regional or regional agreements will ever be initiated, and or concluded will depend largely on the whims and caprices of the coastal State neighbour. This trend will make landlocked and geographically disadvantaged States subordinates to coastal States which will invariably affect not only those States', but global economy. This is due tothe fact that a coastal State may refuse to enter agreement purely on political reasons even when it lacks the capacity to harvest the entire allowable catch, leaving the resources unexploited.

[895]UNCLOS,Arts. 61 and 62 respectively.

Landlocked States also, in theory as in the case of right of transit and freedom of access, have the right to participate, on an equitable basis, in the surplus of the living resources of the exclusive economic zone of coastal States in the same sub- region or region. Such participation is granted taking into account the economic and geographical circumstances of all the States. The terms of such participation were to be established by the States concerned through bilateral, sub-regional, or regional agreements after considering the circumstances mentioned in Article 69 (2) (a) – (d) of the Convention.

A Close analysis of the above article reveals that the right of landlocked States to participate on an equitable basis in the exploitation of the living resources of a coastal State exclusive economic zone in the same region or sub-region is predicted on two main qualifications: (i) the right exists only in respect of "an appropriate part of the surplus" and (ii) the economic and geographic circumstances of all States concerned must be taken into account, along with the criteria that generally govern conservation and utilization of the living resources of an exclusive economic zone. Moreover, according to the Convention, when a coastal State is capable of harvesting the entire allowable catch of the living resources in its exclusive economic zone, the coastal State and other concerned States should cooperate in establishing equitable arrangements. Such arrangements might be bilateral, sub-regional or regional, that would allow for developing landlocked States to participate in the exploitation of the living resources.

The argument here is, whether or not the access of landlocked States to the living resources in the exclusive economic zone could be deemed a "right to participate". While the landlocked States strongly defended their right of access to living resources in the zone, coastal States demanded that their capacity to harvest the living resources be

maintained. Proper examination of the provision of the relevant Article on this matter reveals that, similar to the provision of Article 125 of the Convention, it hinges the effectiveness of the article in the sole decision of the coastal State. It is not just surprising but also ridiculous to learn that coastal States alone are vested with right to determine both their capacity to harvest and the allowable catch. This goes without any obligation on the part of coastal States to give regard to the opinion of the neighbouring landlocked and geographically disadvantaged States, thereby forcing these States to ponder to whims and caprices of their coastal States neighbours. The implication is that the article has either deliberately or unwittingly failed to achieve the course for which it was established, namely to secure the right of participation in exploitation of resources of exclusive economic zone to landlocked and geographically disadvantaged States.

In the third place and above all, the protection of landlocked States' rights of transit, freedom of access to and from the sea forms one of the circuses of this research work. Careful examination of the relevant article dealing with the right of access to and from the sea and freedom of transit for landlocked States has shown that the Convention has not faired well also in this respect.The Convention tactically favoured coastal States over landlocked States, by vesting the entire power to determine the freedom of access in the hand of transit States alone. For example, while paragraph 1 of Article 125 of the Convention provides *inter alia*thatlandlocked States shall have the right of access to and from the sea by enjoying the freedom of transit through the territory of transit States by all means of transport for the purpose of exercising the rights provided for in this Convention including those relating to the freedom of the high seas and the common heritage of mankind, paragraph 2 whittled down its effect by providing that the terms

and modalities for exercising freedom of transit shall be agreed between the landlocked States and transit States concerned through bilateral, sub- regional or regional agreements.

The Article 125 which provides for the rights of access by landlocked States is framed in such a way as to suggest that the transit States have unfettered freedom to cooperate with landlocked States in implementing the provisions of the Article or to refrain from doing so if they wish. Nothing suggests in the Article that transit States would incur responsibility if it fails to support or cooperate with its landlocked State neighbour. The Article makes no provisions setting up an international body/organization as in case of the Area, to monitor how transit States comply with its provisions particularly in relation to rights of access which is crucial in the world economy. Hence, compliance with Article 125depends majorly on the political will of transit States and often times they have used their position to force landlocked States into agreements which have no bearing with transit. Should landlocked State refuse to dance to the tune of its transit Stateneighbour, freedom of transit will likely be withheld. Article 125 merely stated the rights of access to and from the sea and freedom of transit without more as to how these rights would be enforced. Hence, landlocked States especially developing ones among them which are generally weak politically and economically, lack the power to enforce the said rights.

Also, while Article 125 (1) ostensibly recognizes a real juridical right of access, the force of the paragraph was substantially whittled away by Article 125 (2), which specifically emphasizes that the terms and modalities for exercising freedom of transit are to be agreed upon by the landlocked States and the transit State neighbour concerned

though bilateral, sub-regional or regional agreements. This Article left transit States without any obligation whatsoever. It is possible to negotiate, but can one impose obligation to conclude? What happens if, due to selfish tendency, transit State fails to reach agreement? The Convention is silent.

Although, recognized by different international instruments, access to the sea still remains theoretical for many landlocked States. In practice, they have to rely heavily on the decisions of their transit States neighbours, who first consider their own sovereignty and strategic interests, not necessarily the interests of the landlocked States.

Lack of or limited access to the sea especially high seas therefore constitutes a matter of great concern to landlocked States as co-owner/inheritors of the economic resources in the high seas and seabed. Right of transit and free access to the sea is a right for landlocked States, no matter the category of codification it enters. A series of treaties have dealt with it and it was never contested. By denying it absolutely, the transit State shirks its international responsibility. This however does not prevent the transit States from laying certain reasonable conditions.

Despite these flaws and weaknesses identifiable with the Convention, one can still assert without fear of contradiction that the United Nations Convention on the Law of the Sea, (UNCLOS), 1982, is a triumph of the conscience of mankind in the field of international law and represents a milestone in the progressive development of international law. In the past for instance, the rules of international law to be observed by all nations of the world were framed and dictated by only a few countries; the major powers. For the first time in the history of international law, a convention represented a set of rules formulated by the combined will of the great majority of States (130 votes

for, 4 against, and 17 absentials) regardless of size or power, in an assembly where equity and freedom in decision making prevailed as a guiding principle. The Convention has therefore been seen as one of the most important innovations in contemporary international law, which is at present at a stage of comprehensive regime with its objective of guaranteeing the interests of all people, in accordance with the principles of justice, equity and protection of the economic order and conditions of all States especially the developing countries and those in special circumstances. The Convention has equally been applauded in this work for the introduction of new innovative system of dispute settlement on the Law of the Sea. This new system has been extolled for its flexibility, comprehensiveness and ability to accommodate very wide spectrum of choices among different States.

What remains is to set up a legal order that would mandate transit States to cooperate with landlocked States in actualizing the intents and purposes of Article 125 of the Convention to enable the latter share equitably in the common heritage of mankind concept as espoused by the Convention.

9.1.2 Conclusion

In the course of this research, it was discovered that States of the world have grouped themselves into different and sometimes opposing categories while pursuing their common interests in the sea. Such group of States as the research revealed includes developing States, landlocked States, geographically disadvantaged States, transit States, coastal States and advanced economy or developed States. One of the most important matters the Third United Nations Conference on the Law of the Sea was intended to resolve during its negotiation was the equitable participation of nations in the wealth of

the sea and non-discriminatory accommodation of the rights and interests of different States and groups especially developing, landlocked and geographically disadvantaged States.

The present legal regime of the sea establishes an international legal regime for the world's seas. The comprehensive legal regime formed the basis of an international programme of action on the sustainable development of the resources and use of the seas as laid out in the Convention. When it became clear that the question of the limits of national jurisdiction was inseparable from the entire law of the sea, some precise rules came in permitting the establishment of national jurisdiction of States. It became necessary therefore to demarcate the jurisdiction of States over marine space, which necessarily implied re-examination of classical notions of the law of the sea. Most States considered this re-examination an occasion to increase their hold upon the seas. It was a time for "maximalists". States wanted to draw the limits of their maritime space as far as possible. While enlargement of the territorial sea, contiguous zone and continental shelf was being discussed, the concept of the economic zone reserved to coastal States exclusively was also put forth with the claim of strengthening the growing hold of each coastal State on the sea. In this climate, establishing a proper regime to represent various State interests in the sea put at issues most concepts of the international law of the sea.

Among the numerous interest groups involved in the negotiations in the Conference, the group of landlocked and geographically disadvantaged States has emerged as an important group in the various committees and informal forum. The organization of the group began, as revealed during the research, in 1971 during the period of the Seabed Committee. The common denominator bringing these States

together as a group was their realization that the proposals by coastal States for extension of the limits of national jurisdiction, whether for living or non-living resources or both would have drastic, adverse and serious consequences on their interests in the sea. The extension is consequential to the provision of Article 76 of the Convention.

To mitigate the adverse effects arising from the expansion of coastal States jurisdiction on the landlocked and geographically disadvantaged States, the Convention contemplated and graciously established Article 82. The Article, among other things mandates Outer Continental Shelf States to make certain payments or contributions to the International Seabed Authority **(**ISA**)** from income generated from the exploitation of resources in their extended continental shelves. Such payments or contributions are to be redistributed by the Authority among nations of the world taking special account of the conditions of landlocked and geographically disadvantaged States especially developing ones among them.

It is therefore widely accepted today that Article 82 of the Convention represents a compromise between the divergent States interests and thus the legal positions of the two major groups of States which took part in the negotiation of the Convention at the Third United Nations Conference on the Law of the Sea. The so-called ‘ broad margin’ States otherwise known as Outer Continental Shelf States insisted on claiming sovereign rights and jurisdiction over their continental shelves beyond 200 nautical mile; whereas an opposing group States, comprised mainly but not exclusively landlocked and geographically disadvantaged States, contended for a final limit for coastal States’ continental shelves to be set at 200 nautical mile. In return and as a way of compensation for the extension of the continental shelves of coastal States beyond 200 nautical miles

limit, the broad margin States are made to share the revenue derived from the exploitation of the non-living resources of the extended continental shelf with the international community through payments or contributions in kind.Article 82therefore reflects an attempt to compensate or modify the consequences of the United Nations Convention on the Law of the Sea Conference's policy of recognizing that the coastal States' continental shelf rights extended to those parts of the continental margin which lay beyond 200 nautical mile line, which originally formed part of the Area declared to be the common heritage of mankind. This reflects the common position held by the African States that participated in the negotiations to the Convention on this subject. African States conceded the right of 'broad margin' Continental Shelf States to claim continental shelves beyond 200 nautical miles based on the understanding that such States would make payments or contributions from mineral resources produced in the continental shelf area beyond 200nautical mile for redistribution among international community**,** as a kind of *quid pro quo.* It follows therefore that Article 82 provides for the application, albeit in limited form, of the concept of the common heritage of mankind within the outer continental shelf, even though the outer continental shelf is within the coastal State's maritime jurisdiction. The provision was instituted and couched in such a manner that the concept of the common heritage of mankind plays a vital role in controlling over-expansion of the exclusive interest of coastal States in the continental shelves.

We conclude generally that the present legal regime of the sea, despite the above identified flaws, has in some ways facilitated the effective exploitation of economic resources beyond national jurisdiction. From oil to tin, diamonds to gravel, metals to fish, the resources of the sea are enormous. Beginning from late 1967 as research revealed, the

tranquility of the sea was slowly being disrupted by technological breakthroughs, accelerating and multiplying uses of the sea, and a super-power rivalry that stood poised to enter man's last preserve - the seabed. This period held dangers and promises, risks and hopes for the international community due to therising tensions between nations over conflicting claims to ocean space and resources.

Amidst such atmosphere, development or effective exploitations of these vast resources of the sea cannot be undertaken. There arose a need for a more stable order to promote greater use and better management of ocean resources and generate harmony and goodwill among States that would no longer have to eye each other suspiciously over conflicting claims. The UNCLOS came in at the right time to salvage the situation as it became the only alternative by which man avoided the escalating tensions that would have been inevitable if the then situation was allowed to continue. Navigational rights, territorial sea limits, economic jurisdiction, legal status of resources on the seabed beyond the limits of national jurisdiction, passage of ships through narrow straits and territorial seas, conservation and management of living marine resources, protection of the marine environment, a marine research regime and, a more unique feature, a binding procedure for settlement of disputes between States - these form some important features of the treaty. The Convention is an unprecedented attempt by the international community to regulate all aspects of the sea and its resources and thus bring a stable order to man's very source of life.This relative stability brought in by the Convention promises an order in the sea and harmonious developmentof the seabed resources.

9.2 Recommendations

The historical function of the international law of the sea has long been that of achieving an appropriate balance between the special exclusive demands/interests of coastal States and other special claimants and the general inclusive demands/interests of all other Sates in the international community. For landlocked States, historically the most important and almost exclusive concern has been freedom of access to the sea. They have therefore demanded that the international community recognize a fundamental right of access and vouch for a universal convention on the matter.

In practice, as in theory, the most serious obstacle to the recognition of the right of access seemed to be the claim to territorial sovereignty by transit States. Among transit States, while majority of them did object or challenge the principle of free access, the principle of sovereignty however overrode it. It is our opinion here however that freedom of access to and from the sea by landlocked States should not be seen simply as a neighbourlyfavour to the landlocked States, but as a right to be recognized and protected by international practice.

It is true that the right of landlocked States' access to the sea has been accepted as an integral part of international law, but the principle should be sincerely respected by transit States to enable landlocked States pursue their interests in the sea on equal pedestal. Admittedly, crossing of a country's territory should require consent of such country, for even in the old time as recorded in the Holy Bible[896] Moses, the leader of God's people sent delegates to *Sihon* King of Amorites praying for permission to transit through the territory of his country. It must be stressed however that a State must not be allowed to force the landlocked States, merely as a matter of principle to negotiate such

[896]Numbers 21:21-26.

an agreement. Transit States must not use their geographical advantage or position under the pretext of territorial sovereignty to pressure the landlocked States.

Article 125 of the Conventionwhich deals with the right of access of landlocked States commonly reflects a compromise that is often disadvantageous to landlocked States. These landlocked States are in practice, in the position of petitioners. It is our candid view here that, from purely formalistic viewpoint, the process of bilateral negotiations as envisaged by this Article favours the transit States, as the right recognized in the Article often tends to appear like a generous gesture rather than a provision regulated by equal parties. Moreover, from the viewpoint of general principles of international law, it is wrong to make the status of a particular country subject to, and conditional upon the benevolence or malevolence of another State. The issue of access to the sea and its attendant multiple economic benefits constitute a rule of international public order, the content of which should not be infringed by bilateral treaties.

If freedom of access to and from the sea by landlocked States is completely dependent upon the whims and caprices of their coastal transit State neighbours, it will frustrate drastically whatever interests these States might have in the sea and resources therein. Against this backdrop therefore, it is recommended here that Article 125 of the Convention which stipulates the right of access of landlocked States be revisited, reviewed and couched in a manner to make right of transit and freedom of access purely a general rule of international law that applies independent of all agreements, and not merely a conventional right subordinate to bilateral agreements of which transit States always lord over. Provisions on the freedom of access and right of transit of landlocked States should akin to the provisions on right of “innocent passage” on the territorial sea of

coastal States. Right of access should be exercised by landlocked State subject only to conditions to be stipulated by the proposed amendment which will be geared toward the protection of certain interests of the transit States as is the case with right of innocent passage.

Only when this is done will the question of freedom of access become purely a legal issue against political issue as it is presently, and thereby fully protect the fundamental interests of landlocked States. It is hoped that the adoption of the above recommendation will uplift the interest of landlocked States as it relates to exploitation of sea resources even without undermining the territorial sovereign rights of transit States contrary to the argument of transit States.

In addition and prior to the review of the relevant article, and in line with the suggestions given already under chapter six of this work to wit that the Governments of the regions where landlocked developing States situate shouldbe in vanguard of the creation of a culture of democracy, good governance, good policy and tolerance;development of national and regional security doctrines;construction of a constructive conflict-resolutionand teaching of non-military values in schools all to ensure peaceful atmosphere in their respective regions, it is advocated that landlocked States especially in developing regions such as Africa should do a number of things to actualize their interests and rights as provided for by the Convention. Such efforts by landlocked developing States are to be complemented by international community and developed countries.

First and foremost, landlocked States should always promote peace and be at the forefront of peace-building programmes in their respective sub-regions and regions. This

would ensure that violent conflicts do not erupt in these areas as study has revealed that conflicts, whether within transit States neighbours or between landlocked States and transit States hamper landlocked States' access to the sea. The experiences of Ethiopia with Eritrea, Nepal and India, Bolivia and Chile are still fresh in our mind.

Since good transit transport infrastructure is indispensable to make freedom of access a reality, it is recommended here that landlocked and transit States should cooperate in building and maintaining good transit transport infrastructure in both States. Where transit States have no means of transport to the sea to give effect to freedom of transit or where the existing means (including port installations and equipment) are inadequate, the transit States and landlocked States concerned should cooperate in constructing or improving the means of transport. Improvement of the rail, road, air and pipeline infrastructure, are recommended, depending on the local transport mode. In Africa for instance, transit is mainly by road while in South Asia, rail transit is more common.

While landlocked States need the cooperation of neighbouring transit countries in developing efficient transit transport and access to the seas, they also need to demonstrate their commitment to improving the transit process through the formulation and implementation of a clear and consistent national policy. It is important also that landlocked States coordinate among themselves to ensure effective representation at international fora/meetings and articulate their positions with a single voice.

It is our recommendation also that landlocked States should, as a way of strengthening their bargaining position during negotiations with their transit States neighbours on the implementation of Article 125 of the Convention,prior to the

recommended amendment, consider taking initiatives in identifying alternative, competing transit routes that may form the basis for discussion with their neighbouring transit States. They should also create a greater awareness of international developments with respect to transit transport and increase the capacity of government officials and private sectors in addressing issues of concern.

On international level, we advocate that an international agency or authority be established under the United Nations Convention on the Law of the Sea, whose principal role would be to monitor and supervise the level of compliance with Article 125 of the Convention by transit States. Such body or authority would publicize on the international plane any actions by any transit States which are inimical to the intents and purposes of the article. When this is done and any unwholesome, negative attitudes towards implementation of the article by transit States are berated publicly, that will minimize the tendency by transit States to impose stringent conditions on landlocked States during negotiations.

Our research revealed that one of the greatest obstacles to freedom of access to the sea is the cost of customs duties and other taxes while goods are in transit. It is advocated therefore that, to enhance landlocked States' access to the sea, they should be assisted in getting rid of such financial barriers. Freedom of access does not necessarily imply the right to enter a country but only to cross its territory. As such, every State remains a master at home, but should abstain from abusing its geographical position by refusing to grant, or by granting only under costly conditions, the rights of passage for the normal obligatory traffic crossing of its territory. Transit States may however enact measures to protect their territorial integrity and legitimate interests against all foreign

risks but such enactments must not be incompatible with the provisions of the Convention. An article is hereby advocated to be included in the Convention providing for what we may call "international standards" to operate as a yardstick to which every transit State must substantially comply when negotiating transit agreement with its land-locked State neighbour. This would however be done taking into considerations the peculiarity of each case.

The recommendation adopted by the United Nations General Assembly (Res 52/183), adopted in December 18, 1997 that:

> All States and international organizations make it an urgent priority to implement specific actions related to the particular needs and problems of landlocked developing countries as agreed in earlier resolutions of the General Assembly and by major relevant UN Conferences ….

Istherefore apt in the circumstance and makes it incumbent on transit States to implement the provisions of Article 125 of the Convention. Donor countries and multilateral institutions are also invited here to provide landlocked developing States and transit developing States with assistance in constructing, maintaining and improving transport and transport related facilities.

The above recommendations when judiciously adhered to and utilized will certainly promote the interests of landlocked States and other geographically disadvantaged States in the sea by enhancing their freedom of access to the sea. Above all, the recognition of the right of each landlocked States' free access to the seas will

constitute an essential principle for the expansion of international trade and economic development.

We may not suggest any attempts to renegotiate the entire Treaty/Convention as this will risk the unraveling of the package of compromise so tediously put together during the eight years of negotiations. However, with regard to landlocked and geographically disadvantaged States' right of participation in the exploitation of living resources in exclusive economic zone of their region or sub- region, we recommend that the relevant articles should be reviewed. Articles 69 and70 of the Convention should be couched in a manner it will entitle landlocked and geographically disadvantaged States to certain rights to make claims with respect to resources in the exclusive economic zone. For instance, the duty to determine coastal States' harvesting capacity and allowable catch in their respective exclusive economic zones should not be placed in the capricious will and decisions of coastal States alone. Certain criteria for determining coastal States' harvesting capacity and allowable catch should be enshrined in the relevant articles to enable landlocked developing States and geographically disadvantaged States bring legal claims against their coastal States neighbours should they fail to observe the criteria. When this is done, we further suggest that disputes arising from right of landlocked and other geographically disadvantaged States to participate in an appropriate part of the surplus of the living resources of the exclusive economic zones of their coastal States neighbours should be brought under the UNCLOS Compulsory Dispute Settlement. The suggestion is not aimed at whittling away the rights of coastal States in their offshore waters, rather to remove or at least minimize the tendency on the part of coastal States to ignore the opinion and yearnings of landlocked and geographically disadvantaged States

during negotiations to determine the terms and modalities of such participation. With proper criteria in place giving preference to coastal States, they will still be in substantial control of their offshore waters.

The provisions of Articles 69 (3) and 70 (4) rather sound nonsensical. It is difficult to understand why it is when the harvesting capacity of a coastal State approaches a point which would enable it to harvest the entire allowable catch of the living resources in its exclusive economic zone that the arrangements allowing landlocked and geographically disadvantaged States' participation would begin. It is our opinion however, which we believe would be widely shared, that the arrangements on landlocked and geographically disadvantaged States' participation should commence as soon as possible after coastal State had begun exploitation in the exclusive economic zone. Unless and until the above recommendation is adopted, most system of exclusive economic zone will be implemented only by coastal States leaving landlocked and geographically disadvantaged States with no options for invoking their rights before an international forum.

We also discovered in the course of this research work that island nations, going by the definition of Article 70 paragraph 2 of the Convention fall under geographically disadvantaged States as against coastal States. As a result, while the Convention extended the jurisdiction of coastal States to 200 nautical miles of exclusive economic zone, the fate of these island nations was not considered. The upshot of this is that, while the exclusive economic zone of coastal States increases, it reduces the sea coast available to neighbouringisland nations.This situation is ironical. Island nations which are surrounded

by seawater should not be regarded as geographically disadvantaged with regard to access to sea resources.

We therefore suggest that Article 55 of the Convention which establishes exclusive economic zone should be amended in a way to strike a balance between the so-called coastal States and the island nations. When the extension of a coastal State's exclusive economic zone would encroach and reduce the seacoast available to the neighbouring island nations, a provision should be made in a way to delimit the available sea space equitably though not necessarily equally between them. This will accord more with reason than tagging the island nation a "geographically disadvantaged State" thereby making it dependent on the benevolence or malevolence of the coastal States.

With regard to Article 76 of the Convention, this research revealed that inadequate human capacity and technical know-how have immensely limited the ability of developing countries in utilizing marine resources found within their national jurisdictions and beyond. Given the training and expertise required, even a small desktop study is likely to be quite expensive for developing States. The degree of special legal uncertainties and particular scientific difficulties facing developing States in meeting their obligations under Article 76 require external aid. Against this backdrop therefore and without going so far as to suggest reviewing of the Article, we recommend that relevant United Nations agencies such as United Nations Environmental Programme (UNEP) should regularly organize shelf training programmes for these States to upgrade their man-power and technical know-how required for the implementation of Article 76 of the Convention.The mandate given to theCommission on Limits of Continental Shelf (CLCS) by Annex II to the Convention, Article 3 (1) (a) and (b) to "provide scientific and

technical advice" that could be utilized by coastal States in preparing their submission is extremely apposite in the present circumstance. Particular attention should be paid to developing States by the Commission while carrying out this mandate.

In the main, the financial bases of these States are low to undertake such expensive ventures involved in implementing Article 76. We therefore advocate for the international donors and developed countries' financial aid to these developing countries to implement the provisions of the Article. Such financial assistance will among other things help these States in the collection and use of bathymetric, geological and geographical observations. There is need also that the submission deadline stipulated under the Article be relaxed in favour of developing States to enable them meet other requirements of the Article. If developing coastal States do not explore and exploit the resources in their Outer Continental Shelves due to the difficulties presented by Article 76 of this Convention, those resources might not be exploited by any other State either. The implication is that, the resources will remain unexploited and deteriorate which will in the long-run affect the world economy in general.

It is our recommendation that in order to avoid edging developing States out in the activities/exploitation of economic resources in the sea, especially in the Area, proper arrangements should be put in place for transfer of technology to these States, on fair and reasonable terms. Research has revealed that national firms from developed countries invest millions of dollars both in research and development of sea-bed mining technology. We therefore recommend thatpart of this amount should be transferred on concessionary terms to the developing countries which have received mining site from the International Seabed Authority (ISA) Enterprise.

Deep seabed mining is a formidable task. Nodules mining technology developers have to address the basic question of how to pick up the nodules from the sea floor and bring them up to the surface facility; most likely a ship. During the past four decades, three basic concepts for mining technology have been pursued: picking up nodules with a dredge–type collector, and lifting them through a pipe; picking up nodules with a bucket-type collector and dragging up the bucket with a rope or cable; and picking up nodules with a dredge-type collector and having the collector ascend by the force of its own buoyancy. Since developing States conspicuously lack the needed technology and requisite skill for deep seabed resources mining, it becomes necessary for both the Authority and developed economies to assist them in mining them through provision of technology and skill.

Besides, developing countries are advised to embark on training programmes for their nationals, as a way of capacity-building and human development to enable them tackle the enormous task required to implement the provisions of Article 76and to exploit the resources of the sea both within and beyond the limits of their national jurisdiction. One good way of acquiring this training is arranging for the involvement of the nationals of developing States withexperts from advanced economy in the delineation exercise for adequate transfer of requisite skills and technology/knowledge.

It will be useful also, if in the developing coastal States, conscious and deliberate arrangements are made in such a way that those technical and legal personnel who through their involvement and knowledge in this area have proven invaluable be permanently appointed and particularly dedicated to the project. The benefit of this approach would extend beyond a successful submission to the Commission on Limits of

Continental Shelf (CLCS). The technical and analytical capabilities developed, and the international contacts fostered would be readily adaptable to other important initiatives such as management of the newly acquired marine estate and the effective oversight of exploration and exploitation activities within area of jurisdiction and beyond.

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