

THE NEW LAW OF THE SEA AND THE NIGERIAN MARITIME SECTOR

Issues and Prospects for the Next Millennium

*I. A. Ayua
T.A.T. Yagba
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NIGERIAN INSTITUTE OF ADVANCED LEGAL STUDIES

THE NEW LAW OF THE SEA

AND

THE NIGERIAN MARITIME SECTOR

Issues and Prospects for the Next Millennium

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1998

*Nigerian Institute of Advanced Legal Studies
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THE NEW LAW OF THE SEA
AND
THE NIGERIAN MARITIME SECTOR
Issues and Prospects for the Next Millennium

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1998
Nigerian Institute of Advanced Legal Studies
Lagos

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First published 1998

by

Nigerian Institute of Advanced Legal Studies

P. M.B. 12820

University of Lagos Campus

Lagos, Nigeria.

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ISBN 978 - 2353-61-2

1998

Nigerian Institute of Advanced Legal Studies
Lagos



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Preface

The Laws of the Sea (1994) is the result of years of negotiation among States, coastal and land-locked, industrial and undeveloped, and of all shades of political and economic persuasion. The inadequacies existing in the previous legal regimes of the sea spurred the maritime states to become involved in a process which would bring forth a law of the sea which was to synchronise more with the emerging developments in the world; besides there were newly independent Third World States which felt that it was necessary for them to have an input into the world ocean regime as it concerns them. The land-locked States also sought an opportunity to redress the situation whereby they had previously been excluded from the use of the oceans. For the industrialised States which were also maritime powers, they sought to preserve their maritime advantage.

This was, however, not to be the case as the preponderance of less developed States opened the door to new concepts in ocean administration. These included the concept of the sea as *res communis* as opposed to *res nullius*, the concept of Exclusive Economic Zone (EEZ) and the right of land-locked States to ocean resources. Other concepts which came to be included in the Law of the Sea were, among others, environmental preservation and conservation issues, dispute settlement, the transfer of technology, and the joint exploitation of ocean resources for common use. Another important area of negotiation among States was related to delimitation of maritime boundaries. This issue had not been totally exhausted by previous ocean regimes.

The implication of the New Law of the Sea for the Nigerian maritime sector, borders on the fact that the comprehensive nature of the law of the Sea affects practically all aspects of the maritime sector, be it pollution, boundaries delimitation, the zones of the States jurisdiction, general marine issues, military strategic interests as well as other issues which would also be concurrently covered by the domestic laws of the State. As a matter of fact, the law of the sea has practical application for the nation as a coastal State which shares maritime boundaries with other States. At the present, although Nigeria has ratified the Law of the Sea Convention, she has however, not enacted the law domestically in accordance with constitutional provisions which require that all

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international treaties are to be reenacted into Nigerian Law. It is hoped that this compilation of the papers presented at the Institute's workshop on the Nigerian Maritime Sector and the New Law of the Sea provides the impetus for the government to engage in a timely review of the nations maritime laws and policies, to make them keep with the new ocean regime.

Finally, the Institute wishes to place on record its indebtedness to the Nigerian Maritime Authority (NMA) which provided the financial assistance for the workshop as well as the publication of this book. Due to its limited resources, the Institute is always on the look out for financial assistance and it is encouraging that the National Maritime Authority has been a partner in progress for the enlightenment of the society.

I. A. Ayua

Director - General

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1. André De Maey - Mounier 'The Procedural Framework of the Agreement Implementing the 1982 United Nations Convention on the Law of the Sea' *A.I.J.L.* Vol.25, No.4, October 1983, p. 214.

2. *Id.*

3. *See* *Id.*

HISTORICAL OVERVIEW OF THE 1982 UN CONVENTION ON THE LAW OF THE SEA: FIFTEEN YEARS AFTER SIGNATURE

by

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Introduction

General

Nearly 14 years after the work of the United Nations Conference on the Law of the Sea commenced, the 3rd U.N. Convention on the Law of the Sea was opened for signature on the 10th of December, 1982 at Motego Bay, Jamaica, 119 States appended their signature and one country, Fiji, not only signed but also deposited its instrument of ratification. The Convention has since come into force having been ratified by the required 60 States.¹ As at November 16, 1994, 7 more states, making a total of 67 states had ratified it.² The U.S. and its allies have refused to ratify the convention due mainly to their objection to the regime of the Sea Bed Authority which they consider opposed to market forces. It is not quite clear at this stage whether informal negotiations organised to accommodate the interests of the most powerful nations on earth is likely to influence their position.³

In many respects, the Convention has sought, on the basis of consensus, to resolve various conflicting interests, cutting across the traditional groups of North-South, East-West, Land Locked, and disadvantaged States. This represents a monumental achievement in

1. Annick De Marffy - Mantuano "The Procedural Framework of the Agreement Implementing the 1982 United Nations Convention on the Law of the Sea" *A.J.I.L.* Vol.89, No.4, October 1995, p. 814.

2. *Ibid.*

3. See *Infra*

international cooperation and resolution of conflicts in the regime of the Seas. This has been achieved by adopting a creative procedural regime through universal treaty intended to achieve a large measure of participation.

The optimism that greeted the opening of the convention however seemed dimmed by the slow rate of ratification and the refusal of the most powerful states to ratify on grounds of economic and ideological differences.

The factors that have led to the rejection of the convention by US and its allies are central to any serious historical account of the fate of the convention fifteen years after it was opened for signature at Montego Bay, Jamaica.

Methodology

A better appreciation of the problem will be achieved by going back a bit into history. The 1982 convention did not just drop from the sky; it is necessary to understand where we are coming from, highlight the basic achievements of the convention, and examine how the emergent world order has impacted on it not only in terms of the practice of states but also in terms of its possible boost to the evolution of new customary law of the sea separate from the treaty regime. It is pertinent at this point to state our basic conception/methodological position. If there was ever any doubt that law is not a set of abstract rules denuded of values/interests, then the law of the sea negotiations for UNCLOS 3 clearly show that what was at stake was not the refinement of principles and rules of the law but how to harmonize various nations' conflicting interests of economic, security, environmental issues and that in as much as there are several areas of community of interests, there was at least one-The Sea Bed Authority, which has stemmed the universalization of a carefully balanced comprehensive regime of the seas which even its ardent opponents (except for the regime of the Sea-Bed Authority) accept

represents a consensus for the benefit of mankind.⁴ If any person believes that the ideological warfare is over he/she may have to rethink, because it is not dead, it has simply mutated. Our reading of the history of UNCLOS 3, must then be in the light of Third World interests and Nigeria's national interest in particular, which should insist on the sovereign equality of states and our right to national self - determination in the context of democracy and the Rule of Law.

History

From the Beginning

This section highlights important trends which emerged before the 1958 Geneva Conventions and the immediate post 2nd World War period. It is an attempt to identify the primary contradictions that have dogged the regime of the Seas for nations. Apart from such areas as Ports, Harbours, Internal Waters and Closed Bays, which from the earliest time were accepted as falling within the jurisdiction of coastal states, the central issues of the Law of the Seas had always been how to resolve the conflict between claims by coastal states and the desire of maritime powers to limit such claims in the interest, according to their own view, of greater freedom on the Seas.

The freedom to navigate on and fish in the high seas were already being challenged in the 15th and 16th centuries with SPAIN and PORTUGAL, and to some extent BRITAIN laying claims to areas of the open Seas. Such claims of sovereignty were hardly distinguishable from claims to ownership. Portugal claimed the whole of the Indian Ocean and a very large portion of the Atlantic, Spain claimed for herself the Pacific and the Gulf of Mexico, while Britain arrogated to herself the Narrow Seas and the North sea.⁵

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4. Panel on the Law of Ocean Uses - "United States Interest in the Law of the Sea Convention" *A.J.I.L.*, 1994, p. 1167 *et sequ.*
 5. Starke, *Introduction to International Law*, Ninth edition, London, Butterworths, 1984, p.234.

By the 18th century, the principle that the Coastal State had power to control its Maritime belt in order to ensure its security became established. Two independent basis for measuring the breadth of this Maritime belt (territorial sea) namely the cannon shot rule and the 3 mile rule became the general practice even though by the 19th and 20th centuries. Claims over waters appurtenant to the Coast varied from 3 to 4, to 12 even more nautical miles for the Coastal State.⁶

Subsequent developments, under customary international law included the right of hot pursuit, under which a coastal state could pursue and arrest foreign vessels, even on the high seas, if it has reasonable ground to believe that it has infringed its laws and regulations while passing through its maritime belt.⁷ The right of the Coastal State to exercise effective jurisdiction over violator vessels in the maritime belt (territorial seas) was already acknowledged as part of the corpus of customary international laws.⁸

The issue of which state would exercise jurisdiction in cases of collision on the high seas was not settled and the judgement of the PCIJ

6. *Ibid* p. 235.

7. Under the convention the right of hot pursuit has been extended to the Exclusive Economic Zone. Article 111(2) provides:

"The right of hot pursuit shall apply *mutatis mutandis* to violations in the exclusive economic zone or on the continental shelf; including safety zones around continental shelf installations..." Thus subject to other requirements of Article III hot pursuit can commence where the ship pursued or one of its boats or other craft working as a team and using the ship pursued as a mother ship is within the limits of the territorial sea, or as the case may be, within the contiguous zone or the exclusive economic zone or above the continental shelf."

(Article II (4). Under Article 23 of the Geneva Convention on the High Seas hot pursuit is permissible when the vessel pursued is within the territorial sea or contiguous zone.

8. *Gidel, Le droit International public de lar mer*, (1934) Vol.3, p. 151, cited in *Starke op.cit* p. 238.

in Lotus case⁹ did not help matters. There were variations in state practice. Jurisdiction was claimed:

- i) Where the damaged vessel was under the flag of the state claiming jurisdiction.
- ii) Where the vessels involved in the collision consented to the exercise of jurisdiction by such states; and
- iii) Where the ship primarily responsible for the collision was in their ports.

Article II of the Geneva Convention on the High Seas is quite clear on this. It provides that in case 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 any other person in the service of the ship, no penal or disciplinary proceedings may be instituted against such persons except before the judicial or administrative authorities either of the flag state or of the state of which such a person is a national (Article II(I)). Furthermore it is provided in Article II(3) that:

"No arrest or detention of the ship, even as a measure of investigation, shall be ordered by any authorities other than those of the flag state."

Article 97(1) and (2) of the 1982 Convention adopt the same provisions with respect to collisions on the high seas.

The kernel of the PCIJ judgement in the Lotus case was that where collisions occur on the high seas, there was no rule of international law attributing exclusive penal jurisdiction to the flag state of a ship involved in the collision as regards an offence committed on that ship, and that jurisdiction could be equally exercised by the flag state of the ship on

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which the offence had produced its effects in the course of the collision. This decision of the P.C.I.J. did not receive wide acceptance and has been overtaken by the 1958 Geneva Convention on the Law of the Seas. The 1930 Hague codification conference was an attempt to resolve some of the problems of the 'ownership' and use of the sea and its resources. The acceptability of the 3 mile limit was undermined with nothing to replace it and there was no general agreement on the contiguous zone, that is, a belt of water contiguous to the territorial sea over which the Coastal State should have limited rights.¹⁰

The post 2nd World War period saw two important developments. Firstly the idea of the continental shelf became established and the judgement of the ICJ in the *Anglo - Norwegian Fisheries Case*¹¹ added to the traditional method of measuring the maritime belt from the low water mark, another special method of doing so in case of heavily indented coast lines. It also admitted of the validity of the 4 mile breadth for the territorial sea.

These antecedents with several unresolved issues were what the 1st UN Conference on the Law of the Sea had to face. The rules on the Law of the Sea formulated by the International Law Commission between 1949 - 1956 formed the basis for the convening of the first United Nations Conference on the Law of the Sea. The mandate of the Conference was to "examine the law of the sea, taking into account not only the legal but also of the technical, biological, economic and political aspects of the problem and to embody the results of its work in one or more international conventions or such other instruments as the conference may deem appropriate".¹²

Four conventions were the outcome of the 1958 Conference which met from 28th February, 1958 - 27th April, 1958:

10. Gidel, *op. cit.*

11. (1951) ICJ 116.

12. U.N.G.A. Resolution of 21st February, 1957.

- i) Geneva Convention on the Territorial Sea and Contiguous zone (came into force on 10th September, 1965).
- ii) Geneva Convention on the High Seas (came into force on 30th September, 1962).
- iii) Geneva Convention on Fishing and Conservation of Living Resources (came into force on 20th March, 1966).
- iv) Geneva Convention on the Continental Shelf. (came into force 10th June, 1964).

There was also an additional protocol on compulsory settlement of disputes which came into force on 30th September, 1962 and is binding only on the parties thereto.

The issue of land locked states with respect to access to the seas were broached but not finally resolved as the convention did not pretend to grant such right, and the enjoyment of such right depended on "Common agreement" between the parties.¹³

The breath for the territorial sea remained unsettled, as states claimed various expanses of the sea as their territorial sea even when under the 1958 Convention the breath could, that is with wiping out the contiguous zone, go up to 12 miles. The definition of the continental shelf as "... the sea bed and the subsoil of the sub marine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 metres or beyond that limit, to where the depth of the superjacent waters admits of the exploitation of natural resources .." was open ended and gave undue advantages to technologically advanced countries. This was not only not acceptable but fueled unilateral claims beginning with the Truman declarations, the patrimonial sea and the Exclusive Economic Zone

13. The Geneva Convention on the High Seas, 1958 Article 3(1) (a) e (b).

(EEZ).¹⁴ The 1982 Convention had to address other issues such the status of the waters of archipelagic states, the rights and obligations of coastal states through which international straits passed, the place of land locked and disadvantaged states and the larger issue of environmental management and preservation etc.¹⁵

The 1982 Third UN Conference on the Law of the Sea

It could be said that the events that led to the convention of the 3rd UNCLOS could be traced to the UN General Assembly which discussed for the first time the concept of common heritage of mankind. The concept itself could be traced to the 19th century. It was seen as highly political and not necessarily limited to strictly legal and economic concerns which was why the discussion was held in the First Committee of the General Assembly.¹⁶

Already the idea of the 'package' for the new law of the sea regime informed the work of the UN in this field; First through the *Ad hoc* Committee and then the Sea Bed Committee established subsequently by the General Assembly, the process was set in motion for the study of the peaceful uses of the Sea Bed and Ocean Floor beyond the Limits of National Jurisdiction. The intention was to shape and refine the concepts and idea which were to form the basis of a new international regime of the seas. Both committees worked on the basis of consensus.

The Declaration of Principles by the General Assembly in 1970 made pursuant to negotiations in the Sea-Bed Committee solemnly declared

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14. The proclamations arrogated to the US the right to regulate fisheries in those areas of the high seas contiguous to the coast without affecting the freedom of navigation in these waters, and to appropriate the resources of its continental shelf. Other similar and more extensive claims followed.
 15. Bernardo Zuleta, Under Secretary-General and Special Representative of the Secretary General for the Law of the Sea, *The Law of the Sea: United Nations Convention on the Law of the Sea with Index and Final Act of the Third United Conference on the Law of the Sea*, New York, United Nations, 1983, pp. xix et. seq.
 16. *Ibid*, p. xx.

that: "The sea-bed and ocean floor, and the subsoil thereof, beyond the limits of national jurisdiction ... as well as the resources of the area, are the common heritage of mankind" and shall not be subject to appropriation by any means by states or persons. Furthermore it was declared that this area "shall be open to use exclusively for peaceful purposes by all states without discrimination".

A related three part resolution adopted by the General Assembly set the general tone and the agenda for the conference whose preparatory stages were entrusted to the Sea Bed Authority. The preamble already gave an insight into what was to come and read as follows:

"Conscious that the problems of the ocean space are closely interrelated and need to be considered as a whole.

"Noting that the political and economic realities, scientific development and rapid technological advances of the last decades have accentuated the need for early and progressive development of the Law of the sea in a framework of close international cooperation, "having regard to the fact that many of the present states members of the United Nations did not take part in the previous U.N. Conferences on the law of the sea ..."¹⁷

Late in 1973, the Third UN Conference on the Law of the Sea was convened pursuant to UN resolution 3067 (XXIII). It began its work by adopting the consensus procedure, avoiding as much as possible the use of voting procedure. Where consensus failed, by allowing for a moratorium which it was hoped would provide a cooling off period and allow for more reflection and negotiations; it was hoped that voting could be avoided.¹⁸

17. *Ibid.*

18. The Conference adopted its rules of procedure at its second session (A/COIF.62/30). It provided, "Bearing in mind that the problems of the ocean space are closely interrelated and need to be considered as a whole and the