

THESIS TITLE:

GOVERNANCE OF THE FORGOTTEN PROVINCE: A CRITICAL APPRAISAL
OF THE POLICY, LEGAL AND INSTITUTIONAL FRAMEWORKS FOR THE
CONTROL AND MANAGEMENT OF MARINE RESOURCES WITHIN
KENYA'S MARITIME ZONES

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By

PAUL MUSILI WAMBUA

PROMOTOR (SUPERVISOR)

PROF. EDUARD SOMERS

CO-PROMOTOR (SUPERVISOR)

PROF. PATRICIA KAMERI- MBOTE (UON)

VLIZ (vzw)
VLAAMS INSTITUUT VOOR DE ZEE
FLANDERS MARINE INSTITUTE
Oostende - Belgium

DECLARATION

I PAUL MUSILI WAMBUA do declare that that this is my original work and has not been submitted and is not being submitted for a degree in any other university

SIGNED.....

PAUL MUSILI WAMBUA
DECEMBER 2008

This Thesis is submitted for examination with our approval as university supervisors

SIGNED.....

PROF (DR) Eduard Somers, Dean Faculty of Law University of Ghent

SIGNED.....

PROF PATRICIA ANNE KAMERI-MBOTE, Professor of Law, School of Law
University of Nairobi

DEDICATION

To my father, Francis Wambua Maingi, who instilled in me a discipline for hard work and love for education;

To my wife Immaculate Nduku who gave moral and material support in writing this thesis;

To my Children Peter, Patricia and Anne for their understanding and patience as I took time to research and write this thesis.

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ABSTRACT

This research merges the study of certain aspects of two broad disciplines, namely Law and Governance. The approach of the study is to interrogate the interplay between the two disciplines within the parameters of control, management and sustainable exploitation of the marine resources within Kenya's maritime zones

The study thus undertakes a critical appraisal of the policy, legal and institutional frameworks put in place by Kenya for the management, conservation, control and sustainable exploitation of the marine resources. Eventually the study will show that the current policy, legal and institutional frameworks for the control and management of Kenya's marine resources are ineffective and need to be reformed and made more viable on the basis of proper interplay between law and governance.

The study will therefore call for the establishment of a functional, effective, comprehensive and integrated policy, legal and institutional framework for the management of Kenya's marine resources.

LIST OF ACRONYMS

AALCC	-	Asia -African Legal Consultative Committee
CBD	-	Convention on Biological Diversity
CCG	-	Centre for Corporate Governance
CDA	-	Coast Development Authority
CMF	-	Sub-Coastal, Marine and Freshwater Department
CROP	-	Council of Regional Organizations of the Pacific
CSD	-	United Nations Commission on Sustainable Development
CWO	-	Community Wildlife Officer
GEF	-	Global Environment Facility
DWFNs	-	Distant Water Fishing Nations
EEZ	-	Exclusive Economic Zone
EIA	-	Environmental Impact Assessment
EMCA	-	Environmental Management and Coordination Act
EU	-	European Union
FAO	-	Food and Agriculture Organization
FGDC	-	U.S. Federal Geographic Data Committee
GMDSS	-	Global Marine Distress Security System
GPA	-	Global Programme of Action for the Protection of the Marine Environment from Land-Based Activities
GRT	-	Gross Registered Tonnage
ICAM	-	Integrated Coastal Area Management
ICZM Plan	-	Integrated Coastal Zone Management Plan

ICJ	-	International Court of Justice
ILO	-	International Labour Organization
IMO	-	International Maritime Organization
IMOU	-	Indian Ocean Memorandum of Understanding
IOTC	-	Indian Ocean Tuna Commission
ISPS Code	-	International Ship and Port Security Code
IT	-	Information Technology
IUCN	-	International Union for the Conservation of Nature and Natural Resources
JKUAT	-	Jomo Kenyatta University of Agriculture and Technology
KACC	-	Kenya Anti-Corruption Commission
KMA	-	Kenya Maritime Authority
KMFRI	-	Kenya Marine Fisheries Research Institute
KMRI	-	Kenya Marine Research Institute
KPA	-	Kenya Ports Authority
KRA	-	Kenya Revenue Authority
KWS	-	Kenya Wildlife Service
LOSC	-	Law of the Sea Convention
MARPOL	-	International Convention for the Prevention of Pollution from Ships
MGDI	-	Marine Geospatial Data Infrastructure
MPA	-	Marine Protected Area
MRCC	-	Maritime Rescue Coordination Centre
MSS	-	Merchant Shipping Superintendent

MSC	-	Mediterranean Shipping Company
MSWG	-	Marine Sector Working Group
NEAP	-	National Environmental Action Plan
NEMA	-	National Environmental Management Authority
NGOs	-	Non-Governmental Organizations
nm	-	nautical miles
NOCK	-	National Oil Corporation of Kenya
OECD	-	Organization for Economic Co-operation and Development
ODINAFRICA	-	The Ocean Data and Information Network for Africa
ORI	-	Oceanographic Research Institute
PCGIAP	-	GIS Infrastructure for Asia and the Pacific
RFBs	-	Regional Fisheries Bodies
SADC	-	Southern Africa Development Cooperation
SAP	-	Seafarers Assistance Program
SAR	-	Search and Rescue
SOLAS	-	International Convention for the Safety of Life at Sea 1974
STCW '95	-	Convention on Standards of Training Certification and Watch-keeping
SUA	-	Convention on Suppression of Unlawful Acts Against the Safety of maritime Navigation 1988
SWIO	-	South West Indian Ocean
SWIOFC	-	South West Indian Ocean Fisheries Commission
SWIOFP	-	South West Indian Ocean Fisheries Project
TDA	-	Transboundary Diagnostic Analysis

UK	-	United Kingdom
UN	-	United Nations Organization
UNCLOS I	-	The First UN Conference on the Law of the Sea (1958)
UNCLOS II	-	The Second UN Conference on the Law of the Sea (1960)
UNCLOS III	-	The Third UN Conference in the Law of the Sea (1973-1982)
UNCED	-	United Nations Conference on Environment and Development (1992)
UNEP	-	United Nations Environmental Programme
UNESCO	-	United Nations Education Science and Cultural Organisation
UoN	-	University of Nairobi
USA	-	United States of America
USAID	-	United States Agency for International Development
USSR	-	Union of Soviet Socialist Republics of Russia
WIOLaB	-	West Indian Ocean Land Based Sources of Pollution

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1. Armed Forces Act (Cap. 199 Laws of Kenya)
2. Carriage of Goods by Sea Act (Cap. 392 Laws of Kenya)
3. Coast Development Authority Act (Cap 449 Laws of Kenya)
4. Companies Act Cap 486 Laws of Kenya
5. Continental Shelf Act (Cap 312 Laws of Kenya)
6. Government Fisheries Protection Act (Cap 379 Laws of Kenya)
7. Government Lands Act (Cap 280 Laws of Kenya)
8. Environmental Management and Coordination Act (Act No. 8 of 1999)
9. Fisheries Act, (Cap 378 of the Laws of Kenya)
10. Kenya Maritime Authority Act (Act No. 5 of 2006)
11. Kenya Ports Authority Act (Cap. 391 Laws of Kenya)
12. Judicature Act (Cap 8 Laws of Kenya)
13. Land (Group Representatives) Act (Cap 287 Laws of Kenya)
14. Land Titles Act (Cap 282 Laws of Kenya)
15. Marine Insurance Act (Cap. 390 Laws of Kenya)
16. Maritime Zones Act (Cap. 371 Laws of Kenya)
17. Merchant Shipping Act (Cap. 389 Laws of Kenya)
18. Mining Act [Cap 306 Laws of Kenya (revised in 1987)]
19. Oil (Exploration and Production) Act (Cap. 308 Laws of Kenya)
20. Police Act (Cap196 Laws of Kenya)
21. Registration of Titles Act (Cap 281 Laws of Kenya)
22. Registered Land Act (Cap 300 Laws of Kenya)
23. Science and Technology Act (Cap 250 Laws of Kenya)
24. State Corporations Act (Cap 446 Laws of Kenya)
25. Territorial Waters Act (Repealed)
26. Trust Land Act (Cap 288 Laws of Kenya).
27. Water Act (Act No. 8 of 2002)
28. Wildlife (Conservation and Management) Act (Cap 376 Laws of Kenya)

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3. Convention on Biological Diversity (CBD)
4. Convention on Continental Shelf
5. Convention on Fishing and Conservation of Living Resources in the High Seas
6. Convention on Standards of Training Certification and Watch-keeping (STCW '95)
7. Convention on Territorial Sea and Contiguous Zone
8. Convention on the High Seas
9. Global Programme of Action for the Protection of the Marine Environment from Land-Based Activities (GPA)
10. Indian Ocean Memorandum of Understanding (IMOU)
11. International Convention for the Prevention of Pollution from Ships (MARPOL)
12. International Convention for the Safety of Life at Sea 1974 (SOLAS)
13. International Ship and Port Security (ISPS) Code
14. Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA) 1988

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2. *Anglo-Norwegian Fisheries* case [1951] *ICJ Rep.* 116 8, 34-5, 37, 38, 41, 56-7, 61, 80.
3. *Bardabos vs. The Republic of Trinidad and Tobago* (2006)
4. *Canada/France* case 31 *ILM* 1145 (1992) 161, 185, 190, 192, 194, 195
5. *Guyana vs. Suriname* (2007)
6. *El Salvador v. Nicaragua* (1917) 11 *AJIL* 674 (1917) 46
7. *Eritrea vs. Yemen* (1996)
8. *Franconia* case (*R v. Keyn*) (1876) 2 *Ex. D.* 63 73, 75.
9. *Fisheries Jurisdiction* case [1973] *ICJ Rep.* 3, [1974] *ICJ Rep.* 3 80, 284, 285, 294, 452
10. *Greenland/Jan Mayen (Denmark v. Norway)* case [1993] *ICJ Rep.* 38 148, 185, 186, 187, 188, 189, 190, 192, 194-5
11. *Guinea-Guinea-Bissau* case (1985) 25 *ILM* 251 (1986) 183, 185, 192, 194.
12. *Gulf of Maine* case [1984] *ICJ Rep.* 246 185, 192-5, 196
13. *Land, Island and Maritime Frontier* case [1992] *ICJ Rep.* 351 42, 43, 44, 46
14. *North Sea Continental Shelf* cases [1969] *ICJ Rep.* 1 7, 144, 147, 184-6, 187, 188, 190, 191, 285, 294, 449, 452.
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16. *R v. Mills and Others*’, 44 *ICLQ* 949-58 (1995).
17. *Re Pulos & Others* (Italy) Tribunal of Naples, 17 December 1976, 77 *ILR* 587 133
18. *R v. Sunila and Solayman* (Canada, 1986) 28 *DLR* (4th) 450 133, 216
19. *The East African Community vs. Republic* 1970 *EA* 457
20. *The Grisbådarna* case (1909) XI *RIAA* 147 81, 182
21. *The Owners of the Motor Vessel “The Lillian” and Caltex Oil Kenya Limited* [1986-1989] *EA* 305
22. *Tunisia Libya Continental Shelf* case [1982] *ICJ Rep.* 18 43, 185, 187, 188, 189, 190

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CHAPTER 1

INTRODUCTION

The 1998 Lisbon Declaration – “Ocean Governance in the 21st Century; Democracy, Equity and peace in the Ocean”, approved along with the Report of the [Independent World Commission on the Oceans] “The Oceans, Our Future”, alerts to the seriousness of the challenges with which we are faced, accentuated by the increasing multiple use of the Ocean and particularly the Coastal Zone. In this context, it recommends that “we must ensure in a systematic manner the prior assessment of impacts relating to hazardous activities and new technologies”. The Declaration also calls for an effective and integrated management of marine areas in their totality, thus including the resources located therein, taking into account natural processes and phenomena, and impacts of anthropogenic origin. Moreover, the Declaration advocates that action should be based on “the best scientific knowledge” and the “participation of citizens”¹.

Marine conservation has become an increasingly important component of broader discussions of global resource conservation. The World Conservation Strategy placed emphasis on the need of marine environments. Increasing

¹ Ruivo M., “Ocean, Science and Action Speaking Notes” in *IMO International Maritime Law Institute Official Electronic Newsletter* VOL. 4, Issue No. 14, 31, October 2006.

*concern over the possible impacts of environmental abuse has compounded concerns over the sustainability of ocean resource use.*²

1.1 Background To The Problem

The seas have been the basis of civilization, commerce and navigation.³ In this regard, the seas have historically performed two important functions: first as a medium of communication, and secondly as vast reservoir of resources, living and non – living. Both of these functions have stimulated the development of legal rules.⁴

The seas were at one time thought capable of subjection to national sovereignties. The Portuguese in particular in the 17th Century proclaimed huge tracts of the high seas as part of their territorial domain, but these claims stimulated a response by the renowned Dutch scholar Hugo Grotius who elaborated the doctrine of the open seas, whereby the oceans as *res communis* were to be accessible by all nations but incapable of appropriation. This view prevailed, partly because it accorded with the interests of the

² Kenchington R. A, Managing Marine Environments (1990) (Taylor and Francis, New York NY) p. 12.

³ From the earliest times, the sea has been a source of materials, a means of transport and a sink of wastes. Excavation of ancient middens shows that from the earliest prehistoric societies the sea has been a source of food and materials. Legend and history record that transport and communication, made possible by the mastery of the sea, extended the range of human communities and, through trade and conquest, gave access to new resources. Since times before recorded human history, the seas have seemed vast and their capacities infinite in relation to human endeavor. The seas are the last frontier on earth. Adapted from Kenchington R. A., *Supra* note 2 p. 6.

⁴ Shaw, M.N., International Law (4th edn., 1997) (Cambridge University Press) p. 391. See also Churchill, R.R. and Lowe, A.V., The Law of the Sea (3rd edn., 1999) (Manchester University Press, Manchester); Dupuy R.J., and Vignes, D., *Traite du Nouveau Droit de la Mer* (Brussels, 1985) and McDougal M.S. and Burke W.T., *The Public Order of the Oceans* (New Haven, 1962).

North European states, which demanded freedom of the seas for the purposes of exploration of and expanding commercial intercourse with the East.⁵

It was permissible for a coastal state to appropriate a maritime belt around its coastline as territorial waters, or territorial sea, and treat it as an indivisible part of its domain. But the present century has witnessed continual pressure by states to enlarge the maritime belt and thus subject more areas of the oceans to their exclusive jurisdiction.⁶

But while states have been eager to exert extravagant claims on ocean jurisdiction, the exploitation of the resources of the sea has been a forgotten province of most coastal states.⁷ Undue attention has been given to the management of land and land-based resources to the utter disregard of the sea and sea-based resources. Effective management and utilization of marine resources can only be achieved if equal attention is given to the sea and its resources as is given to land and land-based resources.

Within the Kenyan⁸ and East African context, the challenges of governing the maritime zones and their resources are most graphically illustrated by the prevalent instances of

⁵ Malcolm S., *Ibid.*

⁶ *Ibid.* p. 391 – 392.

⁷ The concept of governance of nations through division of a country into administrative provinces has been adopted in Kenya with eight provinces being created i.e Coast, North Eastern, Eastern, Nairobi, Central, Rift Valley, Western and Nyanza provinces. See <http://www.statoids.com/uke.html> accessed on 3/11/2008. South Africa for instance considers her maritime zones to be her tenth administrative province which has led to effective governance within the zones. See <http://www.navy.mil.za/aboutus/role/index.htm> and also <http://www.iss.co.za/Pubs/ASR/5No2/5No2/SAMaritime.html> Accessed on 27/12/2007.

⁸ Kenya has a coastline of 450 km and a long tradition in sea-faring. The international port of Mombasa serves as both a transit port for the rest of a vast hinterland, the Indian Ocean Island states and as a refueling and service port for international traffic.

lack of maritime safety and disaster preparedness,⁹ maritime insecurity,¹⁰ marine pollution, illegal fishing and piracy.

On April 8, 2005 it was reported that the Indian oil tanker *Mt Ratna Shalini* had spilt about 5 million litres of crude oil into the expansive Port Reitz creek at Kilindini Harbour causing extensive damage to marine life on a peninsula off the port and killing hundreds of mangrove trees. The single-hull oil tanker was punctured while it was off-loading its cargo of crude oil at the Kipevu Oil Terminal at the Mombasa Port. The Kenya Navy was called in to join in the clean-up of the oil spill and restoration of the marine environment.¹¹

⁹ Two incidents illustrate this lack of preparedness; *Mv. Mtongwe 1* and *Mv. Bukoba* ferry disasters. In the *Mv. Mtongwe 1* incident, the ferry sunk while crossing the Mtongwe Channel to the island town of Mombasa from the mainland South on April 29 1994. Over 200 travellers were feared dead. Some 44 bodies had been recovered and 70 passengers had survived including many who swam ashore, risking attacks by sharks. Just slightly over two years later, on May 21, 1996, the '*Mtongwe Ferry Disaster*' was followed by a similar tragedy involving the steamer '*Mv Bukoba*' on Lake Victoria in which about 400 passengers on board lost their lives. The combined search and rescue efforts on the fateful day bore little success as only 21 bodies were recovered and 120 survivors rescued. This was said to be the worst ever disaster on Lake Victoria.

¹⁰ The waters off the coast of the neighbouring Somalia which has had no stable government for about two decades are classified as some of the most dangerous waters in the world following repeated acts of piracy and hijacking of ships some carrying relief food to the war torn country. The escalation of the hijacking incidents has prompted the United Nations Security Council to adopt resolution 1816(2008) authorizing a series of decisive measures to combat acts of piracy and armed robbery against vessels off the coast of Somalia. (See <http://www.imo.org/> accessed on 3/11/2008). The hijacking of a Ukrainian ship carrying tanks and an assortment of ammunition that led to perhaps the longest stand off in the ocean between pirates and warships prompted the North Atlantic Treaty Organization (NATO) to announce on 22nd October 2008 that it would be sending warships to patrol the region with a view to reducing the piracy incidents. The acts of piracy however continue unabated and have but escalated.

¹¹ Pursuant to the 'Polluter-Pays' principle of environmental law and the 1969 International Convention on Civil Liability for Oil Pollution to which Kenya is party, the National Environmental Management Authority (NEMA) then quickly announced that the polluter had been fined US \$ 1 Million (Ksh. 78 Million) to make good the wrong by restoring the marine environment. At the time, it was announced that the fine was the cost of clean-up and restoration of marine environment. However, it emerged that the Kenyan Government through NEMA was contemplating a court action at the international level for more compensation. See *Shipping Guide, The Standard*, Thursday, August 11, 2005 at p. S2. Even before the *Mt Ratna Shalini* incident had been fully resolved, a similar disaster loomed at the Port of Mombasa following the arrival of another single-hull oil tanker *Gernmar Commander*, See *The East African*, August 22-28, 2005 p. 26.

The perils of the sea have not been confined to the field of maritime security and marine pollution only. Fish stocks and other marine resources, living and non-living, have been illegally exploited especially in Kenya's Exclusive Economic Zone (EEZ), and those of other African States. The Indian Ocean states have not been spared this menace. For instance, in July 2005, the Indian Ocean Tuna Commission (IOTC), of which Kenya is a member, listed names of a dozen vessels in connection with illegal, unreported and unregulated fishing in the Indian Ocean. The list was posted on the website of the Commission.¹²

1.1 Statement Of The Problem

Kenya lacks clear policy, legal and institutional frameworks for the control, management and governance of the living and non-living resources within her maritime zones. This major set back is reflected by the failure to domesticate international conventions which Kenya has ratified. The Conventions are negotiated by the Executive (officials of the relevant Ministries) without consultation with other relevant agencies and without considering how the provisions of such Conventions fit in with the State's national agenda. In the following paragraphs we highlight incidents and key illustrations of how lack of clear policy, legal and institutional frameworks has hampered effective control and management of marine resources within Kenya's maritime zones.

¹² See the *Standard* Thursday July 7 2005, *Shipping Guide*, p. S6. Nine of the vessels were listed as having their home offices in Singapore while the other three had their base in Papua New Guinea. The vessels named were *TS Elegance*, *TS Emerald*, *TS Excellence*, *TS Prosperity*, *Blue Ocean Marine*, *Ocean Explorer*, *Ocean Pride Marine*, *Liberty*, *Ocean Lion*, *Ocean Star Marine*, *Feng Juan Chin I Wan Feng* and *Yu Fu II*.

Historically, most of the marine resources are regarded as common property and their regulation has been piecemeal and often focused on resolution of single issues. The approach has largely been reactionary rather than proactive. The components of marine environment management have been identified resource allocation, impact minimization and pollution control. These components may be applied to achieve control of the impacts of fishing, recreation, tourism, shipping, coastal engineering, and materials reaching the sea as a consequence of activities on land.¹³

The major problems confronting the management of the maritime zones of most coastal states are duplicity, overlap and lack of clear role definition. In most states, it is not clear which agency deals with management, command and control of the maritime zones. All too often, rivalries between agencies within governments and between potentially complementary agencies of federal, provincial and local governments are so great that coordination can only arise in response to a unifying threat. Most nations have to address deeply entrenched governmental and departmental traditions and power bases if they are to achieve a decision-making structure that can cross the internal boundaries and stem the rivalry. Very few nations have succeeded in stemming rivalry between different governmental agencies involved in the management of marine resources.¹⁴

The changes in and the unprecedented expansion of the uses of marine resources in terms of recreation and tourism such as the attractive day and night anchorages, diving and fish sporting, permanent mooring sites, waterfront properties and business and employment

¹³ *Supra* note 2.

¹⁴ *Ibid.* p. 3.

opportunities have visited marine environments at a time when their policy, legal and institutional frameworks are most wanting.

The incidents and illustrations described in the foregoing paragraphs underscore the complexity of managing the maritime zones. Whereas ensuring the safety and security of land and its resources has registered some degree of success (though there is no unanimity on this¹⁵) on the part of the Kenyan Government, the case has not been so with the maritime zones, even in situations where the Government has acted in collaboration with governments of neighbouring countries.

In Kenya, a number of agencies deal with the issues of management, command and control of Kenya's maritime zones; we have the Kenya Ports Authority (KPA), the Kenya Police, the Kenya Navy, the Kenya Wildlife Service (KWS), the Fisheries Department, the Coast Development Authority, the Anti-Terrorism Police Unit and the National Environmental Management Authority (NEMA), Kenya Marine Fisheries Research Institute (KMFRI), Kenya Maritime Authority (KMA) the Ministry of Transport and the Office of the President.

The multi-agency approach to management of the maritime zones creates the potential for duplicity and overlap. For instance, both the wildlife officers¹⁶ and NEMA officials¹⁷

¹⁵ See, for instance, Okoth-Ogendo H.W.O, *Tenants of the Crown* (1991) (Acts Press, Nairobi); Ojwang J.B. and Juma C. (eds) *In Land We Trust: Environment, Private Property and Constitutional Change* (1996) (Acts Press, Nairobi); and Wanjala S., *Land Law and Disputes in Kenya* (1990) (OUP, Nairobi).

¹⁶ Under Section 3A (f) of The Wildlife (Conservation and Management) Act, Cap 376 of the Laws of Kenya., wildlife officers have powers to surveil marine ports and other maritime estuaries in order to meet conservation and management goals.

¹⁷ See Section 9 (1) (e) and (h) of The Environmental Management and Coordination Act, Act No. 8 of

have powers to police and protect the marine environment. As far as the conservation of living marine resources is concerned, the Fisheries Act¹⁸ allows fisheries officers, police officers, Kenya Navy officers, other members of the armed forces and any other person appointed by the Minister for Fisheries development to patrol and protect the maritime zones.¹⁹ No serious attempt has been made at harmonizing the enforcement mechanisms and the operations of the numerous agencies. This has resulted into a serious lack of coordination which partly accounts for the poor levels of management, and control of the maritime zones.

The legal framework for control and management of Kenya's maritime zones is full of gaping holes since most applicable statutes such as the Maritime Zones Act, which constitutes the principal legislation on delimitation of Kenya's maritime zones do not provide for enforcement mechanisms. A large body of statutes²⁰ has attempted to deal with Kenya's challenges regarding the governance of the maritime zones in general and the question of management and control of marine resources in particular, albeit in an uncoordinated and piecemeal manner. The fundamental flaw (*'Achilles heel'*) in these laws is that they predate the 1982 United Nations Convention on the Law of the Sea (LOSC) and attempts at piecemeal grafting have failed to capture the Convention's spirit.

1999.

¹⁸ Cap 378 of the Laws of Kenya.

¹⁹ See Section 2 of The Fisheries Act, Cap 378 of the Laws of Kenya.

²⁰ These include The Maritime Zones Act (Cap. 371), The Fisheries Act (Cap. 378), The Merchant Shipping Act (Cap. 389), The Marine Insurance Act (Cap. 390), The Carriage of Goods by Sea Act (Cap. 392), The Armed Forces Act (Cap. 199), The Oil (Exploration and Production) Act (Cap. 308), The Kenya Ports Authority Act (Cap. 391) etc.

In a nutshell, the legislative agenda are said to be utilitarian without being LOSC-compliant.²¹

Kenya suffers from lack of appropriate policy, legal and institutional frameworks necessary for the domestication of international treaties and conventions aimed at ensuring sound governance of the maritime sector and the maritime zones in particular. Kenya follows the dualistic approach to treaty domestication²² meaning that unless Parliament enacts a law to incorporate the provisions of a treaty ratified by Kenya that treaty does become part of Kenya's municipal law.

Regardless of whether a state follows the monistic or dualistic methodology of treaty implementation²³, drafting of implementing legislation is necessary in any event. Maritime conventions are fairly specialized and are often relegated to the bottom of the priority list by draftsmen simply because they do not possess the necessary drafting skills and do not appreciate the issues involved. Many countries, Kenya included, do not have draftsmen specializing in maritime legislation.

Due to the lack of defined domestication procedures and statute(s), Kenya, like many other African countries, ratifies international conventions and then fails to domesticate them. The practical legal effect of such failure to domesticate ratified Conventions is that

²¹ Lumumba, P. L. O., "The Exclusive Economic Zone: A Study of the Approaches for its Utilization and Control with Specific Reference to the Kenyan Exclusive Economic Zone," [Unpublished] Ph.D Thesis, University of Ghent (Belgium), 2003 p. 268

²² See *Okunda vs. Republic* [1970] EA 453 at 456, per Mwendwa CJ. and the *East African Community vs. Republic* [1970] EA 457 – 460, per Sir Newbold JA.

²³ See Proshanto K. M., *Maritime Legislation* (2002) (World Maritime University, Malmo, Sweden) Chapter 9 p. 126 - 133 and the section on conceptual framework below for a fuller discussion of the two approaches.

the Conventions can be enforced against Kenya (and such other ratifying countries), but Kenya (and such ratifying countries) cannot take benefit of the Conventions by enforcing them against other states.

Lack of an appropriate maritime policy integrated into a broad National Policy has led to most maritime laws remaining unchanged for years²⁴ and therefore ill-suited for modern international trade. Kenya still operates on the archaic legislations which were inherited from Britain. It is only in 2002 that the Government woke up to the reality of the situation and set up a Task Force to report on the reform of maritime laws.²⁵

The specific Terms of Reference of the Task Force included *inter alia*, to examine and review all maritime laws and make recommendations for appropriate legislation to replace or amend any of the maritime law statutes; to examine and review the relevant pollution conventions and existing environmental legislation with a view to establishing a coordinated and comprehensive marine pollution regulatory regime; to make recommendations on proposals for reform or amendment of maritime laws to make sure they are consistent with the conventions and recommendations of the International Maritime Organization (IMO) and other treaty instruments; to examine the possibility of establishing a Maritime Authority that would oversee maritime trade and regulate merchant shipping practice in Kenya; and to assess and recommend on all legislative, administrative and policy matters pertaining to the security, protection, safety, passage and exploitation of the territorial waters including the EEZ. Amongst the Task Force's

²⁴ *Ibid.*

²⁵ *Vide* Gazette Notice No. 645 of 8th February 2002.

recommendations was the establishment of a comprehensive **Coast Guard Service** as a fully-fledged operational wing of the Kenya Navy in order to deal with the problem of command and control of the maritime zones. Most of the issues addressed by the Task Force's report are yet to be acted upon.

The maritime industry is supported by ill-suited institutions due to inappropriate legal and policy framework and reforms are imperative. Kenya is unable to offer certificates recognized by the IMO to its seafarers to help them secure jobs in foreign ships. Owing to its inability to comply with the mandatory requirements of the Convention on Standards of Training Certification and Watch-keeping (STCW '95), Kenya is excluded from the '*White List*' and the certificates issued by Bandari College in Mombasa are not recognized by the IMO. Most of the seafarers have been training in South Africa or at the Maritime Institute in Dar-es-Salaam. Already cooperation exists through exchange programmes at the National Defence College in Karen, Nairobi but there is room for improvement by engaging other institutions.

The Kenya Maritime Authority (KMA) which initially operated under a Presidential Executive Order issued under the State Corporations Act²⁶ is bedeviled with a number of serious operational and logistical problems and difficulties mainly due to under-funding. After its inception in June 2006, the Authority received funding to the tune of Ksh. 120 Million from the Government. This was a top up on the Ksh. 60 Million extracted from the annual shipping levy. However, the funds, in their totality, were not sufficient

²⁶ Cap 446 of the Laws of Kenya. The Order was issued pursuant to Section 3 of the Act and was contained in Legal Notice No. 79 of 25th June 2004. The Kenya Maritime Authority Act (Cap 5 of 2006) has since been enacted to govern the operations of KMA.

considering that the KMA had to cater for the logistics of acquiring office, employing staff and rolling out operations to cover the Indian Ocean and internal waters. KMA expected its first funding to be at least Ksh. 240 Million to enable it establish its structures and commence operations. In spite of these difficulties, the Authority is expected to transform Kenya into a world-class maritime nation by maximizing the use of maritime resources and preserving the marine environment.

With regard to maritime safety and security, the coast of Somalia, and by extension the whole of the East African region has been having a perennially unique problem. Indeed, both the International Maritime Bureau and the International Maritime Organization have classified the Somali coast as the most dangerous in the Indian Ocean region and its marine environment.²⁷ This state of affairs can be partly attributed to the fact that Somalia has been embroiled in civil turmoil and inter-clan strife and has not had a stable government since the fall of Said Barre in 1991.²⁸ But what is most perturbing is not the prevalence of atrocities at sea but the sporadic, lethargic and uncoordinated reaction by the Kenya Government whenever such incidents of maritime insecurity occur.²⁹

In 2008 alone, more than two dozen ships have been hijacked by pirates operating in the waters off the Somali coast. On 25th September 2008, in what has been the most daring hijacking incident and one that captured headlines the world over, the pirates took

²⁷ See the International Chamber of Commerce Commercial Crime Service at <http://www.icc-ccs.org/main/index.php> (accessed on 6/11/2008).

²⁸ See <https://www.cia.gov/library/publications/the-world-factbook/geos/so.html> (accessed 6/11/2008)

²⁹ On 13 October 2005, the Kenyan Government had been forced to issue a travel advisory to ships flying the Kenyan flag against using the shipping route off the coast of Somalia following an escalation of hijacking incidents along that route. See the *Standard* 14 October 2005.

hostage a Ukrainian ship *Mv Faina* with 20 crew members on board and a cargo that included Russian tanks and ammunition destined for the port of Mombasa.³⁰ Apart from sparking a diplomatic row between the Governments of Kenya and Sudan as the arms were suspected to have been destined for Southern Sudan thereby violating a United Nations arms embargo, the incident also brought to the fore the lack of preparedness by the Kenyan Government to deal with maritime insecurity.³¹ Kenya had to rely on the goodwill of friendly foreign Governments such as the USA, Russia and NATO to ensure that the pirates did not interfere with or offload the deadly cargo aboard *MV Faina* as the standoff in the ocean continued.

The Government of Kenya has identified inadequate maritime administrative and regulatory framework as the critical issue in the regulation of the maritime industry.³²

The policy statement is expressed thus:

“The Ministry of Transport and Communication will streamline the administrative and regulatory structure of the maritime industry by creating a Maritime Affairs Unit within the Ministry which will be responsible for review and implementation of maritime transport policy, maritime laws review and overall coordination of maritime affairs. In addition, an independent maritime regulatory authority will be established to regulate all maritime activities in Kenya. The formation of this independent organization will consolidate and

³⁰ See <http://www.latimes.com/news/nationworld/world/la-fg-pirates31-2008oct31.0.649768.story> and <http://www.buzzle.com/articles/ecoterra-updates-on-the-mv-faina-piracy-crisis-off-the-somali-coast.html> (accessed on 6/11/2008) for a detailed analysis of the events that transpired after the hijacking incident.

³¹ *Supra* note 10.

³² Government of Kenya, Ministry of Transport and Communication; “Recommendations on Integrated National Transport Policy: Moving a Working Nation”, Sub-sector Policy Papers and Implementation Matrices, Vol. II, February 2004 p. 45.

enhance efforts in implementation of maritime conventions and protocols.”

Emphasis added.

Where is the policy framework? When will it be implemented? Is it sound and effective? Can it ensure sustainable exploitation of Kenya's marine resources? Has it taken into account the status of the current legal and institutional frameworks?

Kenya's experience reveals an absence of an aggressive national development plan backed by sufficient funding, appropriate research and political will focused on delimiting, controlling, policing and exploiting the resources of Kenya's maritime zones.³³ There is no clear-cut policy, legal and institutional frameworks for domesticating the provisions of LOSC.

Illegal fishing has continued within Kenya's maritime zones due to lack of capacity to police the zones.³⁴ The Fisheries Act³⁵ gives “authorized officers”³⁶ the power to control fishery and related matters. A closer scrutiny of the officers' powers confirms that they are the only medium through which Kenya's control of maritime resources is achieved. The problem is always that the officers lack the technical capacity to achieve the intended

³³ *Supra* note 21.

³⁴ Wambua P. M., “The Challenges of Controlling African Maritime Zones: Command, Control and Co-Operation-How Do We Do It?” in *The Law Society of Kenya Journal*. VOL.3, 2006 No.1 (ISBN 91966-7121-7-8.). The writer notes at page 6 that the challenge of illegal fishing in the EEZs of most African states still persists. Some African states suffering from the same problem have sought the assistance of other states to flush out foreign vessels fishing illegally in their waters. For example, the Southern Africa Development Cooperation (SADC) mission which uses a South African Ship, *Mv. Sarah Baartman*, has managed to flush out several vessels that were fishing illegally in Tanzanian's waters. The mission will also undertake environmental protection of off shore marine resources as well as monitor and react more rapidly to marine accidents in the region.

³⁵ Cap 378 of the Laws of Kenya.

³⁶ Defined under Section 2 of the Act.

objectives. This state of affairs places Kenya in a very precarious position, given the already emerging evidence of pirate fishing along the East Coast of Africa and the high likelihood of pollution from vessels plying the Indian Ocean maritime routes, already recognized as the heaviest tanker route in the world.³⁷

It is quite embarrassing for a state to fail to protect resources in an area over which it exercises jurisdiction thus allowing exploitation by other states. This negates the rationale and philosophical justification of the concept of the EEZ.

Two pieces of legislation exist to govern the exploitation mineral resources in the submarine areas of Kenya's EEZ. The first is the Petroleum (Exploration and Production) Act³⁸ which vests petroleum property in the Government and seeks to regulate Government negotiation and conclusion of petroleum agreements on the exploration for development, production and transportation of petroleum and related purposes. The Act constitutes the Minister for Energy as the Chief Government Officer responsible for all petroleum operations. The second is the Mining Act³⁹ makes provisions on all mineral and mineral substances other than petroleum. It establishes a licence control mechanism for exploiting mineral resources and establishes the office of the Commissioner of Mines and Geology as the Chief Implementing Officer. Any interested person must apply for a prospecting right, then an exclusive prospecting licence and finally, the registration of locations for mining.

³⁷ UNEP; East Africa Atlas of Coastal Resources, 1998, at 73. See Lumumba in *supra* note 23 p. 121

³⁸ Cap 308 of the Laws of Kenya.

³⁹ Cap 306 of the Laws of Kenya (as revised in 1987).

These two pieces of legislation do not provide a suitable legal framework to govern the exploitation of mineral resources in Kenya's maritime zones because there is no underlying policy and supporting institutional frameworks to govern such exploitation.

Kenya's capacity to explore and exploit marine resources is obscured by lack of technological capacity. Current reports indicate that the National Oil Corporation of Kenya (NOCK) has entered into prospecting agreements with foreign companies following recent amendments to the relevant law [the Petroleum (Exploration and Production) Act]. The actual details of these arrangements remain unclear.⁴⁰

As demonstrated in the foregoing paragraphs, the current policy, legal and institutional frameworks for the control and management of Kenya's marine resources is unsatisfactory, being characterized by duplicity, lack of clarity and clear role-definition and serious overlaps and inconsistencies and is therefore in urgent need of reform. It is therefore imperative to rethink the entire governance structure of Kenya's ocean regime which constitutes a vital part of the country's economy.

1.3 Theoretical And Conceptual Framework

This research study seeks to merge the concepts of Governance and Law. A proper understanding of the traditional notion of the concept of Governance is essential and

⁴⁰ It was reported in one of the dailies, *The People* of November 7, 2001 that the Government had licensed two British Oil Companies to explore the country's deep off-shore basins where it is believed that millions of barrels of oil could be found.

germane to appreciating the crucial link between management of marine resources and the relevant legal concepts and existing legal frameworks.

In constructing a theoretical framework for this study, a brief outline and comment on the following concepts is necessary:

1. The concepts of the Territorial Sea, the EEZ and the Continental Shelf;
2. The monistic and dualistic approaches to treaty implementation;
3. Governance, corporate governance and management; and
4. Policy formulation and implementation.

1.3.1. The concepts of the Territorial Sea, the EEZ and the Continental Shelf

From the time sailors ventured into the sea, there was a problem of how far they could go. There was a problem as to how far a Coastal State could extend its jurisdiction to the sea.⁴¹ Two competing concepts were debated in the early 17th Century.

John Selden stated that the sea was **closed** and that it only belonged to countries with coasts— **mare clausum**.⁴² This view was opposed by a Dutch Jurist, **Hugo Grotius**, who argued for the **freedom of the sea** and that all States could come to the sea and do whatever they pleased – **mare liberum**.⁴³ Grotius view won the day and this meant that the High Seas belonged to humanity and all states could enjoy and benefit there from. The question of determining the extent of coastal state jurisdiction seaward however

⁴¹ Churchill R.R. and Lowe A.V., in *supra* note 4 p. 1. See also Kenchington R. A. in *supra* note 2 p. 6 – 8.

⁴² See Seldon J., *Mare Clausum Seu, De Domino Maris Libri Duo*, (1635) (London).

⁴³ See Grotius H., *Mare Liberum* (1608), a Translation by R.V.D Magoffin; J.B. Scott (ed.), (1966) (New York).

remained unresolved. There was no uniformity as some Coastal States claimed 3 nautical miles, others twelve and some 20 nautical miles seaward as territorial sea.⁴⁴

In 1930 the League of Nations undertook a study of the Law of the Sea in an attempt at settling the question of the breadth of the territorial sea.⁴⁵ This attempt failed and the question of the extent of coastal jurisdiction remained unanswered. The United States of America (USA) claimed 3 nautical miles based on the distance of a canon ball shot at the coast i.e. the territory that it could defend.⁴⁶

There followed a number of uncontrolled unilateral declarations by Coastal States extending their territorial sea. In 1947 **Harry S Truman's (the then President of the USA) Proclamation** brought in the concept of the doctrine of **Continental shelf**. Truman said that the Coastal State jurisdiction should be on the basis of the continental shelf which he described as a natural prolongation of the land mass and went on to declare USA's fishing jurisdiction as 200 nautical miles.⁴⁷ This unilateral declaration by the USA opened a Pandora's box. During the period between 1947 and 1950, and in response to Truman's declaration, some states extended their territorial sea to 100 nautical miles and most South American countries extended their jurisdiction to 200 nautical miles of territorial sea.⁴⁸

⁴⁴ Shaw M.N., in *supra* note 4 p. 303.

⁴⁵ See ILN Acts of the Conference For the Codification of International Law 123-137, 165-169 – (NJ Doc. C. 351 M. 145, 1930, LN Pub. 1930 V 14).

⁴⁶ Christine R. D., Coastal and Ocean Management Law in a Nutshell, (1994) (West Publishing Company St. Paul, MN) p. 297.

⁴⁷ 59 stat 884 (1945): 10 Fed Reg. 12303: (1943-48) 3CFR 67: 13 DSB 485 (1945)

⁴⁸ See for example Argentina's Presidential Decree No. 14708; 1946 Constitution of Panama and Presidential Decree No. 449 of 1967; Congress of Nicaragua Declaration of 23rd June 1947; 1950 Constitution of El Salvador and Costa Rica Declaration of 1943.

In an attempt by the United Nations Organization (UN) to codify the Law of the Sea, (at the Geneva Conference on the Law of the Sea) in 1958 four conventions were passed namely: -

1. Convention on Territorial Sea and Contiguous Zone
2. Convention on Continental Shelf
3. Convention on the High Seas
4. Convention on Fishing and Conservation of Living Resources in the High Seas

The Geneva Convention on the Law of the Sea accepted the theory of natural prolongation of landmass that could be followed as long as it permitted exploitation.⁴⁹ It also introduced the concept of **Contiguous Zone** of 12 nautical miles measured from the baseline in which a Coastal State was to exercise control necessary to prevent infringement of its customs, fiscal, immigration or sanitary regulations within its territory or territorial waters and punish such infringements.⁵⁰ This became the first UN Conference on the Law of the Sea (**UNCLOS I**).

In 1960 there was another United Nations Conference exclusively devoted to resolving the Fisheries jurisdiction (**UNCLOS II**). UNCLOS II failed miserably because it was unable to resolve the crucial question of how far Coastal States could extend fishing jurisdiction.⁵¹

⁴⁹ Brownlie I., Basic Documents in International Law (4th edn, 1995) (Oxford University Press, Oxford)

⁵⁰ Article 24, Geneva Convention on the Law of the Sea (1958)

⁵¹ See UNCLOS II official records 30, 173 9UN Doc A/CONF. 19/8. See also Dean A. Second UN Conference on the Law of the Sea 54A JIL 781-89 (1960).

By their natural configuration, continental shelves are not uniform. There are the so-called **shelf-locked** countries which do not have any continental shelves. On the other hand are the states which have very broad continental shelves, going up to 600 nautical miles. Lack of uniformity became the basis of disagreement during the UNCLOS II.

It was discovered that countries like Japan could roam the world and were fishing from coasts of other countries.⁵² **UNCLOS III**, which lasted for almost nine years, was therefore convened to unravel all the problems of the continental sea shelf. It was agreed that efforts must be made to get a solution on how far a state can extend jurisdiction and then demarcate the rest of the sea as High Seas which was to be declared common heritage of mankind.⁵³ The seabed, the sub-soil and the resources thereof beyond the limit of national jurisdiction were declared common heritage of mankind and cannot be expropriated by any state but can only be exploited on behalf of mankind.⁵⁴

It was agreed that territorial seas would extend up to 12 nautical miles.⁵⁵ The legal definition of continental shelf comprised of the continental shelf proper, continental slope, continental rise which equals to continental margin.⁵⁶

⁵² Oda S., *International Control of Sea Resources* (1989) (Martinus Nijhoff Publishers, London) p. xix.

⁵³ Swartrauber S. A., *The Three Mile Limit of Territorial Seas* (1972) (Annapolis, M.D) p. 10-130. It was ambassador Arvid Pardo of Malta who in 1967 proposed that the seas beyond limits of national jurisdiction be declared a common heritage of mankind as a whole.

⁵⁴ Article 136 of the LOSC (1982).

⁵⁵ Article 3 of the LOSC (1982).

⁵⁶ UN Doc A/CONF. 62/PV 193 (1982). See also Article 76 LOSC (1982).

UNCLOS III also saw the emergence of a new concept of the **EEZ** floated by Kenya. Some scholars have argued that it was not altogether novel but a modification of the earlier concept of Patrimonial Sea defined by the Specialized Conference of the Caribbean Countries at Santa Domingo de Guzman in June 1972.⁵⁷ **Frank X Njenga** the legal advisor to Kenya's Ministry of Foreign Affairs at the Asian-African Legal Consultative Committee (AALCC) Colombo session in January 1971 suggested the concept of an area in which Coastal States exercised less than complete sovereignty.⁵⁸ The area was to be called an Exclusive Economic Zone. The idea was presented to UNCLOS III and after much deliberation was finally accepted. A country can now claim 12 nautical miles of territorial sea and 188 nautical miles EEZ making it a total 200 miles of jurisdiction.⁵⁹

Within the EEZ a Coastal State permits freedom of navigation, other states the right of over-flight and they can lay down pipelines and can install submarine cables but with the Coastal State's consent. In the EEZ, no other state can do any research of any kind without the consent of the Coastal State.⁶⁰

⁵⁷ .See Okidi C.O., "The Kenya Draft Articles on Exclusive Maritime Economic Zone Concept: Analysis and Comments" *Working Paper No. 289* Institute of Development Studies, University of Nairobi, November 1976.

⁵⁸ Churchill R. R. and Lowe A. V. in *supra* note 4 at p. 133.

⁵⁹ The concept of EEZ has since come to be recognized as customary international law and has received judicial endorsement in a number of cases that include The Continental Shelf (*Tunisia v. Libya*) ICJ Reports 1982 p. 72; The Gulf of Maine Case ICJ Reports 1984 p. 246 at p. 294 – 295; The Continental Shelf (*Libya v. Malta*) Case ICJ Reports p 13 and 33 and The Guinea Guinea Bissau Delimitation of Maritime Boundary Case ILM 251 (1985) p. 274.

⁶⁰ See Articles 55 – 75 of the LOSC (1982).

The concept of the **Contiguous Zone** was retained and extended to cover 24 nautical miles measured from the baseline.⁶¹ The jurisdiction of the Contiguous Zone therefore overlaps with the EEZ. Most Coastal States have not claimed their Contiguous Zone and those that have do so for other reasons such as security.⁶²

The Law of the Sea as it stands now is that a Coastal State is allowed to have a 12 nautical miles stretch of territorial sea measured from the baseline, a Contiguous Zone of 24 nautical miles, an EEZ of 200 nautical miles from the baseline and a continental shelf of not more than 350 nautical miles from the baseline.

In Kenya, the Presidential Proclamation of February 28 1979 which took into account UNCLOS I became the guide in Kenya's management of Marine Resources.⁶³ The Maritime boundary with Tanzania had been delimited in July 1976 but the Maritime border with Somali had not been delimited.⁶⁴ The Maritime Zones Act came into force in August 1989.⁶⁵ Several other legislations are said to apply to the management of resources within the Kenyan Maritime Zones but the policy and governing legislation on Kenya's Maritime Zones pre-date the 1982 LOSC.⁶⁶ Recently, the government appointed a task force to come up with recommendations on how best to bring order and sound governance to the Kenyan Maritime Zones.⁶⁷ On 9th June 2005, another Presidential

⁶¹ Article 33, LOSC (1982)

⁶² See Churchill R. R. and Lowe A. V. in *supra* note 4 at p. 116.

⁶³ See Lumumba P. L. O. in *supra* note 21 Chapter 3 for a fuller analysis of the Kenya EEZ.

⁶⁴ See Adede O. A. "African Maritime Boundaries" in Charney I. J. and Alexander M. L. (eds) *International Maritime Boundaries* Vol. I, 1993 (Martinus Nijhoff Publishers).

⁶⁵ Chapter 371, Laws of Kenya

⁶⁶ These include the Mining Act (Cap 306), the Petroleum (Exploration and Production) Act (Cap 308), the Science and Technology Act (Cap 250), the Maritime Zones Act (Cap 371).

⁶⁷ Task Force on the Delineation of Kenya's Outer Continental Shelf *vide* Kenya Gazette Notice No. 3929

Proclamation was issued that in a material way altered the maritime boundary with Tanzania and sought to fix the boundary with Somalia.⁶⁸

1.3.2 The Monist and Dualist Approach to Treaty

There are two basic viewpoints concerning the relationship between international and domestic law, **monism** and **dualism**. The monist view is that international law and domestic law are part of the same legal order, international law is automatically incorporated into each nation's legal system, and international law is supreme over domestic law.⁶⁹ Monism thus requires, among other things, that domestic courts give effect to international law, notwithstanding inconsistent domestic law, even domestic law of constitutional character. By contrast, the dualist view is that international and domestic law are distinct, each nation determines for itself when and to what extent international law is incorporated into its legal system, and the status of international law in the domestic system is determined by domestic law.⁷⁰

of 2nd June 2006. This Task Force was mandated to: -

- a) Explore and recommend modalities for delineation of the country's Continental Shelf according to the provisions of LOSC and in line with the best international practices;
- b) Examine and review laws relating to the sustainable utilization of resources within maritime zones of Kenya;
- c) Examine and make recommendations on the modalities for sustainable utilization of these resources including development of appropriate infrastructure, financial mechanisms, and institutional framework;
- d) Recommend a comprehensive ocean management policy including institutional framework to guide the use and management of the ocean space and resources to ensure that present and future generations of Kenya benefit from the opportunities offered by the vast ocean frontier;
- e) Examine and make recommendations on such other matters related to or incidental to the foregoing.

⁶⁸ Legal Notice No. 82 of 22nd July 2005, Kenya Gazette Supplement No 55 of 2005. Discussed in details in chapter 2.

⁶⁹ Bradley C. A., Breard, Our Dualist Constitution and the Internationalist Conception *Stanford Law Review* Vol. 51, 1999. For an analysis of the jurisprudential basis of the two approaches, see Oyeboode A., *International Law and Politics: An African Perspective* (Bolabay Pubs, 2003) pp. 71-83.

⁷⁰ *Ibid.*

Under the dualist view, when municipal law provides that international law applies in whole or in part within the jurisdiction, this is merely an exercise of the authority of municipal law, an adoption or transformation of the rules of international law.⁷¹ As these definitions suggest, the debate between monism and dualism is in part a debate about where one should look to determine the status of international law in a domestic jurisdiction: Monism looks outward to the structure and content of international law; dualism looks inward to domestic standards and processes.

Under the monistic approach, where it is so provided in the constitutional law or otherwise, an international convention can become part of the domestic legal domain simply as a consequence of the state becoming party to the convention by depositing the relevant instrument of ratification or accession provided the convention itself is self-executing or of direct effect or application. In such case, no legislative action is required. The United States, Belgium, France, the Netherlands and Spain are examples of monistic states. On the other hand, the dualistic system is said to prevail in jurisdictions where some form of legislative action is required for the implementation of an international convention, following its ratification or accession. While dualism is predominant in the United Kingdom and other commonwealth jurisdictions that follow the common law system and the Westminster model of government, there are several civil law jurisdictions such as Italy, Germany and the Scandinavian countries that have adopted the dualistic approach.⁷²

⁷¹ Mukherjee P. K., *Maritime Legislation*, (2002) (World Maritime University, Malmo, Sweden) p. 126 - 133.

⁷² *Ibid.*

Kenya is a dualist state and all treaties that are ratified have to be domesticated to have effect within her jurisdiction. This includes the Conventions on Maritime Jurisdiction and the Law of the Sea. Unfortunately, the process of legislation in Kenya is very slow and bureaucratic.⁷³

1.3.3. Governance, Corporate Governance and Management

1.3.3.1 Governance

Governance refers to the manner in which power is exercised in the management of economic and social resources for sustainable human development.⁷⁴ This concept has assumed critical importance in these days of political pluralism. The concept forms a vital ingredient in the maintenance of a dynamic balance between the need for order and equality in society, the efficient production and delivery of goods and services, accountability in the use of power, the protection of human rights and freedoms, fundamental or non-fundamental, and the maintenance of an organized corporate framework within which each citizen can contribute fully towards finding innovative solutions to common problems.⁷⁵

There are four pillars of good governance namely⁷⁶:

1. There must be an effective body responsible for governance separate and independent of the management team in order to promote accountability, efficiency and effectiveness, probity and integrity, responsibility and transparent and open leadership with accurate

⁷³ See Sections 46-59, Constitution of Kenya and Part XV of The Kenya Parliamentary Standing Orders.

⁷⁴ Private Sector Initiative for Corporate Governance, Principles for Corporate Governance in Kenya, November, 1999, p. 1.

⁷⁵ *Ibid.*

⁷⁶ *Ibid.*

and timely disclosure of information relating to all economic and other activities of an organization. This first attribute manifests itself more significantly within the realm of corporate governance;

2. There must be an all-inclusive approach to governance that recognizes and protects the rights of members and all stakeholders – both internal and external;

3. The institution/organization must be governed and managed in accordance with the mandate granted to it by its founders and the society in general and must take seriously its wider responsibilities to enhance sustainable prosperity; and

4. The institutional framework of governance should be able to provide an enabling environment within which its human resource can contribute and bring to fruition their full creative powers towards finding innovative solutions to shared problems.⁷⁷

1.3.3.2 Corporate Governance

Corporate governance was first defined by the famous economist and Nobel Laureate Milton Friedman. According to Friedman, corporate governance means to conduct the business of a corporation in accordance with owner's or shareholders' desires, which generally will be to make as much money as possible, while conforming to the basic rules of the society embodied in law and local customs.⁷⁸ This definition is based on the

⁷⁷ *Ibid.* p. 4.

⁷⁸ *Ibid.*

economic concept of market-value capitalization that underpins shareholder capitalism. Apparently, in the present day context, Friedman's definition is narrower in scope.⁷⁹

Over a period of time, the definition of corporate governance has been widened. It now encompasses the interests of not only the shareholders but also many stakeholders. According to some experts, "corporate governance means doing everything better, to improve relations between companies and their shareholders; to improve the quality of outside directors; to encourage people to think long-term; to ensure that the information needs of all stakeholders are met and to ensure that executive management is monitored properly in the interest of shareholders."⁸⁰

Experts of the Organization for Economic Co-operation and Development (OECD) have defined corporate governance as the system by which business corporations are directed and controlled.⁸¹ According to these experts, the corporate governance structure specifies the distribution of rights and responsibilities among different participants in the corporation such as the board, managers, shareholders and other stakeholders and spells out the rules and procedures for making decisions on corporate affairs. By performing this role, corporate governance provides the structure through which the company objectives are set, and also provides the means of attaining those objectives and monitoring performance.

⁷⁹ Those who oppose Friedman's view argue that business has responsibilities to other constituents beyond shareholders. See Business Roundtable Statement on Corporate Responsibility (1981) calling for corporations to serve public interest and public profit.

⁸⁰ *Ibid.*

⁸¹ Corporate Governance Bulletin Vol. 4 No. 4 October – December, 2004 p. 1.

These are just but a few definitions of corporate governance .Some of the definitions are subjective but at least it is clear from all that corporate governance deals with the structure and efficient and transparent operation of an organization.

As the custodian of public interest, the Government of the day often engages itself in the process of governance by forming state corporations which are a vehicle for effectuating the public interest through pursuing the economic, political, social and developmental objectives or initiatives that invariably affect the lives of members of the public ('the governed') or a section of it in a substantial way. Reference to corporate governance in the public sector in this study connotes the involvement of state corporations (or parastatals as they are commonly referred to) in the public sector.

1.3.3.3 Management

The process of management often takes an organizational focus i.e. getting the work done efficiently and effectively so as to make the organization's strategy work. Strategic management is defined as the set of decisions and actions that result in the formulation and implementation of plans designed to achieve a corporation's objective.⁸² Strategic management involves the planning, directing, organizing, and controlling of a corporation's strategy-related decisions and actions. By *strategy*, managers refer to their large-scale, future-oriented plans for interacting with the competitive environment to achieve a corporation's objectives. A strategy is a corporation's game plan. Although the plan does not precisely detail all future deployments (of people, finances, and

⁸² *Ibid.*

material), it does provide a framework for managerial decisions. A strategy reflects a corporation's awareness of how, when, and where it should compete; against whom it should compete; and for what purposes it should compete.⁸³ Using the strategic management approach, managers at all levels of the organization interact in planning and implementing the corporate strategy.

One of the devices employed in strategic management in the public sector is performance contracts. A performance contract is a management tool for measuring performance that establishes operational and management autonomy between Government and public agencies. It reduces the controls and enhances the quality of service. It changes the style of public sector management by focusing on results and not processes. Finally, it measures performance and enables recognition and reward of good performance and sanctions bad performance. The contract is a freely negotiated performance agreement between the Government acting as the owner of a government agency, and the agency itself. The mutual performance obligations, intentions and responsibilities between the two parties are clearly specified.⁸⁴

The signing of performance contracts has become a critical component of corporate governance in the public sector. This concept which started in France in the 1960s and is

⁸³ *Ibid.*

⁸⁴ Government of Kenya, Information Booklet on Performance Contracts in the Public Service, March 2005 p. 5.

being implemented in a number of developed democracies has been imported into Kenya.⁸⁵

At the beginning of 2005, the Government of Kenya introduced Performance Contracts for State Corporations. Most of the organizations/institutions dealing with governance of marine resources are state corporations. The improvement in the performance of the public service and the delivery of quality service to Kenyans remain core objectives of the Kenyan Government. The introduction of performance contracting in the Public Service is in furtherance of these objectives. Through the on-going Public Service Reforms, the Government is moving away from the general focus on controls and procedures to the creation of a management culture where public servants focus on results, an approach referred to as 'results - based management' as a performance management system.⁸⁶ A model performance contract signed by public sector institutions/departments involved in the governance of marine resources is shown in Appendix II.

⁸⁵ The concept of Performance Contracting in Kenya can be traced to the year 1990 when Government, through Cabinet Memorandum No. CAB. (90) 35 of 3rd May 1990 approved the introduction of Performance Contracts in the management of public agencies. The Policy commitment is contained in the Economic Recovery Strategy for Wealth and Employment Creation (2003 - 2007). Subsequently, the Performance Contracts Steering Committee was established in 2003 to spearhead the introduction and implementation of the process. Adapted from Information Booklet, *Ibid*. Now under the new presidential circular of 2008, Performance Contract is a department within the Office of the President headed by a Permanent Secretary.

⁸⁶ *Ibid*.

1.3.4. Policy Formulation and Implementation

A **policy** is a broad plan of action to guide decisions and actions.⁸⁷ The term may apply to government, private sector organizations and groups, and individuals. Policy has also been defined as prudence or wisdom in the management of affairs; management or procedure based primarily on material interest; a definite course or method of action selected from among alternatives and in light of given conditions to guide and determine present and future decisions or a high-level overall plan embracing the general goals and acceptable procedures especially of a governmental body.⁸⁸

Policy/strategy formulation and implementation is a critical aspect of the concept of governance. Effective and efficient laws and institutions must be supported by a sound underlying policy framework. Where such policy is lacking, the laws are rendered ineffective and either remain largely unimplemented or haphazardly implemented while institutions crumble down. The underlying policy framework must support and be reflected across the spectrum of enacted laws and institutions.

Policies can be understood as political, management, financial, and administrative mechanisms arranged to reach explicit goals. The goals of policy may vary widely according to the organization and the context in which they are made. Broadly, policies are typically instituted in order to avoid some negative effect that has been noticed in the

⁸⁷ See Ayiar R. P., et al *The Law Lexicon* (2nd edn. 1997) (Wadhwa & Co. Nagpur, New Delhi) p. 1473.

⁸⁸ Adopted from <http://www.m-w.com/cgi-bin/dictionary?Policy>. Accessed on 18/04/2007

organization, or to seek some positive benefit. Policy addresses the intent of the organization, whether government, business, professional, or voluntary.⁸⁹

When the term policy is used, it may also refer to⁹⁰:

- i) Official government policy (guidelines that govern how laws should be put into operation); or
- ii) Broad ideas and goals in political manifestos and pamphlets; or
- iii) A company or organization's policy on a particular topic or issue.

Policy formulation is the development of effective and acceptable courses of action for addressing what has been placed on the policy agenda.⁹¹ The policy formulation process includes the identification of different alternatives, such as programs or spending priorities, and choosing among them on the basis of the impact they will have. In reference to the public sector, policy formulation refers to the crafting of the general principles by which a government is guided in its management of public affairs.⁹²

There is often a gap between stated policy (i.e. which actions the organization intends to take) and the actions the organization actually takes. This difference is sometimes caused by political compromise over policy, while in other situations it is caused by lack of a

⁸⁹ *Supra* note 88.

⁹⁰ *Ibid.*

⁹¹ *Ibid.*

⁹² Adopted from <http://www.emro.who.int/mei/mep/Healthsystemsglossary.htm>. Accessed on 18/04/2007

clear policy implementation and enforcement mechanism.⁹³ **Implementation** means the act of accomplishing some aim, that is, carrying into effect.⁹⁴

Implementing policy may have unexpected results, stemming from a policy whose reach extends further than the problem it was originally crafted to address. Additionally, unpredictable results may arise from selective or idiosyncratic enforcement of policy. Policies are therefore dynamic; they are not just static lists of goals or laws. However, in the words of Mahatma Gandhi, policy is a temporary creed liable to be changed, but while it holds good it has got to be pursued with apostolic zeal.⁹⁵

1.4 Literature Review

It is universally acknowledged that sound maritime governance is difficult to realize in any context, more so within Africa. Many states are caught up in the piecemeal regulation and reactionary syndrome. But few scholars have endeavoured to address the solutions to these management and administrative problems, loopholes, inconsistencies and conundrums in the control and management of marine resources.

However, a large body of scholarly work exists dealing with maritime issues but inadequate research has been done on governance of the maritime zones and their resources, especially a critical appraisal of the existing legal, policy and institutional frameworks in the Kenyan context. A sampling of few works demonstrates lack of focused literature.

⁹³ *Supra* note 88.

⁹⁴ Adopted from <http://www.thefreedictionary.com/Implementation> Accessed on 18/04/2007

⁹⁵ See <http://www.answers.com/topic/policy> Accessed on 18/04/2007

Perhaps the best attempt at and discursive insight into governance of marine areas and their resources is provided by **Richard A. Kenchington** Managing Marine Environments, Taylor and Francis New York Inc. 1990. He succinctly discusses the problem of subordination of aquatic environments to terrestrial ecosystems. He identifies the main problem bedeviling the management of marine ecosystems as lack of effective coordination characterized by rivalry between implementing agencies. The greatest strength of his book lies in its exposition of the planning and management of Australia's Great Barrier Reef Marine Park, which is a *locus classicus* on the management of marine resources. However, the text is dated and does not address the most modern concerns of maritime world true to its year of publication (1990). Besides, it does not give any insight into the Kenyan scenario. This study will address the modern concerns of management of marine resources from a Kenyan perspective and suggest the most appropriate approach to ensure sustainable exploitation of the resources within Kenya's maritime zones.

Adalberto Vallega's book, Sustainable Ocean Governance, Routledge, Francis & Taylor Group, London and New York, 2001, is an analysis of the interplay between science and law in the governance of ocean ecosystems. The book also touches on legal and jurisdictional frameworks, sustainable development as well as integrated coastal zone management. Although the text emphasis is on scientific concepts, the book is a useful guide on how scientific data can be utilized in formulating policy, legal and institutional frameworks for the governance of marine resources.

The Preface of **Mohamed Dahmani's book, The Fisheries Regime of the Exclusive Economic Zone** Martinus Nijhoff Publishers, London, 1987, states that the objective of the book is to examine the jurisdictional content of the EEZ concept as it applies to fisheries and related matters with a view to appreciating its effectiveness and viability from the law of the sea perspective. In particular, the book is concerned with the degree of authority that the coastal state has to regulate the exploitation of the fishery resources and the extent to which this authority is circumscribed by universally recognized principles of fisheries management. Dahmani examines the pre mid-1970s evolution of the international law of fisheries; the genesis and development of the EEZ concept; the coastal state's fisheries management in the EEZ, fisheries research in the EEZ and transfer of fishing technology. He concludes that the fisheries regime of the EEZ is characterized by a high altitude of coastal state discretion in the management and conservation of fish – stocks. He advocates for extensive cooperative arrangements between developed and developing states within the framework of LOSC which, to him, lays the foundation for building a better system of international fisheries management with a greater element of efficiency and perhaps even of equity.

For the purposes of this research, Dahmani's book essentially suffices in discussing the fisheries regime of the EEZ. But only thus far. The book provides no insight into the structures of governance of the fisheries regime of and by a coastal state. In the premise, it is useful in discussing the fisheries regime under the EEZ solely and exclusively as it addresses only but a portion of a comprehensive marine governance structure. This study

will examine governance of marine resources, inclusive of living and non-living resources, and will extend to all (without limitation to any of them) the maritime zones recognized under LOSC.

Justice Shigeru Oda in International Control of Sea Resources Martinus Nijhoff Publishers, London, 1989, though following closely in the footsteps of Dahmani, broadens the content of his exposition through covering the resource regime of the EEZ, the High Seas and the Continental Shelf. He discusses the fundamental problems of international fisheries revolving mainly around the issues of conservation and allocation/sharing of marine resources. He offers a historical perspective of the international fisheries regime as conceptualized at the Geneva Conferences on the Law of the Sea. He concludes the text by proffering a proposal for reconsidering the treatment of sedentary fishing through dealing with it in the same way as regular fishing because “all fishing is of course subject to conservation measures.” Thus, the deficiency of selectivity that characterizes Dahmani’s text also affects Shigeru Oda’s book since the text offers discursive insight only as far as the management of the fisheries regime is concerned, affording little attention to the treatment of non-living marine resources.

This research will adopt a more general approach and analyze the governance and management of the living and non-living the resources within Kenya’s maritime zones.

Akin Oyebode in International Law and Politics: An African Perspective Bolabay Pubs, 2003 is cynical about the development of an international legal regime for the governance

of the ocean spaces. He dismisses the various efforts that have been made at resolving the issue of governance of the sea as an attempt by the powerful nations to install their own order of the sea.

It is noteworthy that Oyeboade is the one scholar to have analyzed international law from an African perspective. However, Oyeboade falls short of suggesting an appropriate order for the oceans. Though his is an African perspective, he does not focus on any particular African country. This study will focus on Kenya's governance of resources within her maritime zones and will attempt at formulating practical and comprehensive legal, policy and institutional frameworks for optimal exploitation of marine resources.

David A. Colson and Robert W. Smith (eds) International Maritime Boundaries, Volume V, Martinus Nijhoff Publishers, Leiden/Boston, 2005, is the fifth volume in a series that offers a systematic approach to the study of maritime boundaries. The book gives global and regional analyses of delimitation of maritime boundaries as well as a report of recent decisions by the International Court of Justice and tribunals regarding disputes amongst coastal states on delimitation of maritime zones. The book is a crucial guide in mapping out a proper delimitation of Kenya's maritime zones and the study will borrow heavily from especially the decisions reported therein on the international practices in delimitation of maritime zones.

Robin Churchill and Vaughan Lowe's The Law of the Sea, 2nd edn., Manchester, 1999 provides an introduction to the law of the sea, surveying not only the 1982 United

Nations Convention on the Law of the Sea but also the customary international and conventional law which supplements it. The writers take each of the major maritime zones recognized in contemporary international law, and explain the rules presently applicable to each zone against the background of the main stages of the historical development of those rules and also attempts at providing separate surveys of each of the main activities carried out in the seas. The book does not touch on the question of Kenya's control and management of marine resources within the recognized zones, which this study seeks to address. This study will be specific in its approach and will zero in on Kenya's effort at management and control of her marine resources.

With regard to the practice in the governance of marine resources in other jurisdictions, several authors have written texts and journal articles which will provide useful insights on the best practices. These texts and articles are reviewed in the following paragraphs.

J. W. van der Schans Governance of Marine Resources: Conceptual Clarifications and Two Case Studies, Eburon Delft, 2001, is an appraisal of community-based governance of common marine resources and the role of government in such initiatives. The book focuses on two case studies: the development of marine salmon farming industry in Scotland and the introduction of a new approach to govern the flatfish catching industry in the Netherlands. The text has useful insights in development of community-based marine resources development initiatives.

Donna R. Christie and Richard G. Hildreth Coastal and Ocean Management Law, Thomson/West, St. Paul, 2007, is a summary of the law applicable in the governance of coastal and maritime zones with special regard to the United States of America. The book first gives an analysis of private and public rights in the coastal zone and then proceeds to examine how the coastal area and maritime zones have been governed in the USA. The book is issue specific in that it focuses on the USA maritime jurisdiction. The challenges faced by the USA in the management of her marine resources may not be necessarily the same as those faced by Kenya owing to the fact that the two nations are at different levels of development. However, some of the principles embodied therein will prove useful in charting an efficient marine resources governance system in Kenya.

A Sea Change: The Exclusive Economic Zone and Governance Institutions for Living Marine Resources, Springer, Dordrecht, 2005, edited by **Syma A. Ebbin, Alf Håkon Hoel and Are K. Sydnes** is a collection of articles focusing on the development of institutional frameworks for the governance of marine resources that have evolved subsequent to the adoption of the EEZ concept. Case studies are taken from both the northern and southern Pacific and Atlantic Oceans in order to critically examine the effect of the EEZ concept on the local, national, regional and international institutional frameworks for the governance of marine resources. The book provides an apt opportunity for a comparative analysis.

Biliana Cicin-Sain and Robert W. Knecht Integrated Coastal and Ocean Management: Concepts and Practices, Island Press, Washington DC, 1998 is an account of the concept

of integrated coastal and ocean management (ICM) and also illustrates how ICM can be accomplished by describing ways in which particular nations have implemented various aspects of it. The book that was developed in conjunction with the Intergovernmental Oceanographic Commission, UNESCO and the International Year of the Ocean is a presentation of the major concepts and methodologies of ICM as well as practical guide to the establishment, implementation, and operation of ICM programmes.

Managing Britain's Marine and Coastal Environment: Towards a Sustainable Future, Routledge, Taylor & Francis Group, London and New York, 2005, edited by **Hance D. Smith and Jonathan S. Potts** is a collection of 14 articles by various authors dealing with a variety of issues in the management of Britain's coastal and offshore resources ranging from fisheries to oil and gas exploration. Although the issues in the management of Britain's marine resources may be slightly different from those in Kenya owing to the peculiarity of the challenges faced by each nation one being a developed nation, while the other is a developing state, the principles embodied therein are of universal application and will form useful guidelines on the best practices that Kenya can adopt in evolving an ocean governance structure.

Donald R. Rothwell and David L. VanderZwaag (eds) Towards Principled Ocean Governance: Australian and Canadian Approaches and Challenges, Routledge Taylor & Francis Group, London and New York, 2006, is a collection of papers authored by leading Australian and Canadian policy-makers and scholars in ocean law and policy which give an appraisal of principled oceans governance from the perspective of these

two large maritime nations. The book analyzes the obligations, compliance, implementation and trends in the international ocean law and the impact they have had on Australia and Canada and also attempts at expounding on the legal and policy responses of the two nations to challenges of ocean governance. Although just like Britain Australia and Canada are developed nations, the principles applied in their marine resources governance could form useful guidelines in formulating efficacious policy and legal frameworks for governance of Kenya's marine resources.

Bilal U. Haq, Syed M. Haq, Gunnar Kullenberg and Jan H. Stel (eds) Coastal Zone Management Imperative for maritime Developing Nations, Kluwer Academic Publishers, Dordrecht, 1997, is based on a 1994 international workshop and brings together contributions by leading specialists on basic concepts and their application to coastal and marine resources governance. The book deals with issues on conceptual frameworks for Integrated Coastal Zone Management (ICZM), regional and global aspects of coastal and marine resources governance, environmental assessment in ICZM, capacity building and technological transfer, monitoring and environmental analysis and case studies and status of ICZM plans. The book also has an ICZM planning module that can be useful in designing coastal and marine resources governance tools.

Timothy Hennessey and Jon Sutinen (eds) Sustaining Large Marine Ecosystems: The Human Dimension, Elsevier, Amsterdam, 2005, provides innovative approaches for improving and sustaining socioeconomic benefits from Large Marine Ecosystems (LMEs). LMEs are described as areas of the ocean characterized by distinct bathymetry,

hydrography, productivity and trophic interaction which accounts for 90% of the world's fish. The efforts to reduce degradation of linked watersheds, marine resources and coastal environments from pollution, habitat loss and over-fishing described therein are worth emulating in Kenya's quest for a sustainable ocean governance regime.

Large Marine Ecosystems of the Indian Ocean: Assessment, Sustainability and Management, Blackwell Science, Malden, 1998 edited by **Kenneth Sherman, Ezekiel N. Okemwa and Micheni J. Ntiba** is a largely scientific account of proceeding in a symposium by marine experts from the Indian Ocean region organized to review various studies on the status of LMEs in the region. The book provides useful insights into the status of marine resources in the Indian Ocean region to which Kenya belongs.

Anne Laine and Malin Kronholm's Bothnian Bay Life: Towards Integrated Coastal Zone Management, Environmental Science & Policy, Volume 8, Issue3, June 2005, Pages 259-262 is a concise summary of the Bothnian bay Life Project established in 2001. The aim of the project was to improve information exchange between countries, regions, industries and municipalities around the Bothnian Bay in line with the European Union (EU) strategies and directives, develop guidelines for integrated management and monitoring and to define targets and priorities towards sustainable development of the bay. The end result targeted by the project was an Integrated Management System for the bay which would support the development of Integrated Coastal Zone Management and facilitate the implementation of the Water Framework Directive in the area. The paper analyzes how the project seeks to achieve the above mentioned ends. Although the paper

is largely descriptive, the insights provided on integrated coastal zone management will provide useful guidelines on how Kenya can best govern her maritime resources in an integrated manner.

Candace M. Newman in Towards Community and Scientific-Based Information Integration in Marine Resources Management in Indonesia: Bunaken National Park Case Study, *Environments*, August 1, 2005, gives an indepth appraisal of community involvement in marine resources management. Candace analyzes the efficacy of a 1997 initiative undertaken by the government of Indonesia to decentralize management efforts from central to local levels for several marine parks with a special emphasis on the Bunaken National Park in the northern region of the country. The article exemplifies how traditional and local knowledge can be fused with scientific data to engender an effective and efficient governance regime for marine resources that is all inclusive and eliminates conflicts. This article will be invaluable in undertaking a comparative analysis of the levels of involvement of local communities in management of marine resources in Kenya with the best practices.

Selina M. Stead and J. McGlashan in A Coastal and Marine National Park for Scotland in Partnership With Integrated Coastal Zone Management, *Ocean & Coastal Management*, Volume 49, Issues 1-2, 2006 pp. 22-41 argue for the use of integrated coastal zone management as a process to develop a coastal and marine national park in Scotland. The article gives a detailed analysis of the background to the integrated coastal zone management and the coastal and marine national parks in Scotland and then

proceeds to give a Strength Weakness Opportunity Threats (SWOT) analysis for a possible coastal and marine national park programme to help decide whether such a programme would be the best way for Scotland. The article is issue specific in that it focuses on a particular geographical area namely Scotland and might therefore be of little applicability to the Kenyan context more so taking into consideration the fact that United Kingdom is a developed nation whereas Kenya is a developing nation. However, the underlying principles are of universal application and will prove useful in laying a basis for the study by outlining the recognized principles of governance of marine resources.

Lalaina R. Rakotoson and Kathryn Tanner's Community-Based Governance of Coastal Zone and Marine Resources in Madagascar *Ocean & Coastal Management*, Volume 49, Issue 11, 2006 pp. 855-872 (Environmental Issues in the Western Indian Ocean) is an account of how the traditional customary law in Madagascar generally known as "*Dina*" has blended with the formal laws that are based on the French civil law that is the colonial heritage of Madagascar in the governance of marine resources and coastal zones. Through case study, the studies targeted three Marine Protected Areas namely: Antongil Bay, Nosy Ve and Mangily. The article demonstrates how democratic participation is crucial to the efficacy of regulations governing exploitation of marine and coastal resources.

Mark Baine, Marion Howard, Sandy Kerr, Graham Edgar and Veronica Toral in their article Coastal and Marine Resource Management in the Galapos islands and the Archipelago of San Andres: Issues, Problems and Opportunities, *Ocean & Coastal*

Management, Volume 50, Issues 3-4, 2007, Pages 148-173, analyze the health of fishery resources, the environment and their dependant industries in the Galapagos Islands, Ecuador, and the Archipelago of San Andres, Colombia. This is done against the backdrop of policy development and user conflicts, supported by a range of technical studies undertaken between 1998 and 2002. These studies are aimed at examining a more participatory and effective role for local stakeholders in the management of the islands as their participation is deemed essential to the success in marine resource management and zoning initiatives within the islands.

Jennifer Sesabo, Marine Resource Conservation and Poverty Reduction Strategies in Tanzania, Springer, New York, 2007, is by far the most relevant case study to this study. Using case studies from two villages on the coastal shores of the Indian Ocean, Sesabo analyzes how lack of a focused governance regime for Tanzania's coastal and marine resources has contributed to socio-economic problems in this region. Sesabo's work is relevant to this study in that it analysis the governance regime in the neighbouring Tanzania where similar challenges as those faced in Kenya are experienced.

Lumumba PLO's, The Exclusive Economic Zone: A Study of the Approaches for its Utilization and Control with Specific Reference to the Kenyan Exclusive Economic Zone, Unpublished Ph.D. Thesis, University of Ghent (Belgium), 2003 is a classical piece on the concept of the EEZ and its jurisdictional content. The author comprehensively discusses the approaches for the utilization and control of the EEZ and uses the Kenyan EEZ as his reference point. The thesis' expositions on the juridical

status, scope and character of the EEZ and the jurisdictional competences over the EEZ are as illustrative and insightful as is the assessment of Kenya's mechanisms of control and utilization of the resources of the country's EEZ. Of primordial relevance for the purposes of this thesis is the discussion on the legislative and administrative frameworks for the utilization of the living and non-living resources of the Kenya's EEZ. Two remarkable strengths of Lumumba's thesis are;

- (a) The comparative trend using the experience of the United Republic of Tanzania and,
- (b) Based on his critique of Kenya's prevailing system of 'management by statute', the inclusion of a model legislation, what he calls the 'Proposed EEZ Bill' as the *piece de resistance* of his study.

This study will inevitably mirror these trends. The study will however delve deeper than Lumumba's Thesis in that it will not limit itself to the EEZ but will instead examine all the internationally recognized maritime zones within Kenya's jurisdiction and recommend comprehensive and integrated policy, legal and institutional frameworks for the management and control of living and non-living resources within Kenya's maritime zones. The study will also pay regard to some recent developments that have occurred since the time of writing of Lumumba's Thesis.

Professor Charles Odidi Okidi is perhaps the only scholar to have given the issue of management of marine resources in Kenya the widest consideration. In an array of papers presented on various dates at the Institute for Development and International Studies

(IDIS), University of Nairobi, Okidi highlights the efforts the Eastern Africa countries and particularly Kenya have made towards developing a policy framework in the management of Marine resources albeit without conclusively addressing the issue.

Legal Aspects of Management of Coastal and Marine Environment in Kenya published in Okidi et al (eds.) “Environmental Governance in Kenya: Implementing the Framework Law (East Africa Educational Publishers, Nairobi) (2008) discusses the legal aspects of management of Kenya’s coastal and marine environment. The chapter outlines what constitutes Kenya’s coastal and marine environments and proceeds to examine the various legislations that apply within those environments. The chapter also analyzes the inter-jurisdictional issues that arise in the management of the coastal and marine environments such as marine fisheries and pollution. This chapter will form a crucial guide in the examination of the efficacy of Kenya’s legal regime for the protection of her marine environments.

Conservation and Development of Coastal and Offshore Resources in Eastern Africa, IDIS, University of Nairobi, Occasional Paper No. 268, 1976, is an outline for a long series of studies in what Kenya was then doing, planning to do and ought to have been doing in conservation and development of its coastal and off-shore resources.

The Kenya Draft Articles on Exclusive Maritime Economic Zone Concepts: Analysis and Comments, IDIS, University of Nairobi, Working Paper No. 289, 1976, is an appraisal of

the Kenyan-conceived idea of EEZ as presented at UNCLOS III and the impact it is likely to have on the management of Marine resources.

In Kenya's Marine Fisheries: A General Outline of Policy and Activities, IDIS, University of Nairobi, Occasional Paper No. 30, 1979, Professor Okidi isolates Marine Fisheries sector and examines the range of activities in which Kenyan nationals and companies are involved in. The role of relevant government departments in promoting the activities is appraised and the degree of intrusion of foreign long-distance fleets in Kenyan waters examined.

In Management Profile and Training Needs for Marine Resources Development, IDIS, University of Nairobi, Working Paper No. 415, 1984, Okidi argues that in order for Kenya to benefit in any meaningful way from the natural resources newly brought under its jurisdiction, it must acquire requisite technology and manpower to explore, transport, process, and market the products. He therefore proposes a training curriculum for the stakeholders in the management of marine resources.

Management of Coastal and Offshore Resources in Eastern Africa, IDIS, University of Nairobi, Occasional Paper No. 28, 1978, is a collection of papers in which the writers examined the management of Kenya Marine resources as it was then with particular regard to Marine Fisheries. The writers are in agreement that no meaningful governance of Marine resources can be achieved by one Coastal State in isolation and therefore vouch for regional cooperation.

Okidi's research work places emphasizes on Marine Fisheries. Marine resources include non-living resources, not just fisheries. Another notable feature of Okidi's research is that all but one of Okidi's papers considered above pre-date LOSC and therefore are not up to date with the developments in the management of Marine resources subsequent to UNCLOS III. This study will build on the works of Professor Okidi but will analyze the issue of comprehensive and integrated control and management of living and non-living Marine resources in Kenya's Maritime zones in a more in-depth, up-close and up-to-date manner. The study will also explore the more recent development in the management and control of marine resources.

A pre-view of Internet materials invariably reveals a number of publications which form part of the literature review as hereunder:

- (a) Center for the Study of Marine Policy, *National Ocean Service, NOAA, Ocean Governance Study Group, The Stratton Roundtable: Proceedings*, Washington D.C. 1998.

This work is a collection of twelve (12) short papers pertaining to the lessons learnt from the Stratton Commission's review of national ocean policy. Relevant papers include:

- (i) *"Issues for A New Ocean Policy Commission: The Changing Regime of the High Seas"* by Lewis M. Alexander, pp. 22-30. This paper addresses aspects

of environmental protection and preservation, conservation and management of living marine resources, protection of underwater cultural heritage and marine scientific research.

- (ii) *"The Stratton Commission: A Historical Perspective of Policy Studies in Ocean Governance, 1969 and 1998"* by Harry Scheiber, pp. 31-37. This paper, on the other hand, discusses effective government coordination and ecosystem design.
- (iii) *"Our Ocean Future"* by Charles A. Bookman, pp. 49-51. Though short in length, the article embraces a discussion of four crucial items, viz, integrated management infrastructure and institutions, managing the coasts for economic and environmental prosperity, protecting and restoring fisheries and other living marine resources and advancing and applying ocean science and technology.
- (iv) In about 7 pages, Daniel J. Basta's (*et al*) *"Ocean and Coastal Trends, 1969-98"*, discusses a range of marine-related issues. These include dredging, waterborne commerce, saltwater recreational fishing, beach closures, eutrophication, agriculture, point and non-point sources, contamination of the marine environment, oil spills and response, and water use. These issues are relevant and pertinent to the present study and Basta's paper will, no doubt, form a credible reference point.

- (b) H. John Heinz III Center for Science, Economics and Environment, *Our Ocean Future: Themes and Issues Concerning the Nation's Stake in the Oceans Developed for Discussion During 1998, The Year of the Ocean*, Washington D.C., 1998.

The paper discusses what it identifies as the three key issues to understanding the ocean. These are: Firstly, the challenge of sustainable coasts, protecting and restoring fisheries and science and technology. With regard to managing the coasts for economic and environmental prosperity, the book emphasizes on managing the stresses on the costal environment such as nutrients, chemicals and debris, transportation-related stresses and development-related stresses. Other horizons of emphasis include enhancing and sustaining coastal environmental quality especially with regard to the marine protected areas, shoreline management, offshore oil and gas development, the future of ports and governance and management.

Secondly, with regard to protecting and restoring fisheries and other living marine resources, the paper stresses the curbing of overfishing and overcapitalization and ensuring habitat protection, aquaculture, interjurisdictional fisheries and ecosystem management.

Thirdly, the paper posits that in order to advance and apply ocean science and technology, the needs for new facilities and human and fiscal resources must be addressed as a matter of extreme priority. One of the notable and candid observations of the paper is the fact that improved technology in the U.S. has opened up new possibilities for exploration and exploitation of marine resources. The write-up however notes that a variety of issues concerning ownership, patents, royalties (etc) attaching to ocean resources are not quite clear, particularly where the eventual bioproduct is a byproduct of ocean resources collected from the United States' EEZ. The paper notes further that bioprospecting and exploration of ocean resources raises a number of issues of ocean governance that could be addressed as an example for broader discussion.

- (c) National Research Council, *Striking a Balance: Improving Stewardship of Marine Areas*, Washington, D.C.: National Academy Press, 1997

The content of this text constitutes a clarion call for a more coherent approach in the management of a coastal state's marine resources. The book is a joint effort of a committee of experts who propose principles, goals, and a management framework for improved marine area governance, including governance structures at the federal and regional levels and the adoption of innovative processes in existing programs and regulatory systems.

In terms of improving governance, the book proposes the establishment of a National Marine Council to define national objectives in the marine environment and to coordinate

the activities of federal agencies, state agencies, and interested parties in the private sector. The book also proposes the creation of regional councils authorized by the National Marine Council where there are serious conflicts or high resource values and existing programs are either unavailable or ineffective.

The book also proposes the exploration and adoption of management tool such as those used in the management of land-based resources for use in management of marine resources. Surveillance and strengthening of sanctions is identified as necessary to ensure compliance.

The best practices, as captured above, are critical and pertinent to this study. They denote trends that are worth borrowing, for example, effective policy and strategy formulation and the focus on conservation and exploitation of marine resources owing to the rich potential and wealth of the marine environment. It suffices to re-assert that these trends are worth emulating and will undoubtedly form a subject of consideration under Chapter Five (5) of the thesis as the study seeks to construct the structure of a new maritime governance structure in Kenya.

1.5 Broad Research Area And Scope Of The Study

In the maritime world, it has become common for jurists, ship-owners, ship charterers, ship crew, passengers, Governmental agencies, non-governmental agencies and relevant international organizations to think and re-think the issue of maritime governance. This issue has assumed a top position in the agenda of most conferences, seminars and

symposia throughout the world. Proposals for revising relevant international conventions and national laws to adequately address maritime governance have been made at some of these meetings.

The purpose of this study is to examine the problem of governance of marine resources within Kenya's maritime zones in its entirety. The study will first seek to identify internationally accepted principles of governance of marine resources and delimitation of maritime zones. An appraisal of some of the best practices in coastal states which have achieved considerable success in evolution of ocean regimes will be given as a benchmark on which Kenya's governance of marine resources will be weighed.

The study will then examine if and how these principles have found application in Kenya's quest for effective governance of the marine resources within her maritime zones. In this regard, a review of the existing policy, legal and institutional frameworks in the area of governance of marine resources will be attempted as well as an examination of how Kenya has sought to implement the relevant Conventions. It has been noted that for historical, and to some extent practical, reasons the precise content and coverage of maritime law is by no means co-extensive with the whole reach of the industry's legal concerns. Therefore, this study will delve into the policy, legal and institutional aspects of Kenya's maritime zones. Proposals for reform and other recommendations for adoption will be made at the end of the study.

1.6 Justification For The Study

Technically, this study derives its underlying rationale from the erstwhile lack of focused literature in the sphere of governance of marine resources. Needless to say, the interface between governance, the law of the sea and maritime law in the control, management and exploitation of the resources of a coastal state's maritime zones has attracted insufficient academic comment. And yet, the problems bedeviling the control and management of marine resources constitute day-to-day realities and occurrences.

It suffices to reiterate that these issues are topical and contemporary and the recognition of this fact provides the essential underlying bulwark of this study. No known local study has attempted to investigate the interplay between law and governance in the control and management of marine resources.

1.7 Specific Research Questions

1. What are the current policy, legal and institutional frameworks for the control and management of marine resources within Kenya's maritime zones?
2. What customary international law and treaty law issues need to be examined for the purpose of assessing the efficacy of Kenya's current policy, legal and institutional frameworks for ensuring optimal and sustainable exploitation of Kenya's marine resources?

3. What issues of governance need to be examined and addressed in order to bring about a harmonized, coordinated and reformed approach to the control and management of the marine resources within Kenya's maritime zones?

1.8 Research Methodology

This study seeks to specifically discuss governance of marine resources in Kenya's maritime zones in its various manifestations. This implies that the information collected and collated for the study is very specific and not readily available to the wider population as the marine resources governance regime in Kenya is still at a very rudimentary stage. The research therefore employs qualitative rather than quantitative technique of data collection and analysis. In addition, the study relies largely on secondary data that require content analysis technique that is not subject to quantification.

The subject being topical and contemporary, library and other electronic research methods are used in the collection of secondary information from sources such as publications, documentation centres, archives and information resource centres. This involves desk analysis of various texts and materials. Where deemed necessary, select comparative case studies are adopted for identifying international best practices.

The internet research method proved useful as was the personal interview methodology. This is because the internet is replete with information whose collection through personal interviews and other research methods would prove laborious and time consuming. Use

of the internet minimized the need for primary data collection. The websites visited include, *inter alia*, the International Maritime Organization website, the World Maritime University website and the Institute for Security Studies website. Institutions visited include the United Nations Environmental Programme (UNEP), the Centre for Corporate Governance (CCG), the KMA, the Kenya Ports Authority, the Seafarers Assistance Programme, the National Environment Management Authority (NEMA), the Kenya Police, Ministry of Foreign Affairs, Kenya Wildlife Service (KWS), Kenya Marine Fisheries Research Institute (KMFRI), Coastal Development Authority (CDA) and the Ministry of Transport.

The review of literature will involve a process of rigorous analysis aimed at:

1. Identifying the theoretical and practical gaps in the study of governance of maritime zones.
2. Appreciating the inadequacy of existing legal, policy and administrative/institutional frameworks in the management of marine resources and enforcement of governance within Kenya's maritime zones.
3. Recognizing the challenges of command and control of maritime zones.

Structured personal interviews were conducted on specific personalities selected based on their role in the governance of marine resources in Kenya. Most of these personalities were senior managers in institutions that exercise jurisdiction over Kenya's maritime zones or are directly involved in the management of marine resources in Kenya. These are the persons with the most relevant and considerably accurate information on the

status of the governance regime of Kenya's maritime zones. This method of research eliminated the need to plume through tones of irrelevant data that any other method of primary data collection would have accumulated.⁹⁶

A total of 9 persons were interviewed. A set of 23 standard questions with slight modifications to suit the capacity of the interviewee were administered with additional follow-up questions to further understand the informant's point of view. The data collected was then qualitatively analyzed and used to corroborate information obtained from secondary sources such as the internet, texts and reports.

The study also relied on the media as a source of information on current trends, events and activities in the management of maritime zones and marine resources in Kenya. Kenyan daily newspapers particularly the Daily Nation and the Standard provided information that is not present in official records. These newspapers are easily accessible at the Jomo Kenyatta Memorial Library at the University of Nairobi where they are stored in bound volumes dating back to pre-independence days. The newspapers provided information on government policy statements, proposed legislation and public opinion in the governance of marine resources in Kenya.

1.9 Major Hypothesis

The study is based on the following hypothesis, which shall be tested:

⁹⁶ This method of data collection has been used elsewhere in Sesabo J., *Marine Resources Conservation and Poverty Reduction Strategies in Tanzania* (2007) (Springer, New York) and Rakotoson L.R. and Tanner K., "Community-based Governance of Coastal Zone and marine Resources in Madagascar", *Environmental Issues in the Western Indian Ocean*, Vol. 49, Issue 11, 2006 Ocean & Coastal Management pp. 55-872

If clear, comprehensive, and coordinated policy, legal and institutional frameworks are necessary for effective and sustainable governance of marine resources of a coastal state, then lack of clear, comprehensive, and coordinated policy, legal and institutional frameworks in Kenya hamper effective and sustainable governance of her marine resources.

1.10 Broad Chapter Breakdown

CHAPTER ONE - INTRODUCTION

This chapter proposes to introduce the research problem to be interrogated and investigated, the theoretical and conceptual links between law and governance, the appropriate methodology to be adopted in discussing the research problem, the major hypothesis to be tested, the literature review, objectives of the study and the broad chapter breakdown.

CHAPTER TWO – THE PRINCIPLES OF GOVERNANCE AND MANAGEMENT AND THEIR APPLICATION TO THE ADMINISTRATION AND CONTROL OF MARINE RESOURCES

Building on the foundation laid by chapter one which introduces the traditional notions and critical aspects of governance such as good governance, the pillars of good governance, corporate governance, performance contracting and the underlying theory of policy formulation and implementation, chapter two seeks to explain the aforementioned notions and concepts insofar as they are applicable to the management of marine resources. The aim of the exposition will be to forum-set the discussion of governance of

marine resources which constitutes the core of the study. At the end of the chapter, a preview of the institutions involved in the governance of marine resources in Kenya will be undertaken.

CHAPTER THREE - EFFORTS AT DELIMITATION OF KENYA'S FORGOTTEN PROVINCE

Chapter three is based on the realization that a basic challenge of control and management of the maritime zones of any coastal state is the delimitation of these zones. Thus, the chapter will seek to offer an appraisal of the efforts made in the at delimitation of Kenya's maritime zones highlighting the challenges faced by the country.

CHAPTER FOUR -KENYA'S LIVING AND NON-LIVING MARINE RESOURCES: A REVIEW OF EXISTING POLICY, LEGAL AND INSTITUTIONAL FRAMEWORKS

Chapter four forms the sub – stratum and core of the proposed study and will explore and give a critical appraisal of the existing policy, legal and institutional frameworks for the control and management of the living and non-living marine resources within Kenya's maritime zones.

CHAPTER FIVE - TOWARDS A NEW MARITIME GOVERNANCE REGIME IN KENYA

Against the background of the foregoing proposed exploratory study, Chapter five envisages the creation of a new governance regime in Kenya to control and manage the sustainable exploitation of the marine resources present within Kenya's maritime zones.

CHAPTER SIX - CONCLUSIONS

Finally, Chapter Six will discern the emergent trends and conclusions and in the premise, proffer recommendations aimed at achieving harmonious, integrated and sustainable policy, legal and institutional frameworks for the control and management of Kenya's marine zones.

CHAPTER 2

THE PRINCIPLES OF GOVERNANCE AND MANAGEMENT AND THEIR APPLICATION TO THE ADMINISTRATION AND CONTROL OF MARINE RESOURCES

*Corporate Governance has become an issue of worldwide importance. The Corporation has a role to play in promoting economic development and social progress. It is the engine of growth internationally, and is increasingly responsible for providing employment, public and private services, goods and infrastructure. The efficiency and accountability of the Corporation is now a matter of both private and public interest, and governance has, thereby, come to the head of international agenda.*⁹⁷

Now that it has been agreed that conservation and control of sea resources are a necessity, the question arises of who shall divide and regulate these resources

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...

⁹⁷ The Global Corporate Governance Forum Mission Statement.

⁹⁸ Dean, "Achievements at the Law of the Sea Conference" *Proceedings of the A.S.I.L* (1959) pp. 186, 191.

*[The coastal state] ... must make investment in talent, time, money and self-denial necessary to derive the best use from the present and potential resources of the sea ...*⁹⁹

2.1 Introduction

Chapter One laid a basis for this chapter by introducing the traditional notions and critical aspects of governance such as good governance, the pillars of good governance, corporate governance, performance contracting and the underlying theory of policy formulation and implementation.

Chapter Two seeks to explain the aforementioned notions and concepts insofar as they are applicable to the management of marine resources. The aim of this exposition is to forum-set the discussion of governance of marine resources which constitutes the core of the study.

It is imperative to note that the first quotation appearing at the top of this chapter underscores the crucial role that governance plays in developmental agenda the world over. The second quotation recognizes the need for regulation of the resources of the sea in the interests of conservation and control of these resources. The third quotation specifies the obligation of a coastal state in the regulation of marine resources and obliges the coastal state to make investment in talent, time, money and self-denial, where

⁹⁹ Herrington, "Comments on the Principle of Abstention", *Rome Conference Papers* (1955) p. 349.

necessary, in order to derive maximum use from the resources of the sea. The three quotations set the parameters of the discussion targeted by this chapter and highlight the issues to be addressed.

In seeking to determine the points of linkages between the broad concept of governance and the related concepts of corporate governance and management, this chapter proceeds from the premise that the purpose of the whole research study is to spotlight the discussion of marine resource regulation, management of these resources and the broader question of interpreting what governance of the maritime zones and the resources found therein, while at the same time underplaying the corporate governance aspect of the study.

In pursuit of the foregoing goals, the chapter will therefore explore the concept of governance of marine resources to some appreciable depth.

2.2 Governance Of Marine Resources Defined

Generally speaking, within the maritime sector, governance refers to the regulation, coordination and the oversight role of maritime affairs. This entails the enactment of the laws and the formulation and implementation of policies necessary for the proper management for the sector. The laws emanating from this process are unique in that they focus on a place rather than a particular place of law.¹⁰⁰

¹⁰⁰ See Christie D. R., Coastal and Ocean Management Law (3rd edn. 2007) (Thomson West, St. Paul MN) p. 1.

Resources are a valuable component of the maritime sector. In order to guarantee their long-term sustainability, resources must be used conservatively and at the same time optimally in order to meet the needs of the present and future generations.

Governance of marine resources is intricately linked to the management of the other aspects of the sea such as shipping, commerce, navigation, and tourism.¹⁰¹ This is essentially because of the scale of processes involved in the entire marine eco-system.

In the overall context, the scale of processes are important in setting a governance and management environment that will flow into the general decision making framework of global economic policy. For the developing nations like Kenya, these processes are critical because such nations often possess very large areas of marine jurisdiction and yet very limited resources. Therefore, the provision of substantial technical support and training is crucial to the implementation of proper management of the marine environments that support the economies of many of the world's developing countries.¹⁰²

Terrestrial resource decision-making is characterized by concepts of independent sovereignty, and the machinery of policy, consultation, and management involved is developed on the basis of the concept of independent and staunchly defended sovereignty and jurisdiction. However, effective management of marine resources, like management of atmospheric phenomena, involves intergovernmental cooperation to a degree that is

¹⁰¹ Ebbin S.A. et al (eds.) *A Sea Change: Exclusive Economic Zone and Governance Institutions for Living Marine Resources* (2005) (Springer, Dordrecht) p. 3-4.

¹⁰² Kenchington R. A., in *supra* note 2 pp. 219-220.

not easily reconcilable with these scales of national decision-making and concepts of independent sovereignty.¹⁰³

The establishment of marine management regimes is therefore often greatly complicated by issues of jurisdictional authority. Defining an area, identified on ecological criteria as requiring management, requires establishment of agreed landward and seaward boundaries. These boundaries will typically traverse the terrestrial and maritime jurisdiction of the coastal state concerned. In so doing, they involve local, national and, regional levels of government. The areas often impinge on regions under the jurisdiction of a neighbouring state and may extend far beyond traditional concepts of territorial waters into areas beyond national jurisdiction.¹⁰⁴

Because of the scale and linkages of marine environments, their conservation is more clearly a matter of broad-based management of human beings than is the case on land. The major aspect of any natural environment that can be managed is the impact of human activity. By design or out of sheer ignorance, human action can rapidly degrade or destroy the natural environment and its capacity to sustain the long-term economic, cultural and scientific needs of the human society. The management of plants and animals, and their environments, therefore invariably involves the management of people.

¹⁰³ See Vallega A. *Sustainable Ocean Governance* (2001) (Routledge, New York NY) pp. 59-81 and also Juda L. and Hennessey T. "Governance Profiles and the Management of the uses of Large Marine Ecosystems" in Hennessey T. and Sutinen J. (eds.) *Sustaining Large Marine Ecosystems: The Human Dimension* (2005) (Elsevier B. V., Amsterdam) pp. 83-109.

¹⁰⁴ See Cicin-Sain B. and Knecht R. W. *Integrated Coastal and Ocean Management: Concepts and Practices* (1998) (Island Press, Washington DC) pp. 139-169 and also Hennessey T. and Sutinen J. (eds.) *Sustaining Large Marine Ecosystems: The Human Dimension* (2005) (Elsevier B. V., Amsterdam).

Clearly the basic requirement for marine environment and resource protection is the management of human use of and impacts on these environments and resources.¹⁰⁵

In terms of management approaches, the logic of strategic management and planning is simple. It consists of problem definition – identifying the impacts related to each activity, and problem rectification – incorporating suitable controls and limitations in a management plan.¹⁰⁶

Due to the number of agencies involved in governance of marine resources, there is need for coordination of the activities of such agencies. Individual activities involving direct and indirect use of marine environments have tended to be managed separately with informal or *ad hoc* mechanisms for resolving issues between sectors. In coastal zones there are often two and sometimes three levels of government jurisdiction with several other agencies involved. The diversity of agencies, many of which are not likely to regard conservation of the marine environment as their primary concern or even a significant goal, makes the establishment of effective coordination to focus on marine environment management at an appropriate scale an extremely challenging task.¹⁰⁷

Management of direct users of marine resources requires regulation of demand and impact so that they do not exceed the supply or natural regenerative capacity of the marine environment. Issues linked to the demand and impact may be addressed through

¹⁰⁵ Vallega A. Sustainable Ocean Governance (2001) (Routledge, New York NY) pp. 136-163.

¹⁰⁶ *Ibid* pp. 164-189.

¹⁰⁷ Sorensen J.C., et al, "Institutional Arrangements for the Management of Coastal Resources" *Renewable Resources Information Series*, Coastal Management Publication No. 1, (1984) (Research Planning Institute, Columbia SC) p. 165.

activity-specific legislation and agencies. As for the long-established activities, there is generally a need to devise strategies to address internal competition arising from increases in the extent and efficiency of the existing use.¹⁰⁸

Converting an awareness of need into action to manage marine areas or resources generally involves detailed consultation and planning. Such a process is futile if it is not matched by a long-term commitment of people, equipment, and finances and a resolve to implement the plan, monitor the outcome and ensure that the exercise is more than just a matter of creating plans or statements of intent.¹⁰⁹

The first step should be to identify and develop goals and objectives that may be addressed by a single coordinating marine management plan or by looser interactions between the sectoral plans of the relevant agencies. The approach will depend upon the socio-economic structure and decision-making processes of all the agencies involved. These may range from traditional management decision-making practices, to the planning processes of technologically complex societies.¹¹⁰

¹⁰⁸ See Sutinen J. G. et al "A Framework for Monitoring and Assessing Socioeconomics and Governance of Large Marine Ecosystems" in Hennessey T. and Sutinen J. (eds.) *Sustaining Large Marine Ecosystems: The Human Dimension* (2005) (Elsevier B. V., Amsterdam) pp. 27-82 for a detailed analysis of how strategies can be designed for management of large marine ecosystems. The scientific approach adopted by the authors is universal and applies to all marine environments as the principles embodied are invariably the same.

¹⁰⁹ See Cicin-Sain B. and Knecht R. W. *Integrated Coastal and Ocean Management: Concepts and Practices* (1998) (Island Press, Washington DC) pp. 215-248

¹¹⁰ *Ibid* pp. 197-213.

2.3 Principles Of Governance Of Marine Resources At The International, Regional And National Levels

Generally, issues related to the administration of marine resources may be categorized as stakeholder issues, technical issues, and legal issues.¹¹¹ Many of these issues are common across international jurisdictions but, obviously, there are issues peculiar to specific jurisdictions.¹¹² LOSC provides us with the broad international legal framework based on rights and obligations of States to pursue the protection and sustainable development of marine resources.¹¹³ It provides guidance on management strategies and a base for policy formulation relating to the oceans. LOSC is in many ways a framework convention, or *loci cadre*, and contains frequent exhortations to its state parties, acting collectively through international conferences, both global and regional, to adopt rules, standards and guidelines to give effect to and develop its provisions.¹¹⁴

The complex situation of administration of marine resources is compounded by the gulf between monist and dualist approaches by states to treaty implementation.¹¹⁵ Due to lack

¹¹¹ Fig Publication No. 36 "Administering Marine Spaces: International Issues" available at <http://www.fig.net/pub/figpub/pub36/figpub36.htm>. Accessed on 28/04/2007

¹¹² Cician-Sain B and Knecht R. W., *Integrated Coastal and Ocean Management: Concepts and Practices* (1998) (Island press, Washington DC) p. 9. The authors argues that even the much acclaimed Integrated Coastal Zone Management is not a 'one size fits all' concept nor a fixed approach that can be applied in a wholesome fashion to all situations but is rather a progressive process designed to ensure that all decisions and activities related to or affecting a country's coastal area are consistent with, and supportive of, agreed goals and objectives for the region and the nation.

¹¹³ After Liberia's ratification of the LOSC on 25th September 2008, there were 157 States party to the Convention, including one international organization as of November 2008. Kenya ratified the convention on 2nd March 1986. See

http://www.un.org/Depts/los/reference_files/chronological_lists_of_ratifications.htm accessed on 27/11/2008.

¹¹⁴ UN General Assembly Sixty-first session resolution 61/222 of 16 March 2007. See also Churchill R. R., "Levels of Implementation of the Law of the Sea Convention: An Overview" in Vidas D. and Ostreng W. (eds.), *Order for the Oceans at the turn of the Century* (1998) (Kluwer Law International, The Hague) pp. 317 – 325.

¹¹⁵ See Gold E., "From Process to Reality: Adopting Domestic Legislation for the Implementation of the Law of the Sea Convention" in Vidas D. and Ostreng W. (eds.), *Order for the Oceans at the turn of the*

of defined domestication statutes many countries ratify international conventions and then fail to domesticate the same. As a result the conventions can be enforced against such countries, but such countries cannot take benefit of the conventions by enforcing the same against other states. It would therefore be prudent to conclude that a certain degree of drafting of implementing legislation is necessary if international conventions are to be properly domesticated.

Regardless of whether a state follows the monistic or dualistic methodologies of treaty implementation, drafting of implementing legislation is necessary in any event. Maritime security issues are today at the top of the agenda in virtually every jurisdiction.¹¹⁶ Many countries, Kenya included, do not have draftsmen specializing in maritime legislation. Maritime conventions that require fairly specialized drafting skills are often relegated to the bottom of the priority heap by draftsmen simply because they do not possess the necessary drafting skills and because appreciation of the issues involved is grossly lacking. There is therefore need to examine model laws developed in other jurisdictions and then tailor them to meet the local circumstances of each nation.

Sustainable development of marine resources cannot be secured just through a jurisdictional approach. An ecosystem-based approach is also necessary because of the trans-boundary nature of the resources and the impact of their uses within the maritime

Century (1998) (Kluwer Law International, The Hague) pp. 375 – 387.

¹¹⁶ Wambua P. M., in *supra* note 34.

environments.¹¹⁷ The LOSC and the United Nations Conference on Environment and Development (1992) (UNCED) provide the necessary framework for protecting the seas and oceans while also providing the basis for realizing its economic potential.¹¹⁸

Based on the provisions of LOSC, the policy framework for sustainable marine resource use and management is outlined in chapter 17 of Agenda 21.¹¹⁹ The major principles that link these programmes are integration and precautionary approach to ocean and coastal management and development on a national, sub-regional, regional and international level.¹²⁰ All these programmes have particular emphasis on the role of national organizations supported by a framework for international cooperation to address resource depletion and pollution of the marine environment. Due to the inherent limitations of international law, each Coastal State must develop national regulations concerning the

¹¹⁷ See Sherman K. "Assessment, Sustainability, and Monitoring of Coastal Ecosystems: An Ecological Perspective" in Sherman K et al (eds.) *Large Marine Ecosystems of the Indian Ocean: Assessment, Sustainability and Management* (1998) Blackwell Science Inc., London) pp. 3-22

¹¹⁸ Falk R. and Elver H., "Comparing Global Perspectives: The 1982 UNCLOS and the 1992 UNCED" in Vidas D. and Ostreng W. (eds.), *Order for the Oceans at the turn of the Century* (1998) (Kluwer Law International, The Hague) pp. 145 – 156.

¹¹⁹ Under chapter 17, seven core programme areas are identified for policy action. These are:

- a) Integrated management and sustainable development of coastal and marine areas including exclusive economic zones;
- b) Marine environmental protection;
- c) Sustainable use and conservation of marine living resources of the high seas;
- d) Sustainable use and conservation of marine living resources under national jurisdiction;
- e) Addressing critical uncertainties for management of marine environment and climate change;
- f) Strengthening international, including regional, cooperation and coordination; and
- g) Sustainable development of small islands.

¹²⁰ Among other general principles and approaches to achieve sustainable development in the marine and coastal areas include:

- a) inter-agency/ institutional co-operation and coordination,
- b) polluter pays principle,
- c) adaptive management,
- d) intra and inter-generational equity,
- e) ecosystem-based management,
- f) public and private sector participation,
- g) good governance,
- h) community- based management and
- i) marine stewardship.

management of marine resources.¹²¹ The predominance of national interests in regulating marine resources means that sustainable exploitation of those resources has to be addressed first and foremost, at the national level.¹²² In other words, the progress of Agenda 21 and LOSC to a large extent depends on translating the provisions into national policies, action plans, legislation and guidelines.

The underlying unity of the oceans require effective global management regimes; the shared resource characteristics of many regional seas make forms of regional management mandatory; and the major land-based threats to the oceans require effective and integrated national action based on international co-operation.¹²³ A good example of nations that have set out to implement provisions of LOSC through regional co-operation is the Pacific Island Countries.¹²⁴ Through regional cooperation, these Island nations have been able to aptly manage their maritime zones with a considerable degree of success.¹²⁵

¹²¹ Roberts G. K., "Offshore Petroleum Exploitation and Environmental Protection: The International and Norwegian Response", *San Diego Law Review* 629 (1979-1980) p. 642.

¹²² Tsamenyi, M., "Mechanisms for Integrated Resource Management" in: Kusma-Atmadju, et al (eds.) *Sustainable Development and Preservation of Oceans: the Challenges of LOSC and Agenda 21*, Proceedings of the Law of the Sea Institute, 29th Annual Conference, (1997) (University of Hawaii) pp.414- 448.

¹²³ World Commission on Environment and Development, *Our Common Future*, (1987) (Oxford University Press, London) p.264.

¹²⁴ These include 22 Pacific Island States and Territories – American Samoa, Cook Islands, Federated States of Micronesia, French Polynesia, Fiji, Guam, Kiribati, Marshall Islands, Nauru, New Caledonia, Niue, Northern Marianas, Palau, Papua New Guinea, Pitcairn Island, Samoa, Solomon Islands, Tokelau, Tonga, Tuvalu, Vanuatu, and Wallis and Futuna. See Herr R. A., "Small Island States of the South Pacific: Regional Seas and Global Responsibilities" in Vidas D. and Ostreng W. (eds.), *Order for the Oceans at the turn of the Century* (1998) (Kluwer Law International, The Hague) pp. 203 – 231.

¹²⁵ See Vina Ram-Bidesi, "Sustainable Use of Marine Resources: lessons from the Pacific Islands", *UNU Global Seminar Oceans: Interaction between Man and Maritime Environments*, 5th Shimane Session, 2 –5 August 2004, The University of Shimane, Japan. The regional strategy is achieved through ten regional inter-governmental institutions that work under the Council of Regional Organizations of the Pacific (CROP) and focus on regional strategies for sustainable development. CROP consists of: Pacific Islands Forum Secretariat, Secretariat of the Pacific Community, Forum Fisheries Agency, South Pacific Regional Environment Programme, South Pacific Applied Geoscience Commission, University of the South Pacific, South Pacific Tourism Organization, Fiji School of Medicine and South Pacific Board of Educational Assessment and Pacific Islands Development Programme. The ocean related activities by these

However, while in some instances regional cooperation has worked well, often problems also arise which can undermine its effectiveness because of politically motivated decisions of some governments and the pressure to address internal short-term and immediate priorities as opposed to long term regional goals.

A number of major present and future threats to the integrity of marine ecosystems are still likely to come from outside sources such as pollution from international shipping, over fishing by foreign fishing vessels and coastal development projects by foreign investors. There is, therefore, a need for greater institutional cooperation and coordination at the regional and international level for the effective enforcement and monitoring of activities so that there is equitable share of management responsibilities for users of a region's ocean resources. Greater international cooperation through institutional strengthening is also required for sharing and exchange of scientific and research information, technologies and expertise that can lead to cost-effective outcomes.¹²⁶

On their part, most African countries do not have clearly defined agencies to deal with issues of command, control and management of the maritime zones. A reconstitution and harmonization of the relevant administrative agencies is urgently needed to signal a fresh start and correct the deficiencies and problems hitherto occasioned by the multi-agency approach to maritime administration and its collateral flaws such as duplicity, overlap and lack of clear role definition. A strong case can be made for harmonization of these

organizations are coordinated by the Marine Sector Working Group (MSWG) created in 1997 which consists of technical experts from the CROP members. The aim of the MSWG is to promote better co-ordination of activities among the regional organizations on marine related issues. See also Teiwaki R., *Management of Marine Resources in Kiribati* (1988) (University of South Pacific).

¹²⁶ *Ibid.*

agencies at the national, regional and continental levels in order to build a strong and cohesive culture of command, management and control of the maritime zones.¹²⁷ As Scottat notes:

*"There is work to be done. The unity of oceans calls us to harmonize our activities and policies on the world's oceans and to create new arrangements suitable to the scale of the oceans. The issues are, of course, complex and they are many. We must encourage policy-makers to see their best advantage in an effort by international organizations at a harmonious ocean regime."*¹²⁸

Since the mid 1990s, following the UNCED and the entry into force of LOSC, countries can be seen at various stages in the implementation of their national plans and policies on integrated ocean and coastal management. Monitoring and reporting of progress has continued through the United Nations Commission on Sustainable Development (CSD) that was created in 1992. The Millennium Development Goals (2000) and the Johannesburg Plan of Implementation (2002) resulting from the World Summit on Sustainable Development have further put pressure to expedite the effective implementation of strategies while at the same time further streamlining the policy

¹²⁷ Wambua P. M. in *supra* note 34.

¹²⁸ Scottat A., "National Interests and Collective Security in the Ocean Regime" *12 Ocean Year Book* 19-31, 31 (1996). Similar views are shared by other commentator John Maliti who in a newspaper article entitled "Without a 'Marshall Plan,' Africa will not recover," *The East African*, July 18-24, 2005, argues that "Africa is today badly in need of a 'plan' such as the (European) Marshall Plan to pull itself out of its...bondage...Africa badly deserves help now not tomorrow. However, the tragedy is [that] the super-rich are not about to willingly let go their grip on Africa's resources." The writer continues to observe that Africa requires a generous recovery programme like that offered to Europe to help get itself back on its feet. The primary aim of the Marshall Plan was to reconstruct the devastated Germany and democratize it by means of wealth creation so that extremism could not get a foothold and the danger of communism minimized.

pathway for sustainable development. The Johannesburg Plan of implementation provides a blueprint for the implementation of the most urgent issues of Agenda 21.¹²⁹

2.4 The Salient Issues In The Governance Of Marine Resources

The governance of any geographical area, including maritime zones, is in essence the management of stakeholder relationships with regard to use of resources that are both spatial and temporal in the pursuit of many sanctioned economic, social, political, and environmental objectives.¹³⁰ The scarcity of the marine resources compels the stakeholders to choose not only how particular resources should be used but also which person or institution should make the decisions.¹³¹ The question of who makes decisions is paramount because it influences the decisions that are made.

Good governance is based on recognition of the interests of all stakeholders and inclusion of their interests in the management plan where practicable. These interests can take various forms such as jurisdictional sovereignty, administrative rights, ownership, licenses and permits, customary and aboriginal rights, collective and community rights,

¹²⁹ While the Johannesburg Plan of Implementation should be seen as a whole, para. 30 to 35 specifically place emphasis on the protection and management of the ocean resources for economic and social development. The Johannesburg Plan reiterates the need to strengthen international and regional cooperation and coordination in the implementation of the various United Nations agreements and guidelines relating to ocean and coastal management. The Johannesburg Plan of Implementation also calls for the promotion of integrated, multi-disciplinary and multi-sectoral coastal and ocean management at the national level, and for coastal States to develop national ocean policies (Para. 30 (e)) that can guide the national implementation process. The Johannesburg Plan of Implementation further addresses six major dimensions: cross sectoral aspects, fisheries, biodiversity, ecosystem functions, pollution from land-based activities, maritime safety and marine pollution, science and radio-active wastes.

¹³⁰ See Cician-Sain B and Knecht R. W., *Integrated Coastal and Ocean Management: Concepts and Practices* (1998) (Island press, Washington DC) p39-40. See also Michael S. and Nichols S., "Issues in the Governance of Marine Spaces" *Fig Publication No. 36 Administering Marine Spaces: International Issues, A Publication of Fig Commissions 4 & 7 Working Group 4.3*. Available at http://www.fig.net/pub/figpub/pub36/chapters/chapter_1.pdf accessed on 26/04/2007.

¹³¹ Eckert R. D., *The Enclosure of Ocean Resources: Economics and the Law of the Sea* (1978) (Hoover Institution Press, California) pp. 47 – 52.

or littoral and public rights,. Coastal states must face the challenge of managing these multidimensional interests in their maritime zones. But, as earlier mentioned, addressing the complexities associated with these interests solely from boundary delimitation and jurisdictional perspective does not necessarily improve the governance of marine resources.¹³²

The governance and management of the maritime zones involves at least three different aspects¹³³:

- a) The natural marine ecosystems;
- b) The activities within those marine ecosystems; and
- c) Governance policies, programmes and agencies to regulate those activities.

In order to optimize this management and effectively address stakeholder issues, it is necessary to put in place effective governance frameworks.

Effective governance of marine ecosystems and resources involve consideration of a number of factors. These include the following¹³⁴:

- a) participatory approach i.e. the need to include stakeholders;
- b) a framework for dealing with the overlapping stakeholder interests;
- c) a credible system of identifying and bringing on board all the relevant stakeholders;

¹³² See Rothwell D. R. and Vander Zwaag D. L. "The Sea Change: Towards Principled Ocean Governance" in Rothwell D. R. and Vander Zwaag D. L. (eds.) *Towards Principled Oceans Governance: Australian and Canadian Approaches and Challenges* (2006) (Routledge Taylor & Francis Group, New York NY) pp. 3-15.

¹³³ Cicin-Sain B. and Knecht R. W., "The Problem of Governance of U.S. Ocean Resources and the New Exclusive Economic Zone" *Ocean Development and International Law*, VOL. 15, 1985 p. 289.

¹³⁴ *Supra* note 145.

- d) scientific data such as boundary delimitation and its importance to the governance plan;

This wide range of coastal and marine issues must be considered in developing tools for integrated governance for management of marine resources and safeguard the marine ecosystem integrity while minimizing conflict.

In most jurisdictions, the challenges hampering effective ocean governance can be attributed, at least partially, to the fragmented approach of the present systems. The current frameworks often operate under rather narrowly focused legislations and regulations, which often do not consider the broader spectrum of overlapping issues and conflicts.¹³⁵ Overlap between state and local agencies and the lack of participation and coordination of interests at the local level can be said to be two fundamental flaws of the existing systems of governance and management of marine resources. Single-purpose and uncoordinated laws that characterize the present marine resources governance regimes of various local, state and regional authorities should be addressed as a starting point for developing a coherent and purposeful policy on governance of marine resources.¹³⁶

Despite the numerous agencies and regulations that oversee governance of coastal and marine areas and resources the world over, there is an absence of coherent frameworks at the national levels that would enable management and control of maritime zones. In the

¹³⁵ See Binkley M. et al "Community Involvement in Marine and Coastal Management in Australia and Canada" in Rothwell D. R. and Vander Zwaag D. L. (eds.) *Towards Principled Oceans Governance: Australian and Canadian Approaches and Challenges* (2006) (Routledge Taylor & Francis Group, New York NY) pp. 249-279.

¹³⁶ See VanderZwaag D. L. and Rothwell D. R. "Principled Oceans Governance Agendas: Lessons Learned and Future Challenges" in Rothwell D. R. and Vander Zwaag D. L. (eds.) *Towards Principled Oceans Governance: Australian and Canadian Approaches and Challenges* (2006) (Routledge Taylor & Francis Group, New York NY) pp. 400-413

absence of marine resources governance frameworks, management inefficacies such as jurisdictional and regulatory overlaps are perpetuated, conflicts and disputes become more entrenched and destructive practices continue.¹³⁷

The prevailing frameworks for marine resources governance have resulted in the perpetuation of entrenched problems. Pertinent issues and venerable conflicts that affect the health and productivity of marine environments, such as over fishing, degradation of habitat and marine environments pollution continue to go unresolved. Conflicting and overlapping policy, legal and institutional frameworks and jurisdictional lapses are at the heart of the problem.¹³⁸ As a result of the inefficiency in the governance regimes and frameworks, there is a consistent decline in critical biological resources (and associated ecological processes) and the loss of vital economic opportunities.¹³⁹ In the following paragraphs, the study seeks to examine some of the salient issues that need to be addressed in order to ensure that this trend is reversed and effective governance of marine resources attained.

2.4.1 Stakeholder Interests

In as far as involvement of stakeholders in the governance of marine resources is concerned, the following practical challenges emerge:

¹³⁷ Knecht R. W. "Integrated Coastal Zone Management for Developing Maritime Countries" in Haq B. U. et al (eds.) *Coastal Zone Management Imperative for Maritime Developing Nations* (1997) (Kluwer Academic Publishers, Dordrecht) pp. 29-42

¹³⁸ See for instance Okidi C. O. "Legal Aspects of Management of Coastal and Marine Environment in Kenya" in Okidi C. O. et al (eds.) *Environmental Governance in Kenya: Implementing the Framework Law* (2008) (East Africa Educational Publishers, Nairobi) pp. 440-483.

¹³⁹ See Sesabo J. *Marine Resource Conservation and Poverty Reduction Strategies in Tanzania* (2007) (Springer, Berlin) for a case study of how lack of appropriate governance frameworks for the marine resources has impacted negatively on the economic growth of developing nations.

- a) how to identify the relevant stakeholders;
- b) how to effectively engage them; and
- c) how to manage their input.

In order to take into account stakeholder interests, the governance process must of essence therefore comprise of liaison, consultation, education, and leadership.¹⁴⁰

2.4.1.1 Identification and Inclusion of Stakeholders in Marine Resources Governance

A narrow approach to stakeholder participation is one of the greatest limitations in most marine resources governance regimes. The narrow approach is often a result of a combination of factors such as: time constraints, inadequate knowledge, single issue focus, and governmental bureaucracy. This is particularly so in cases where the maritime zones are not clearly delineated and where there are overlaps and gaps.¹⁴¹

The widely embraced top down approach to management, which is perhaps the easiest to implement, is also the least likely to have desirable and sustainable results in identifying stakeholder interests. A bottom up approach which involves spending time at the local level in the initial stages of marine activities through workshops and consultative meetings can help to identify the breadth of stakeholders and their interests.¹⁴²

¹⁴⁰ See Dorrough S. D., "Indigenous People and the Law of the Sea: The Need for a New Perspective" in Vidas D. and Ostreng W. (eds.), *Order for the Oceans at the turn of the Century* (1998) (Kluwer Law International, The Hague) pp. 407 – 426.

¹⁴¹ *Ibid.*

¹⁴² Hildebrand L. P. "Participation of Local Authorities and Communicaties in Integrated Coastal Zone Management" in Haq B. U. et al (eds.) *Coastal Zone Management Imperative for Maritime Developing Nations* (1997) (Kluwer Academic Publishers, Dordrecht) pp. 43-54.

2.4.1.2 Effective Involvement and Engagement of Stakeholder

Effective consultation and engagement of stakeholders goes further than articulation of policies. It must provide the stakeholders with a forum through which their views on the governance frameworks are collected and collated for use in mapping out policies and legislations for the governance regimes. Consultative meeting are one such forum but they have been faulted as lacking an effective collation mechanism for harnessing the emanating proposals. A variety of means could be used to obtain input including publications and broadcasting media. However, the forum used must take cognizance of the caliber of stakeholder that it targets and the results that it aims at achieving.

2.4.1.3 Management of Stakeholder Input, Views and Interests

Once stakeholders' input is obtained, consensus building strategies are required to establish priorities and identify appropriate solutions. The priorities might be different at the various levels of management but the overall objective should be sustainable use of the marine resources. In the process of the governance of marine resources, dissenting opinions have to be accommodated and reconciled to the governance policy.¹⁴³

The above approach, simplistic as it may seem, if ignored can undermine even the best intentioned marine resources governance plans. In Canada, for example, significant delays were experienced in establishing a Marine Protected Area (MPA) because a First

¹⁴³ See for instance Daconto G. "Capacity Building for Integrated Coastal Zone Management in Countries of South Asia" in Haq B. U. et al (eds.) *Coastal Zone Management Imperative for Maritime Developing Nations* (1997) (Kluwer Academic Publishers, Dordrecht) pp. 143-165.

Nation (aboriginal) group was left out in the initial discussions and consultations.¹⁴⁴ The result was that policy implementation was delayed for 10 years and inappropriate construction increased in the meantime to avoid the expected regulations.¹⁴⁵

An integrated approach to marine resources management invariably leads to success in the governance of maritime zones. Australia for instance has registered tremendous success in her management of the Great Barrier Reef through her National Ocean Policy, a comprehensive planning and management policy released in 1998.¹⁴⁶ This ocean policy is based on a system of integrated and ecosystem-based planning and management for all of Australia's marine jurisdictions. It builds on the existing management structures and mechanisms but calls for an integrated series of arrangements that guide both policy and implementation. Australia's Oceans Policy calls for the development of regional marine plans to ensure coordination and consistency across various marine jurisdictions. This way, Australia has been able to reap near maximum benefits from the marine tourism in

¹⁴⁴ See Ginn D. "Aboriginal Title and Oceans Policy in Canada" in Rothwell D. R. and Vander Zwaag D. L. (eds.) *Towards Principled Oceans Governance: Australian and Canadian Approaches and Challenges* (2006) (Routledge Taylor & Francis Group, New York NY) pp. 283-298. The MPA program is led by the federal government of Canada which has taken nearly ten years to recognize and understand the importance of provincial, municipal, and private interests.

¹⁴⁵ Nichols, S., et al "Adaptation Strategies" in R. Daigle, (ed.), *Impacts of Sea-Level Rise and Climate Change on the Coastal Zone of Southeastern New Brunswick*, (2006) (Environment, Canada) Section 4.8

¹⁴⁶ Sakell V., "Operationalizing Integrated Coastal and Ocean Management in Australia: The Challenges" in Rothwell D. R. and Vander Zwaag D. L. (eds.) *Towards Principled Oceans Governance: Australian and Canadian Approaches and Challenges* (2006) (Routledge Taylor & Francis Group, New York NY) pp. 72-98. This national oceans policy establishes four different institutional arrangements:

- a) A National Oceans Ministerial Board;
- b) A National Oceans Advisory Group;
- c) Regional Marine Plan Steering Committees;
- d) National Oceans Office.

For a fuller analysis of the management of the Great Barrier Reef, see also Great Barrier Reef Marine Park Authority Protecting Biodiversity Brochure 2005.

the Great Barrier Reef Marine Park while also ensuring conservation of the biodiversity therein.¹⁴⁷

2.4.2 The Apposite Legal Issues

Governance of marine resource also involves governance functions that link governance to law and information. These functions include the following¹⁴⁸:

- a) allocation of resource ownership, control, stewardship and use amongst the various stakeholders;
- b) regulation of use of resources (e.g., protection of the marine environment, regulation of development and exploitation, and management of rights to economic and social benefits);
- c) monitoring and enforcement of the various regulations;
- d) disputes resolution through inclusive processes;
- e) management of spatial data and other types of information necessary for the performance of all of the above functions.

The functions outlined above necessitate the evolution of legal frameworks within each nation in the management of marine resources. These frameworks are generally multi-layered ranging from LOSC, international customary law and international treaties to national, state, and local laws derived from tradition, legislation, and the case law.

¹⁴⁷ Bateman S. et al "Integrated Maritime Enforcement and Compliance in Australia" in Rothwell D. R. and Vander Zwaag D. L. (eds.) *Towards Principled Oceans Governance: Australian and Canadian Approaches and Challenges* (2006) (Routledge Taylor & Francis Group, New York NY) pp. 119-142.

¹⁴⁸ Nichols, S., et al, "Good Governance of Canada's Offshore and Coastal Zone: Towards an understanding of the Maritime Boundary Issues", *Geomatica*, Vol. 54, No. 4 (2000) pp. 415-424.

2.4.2.1 The Complexity of Legal Frameworks in the Management of Marine Resources

LOSC establishes a broad framework for national and international governance of marine resources by, among other provisions, establishing limits to national resource use and control. However, each nation must also have a set of procedures for allocating resources within its maritime zones. In many cases, this depends on tradition and legal frameworks. These legal frameworks may be defined by the local, regional and national legal systems and constitutions. Even when only national interests are considered, the resulting legal arrangements touching on governance of marine resources are fairly complex.

2.4.2.2 The Peculiarity of Marine Interests

Theoretically speaking, governance legal regimes for both terrestrial and marine spaces are complex in nature. However, of the complexity of marine interests is more apparent owing to the following unique characteristics:¹⁴⁹

(i) The legal frameworks for governance of marine spaces continue to evolve rapidly as more discoveries regarding their economic value are made and therefore are often incomplete and contain more uncertainty than on land: Although property and other related law to land is progressive and continually evolves, marine legal frameworks have been changing more rapidly over the last century. These rapid changes may be partially attributed to the following factors:

- a) expansion of national maritime zones under the LOSC and the attendant complexity of boundary delimitation;

¹⁴⁹ *Ibid.*

- b) the often overlap of maritime jurisdictions which necessitate clarification of intergovernmental title, jurisdiction, and authority over these expanded zones;
- c) scientific advancement and discoveries of new uses of marine resource and increasing intensity of existing uses such as off-shore petroleum and mineral exploitation and transportation, coastal areas development, recreation and tourism, aquaculture and sea ranching and renewable off-shore energy production;
- d) shifting of focus to new issues such as marine habitat and resource conservation and marine environmental risk and pollution reduction;
- e) increase in recognition of the rights of aboriginal and indigenous groups and other stakeholders in coastal and marine resource.

(ii) *Marine spaces are virtually common property with no exclusive rights of ownership:*¹⁵⁰ The three dimensional rights aspect of a geographical zone is more apparent in sea than on land because rights are either allocated for specific portions such as the seabed or water column, or specific activities such as fishing and navigation. The interests usually coexist and even this coexistence may change over time specially where the rights are time specific. This coextensive nature of the rights increases the number of stakeholders that must be considered while designing a legal framework for governance of any maritime zone. It also results in a multiplicity of boundaries of jurisdiction, administration, ownership and use with in some instances, a boundary or limit being set for each specific resource or activity.

¹⁵⁰ van der Schans J. W., Governance of Marine Resources: Conceptual Clarifications and Two Case Studies (2001) (Eburon Delft) pp. 27-240.

(iii) *Interests in marine space are more fragmented than on land:* Related to the first point is the fact that the management of marine interests tends to focus on specific resources or activities rather than geographic areas. On land interest are classified either as government (public) land, private land and trust land¹⁵¹ or in terms of the extent of exclusive rights of surface ownership such as freehold, leaseholds or licences. This is not the case with marine spaces where interests are classified with reference to specific resources such as fishing rights, off-shore petroleum and oil exploration and shipping.

This fragmentation of interests is also reflected in the institutional structures of government. In Kenya for instance, a number of agencies deal with the issues of command, management and control of Kenya's maritime zones; we have KPA, the Port Police, the Kenya Navy, the Kenya Wildlife Service, the Fisheries Department, the Coast Development Authority, the Anti-Terrorism Police Unit and NEMA.¹⁵²

The multi-agency approach to administration creates the potential for duplicity and overlap. For instance, in Kenya both the wildlife officers¹⁵³ and NEMA officials¹⁵⁴ have powers to police and protect the marine environment. As far as the exploitation of marine resources is concerned, the Fisheries Act¹⁵⁵ allows fisheries officers, police officers, Kenya Navy officers, other members of the armed forces and any other person appointed

¹⁵¹ In Kenya, we have these various categories of land tenure systems being governed by different legislations. The Government Lands Act (Cap 280) governs government (public) land; private land is *inter alia* governed by the Registration of Titles Act (Cap 281), the Land Titles Act (Cap 282) and Registered Land Act (Cap 300); and trust land is governed by the Land (Group Representatives) Act (Cap 287) and Trust Land Act (Cap 288).

¹⁵² See P. M. Wambua in *Supra* note 34.

¹⁵³ Under Section 3A (f) of The Wildlife (Conservation and Management) Act, Cap 376 of the Laws of Kenya., wildlife officers have surveillance powers over marine ports and other maritime estuaries in order to meet conservation and management goals.

¹⁵⁴ See Section 9 (1) (e) and (h) of the Environmental Management and Coordination Act, Act No. 8 of 1999.

¹⁵⁵ Chapter 378 of the Laws of Kenya.

by the Minister for Fisheries Development to superintend over the same.¹⁵⁶ No serious attempt has been made to harmonize the enforcement mechanisms of the numerous agencies. This has resulted into a serious lack of coordination which partly accounts for the poor levels of command, management and control of the maritime zones. One result is the fact that information about the stakeholders, their interests, and activities is widely scattered throughout many government departments and agencies.

2.4.3 The Ambulatory Nature of the Land-Water Interface

Much of marine activity is concentrated at the coast. There is intensity of land use in many countries at the coast mainly because of transportation and shipping through ports. The result is that the number of stakeholders is relatively high and therefore the opportunities for conflict among their interests and the value the society places on their different interests is accentuated at the coastline. In Kenya, Tiomin, a Canadian titanium mining company has been locked in an impasse with the local community over the issue of compensation for loss of land to the titanium exploration project. Two of Kenya's marine protected areas, Kisite and Mpunguti, are located in this area and serves as habitat for at least 50 Indo-Pacific humpback dolphins, 100 to 150 spotted dolphins, shellfish and seaweeds. Many endangered species including the only groups of Colobus monkeys on the East African coast and Kenya's last remaining herds of Sable antelope, depend on this fragile coastal ecosystem.¹⁵⁷

¹⁵⁶ See Section 2 of the Fisheries Act, Cap 378 of the Laws of Kenya.

¹⁵⁷ See "Titanium in Kenya: Creating a Balanced Solution" Available at <http://www.ifaw.org/ifaw/general/default.aspx?oid=12849> Accessed on 3/06/2007

The following are some among the factors that make coastlines prone to being potential conflict zones:¹⁵⁸

(a) *Overlaps and laches:* There are often overlaps and duplicity of jurisdictional authority and administrative power between government bodies that are primarily land based and those that are marine based for example in ports where land and marine activities are intertwined. Consequently, the information about the marine interests in question is not only fragmented but may also be inconsistent and incomplete leading to general inefficiency in administration;

(b) *Competing private and public interests:* Private land interests such as rights for wharf development, littoral rights associated with upland ownership, traditional rights to areas for fishing through weirs frequently extend into marine areas. In many cases these rights are undocumented and unregistered and have been acquired through usage. Furthermore, these rights are seldom well understood by planners, managers, and policy makers without a maritime law background. An additional complexity is that there are also emergent public interests such as the public right to access beaches and to have environmental protection of endangered habitats. Such public interests naturally clash with private interests which are inclined towards exclusive ownership and, in many cases, are also neither well defined nor documented.

¹⁵⁸ van der Schans J. W., in *supra* note 150 pp. 27-240.

In Kenya, for example, it is mandatory to seek presidential consent to transfer a beach property which is usually given by the Provincial Commissioner on a purely administrative and *ad hoc* basis.¹⁵⁹ The problem is also illustrated by the long standing conflict between Tiomin Kenya, a subsidiary of the Canadian mining company, Tiomin Resources, Inc., and the local community in Kwale District over the issue of compensation for land lost to the titanium mining project.¹⁶⁰

(c) Limited or no appreciation of local knowledge and traditional practices:

Information about marine interests is generally not well documented and managed because of the numerous government agencies involved resulting in fragmented, duplicated, incomplete and inconsistent datasets. Historical datasets are often incomplete and out of date due to the fact that marine governance has until recently been ignored by planners and policy makers. In most instances, there is no specific agency with the responsibility to lead data management activities in both coastal land and maritime zones.

In Kenya for instance, the fragmented approach to management of marine resources whereby KPA, the Kenya Police, the Kenya Navy, the Kenya Wildlife Service, the Fisheries Department, the Coast Development Authority, the Anti-

¹⁵⁹ This is pursuant to a 1970 Presidential Decree. See Yahya S. S., "Who Owns the Kenya Coast? The Climaxing of Land Conflicts on the Indian Ocean Seaboard" Available at <http://payson.tulane.edu/conflict/Cs%20St/SAADFIN5.html> Accessed on 4/06/2007.

¹⁶⁰ *Supra* note 157.

Terrorism Police Unit and NEMA are all charged with governance of the maritime zones has led to inconsistency and duplicity in datasets.

(d) *Uncertainty in boundaries and limits delimitation:* Boundaries and limits in the coastal zone are ordinarily made with reference to physical features such high water, the shoreline, the normal baseline, many of which are difficult to clearly identify, define or locate. The land-water interface is ambulatory and most traditional boundaries and limits followed the motions of that interface. Today greater emphasis is placed on fixing these boundaries. This may be driven by law such the need to conform with LOSC; by institutional structure and practice such as the municipal coastal boundaries defined on internationally recognized maps; or by technological needs for instance the desire to establish coordinates or boundaries for geographical information systems. In most cases, these boundaries are not defined or fixed until an issue or conflict arises. Therefore without court decisions or specific legislation the location of many maritime boundaries is a matter of considerable subjective interpretation.¹⁶¹

The Kenya Presidential Proclamation of 9th June 2005 sought to fix the maritime boundaries of Kenya with Tanzania and Somalia. Whereas the boundary with Tanzania might have been conclusively determined, it remains to be seen how effective the boundary with Somalia is going to be since it was unilaterally fixed

¹⁶¹ Churchill R R. and Lowe A. V. *The Law of the Sea* (3rd edn., 1999) (Manchester University Press, Oxford) pp. 7-22. See also Anderson D., "Development in Maritime Boundary Law and Practice" in Colson D. A. and Smith R. W., *International Maritime Boundaries* VOL. V (2005) (Martinus Nijhoff Publishers) pp. 3199-3222.

by Kenya and Somalia claims a 200 nm EEZ. It is only recently that the government appointed a Task Force on the Delineation of Kenya's Outer Continental Shelf to come up with recommendations on how best to bring order and sound governance to the Kenyan Maritime Zones.¹⁶²

2.4.4 Scientific and Technical Considerations

2.4.4.1 Relevance of Information and Data

Information is an essential technical component of the governance of marine resources. Information on the current status and abundance of marine resources, the nature of the environment and habitat within which those resources exist as well as on the users and uses of those resources is a vital requirement for effective evaluation and monitoring of marine resources. Information on, for example, living and non-living resources, maritime boundaries, shoreline changes, marine pollution and contaminants, seabed characteristics, water quality, and property rights can contribute to the sustainable exploitation and good governance of coastal and marine resources.¹⁶³

Information on maritime boundaries is essential in the management and administration of marine resources. The precise delimitation of boundaries usually become important in relation to the need to allocate equitable resources perceived to be dissected by the potential boundary.¹⁶⁴ Such is the case with the boundary dispute between Nova Scotia

¹⁶² vide Kenya Gazette Notice No. 3929 of 2nd June 2006. The Task Force was required to submit its report by 30th November 2007 but is yet to complete its work. A detailed analysis of Kenya's maritime zones delimitation regimes will be undertaken in chapter 3.

¹⁶³ Nowlis J. S. and Friedlander A. "Research Priorities and Techniques" in Sobel J. and Dahlgren C. (eds.) *Marine Reserves: A Guide to Science, Design and Use* (2004) (Island Press, Washington DC) pp. 128-163.

¹⁶⁴ Hildreth, R. and Johnson R., *Ocean and Coastal Law* (1983) (Prentice-Hall, Inc., New Jersey).

and Newfoundland.¹⁶⁵ However, in some other cases it may be prudent not to focus too much attention on boundaries, as boundary uncertainties such as with federal and provincial boundary uncertainties in some coastal regions in Canada¹⁶⁶ are the cause of social and administrative conflicts in coastal and maritime zones.

2.4.4.2 The presence of multi-dimensional rights and interests in maritime zones

When considering marine resources from a right-based perspectives, one ought to consider that in one column of the marine space there are rights to the surface of the water column such as navigation, to the water column itself such as fishing, to the seabed and subsoil such as mining, and to the air space above such as overflight. The very nature of the marine spaces requires that the tapestry of rights be considered from a multi-dimensional perspective taking into account the possibility of changes in the rights over time. Technically, therefore, tools designed to manage and administer rights to maritime zones should consider the inherent multidimensional nature of those rights.¹⁶⁷

Any technical tool such as a marine cadastre or marine administration system is faced with the challenges of not only dealing with the multidimensionality of rights to marine resources but also with the fact that in many maritime zones, there is the added intricacy of overlapping interests such as jurisdictional rights, administrative rights, customary

¹⁶⁵ Arbitration Tribunal, Nova Scotia-Newfoundland Dispute (2002) Available at <http://www.boundarydispute.ca/>. Accessed on 25/04/2007.

¹⁶⁶ See Binkley M. et al "Community Involvement in Marine and Coastal Management in Australia and Canada" in Rothwell D. R. and Vander Zwaag D. L. (eds.) *Towards Principled Oceans Governance: Australian and Canadian Approaches and Challenges*(2006) (Routledge Taylor & Francis Group, New York NY) pp. 249-279.

¹⁶⁷ Ng'ang'a, S. M. et al "Toward a 3D marine cadastre in support of good ocean governance: A review of the technical framework requirements" *Computer, Environment and Urban Systems*, 28, 2004, pp. 443-470.

rights, aboriginal rights and public rights. The design of marine information systems dealing with the management of rights information should therefore take the possibility of overlapping and coexisting rights into consideration.¹⁶⁸

2.4.4.3 Management of maritime data and information on marine resources

Proper management of maritime data is an asset to the efficient management of marine resources, and can in many instances help to avoid and minimize conflicts among the many stakeholders. Recognizing this need and the fact that no one stakeholder possesses all the necessary information, many coastal states have begun initiatives to better manage coastal and marine spatial data and to apply the information and technology to the management of marine resources.¹⁶⁹

In order to coordinate the dissemination of marine spatial data that can support sound governance of coastal and marine resources, marine geospatial data infrastructure initiatives are underway in many parts of the world. Initiatives such as Canada's Marine Geospatial Data Infrastructure (MGDI) and the U.S. Federal Geographic Data Committee (FGDC) are considering the information and other infrastructure components necessary to provide geographically dispersed stakeholders with spatial data to support marine governance decision making. Regional bodies such as the Permanent Committee on GIS Infrastructure for Asia and the Pacific (PCGIAP) are also taking steps to set up marine geospatial infrastructures.¹⁷⁰

¹⁶⁸ *Ibid.*

¹⁶⁹ Cicin-Sain B. and Knecht R. W. *Integrated Coastal and Ocean Management: Concepts and Practices* (1998) (Island Press, Washington DC) pp. 171-196.

¹⁷⁰ Ng'ang'a S. M. et al in *supra* note 167.

Kenya has no such initiative that collects and collates information from stakeholders for consideration in decision making. The knee jerk approach through appointment of Task Forces that the government of Kenya has adopted in management of marine resources is *ad hoc* and such initiatives are not permanent in nature but created as and when pressure is exerted by stakeholders or there is need to bring the country up to speed with the international developments under LOSC.

2.4.4.4 Definition of coastlines and maritime boundaries

Tidal and shoreline boundaries along coasts are important in the governance of marine resources. In North America for example, they are defined in law either as the “intersection of a specific tidal datum with the shore” or as “tide marks left on the shore by the receding waters of a particular stage of tide”.¹⁷¹ These definitions can be more or less universally applied. Tidal data is related to specific sea levels and therefore ambulatory and subject to temporal and spatial variations. The marks left by tidal actions on shores also vary with the changes in sea level and tides and therefore boundaries defined by these methods are sometimes subject to ambiguity.¹⁷²

Constant tidal action against the shore can cause the deposit of material on the shore and the erosion of others thereby making the physical configurations of shorelines subject to

¹⁷¹ Nichols, S., “Tidal Boundary Delimitation” *Technical Report No. 103*, (1983) (Department of Geodesy and Geomatics Engineering, University of New Brunswick, Canada).

¹⁷² Christie D. R. and Hildreth R. G. *Coastal and Ocean Management Law in a Nutshell* (3rd edn. 2007) (Thomson West, St. Paul MN) pp. 14-19.

constant change.¹⁷³ This means that resurveys are sometimes necessary in order to keep coastal boundary information up to date. These and other factors defining coastline boundaries indirectly affect the governance of marine resources since, for example, the implementation of jurisdictional and administrative rules and regulations often depend upon defined boundaries.

Kenya relies on pre LOSC Presidential Proclamation of 9th June 2005, to guide her management of Marine Resources.¹⁷⁴

2.4.4.5 The interplay between Science and Traditional Local Knowledge

Sufficient knowledge about marine resources is a precondition for sound management the resources.¹⁷⁵ Just as on land, traditional or local knowledge can play an important role in marine resources governance.¹⁷⁶

Unfortunately the value of local and traditional knowledge is not always appreciated or is ignored because it is not standardized, is considered to be subjective and it is not easily accessible. Science has only begun to give a picture of the vast ocean territory, even near the coast and a lot is yet to be discovered and understood. Local knowledge comes in handy in filling the gaps left by scientific knowledge, validating the scientific sample and

¹⁷³ Flushman, B. S., "Water Boundaries: Demystifying Land Boundaries Adjacent to Tidal or Navigable Water" in *Surveying and Boundary Control* (Wiley Series, 2002). See also Lamden, D. W. and I. de Rijcke., *Boundaries in Survey Law in Canada: A Collection of Essays on the Laws Governing Survey of Land in Canada*. (1989) (The Canadian Institute of Surveying and Mapping; Canadian Council of Land Surveyors).

¹⁷⁴ Legal Notice No. 82 of 22nd July 2005, Kenya Gazette Supplements No. 55 of 2005.

¹⁷⁵ Alf Håkon Hoel Brochure/guide, "Norwegian Management of Living Marine Resources" available at <http://odin.dep.no/odin/ongelsk/norway/environment/03091-120004/index-dox000-b-n-a.html> Accessed on 28-04-2007.

¹⁷⁶ *Supra* note 172 pp. 132-3.

theories and in understanding the interconnection within ecosystems. Fishermen along the East and West Atlantic coasts, for example, could have advised the scientists who assisted governments in establishing fishing quotas in the 1970s-1990s that the fish stocks in the North Atlantic were declining long before the science driven government policies endangered the fishing resources.¹⁷⁷

Very little work has been done on fishery resources in the deeper waters of the Kenya's maritime zone as to establish species composition, distribution, behaviour, and migration.¹⁷⁸ Local knowledge amongst fishermen would therefore be vital in understanding the potential of fisheries in these zones.

2.5 Basic Guidelines for Good Governance of Marine Resources

Kelleher and Lausche¹⁷⁹ formulated a set of guidelines for the development of policy, legal and institutional guidelines for marine resource management. The guidelines were articulated in general terms in order that they may be applicable to a wide range of legislative and executive systems. These guidelines although made over twenty years ago have attained recognition as a model on effective governance of marine resource and still applicable and relevant to this study.¹⁸⁰ They include:

¹⁷⁷ Sobel J. and Dahlgren C., *Marine Reserves: A Guide to Science, Design, and Use* (2004) (Island Press, Washington DC) p. 3.

¹⁷⁸ Gitonga K.N and Achoki R., "Fiscal reforms for Kenya fisheries" [unpublished] Papers presented at the Workshop and Exchange of Views on Fiscal Reforms for Fisheries - to Promote Growth, Poverty Eradication and Sustainable Management, Rome, 13-15 October 2003.

¹⁷⁹ G. Kelleher and B. Lausche., "Review of Legislation" in Kenchington R. A, and Hudson B. E. T. (eds.) *UNESCO Coral Reef Management Handbook*, (2nd edn. 1987) (UNESCO, Jakarta), pp. 47-51.

¹⁸⁰ Kenchington R. A, in *supra* note 2 p. 61.

(i) **Basic policy:** The policy may be established within a national or regional management and conservation strategy.¹⁸¹

(ii) **Clear objectives:** Conservation should be the paramount objective in the resource management legislation in order to maximize sustainable use and enjoyment of the resource.¹⁸²

(iii) **Regional and International Co-operation:** Marine resources and environments as well as the problems associated with their management have an international character.¹⁸³ Such an approach ensures that the management initiatives of one country are not negated by the actions of others hence guarantees a better result.¹⁸⁴

(iv) **Sustainable use:** Most of the marine resources that can be exploited for any economic gain are exhaustible in nature.¹⁸⁵ There is therefore need for legislations on governance of marine resources to recognize the linkage between protection and maintenance of ecological processes and states, and the sustainable use of living resources.

¹⁸¹ See van der Schans J.W., *Governance of Marine Resources: Conceptual Clarifications and Two Case Studies* (2001) (Eburon Delft) pp. 195-6.

¹⁸² Vallega A., *Sustainable Ocean Governance: A Geographical Perspective* (2001) (Routledge, Taylor & Francis Group, Newyork NY) pp. 136-163.

¹⁸³ Oda S., in *supra* note 52 pp. 63 – 65.

¹⁸⁴ See Cicin-Sain B. and Knecht R. W., *Integral Coastal and Ocean Management: Concepts and Practice* (1998) (Island Press, Washington DC) pp. 139-148

¹⁸⁵ Dyer C. L. and Poggie J. J., “A Total Capital Approach to the Management of Large Marine Ecosystems: Case Studies of Two Natural Resource Disasters” in Hennessey T. M. and Sutinen J. G. (eds.), *Large Marine Ecosystems: The Human Dimension* Vol. 13 (2005) (Elsevier, Amsterdam) pp. 111-136

(v) ***Integrated Management:*** Legislation should be based on sustainable multiple-use of substantial managed areas rather than the single agency regulation on a piecemeal or industry basis approach to isolated highly protected pockets.

(vi) ***Coordination:*** All intra-governmental, intergovernmental and international agencies with statutory responsibilities within maritime zones, must work together in the planning and management of the resources therein¹⁸⁶

(vii) ***Regulation of extra-marine activities:*** Some land-based activities might adversely affect features, natural resources, or activities within the marine areas. Often low or high water marks form a jurisdictional boundary, but these are impractical boundaries for species with life cycles or feeding habits that involves crossing them. There is therefore need to regulate such activities which though not occurring within the marine areas affect the resources within those areas.¹⁸⁷

(viii) ***Legislative framework:*** Provisions should be made within the legislation for power to establish any marine protection or conservation management system. The legislation should contain sufficient details for proper implementation and compliance, delineation of boundaries, providing adequate statements of authority

¹⁸⁶ Sobel J. and Dahlgren Marine Reserves: A Guide to Science, Design, and Use (2004) (Island Press, Washington DC) pp. 61-90. See also Upton H. F. and Sutinen J. G. "Fish Habitat: A Valuable Ecosystem Asset" in Hennessey T. M. and Sutinen J. G. (eds.), *Large Marine Ecosystems: The Human Dimension* Vol. 13 (2005) (Elsevier, Amsterdam) pp. 201-213.

¹⁸⁷ Christie D. R. and Hildreth R. G., *Coastal and Ocean Management Law in a Nutshell* (3rd edn) (2007) (Thomson West, St. Paul MN) pp. 333-4.

and precedence and for providing infrastructural support and resources allocation to ensure that the necessary tasks can be carried out.¹⁸⁸

(ix) ***Consistency with tradition:*** The legislation should take into account the legal institutional and social practices and values of the nation and people involved in the exploitation of the marine resources and whose activities it seeks to govern. This would make it to be readily accepted. Acceptance or rejection of any legislation by the stakeholders is vital for success in implementing its objectives.¹⁸⁹

(x) ***Definitions:*** The definitions and terminology in legislation should use words that reflect, in language clearly understood by those affected, the intentions, goals, objectives, and purposes of the legislation.¹⁹⁰

(xi) ***Involvement of Non-Governmental Organizations:*** Responsibility, accountability, and capacity should be defined sufficiently to ensure that the basic goals, objectives, and purposes are realized. Traditional village community bodies, individual citizens, clubs and associations with compatible goals, objectives and responsibilities should be involved in management of marine

¹⁸⁸ Nowlis J.S. and Friedlander A., "Design and Designation of Marine Reserve" in Sobel J. and Dahlgren *Marine Reserves: A Guide to Science, Design, and Use* (2004) (Island Press, Washington DC) pp. 128-163.

¹⁸⁹ Hildebrand L. P., "Participation of Local Authorities and Communities in Integrated Coastal Zone Management" in Haq B. U. et al (eds.) *Coastal Zone Management Imperative for Maritime Developing Nations* (1997) (Kluwer Academic Publishers, Dordrecht) pp.43-54.

¹⁹⁰ *Supra* note 2 p. 64.

resources whenever practicable to supplement government agencies, local government and administration.¹⁹¹

(xii) **Management and zoning plans:** Zoning is usually the best way of ensuring strict protection of a core zone, or zones, as part of a larger multiple-use protected area. A zoning plan establishes the framework for management and it is usually the best way to reconcile an array of different uses of a geographical area. Zoning has been employed with success in maritime nations such as Canada and Australia.¹⁹²

(xiii) **Public participation :** Consultation and active involvement of users of marine resources in the development of legislation in establishing, maintaining, monitoring and implementing management of marine areas is paramount to the acceptability or legitimacy and success of management. It is highly expedient that the concept of public participation, expressed in terms appropriate to social and governmental structures, be entrenched in legislation and that the procedures be sufficiently outlined to guarantee maximum participation.¹⁹³ The public should be afforded the opportunity to input in the process of formulating management and zoning plans for marine areas.

(xiv) **Monitoring, research, and review:** Surveillance is important in order to determine the extent of adherence to provisions of management. The legislation

¹⁹¹ *Ibid.*

¹⁹² See IUCN "Guidelines For Marine Protected Areas" available at http://www.iucn.org/bookstore/HTML-books/BP3%2DGuidelines_for_marine_protected_areas/pag-003/.../html Accessed on 30/04/2007.

¹⁹³ *Supra* note 186 p. 65.

should also make provisions for periodic review of management and zoning plans in order to update them and incorporate pertinent modifications based on the findings of surveillance, monitoring and research. Just as in the initial plan formulation, public participation should be accommodated in the review.¹⁹⁴

(xv) **Compensation:** Where organizationally established local rights and practices are disturbed by the mode of management opted for, there should be arrangements for specific benefit to local inhabitants in terms of employment or of compensation of lost rights.¹⁹⁵

(xvi) **Financial accountability:** Financial accountability is necessary for the success of any policy including the management of marine resources. Financial arrangements should be capsulated in legislation according to local practice such that consideration is given to establishing special funds whereby revenue raised from marine resources management can be applied directly back to the program or to the stakeholders.¹⁹⁶

(xvii) **Rules of governance:** Legislation must grant power for adequate regulation in order that activities within marine areas can be controlled or prohibited as necessary. The rules of governance may comprise of: enforcement regulations, protective regulations to provide protection for areas for which no plans have been developed and governing regulations to control activities

¹⁹⁴ *Ibid* p. 67.

¹⁹⁵ *Supra* note 226.

¹⁹⁶ *Ibid*.

occurring outside marine areas that have a direct impact on the resources within those areas.¹⁹⁷

(xviii) ***Enforcement and penalties***: Effective legislation must provide adequate enforcement mechanisms, powers, and duties. Penalties for breach of regulations, incentives for compliance, adequate powers for enforcement agencies to take necessary enforcement action such as arresting of violators, gathering of evidence, confiscation of equipment and evidence, prosecutorial powers and where practicable, powers for local people to reinforce or provide enforcement are among the things that the legislation should contain.¹⁹⁸

(xix) ***Education***: A proper mechanism for disseminating the relevant information and creating awareness amongst the stakeholders in the management of marine resources should be put in place. The stakeholders should be made aware of their rights and responsibilities under the management legislation.¹⁹⁹

2.6 Conclusion

This chapter sought to investigate the interplay between the broad concept of governance and the related concepts of management and policy formulation and implementation with a view to demonstrating that unless the concepts are adopted in the

¹⁹⁷ *Ibid* pp. 66 – 67.

¹⁹⁸ *Ibid*.

¹⁹⁹ *Supra* note 118. See also Lisa J. B. et al Education as a Tool for Coral Reef Conservation: Lessons from Marine Protected Areas 0521855365c14.xml CUUK260B-Cote November 26, 2005.

The pivotal role of education was reaffirmed at the World Summit on Sustainable Development in Johannesburg in August/September 2002 (UNESCO, 2005). Later in the same year, the UN General Assembly adopted a resolution to launch the UN Decade of Education for Sustainable Development (DESD) 2005–2014, identifying UNESCO as the lead agency.

control and management of marine resources, no sound and effective marine resource governance can be achieved.

The problems of governance of marine resources are often greater than those of governance of land-based resources partly because of the intense pressure of competing interests, all appearing to converge on relatively small areas and the cost of operating vessels and conducting surveillance and monitoring. In Kenya, these problems are compounded by lack of appropriate policy, legal and institutional frameworks for governance of marine resources.

The challenge is to build into initial planning a realistic basis for perpetual support of sound governance and adequate management. The basis should be tied to economic developments that use or have impacts upon the resources of the maritime zones of a coastal state. The priority tasks of the initial period also include public education and, possibly, economic adjustment so that the local communities and users are generally motivated to support the objects of the resource governance regime.

A multidisciplinary approach is needed if there is to be effective governance of marine resources. Surveyors, lawyers, planners, and resource managers all understand part of the picture. To be complete or even useful, any information system to support marine resources governance needs to reflect the variety of interests, their complexity, and the unique aspects of marine interests.

The emphasis should not necessarily be on precise boundary delimitation. Many of the boundaries and limits are undefined or un-delimited until an issue arises. Others are fuzzy or moveable by nature and best serve the interest of stakeholders that way. In order to be able to maximize the benefits of the governance of maritime zones there should be in place information systems able to manage and visualize information on multiple marine resource interests that overlap in three dimensional space, and time. These systems should also function in an environment of efficient and effective governance and legal frameworks, and optimal institutional arrangements that meet the often diverse needs of identified and engaged stakeholders.

Kenya's experience in the management of marine resources as shall be illustrated in the next chapter has been characterized by duplicity, overlap and inconsistency due to the multi-agency approach and scattered legislative provisions. Each of the various agencies charged with the management, command and control of Kenya's maritime zones seeks to implement its mandate without harmonizing its activities with those of the other agencies. The net effect has been overlap, duplicity and general inefficiency which has greatly hampered the governance of Kenya's marine resources making a "forgotten province".

CHAPTER 3

EFFORTS AT DELIMITATION OF KENYA'S FORGOTTEN PROVINCE

*The delimitation of sea areas has always an international aspect; it cannot be dependent merely upon the will of the coastal State as expressed in its municipal law. Although it is true that the act of delimitation is necessarily a unilateral act because only the coastal State is competent to undertake it, the validity of the delimitation with regard to other States depends upon international law.*²⁰⁰

Since the EEZ is a juridical zone in which legal obligations vary from those in adjacent high seas and among different EEZs by virtue of national laws, it is not surprising that the 1982 LOS Convention requires that the lines of delimitation of national EEZs be shown, in adequate scales on charts so as to be ascertainable to others. ...

*...It would appear from the perspective of the coastal state that internationally accepted boundaries would serve its interests in planning, regulation and enforcement.*²⁰¹

There are no simple rules for the establishment of boundaries for marine environment management areas. In each case the process usually involves

²⁰⁰ [1951] ICJ Rep. 116 8, 34-5, 37, 38, 41, 56-7, 61, 80.at 132.

²⁰¹ Juda L., "The Exclusive Economic Zone and Ocean Management" in *Ocean Development and International Law* VOL 18, 1987 pp. 313 - 4.

*considering a range of biophysical, geographic, and legal factors in order to develop a workable solution.*²⁰²

3.1 Introduction

The discussion in this chapter is premised on the realization that a basic challenge of control and management of the maritime zones of any coastal state and the resources therein is the delimitation of these zones. The LOSC requires that coastal states delineate their maritime zones. As noted in the quotations above, complex as it may be, delimitation of maritime zones is necessary to establish the legal limits of the jurisdiction of a coastal state seaward.

The first quotation underscores the international character of delimitation of maritime zones. Coastal States may undertake delineation of the maritime zones they lay claim on but this must as of essence be in accordance with principles and guidelines of international law and practice. The second quotation reiterates this assertion and places emphasis on the importance of publishing boundaries of maritime zones that have been delimited so as to accord other States an opportunity to either acquiesce to or reject the proposed boundaries. The third quotation demonstrates the rather intricate nature of the process of delimitation of maritime zones which is further compounded by the numerous considerations to be taken into account.

²⁰² Kenchington R. A., in *supra* note 2 p. 15

In this regard, the chapter will seek to offer an appraisal of Kenya's efforts at delimiting her maritime zones. It will critically examine the challenges faced by the country in delimiting her maritime zones.

3.2 International Law And Practice In The Delimitation Of Maritime Zones

Whereas some degree of unanimity has been achieved in defining maritime zones, the case has not been so with regard to modes of delineating such zones.²⁰³ This has been caused by the close geographical proximity of many coastal states and the often overlapping nature of their maritime zones.²⁰⁴ Theoretically, each maritime zone is delimited separately giving rise to distinct boundaries for territorial sea, contiguous zone, the EEZ and the continental shelf. In practice however, it is not uncommon to find these boundaries bundled together both in judicial settlements and bilateral agreements thereby yielding one single maritime boundary.²⁰⁵ LOSC, courts and arbitral tribunals have nonetheless formulated general principles to guide in the delimitation of the different maritime zones.²⁰⁶ It is imperative to examine these principles as they form the guidelines on which Kenya's maritime zones should be delimited.

3.2.1 Territorial Baseline

²⁰³ For a full analysis, see Anderson D. "Development in Maritime Boundary Law and Practice" in Colson D. A. and Robert W. Smith (eds.) *International Maritime Boundaries* VOL V. (2005) (Maritinus Nijhoff Publishers) pp. 3119-3222.

²⁰⁴ Churchill, R.R. and Lowe, A.V., *The Law of the Sea* (2nd edn. 1999) (Manchester) p. 181

²⁰⁵ *Supra* note 252 p.p. 3209-10.

²⁰⁶ See Colson D. A. and Robert W. Smith (eds.) *International Maritime Boundaries* VOL V. (2005) (Maritinus Nijhoff Publishers) and Vidas D. and Ostreng W. (eds.), *Order for the Oceans at the turn of the Century* (Kluwer Law International, The Hague, 1998) pp 457-69 for how LOSC has affected the delimitation of maritime boundaries.

A **nautical mile (abbreviated as nm²⁰⁷)** is the accepted unit used in the measurement of maritime zones and it corresponds to a distance of 1,852 metres.²⁰⁸ This value was adopted by the 1929 International Hydrographic Conference held in Monaco and has subsequently been adopted by the International Bureau of Weights and Measures. The length of the nautical mile is very close to the mean value of the length of 1 minute of latitude, which varies from approximately 1,843 metres at the equator to 1,861.6 metres at the pole.²⁰⁹ The nautical mile is used around the world for maritime and aviation purposes. It is commonly used in international law and treaties, especially regarding the limits of territorial waters. It was also adopted by LOSC as the unit of measurement of the maritime zones recognized therein.²¹⁰

The boundary between the land and the sea is dynamic due to tidal variations. Virtually all sea/land boundaries are fixed relative to locations described in terms of tide.²¹¹ The term **baseline** refers to the line from which the seaward limits of a coastal state's maritime zones are measured.²¹² This line corresponds with the low-water mark along the coast.

²⁰⁷ Although nm is the official symbol for nanometer, there is little confusion because it is used in very different contexts, and differs by twelve orders of magnitude.

²⁰⁸ For online definitions, see "Definitions and Much More from Answers.com", <http://www.answers.com/topic/nautical-mile?cat=technology>; and Howstuffworks "What is a nautical mile and how does it differ from a normal mile and a kilometer?"

<http://people.howstuffworks.com/question79.htm>. Accessed on 16/07/2007

²⁰⁹ *Ibid.*

²¹⁰ See for example Art. 3 LOSC.

²¹¹ Kenchington R. A. in *supra* note 2 pp. 16 - 17.

²¹² Churchill R. R. and Lowe A. V. in *supra* note 4 p. 31. See also Marques Antunes S. N. "Some Thoughts on the Technical Input in Maritime Delimitation" in Colson D. A. and Smith R. W. (eds.) *International Maritime Boundaries* VOL V. (2005) (Martinus Nijhoff Publishers) pp.3391.

The mode of establishing a baseline is rather straightforward in instances where the coastline is relatively straight and unindented. The exercise becomes complex where the coastline is characterized by deep indents or is a fringe of islands. The delimitation is a technical exercise and can at times be costly.²¹³ Consequently, LOSC has guidelines for determining various types of baselines depending on the shape of the coastline in any given locality.

The **Normal baseline** corresponds with the low water line along the coast, including the coasts of islands.²¹⁴ Normal baseline can be drawn around low tide elevations which are defined as naturally formed areas of land surrounded by and above water at low tide but submerged at high tide and is situated wholly or partly at a distance not exceeding 12 nautical miles (nm). The effect of choosing the low-water line rather than the high-tide line is to extend the outer limit of the maritime zones more so on coasts with extensive tidal ranges.²¹⁵ However, LOSC does not address the question whether the low-water line is represented by the mean low-water spring tide, the lowest astronomical tide or some other low-water line.²¹⁶

Straight baselines are a system of straight lines joining specified or discrete points on the low-water line, usually known as straight baseline end points.²¹⁷ These may be used in localities where the coastline is deeply indented and cut into, or where there is a fringe

²¹³ See Marques Antunes S. N. "Some Thoughts on the Technical Input in Maritime Delimitation" in Colson D. A. and Smith R. W. (eds.) *International Maritime Boundaries* VOL V. (2005) (Martinus Nijhoff Publishers) pp.3377-3398.

²¹⁴ Art. 5 LOSC.

²¹⁵ Churchill R. R. and Lowe A. V. in *supra* note 4 p. 33.

²¹⁶ See Whiteman M. M., *Digest of International Law* Vol. IV p. 141 and O'Connell D. P. O., *The International Law of the Sea* (Oxford, Clarendon Press 1982) Vol. I pp. 171 - 85.

²¹⁷ Art. 17 LOSC.

of islands along the coast in its immediate vicinity. The concept of straight baselines emanated from the Norwegian baseline claims.²¹⁸ The coastline of Norway is characterized by numerous fjords, islands, islets, rocks and reefs known as the *skjaergaard* which translated literally means rock rampant. Drawing a baseline around these *skjaergaard* would be an impracticably onerous and cumbersome task. Norway therefore adopted a method that used a series of straight lines connecting the outermost parts on the *skjaergaard* to determine her baseline.

The United Kingdom (UK) objected to this method of determination of baseline because it in effect extended farther seaward the outer limit of Norway's territorial sea and reduced the high seas open for fishing by British vessels. The ensuing dispute culminated in the landmark *Anglo-Norwegian Fisheries* case.²¹⁹ In this case, the court held that the Norwegian straight baseline system was in conformity with international law having been used by several states without objection. In the following paragraphs, we examine the basis of the court's decision and the key issues addressed by the court.²²⁰

According to the court, where a coast was deeply indented or fringed by islands, then, neither the *tracé parallèle* nor the *courbe tangente* methods was appropriate. Rather, "the

²¹⁸ *Supra* note 215

²¹⁹ *Supra* note 200.

²²⁰ *Ibid* at 128. The court observed that the *skjaergaard* was just an extension of the Norwegian mainland and therefore it was the outer limit of the *skjaergaard* and not the mainland that constituted the actual dividing line between the land and the sea. The outer line of the *skjaergaard* and not that of the mainland was therefore the one to be used as the low-water mark in determining the baseline. The court noted that "three methods have been contemplated to effect the application of the low-water mark rule"

- (i) the *tracé parallèle* which involves drawing the outer limit of the territorial sea by following the coast in all its sinuosities;
- (ii) the *courbe tangente* which involves drawing arcs of circles from points along the low-water line; and
- (iii) straight baselines.

baseline becomes independent of the low-water mark, and can only be determined by means of a geometric construction".²²¹ The straight baseline was such a geometric construction.

Apart from upholding the validity of straight baselines in international law, the court also clarified that coastal states did not have unfettered discretion in drawing straight baselines. The court laid down guidelines governing the drawing of such baselines²²²: -

- (i) the lines must be drawn so that they do not depart to any appreciable extent from the general direction of the coast;
- (ii) they must be drawn so that the sea areas lying within these lines are sufficiently linked to the land domain to be subject to the regime of internal waters; and
- (iii) it is legitimate to take into account certain economic interests peculiar to a region, the reality and importance of which are clearly evidenced by a long usage.

The concept of the straight baseline and the conditions for its application were adopted by the 1958 Geneva Territorial Sea Convention²²³ and LOSC²²⁴ both of which reiterated the court's ruling almost verbatim. Under LOSC the straight baseline method is to be used in situations where due to the presence of a delta and other natural condition, the coastlines is highly unstable.²²⁵

²²¹ *Ibid* at 129.

²²² [1951] *ICJ Rep.* 116 at 133

²²³ Art. 4 Territorial Sea Convention.

²²⁴ *Supra* note 217.

²²⁵ See Vidas D. and Ostreng W. (eds.), in *supra* note 206 pp 445-56 for how the straight baseline system has been implemented.

Bay or river closing lines are straight lines drawn between the respective low-water marks of the natural entrance points of bays or rivers.²²⁶ A bay is defined as a well-marked indentation whose penetration is in such proportion to its width to contain land-locked waters and constitute more than a mere curvature of the coast.²²⁷ For an indentation to be regarded as a bay, its area must be at least that of the semi-circle whose diameter is a line drawn across the mouth of that indentation. Once a bay is established to exist, a closing line can be drawn across it. If the length of the line between the natural entrance points is less than 24 nm, this line is the closing line and hence the baseline. If the line is more than 24 nm, a straight line is drawn within the bay in such a manner as to enclose the greatest amount of water possible. Waters on the landward side of the baseline are internal waters for the purposes of international law.

Historic bays are exempted from the foregoing requirements. A state may validly claim title to a bay on historic grounds if it can show that it has for a considerable period of time claimed the bay as internal waters and has effectively, openly and continuously exercised its authority therein, and that during this time the claim has received acquiescence of other states.²²⁸ A closing line may be drawn across a historic bay which will then form the baseline and there appears to be no limitation as to the maximum length of such lines.

²²⁶ Art. 9-10 LOSC

²²⁷ Art. 10 (2) LOSC

²²⁸ Churchill R. R. and Lowe A. V. in *supra* note 4 pp. 43-5.

Historic bay claims have not always been straightforward as such and in most instances where such claims are laid they have been the subject of dispute between the claimant coastal State and States who do not acquiesce to the claim. Both Japan and Colombia had at UNCLOS I and III respectively proposed draft articles to address the status of historic bays.²²⁹ UNCLOS I adopted a resolution to have the UN undertake a study on the juridical regime of historic waters including historic bays.²³⁰ The study was published by the UN Secretariat in 1962 but it did not yield to any legislative action by the international community.²³¹

The position with regard to historic bay claims therefore by and large remains subject to customary international law. In the *Tunisia Libya Continental Shelf* case²³² the International Court stated that ‘general international law ... does not provide for a *single* “regime” for “historic waters” or “historic bays” but only for a particular regime for each of the concrete, recognized cases of “historic waters” or “historic bays”’.²³³ The implication therefore is that in one instance only exclusive ‘historic’ fishing rights might exist while in another a coastal State may enjoy full sovereignty. This approach was endorsed by the court in the subsequent *Land, Island and Maritime Frontier* case.²³⁴

The general criteria for the establishment of a historic title to a bay stated above were addressed by the 1962 UN Secretariat study. Many recently independent developing

²²⁹ UNCLOS I Official Records, Vol. III p. 241 and UNCLOS III Official Records Vol. V p. 202 respectively.

²³⁰ UNCLOS I Official Records Vol. II p. 145.

²³¹ UN Secretariat, Juridical Regime of Historic Waters Including Historic Bays, ILC Yearbook, 1962, Vol. 2 p. 1-26.

²³² [1982] ICJ Rep. 18 43, 185, 187, 188, 189, 190

²³³ *Ibid* at 74.

²³⁴ [1992] ICJ Rep. 351 42, 43, 44, 46

countries however find these criteria objectionable for the reason that it is impossible for such States to establish uninterrupted exercise of authority. These developing States having been established not more than a century ago after being granted independence by their colonizers have not exercised uninterrupted control as there was break of control during the transition from colonialism to the establishment of the independent States. While some developing countries such as Sri Lanka have opted to cite the practice of the colonial and pre-colonial period,²³⁵ others have argued for a theory of 'vital bays' under which vital security or economic interests would justify title to a bay independently of any historic title.²³⁶ This theory has naturally been rejected by the traditional maritime States for the ease with which it would allow coastal States to claim large ocean spaces as internal waters at the expense of the international community.

Currently, some twenty coastal States claim historic bays.²³⁷ The most controversial of these claims is that of Libya to the Gulf of Sidra (Sirte) as a historic bay. Libya claimed this bay in 1973 and drew a 296 nm closing line across it provoking protests from several States including Australia, France, Norway, the UK, USA and the then Union of Soviet Republic of Russia (USSR). USA was more pronounced in her protest and passed a naval squadron through the Gulf in addition to sending a protest note to demonstrate her

²³⁵ *Supra* note 224. Sri Lanka's claim to Palk Bay as historic waters is based not only on acts of the British, Dutch and Portuguese colonial administrations but also on authority exercised by the pre-colonial kings of Ceylon.

²³⁶ *Ibid.*

²³⁷ See Roach J. A and Smith R. W., *United States Responses to Excessive Maritime Claims* (2nd edn. 1996, The Hague, Nijhoff) pp. 33-4 for a list of claimed historic bays. Examples include Russia to Peter the Great Bay (objected to by several States including USA and UK); Canada to Hudson Bay (objected to by USA); Thailand to the inner part of the Gulf of Thailand; and Vietnam to parts of the Gulfs of Thailand and Tonkin (objected to by several States including France, Thailand, China and USA).

naval strength. In 1981 and 1986, the USA engaged in further actions to assert that the Gulf remains high seas, notably, the shooting down of two Libyan aircrafts.²³⁸

The quagmire surrounding historic bay claims is most pronounced when it comes to bays bordered by more than one States. In *El Salvador v. Nicaragua*²³⁹ the now defunct Central American Court of Justice held that the Gulf of Fonseca bordered by Nicaragua, El Salvador and Honduras was a historic bay co-owned by the three riparian States save for the innermost 3 miles which was the property of each State. The International Court reached a similar conclusion as to the Gulf's status some seventy-five years later in the *Land, Island and Maritime Frontier* case.²⁴⁰ It is therefore not totally impossible for a multi-State bay to be claimed as a historic bay.²⁴¹

Under the LOSC regime, the outermost permanent **harbour works** which form an integral part of the harbour system are regarded as forming part of the coast.²⁴² Off-shore installations and artificial islands are however not considered to be permanent harbour works. **Roadsteads** which are normally used for the loading, unloading and anchoring of ships are considered part of territorial sea regardless of whether they wholly or partly extend beyond the 12 nm limit.

²³⁸ *Ibid.* Italy's claim to the Gulf of Taranto on the same grounds has elicited similar reactions.

²³⁹ (1917) 11 AJIL 674 (1917) 46

²⁴⁰ *Supra* note 234. Justice Oda in his dissenting opinion asserted that it was impossible for a multi-State bay to constitute a historic bay.

²⁴¹ Cf. the agreement between Mozambique and Tanzania under which a closing line is drawn across Ruvuma Bay, which does not appear to have been claimed as a historic bay, with the Bay then being divided between the two States as internal waters. Churchill R. R and Lowe A. V. in *supra* note 4 p. 46.

²⁴² Art. 11 C

LOSC allows for combination of methods for determining baselines.²⁴³ Where the coast of a coastal State is not uniform, the coastal State may determine the baseline in turn by any of the methods provided for under LOSC. In practice, there is not a single coastline that is uniform all through and coastal States therefore almost invariably use a combination of the prescribed methods to determine their baselines. However, in choosing to adopt one mode of delimitation over the others, the coastal State has to remain within the ambit of international law. Whatever the baseline adopted, LOSC requires that the coastal State publish the same in charts or lists of geographic coordinates and give due publicity to the same and deposit a copy with the UN Secretary-General.²⁴⁴

3.2.2 Territorial Sea

The consequences of failure to lay claim over territorial sea were first brought to the fore by the nineteenth century decision of the English Court for Crown Cases Reserved in the *Franconia* case.²⁴⁵ In this case, a German ship, *Franconia*, collided with a British ship, *Strathclyde*, two and a half miles off Dover beach on the British coast causing the death of thirty-eight of the *Strathclyde*'s passengers. Keyn, the commander of the *Franconia* was indicted for manslaughter and convicted by an English court. He appealed against his conviction on the grounds that the court lacked jurisdiction to try him as he was a foreigner and at the material time sailing a foreign ship on the high seas. The Crown contended that since the collision occurred within three miles of Britain's shores, it was within British jurisdiction. The Court for Crown Cases Reserved by a majority of seven

²⁴³ Art. 14 LOSC

²⁴⁴ Art.16 LOSC.

²⁴⁵ *R v. Keyn* (1876) 2 Ex. D. 63 73, 75.

to six allowed the appeal, the court's reasoning being that even though Britain might be entitled to claim a territorial sea, it had not expressly done so, and until the British Parliament made such a claim by legislation the English courts could not hold that British jurisdiction extended to foreigners and foreign ships beyond British shores.

Although a proposal by the Territorial Waters Committee of the 1930 Hague Conference to include a provision for territorial sea over which a coastal state could exercise sovereignty subject to conditions prescribed in the Convention therein and the other rules of international law²⁴⁶ was not adopted owing to failure to agree on the breadth of the territorial sea, the proposal became the basis of the juridical status of the territorial sea. The Territorial Sea Convention adopted by the 1958 Geneva Conference eventually codified this proposal into international law.²⁴⁷

The question of the breadth of the territorial sea remained outstanding for a long time. The 1930 Hague and the 1958 Geneva Conventions had both attempted to reach agreement on the width of the territorial sea without success. Coastal States continued to claim territorial seas of varied breadths with some claiming 3 nm while others claimed up to 200 nm. UNCLOS II almost provided a limit as to the extent of territorial sea with a proposal for a 6 nm limit failing to be adopted by only one vote.²⁴⁸ It was UNCLOS III

²⁴⁶ League of Nations Doc. C. 351(b). 1930. v, p. 212. See also Rosenne S. League of Nations Conference for the Codification of International Law 1930 (1975) (Oceana Dobbs Ferry, N.Y.) p. 1414.

²⁴⁷ Art. 1 Territorial Sea Convention.

²⁴⁸ Churchill R. R. and Lowe A. V. in *supra* note 4 p. 79.

that finally put a limit to the extent of territorial sea claims and coastal States were henceforth allowed to claim a territorial sea of up to 12 nm.²⁴⁹

Under LOSC, territorial sea is therefore a belt of water not exceeding 12 nm in width measured from the territorial sea baseline. LOSC appears to have validated an earlier assertion by Judge McNair in the *Anglo-Norwegian Fisheries* case²⁵⁰ that territorial sea is appurtenant to coastal States. In his dissenting opinion, the judge 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. The possession of this territory is not optional, not dependent upon the will of the State, but compulsory.*²⁵¹

A coastal States sovereignty therefore extends to the territorial sea, its seabed and subsoil, and to the air space above it without invoking the willingness of the coastal State to assume jurisdiction.²⁵² This sovereignty is exercised in accordance with international law as stated in LOSC and involves inherent rights as well as duties. As Judge Fitzmaurice stated in the *Fisheries Jurisdiction* case:

The territorial sea involves responsibilities as well as rights ... for example policing and maintaining order; buoying and marking channels and reefs,

²⁴⁹ Art. 3 LOSC.

²⁵⁰ *Supra* note 200.

²⁵¹ *Ibid* at 160.

²⁵² Art. 2 LOSC.

*sandbanks and other obstacles; keeping navigable channels clear and giving notice of danger of navigation; providing rescue services, lighthouses, lightships, bell-buoys etc.*²⁵³

Where two coastal States are opposite or adjacent to each other, unless the States agree otherwise, the boundary of the territorial sea is taken to be the median line equidistant from the nearest points on the baselines from which the breadth of the territorial sea of each of the two States is measured.²⁵⁴ An exception is made for situations where it is necessary by reason of historic title or other special circumstances to delimit the territorial seas of the two States in a different manner.²⁵⁵

The practice in delimiting territorial seas between opposite coastal States has normally been to agree upon the median line, equidistant from the nearest points of the opposite States' shores as the boundary.²⁵⁶ State practice has however been at variance when delimiting the territorial seas of adjacent States.²⁵⁷ Expediency has in certain

²⁵³ [1973] *ICJ Rep.* 3, [1974] *ICJ Rep.* 3 80, 284, 285, 294, 452

²⁵⁴ Art. 15 LOSC. See also Brown E. D., "Sea-bed Energy and Minerals: The International Legal Regime" *The Continental Shelf* VOL 1, (1992) (Martinus Nijhoff Publishers, London) pp. 14 -6

²⁵⁵ In the 1974 Agreement between Sri Lanka and India on the Boundary in Historic Waters, for instance, a modified median line was adopted to take into account historical factors. See United Nations, *The Law of the Sea: Maritime Boundary Agreements (1970-84)* (1987) (New York, United Nations).

²⁵⁶ See for example the 1932 Danish-Swedish Declaration concerning the Sound and the 1928 Agreement between Britain and the Sultan of Johore, the (UK) Straits Settlement and Johore Territorial Waters (Agreement) Act, 1928.

²⁵⁷ See Yacouba C. and McRae D. "The legal Regime of Maritime Boundary Agreements" in Colson D. A. and Robert W. Smith (eds.) *International Maritime Boundaries* VOL V. (2005) (Martinus Nijhoff Publishers) pp 3281-3304 and also Lathrop C. G. "Tripoint issues in maritime Boundary Delimitation" in in Colson D. A. and Robert W. Smith (eds.) *International Maritime Boundaries* VOL V. (2005) (Martinus Nijhoff Publishers) pp 3305-3375. Some, such as the 1976 Colombia-Panama delimitation, have adopted the equidistance principle; others, such as the 1958 Poland-USSR delimitation, have adopted the perpendicular line drawn to the general direction of the coast favoured by the Permanent Court of Arbitration in the *Grisbådarna* case (1909) XI *RIAA* 147 81, 182 which had been made relevant by a 1661 treaty concerning the Norwegian-Swedish boundary. Others, such as the 1975 Ecuador and Colombia delimitation agreement, follow the line of latitude passing through the point where the land boundary meets

circumstances demanded a departure from the conventional practice outlined by LOSC to allow setting of boundaries by making reference to geographical co-ordinates to ensure certainty and simplicity.²⁵⁸ In the *Guinea-Guinea-Bissau* case,²⁵⁹ the arbitration tribunal held that all delimitations had to be benchmarked against the goal of producing an equitable solution in the circumstances of each case.

The major limitation on coastal States' exercise of sovereignty in the territorial sea has been the right of innocent passage for foreign ships.²⁶⁰

3.2.3 Contiguous Zone

During the mid-nineteenth century when the concept of three-mile limit territorial sea coupled with the exclusivity of flag State jurisdiction on the high seas beyond the territorial sea gained prominence, it was impermissible to seize foreign vessels which committed violation of domestic laws beyond the territorial seas.²⁶¹ There were some exceptions allowing the exercise of jurisdiction against foreign ships at greater distances

the sea.

²⁵⁸ See Charney J. I. and Alexander L. M., (eds.) *Maritime Boundaries* VOL. I and II, (1991); VOL. III, (1997) (Martinus Nijhoff Publishers).

²⁵⁹ (1985) 25 *ILM* 251 (1986) 183, 185, 192, 194.

²⁶⁰ Art. 14-21 LOSC. Passage means navigation through the territorial sea for the purpose of:

(a) traversing that sea without entering internal waters or calling at a roadstead or port facility outside internal waters; or

(b) proceeding to or from internal waters or a call at such roadstead or port facility

It should be continuous and expeditious. The definition is however wide enough to include stopping and anchoring, but only in so far as the same are incidental to ordinary navigation or are rendered necessary by force majeure or distress or for the purpose of rendering assistance to persons, ships or aircraft in danger or distress. "Innocent" means that the passage is not prejudicial to the peace, good order or security of the coastal State.

²⁶¹ Churchill R. R. and Lowe A. V. in *supra* note 4 pp. 132-9. Cf. the Hovering Acts of Britain. The application of these Acts was discontinued after British Law Officers advised that the seizure of the French ship the *Petit Jules* FOCP 2633, No. 39 132 twenty-three miles off the Isle of Wight in 1850 was not permissible under international law. The one member crew who had been arrested was released.

from the shore.²⁶² First, there was the doctrine of constructive presence according to which where a ship beyond the territorial sea dispatched its boats to within the limit, no distinction would be made between the ship and its boats and the ship was liable to seizure for violation of domestic laws.²⁶³ This doctrine was modified to exclude application where the ship communicated with the shore, not by means of its own boats but by means of boats sent out from the shore.²⁶⁴

The second exception was the doctrine of hot pursuit in which a ship found within the territorial sea of a State and there was good cause to believe that it had violated domestic laws could be pursued and arrested in the high seas. This doctrine was ultimately adopted and incorporated into LOSC.²⁶⁵

There were other States that did not lay claim on territorial seas as zones of unified jurisdiction but as a variety of jurisdictional zones.²⁶⁶ Yet another group of mainly Latin America States claimed territorial seas and a further zone beyond the territorial seas in

²⁶² *Ibid* at pp. 132-3.

²⁶³ Lowe A. V. "The Development of the Concept of the Contiguous Zone" 52 *BYIL* 109-69 (1981).

²⁶⁴ See diplomatic exchanges concerning the seizure of the *Henry L. Marshall* (1922) 292 Fed. 286 133 for violation of the American liquor laws and the Italian case of the *Sito* (1957) 89 *Journal de droit international* 229 (1962) 113 133. This rejection of extensive constructive presence and adoption of simple constructive presence impedes action against drug traffickers and consequently some States have begun to adopt a more liberal approach. See for example *R v. Sunila and Solayman* (Canada, 1986) 28 DLR (4th) 450 133, 216; W. C. Gilmore, 'Hot pursuit and constructive presence in Canadian law enforcement', 12 *Marine Policy* 105-11 (1988). Cf. *Re Pulos & Others* (Italy) Tribunal of Naples, 17 December 1976, 77 *ILR* 587 133; *R v. Mills* (UK) Unreported, 1995, Croydon Crown Court, Devonshire J 133, 215, 216 noted by W. C. Gilmore, 'Hot Pursuit: The Case of *R v. Mills and Others*', 44 *ICLQ* 949-58 (1995).

²⁶⁵ Art. 111 LOSC.

²⁶⁶ Churchill R. R. and Lowe A. V. in *supra* note 4 p. 133. France for example maintained a 3 mile zone for fishery and general policing purposes coupled with a 6 mile neutrality zone and 20 km customs zone. Belgium, Italy, Greece, Spain, Cuba and Turkey adopted similar positions.

which the States were to enjoy right of policing for customs and security purposes only.²⁶⁷

The idea of using a contiguous zone, distinct, contiguous to and seaward of the territorial sea in which States would have limited powers for the enforcement of customs, fiscal, sanitary and immigration laws was adopted as a basis for compromise between the divergent State practices. This concept was adopted by the 1958 Geneva Convention and reiterated with modification in LOSC.²⁶⁸ Under the LOSC regime, contiguous zone is a belt of water contiguous to the territorial sea, the outer limit of which does not exceed 24 nm from the territorial sea baseline. In this zone, a coastal State may exercise control necessary to prevent and punish infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea. LOSC however does not contain provisions on the delimitation of the contiguous zone between opposite and adjacent States.²⁶⁹

²⁶⁷ *Ibid.* The Chilean Civil Code of 1855 had such provisions and so did the laws of Argentina, Ecuador, Honduras and Mexico. Outside Latin America, Egypt, Latvia and Norway followed this practice. The most notorious claims were those advanced by the United States in its Tariff Act of 1922 under which foreign vessels within 12 miles of the US coast were subject to US laws on prohibition of alcohol which had been introduced by the Volstead Act of 1919.

²⁶⁸ Art. 24 Territorial Sea Convention and Art. 33 (1) LOSC. Under Territorial Sea Convention, the contiguous zone could not exceed 12 nm from the baseline or, unless there was agreement to the contrary between the States concerned, farther than the median line equidistant from the points on the baselines where two States lay opposite or adjacent to each other. LOSC extended the limit to 24 nm since the territorial sea limit was fixed at 12 nm.

²⁶⁹ See Churchill R. R. and Lowe A. V. in *supra* note 4 p. 136 for some of the reasons advanced for this omission. These reasons include *inter alia* that the contiguous zone is subsumed in the EEZ and therefore such provisions would be superfluous; the contiguous zone is not an area of exclusive jurisdiction and there is therefore no harm in contiguous zones overlapping; and that (as is the case with the Yugoslavia's declaration made while ratifying LOSC) the delimitation of the contiguous zone should be governed by principles of customary international law codified in Art. 24 (3) of Territorial Sea Convention.

3.2.4 EEZ and Fishing Zones

As was discussed in Chapter one, the EEZ concept is of fairly recent origin. It was first put forward by Kenya to the Asian-Africa Legal Consultative Committee in January 1971 and to the United Nations' Sea Bed Committee the following year and received active support from many Asian and African States.²⁷⁰ At about the same time the Latin America States evolved a similar concept of the patrimonial sea.²⁷¹ By the time UNCLOS III began, the two concepts had effectively merged and found favour among most developing States as well as a section of developed coastal States such as Canada and Norway.²⁷²

The EEZ concept gained rapid acceptance and negotiations in UNCLOS III were limited to points of details and eventually led to inclusion of the concept in LOSC.²⁷³ Although LOSC does not make it mandatory for coastal States to claim EEZs, the provisions contained therein are of great significance given the wealth of marine resources situated within the EEZs.²⁷⁴

²⁷⁰ See the Conclusions in the General Report of the African States Regional Seminar on the Law of the Sea held in Yaoundé, June 1972. *UN Leg. Ser. B/16*, p. 601; *ND 1* p. 250.

²⁷¹ Declaration of Santa Domingo, June 1972. *UN Leg. Ser. B/16*, p. 599; *ND 1*, p. 247. This declaration was a culmination of earlier Latin America proclamations in particular the Montevideo Declaration on the Law of the Sea, 1970 and the Lima Declaration on the Law of the Sea, 1970. *UN Leg. Ser. B/16*, pp. 586 and 587; *ND 1* pp. 235 and 237.

²⁷² But see G. Pontecorvo (ed.) *The New Order of the Ocean* (1986) (Columbia University Press, New York NY), chapters 6 and 7 for differences between the two concepts.

²⁷³ Part V, LOSC. The EEZ was seen first as a reflection of the aspirations of the developing countries for economic development and their desire to gain greater control of the economic activities off their coasts, particularly fish stocks which were being exploited by the distant-water fleets of developed States. Others saw it as a somewhat compromise between those States which claimed extensive territorial sea of up to 200 nm and those States which did not approve of such claims. Churchill, R.R. and Lowe, A.V., in *supra* note 4 pp. 160-1. See also Oda S., in *supra* note 52 pp xiii-xx.

²⁷⁴ EEZs form about 30% of the total area of the sea. This area contains over 90% of commercially exploitable fish stocks, about 87% the world's known submarine oil deposits and about 10% of manganese nodules. A lot of marine scientific research takes place within EEZs and virtually all major shipping routes of the world pass through the EEZs of States other than those in which the ports of departure and destination are situated. Churchill R. R. and Lowe A. V. in *supra* note 4 p. 162. See also Eckert R. D., *The*

The EEZ is therefore an area beyond and adjacent to the territorial sea.²⁷⁵ Under LOSC, the outer limit of the exclusive economic zone cannot exceed 200 nm from the baseline from which the breadth of the territorial sea is measured.²⁷⁶ In the EEZ, coastal States have sovereign rights for the purpose of exploring and exploiting, conserving and managing all natural resources of the waters superjacent to the seabed and of the seabed and its subsoil together with other activities such as the production of energy from water, currents and wind.²⁷⁷ Jurisdiction also extends to the establishment and use of artificial islands, installations and structures, marine scientific research, the protection and preservation of the marine environment, and other rights and duties.²⁷⁸

Often, coastal States are unable to claim a full 200 nm EEZ because of the presence of neighbouring States making it necessary to delimit the EEZs of opposite and adjacent coastal States. A number of cases with a bearing on the delimitation of EEZs have been adjudicated over by the International Court of Justice. Most of these cases were decided after the signing of LOSC but before its entry into force. So far, only one case has been concerned purely with an EEZ/fishing zone boundary *simpliciter*.²⁷⁹ The others are

Enclosure of Ocean Resources: Economics and the Law of the Sea, Hoover Institution Press (Stanford, California, 1978) pp. 42-7 and Juda L. in *supra* n. 239.

²⁷⁵ Art. 55, LOSC.

²⁷⁶ Art. 57, LOSC. When the territorial sea is factored in, the actual limit of the EEZ is 188 nm. From the wording of the provision, it is possible for a state to claim an EEZ of a lesser extent. 200 nm was settled on as the limit since the most extensive zones claimed were 200 nm claims by Latin American and African States. Hollick A. L., "The Origins of 200 Miles Offshore Zones" 71 *AJIL* 494-500 (1970).

²⁷⁷ Art. 56, LOSC.

²⁷⁸ *Ibid.* See also Kenchington R. A. in *supra* note 2 p. 22. Kenchington argues that a coastal State which does not wish to appropriate the entire 200 nm EEZ can declare an Exclusive Fishing Zone within which it asserts its right to harvest the maximum sustainable yield of the living natural resources and its responsibility for managing them.

²⁷⁹ Although LOSC does not mention a fishing zone, customary international law and case law has adopted this term and it is often used interchangeably with EEZ.

concerned with the delimitation of a single maritime boundary between both the continental shelves and the EEZ/fishing zones of the States concerned.

The *Gulf of Maine* case²⁸⁰ involved drawing of a single boundary between the continental shelves and the fishing zones of Canada and the USA. The Court enunciated a two-stage fundamental norm of maritime delimitation:

- 1) *No maritime delimitation between States with opposite or adjacent coasts may be effected unilaterally by one of those States. Such delimitation must be sought and effected by means of an agreement, following negotiations conducted in good faith and with the genuine intention of achieving a positive result. Where, however, such agreement cannot be achieved, delimitation should be effected by recourse to a third party possessing the necessary competence.*
- 2) *In either case, 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.*²⁸¹

²⁸⁰ [1984] ICJ Rep. 246 185, 192-5, 196

²⁸¹ *Ibid* pp. 229-300. Although both parties were parties to the Continental Shelf Convention, the Court held that this was not necessary to the drawing of a single boundary since the Convention related only to the sea bed and was not concerned with the superjacent waters.

The Court then decided that the most suitable criteria and methods of delimitation were those that were appropriate to both the sea bed and water column. This approach was followed in the *Guinea/Guinea Bissau*²⁸² and *Canada/France*²⁸³ cases.

In the *Greenland/Jan Mayen (Denmark v. Norway)* case²⁸⁴, the Court rather than draw a single boundary engaged in two separate delimitation exercises for the continental shelf and fishing zones of Greenland and Jan Mayen although the resultant boundaries inevitably overlapped. The Court decided to apply customary law governing EEZ delimitation in determining the fishing zone boundary.²⁸⁵ The Court went ahead to draw a median line as the provisional boundary and then adjust it in the light of any relevant circumstances in order to achieve an equitable result.

From the foregoing, it is apparent that customary international law allows coastal States with overlapping EEZs to agree on any boundary. Failing agreement, there is recourse to a third party arbitration and the boundary should be drawn applying, as far as is practicable, equitable criteria and taking into account all the relevant circumstances in order to achieve an equitable result.²⁸⁶ A coastal State which does not wish to appropriate the entire 200 nm EEZ can declare an Exclusive Fishing Zone within which it asserts its

²⁸² *Supra* note 259.

²⁸³ 31 *ILM* 1145 (1992) 161, 185, 190, 192, 194, 195

²⁸⁴ [1993] *ICJ Rep.* 38 148, 185, 186, 187, 188, 189, 190, 192, 194-5

²⁸⁵ The Court asserted that this customary law was the same as the LOSC provisions governing EEZ delimitation and are also the same governing continental shelf delimitation *mutatis mutandis*. Arts 74 (1) and 83 (1) LOSC respectively.

²⁸⁶ Cf. Art. 74 (1) LOSC. Recent trends and decisions from the UN Arbitral Tribunal have further augmented this approach. See Colson D. and Smith R. (eds.) "International Maritime Boundaries" VOL V (2005) (Martinus Nijhoff Publishers) pp. 3549-4056; *Eritrea vs. Yemen* (1996); *Barbados vs. The Republic of Trinidad and Tobago* (2006); and *Guyana vs. Suriname* (2007). Available at www.pca-cpa.org Accessed on 20/01/2008.

right to harvest the maximum sustainable yield of the living natural resources and its responsibility for managing them.²⁸⁷

3.2.5 The Regime of the Continental Shelf

Continental shelf claims replaced the once prevalent grandiose claims over the high seas that had characterized the early nineteenth century as claims to jurisdiction extending beyond the modest belt of the territorial seas.²⁸⁸ During the rudimentary stages of the development of the concept of the continental shelf, the question of the seaward limit was of little significance.

This question however gained prominence during the negotiations that culminated in UNCLOS I. A number of States felt that the proposed legal definition of continental shelf as including all the sea bed contiguous to the coast where the depth of the superjacent waters admitted exploitation of the sea bed and the subsoil was inappropriate since exploitability was too vague a criterion prone to international disputes.²⁸⁹ A 200-metre isobath limit was acceded to as a practical limit fit to satisfy national interests. This was however modified to accommodate the exploitability criterion in light especially of the resolutions of the Inter-American Specialized Conference on Conservation of Natural Resources held in 1956 at Trujillo.²⁹⁰

²⁸⁷ Kenchington R. A. in *supra* note 2 p. 22.

²⁸⁸ Oda S., in *supra* note 52 p 167. Also Churchill R. R. and Lowe A. V. in *supra* note 4 p. 146.

²⁸⁹ *Ibid.*

²⁹⁰ This ensured that in circumstances where exploitation was possible at depths greater than 200 metres, the coastal State would retain its exclusive rights. See Art. I of the 1958 Continental Shelf Convention.

Despite the coming into force of the 1958 Convention on Continental Shelf, difficulties in defining continental shelf persisted. The “exploitability” test adopted made the seaward limit of continental shelves uncertain and at any rate imprecise. As technology advanced thereby enabling coastal States to venture deeper into ocean floor, the limit of the continental shelf would have been pushed further in tandem with the technological advancement. There was also the use of the term “adjacent” without giving it a sufficient definition. These imprecisions meant that a new definition had to be coached and a definite outer limit fixed and UNCLOS III was the right forum to address these issues.

At UNCLOS III, coastal States begrudgingly adopted the “Irish formula”²⁹¹ as the legal definition of continental shelf which is quite different from the geographical definition.²⁹² Under this formula, the continental shelf is defined as consisting of the area called the continental margin, that is to say, the shelf, slope and rise but excluding the deep oceanic floor and its oceanic ridges.²⁹³ The outer limit of the continental shelf is taken to be either a line connecting points not more than sixty miles apart, at each of which points the thickness of sedimentary rocks is at least one per cent of the shortest distances from such points to the foot of the continental slope, or a line connecting points not more than sixty miles apart, which points are not more than sixty miles from the foot of the slope. In each case the points referred to are subject to a maximum seaward limit, that is, they must be either within 350 nm of the baseline or 100 nm of the 2, 500 - metre isobath.²⁹⁴

²⁹¹ See Jagota S. P. Maritime Boundary (Martinus Nijhoff 1985). The “Irish Formula” was first circulated in UNCLOS III.

²⁹² Cf. the analysis of the Irish continental shelf claim in Symmons C. R., Ireland and the Law of the Sea in Treves T. and Pineschi L. (eds), *The Law of the Sea: The European Union and its Member States* (1997) (The Hague, Kluwer), 262 at 286-91.

²⁹³ Art. 76 (3) LOSC.

²⁹⁴ Art. 76 (4), (5) LOSC.

Consequently, under LOSC a coastal State is entitled to a continental shelf of the sea bed reaching 200 nm from the baseline and subject to the Irish formula to a further area of the continental margin known as the outer continental shelf.

A coastal State has sovereign rights over the continental shelf for the purposes of exploring and exploiting the mineral and other non-living resources of the seabed and subsoil, together with sedentary organisms. These rights do not depend on occupation, effective or notional, or on any express proclamation.²⁹⁵

The customary international law applicable to the delimitation of continental shelves between opposite or adjacent coastal States was succinctly stated by the International Court in the *North Sea Continental Shelf* cases.²⁹⁶ The court stated *inter alia*:

*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 constitutes a natural prolongation of its land territory into and under the sea, without encroachment on the natural prolongation of the land territory of the other.*²⁹⁷

In the subsequent *Tunisia/Libya* case,²⁹⁸ the Court stressed that the goal of this delimitation process is an equitable result. Thus, in the *Anglo-French Continental Shelf*

²⁹⁵ Art. 77 LOSC.

²⁹⁶ [1969] *ICJ Rep.* 1 7, 144, 147, 184-6, 187, 188, 190, 191, 285, 294, 449, 452.

²⁹⁷ *Ibid* at 54.

²⁹⁸ *Supra* note 232.

case in 1977 dealing with delimitation of the Western Approaches between France and Britain the arbitral tribunal stated that the equidistance-special circumstances rule 'in effect 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'.²⁹⁹ The International Court in the *Greenland/Jan Mayen* case equated this principle to the provisions of the 1958 Continental Shelf Convention.³⁰⁰ The court stated:

*If the equidistance-special circumstances rule of the 1958 Convention is, in the light of this 1977 Decision, to be regarded as expressing a general norm based on equitable principles, it must be difficult to find any material difference - at any rate in regard to delimitation between opposite coasts - between the effect of Article 6 and the effect of the customary rule which also requires a delimitation based on equitable principles.*³⁰¹

In delimitations between opposite States, the practice has been to start by drawing an equidistance line as a provisional boundary and then considering whether it requires modification in the light of the relevant circumstances in order to achieve an equitable solution.³⁰² A line that encroaches on or cuts off areas that more naturally belong to one party than the other will normally not be picked as a boundary.³⁰³ The presence of continental shelves claimed by other States will also have to be taken into account.³⁰⁴

²⁹⁹ (1977) Cmnd. 7438; 18 *ILM* 397 (1979) 57, 185, 186-7, 188, 189, 451

³⁰⁰ Art. 6, Continental Shelf Convention.

³⁰¹ *Supra* note 284 at 58.

³⁰² This was done, for example, in the *Libya/Malta* [1985] *ICJ Rep.* 13 145, 148, 161, 185, 187, 188, 189, 190, 194 and *Greenland/Jan Mayen* (*supra* note 284) cases.

³⁰³ See for instance the *North Sea Continental Shelf* (*supra* note 296) and *Tunisia/Libya* (*supra* note 232) cases.

³⁰⁴ This happened in the *Libya/Malta* case (*supra* n. 302). The courts and tribunals have emphasized that in carrying out boundary delimitations, they are not engaged in an exercise in distributive justice and dividing

In the *North Sea Continental Shelf* cases, great emphasis was placed on the concept of natural prolongation of land territory as a major factor in delimitation of continental shelf boundaries.³⁰⁵ It would therefore follow that geographical and geomorphological features such as deep trenches amounting to a discontinuity in the sea bed would constitute relevant circumstances. However, later decisions seem to have departed from such emphasis and instead based title to continental shelf on a distance criterion.³⁰⁶

3.3 A Review Of The Current Legislative Framework For Delimitation Of Kenya's Maritime Zones

As was noted in the foregoing chapters, Kenya's style of legislation is utilitarian rather than proactive. Legislation is done in an *ad hoc* basis as and when a near crisis situation arises to resolve the particular situation without much foresight. The legislative framework for delimitation of maritime zones has not been spared from these vagaries of lack of foresight and it has only been necessary to pass legislations when situations which require such a legislative action arise notwithstanding that the country has ratified LOSC.³⁰⁷ In the following paragraphs, we consider the attempts at establishing a

the delimitation area into just and equitable shares. See for example the *Greenland/Jan Mayen* case (*supra* note 284)

³⁰⁵ *Ibid* at 51 and 53.

³⁰⁶ In the *Libya/Malta* case (*supra* note 302), the International Court concluded that, in order to give effect to the now incontestable 200nm EEZ entitlement, the breadth of the continental shelf must be at least 200 nm. Cf. the *Canada/France* case³¹ ILM 1145 (1992) at 1172 in which the tribunal ruled that it had no competence to delimit the continental shelf beyond 200 nm owing to the interests of the international community, particularly the International Sea Bed Authority and the Commission on the Limits of the Continental Shelf in the issue of the seaward limit beyond 200 nm.

³⁰⁷ See Okidi C. O. "Legal Aspects of Management of Coastal and Marine Environment in Kenya" in Okidi C. O et al *Environmental Governance in Kenya: Implementing the Framework Law* (East Africa

legislative framework for delimiting Kenya's maritime zones since the country became an independent maritime nation.

3.3.1 The Territorial Waters Act (Repealed)

The enactment of the Territorial Waters Act on 16th May 1972 was the first legislative action taken by Kenya towards delimiting her maritime zones. The Act had four sections only and did no more than lay claim to Kenya's territorial sea in line with the Territorial Sea Convention which Kenya had ratified in 1969. The section on the mode of delimitation provided that:

2. *(1) Except as provided in subsection (4) of this section the breadth of the territorial waters of the Republic of Kenya shall be twelve nautical miles.*
2) The breadth of such territorial sea shall be measured in the manner set out in the Schedule to this Act calculated in accordance with the provisions of the Convention on the Territorial Sea and the Contiguous Zone done at Geneva on 29 April 1958.
(3) For the purposes of article 7 of the aforesaid Convention Ungwana Bay (sometime known as Formosa Bay) shall be deemed to be and always to have been an historic bay.
(4) On the coastline adjacent to neighbouring States the breadth of the territorial sea shall extend to a median line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial waters of each of the respective States is measured.

The Minister responsible for Foreign Affairs could be called upon to resolve a dispute as to whether an act or omission took place within or without Kenya's territorial waters which in effect meant that the Minister had power to unilaterally fix the outer limit of the territorial waters (sea).³⁰⁸

The Act contained a schedule that established the straight baseline system for the delimitation of Kenya's territorial sea. (See Appendix III). It did not however claim a contiguous zone although the Geneva Convention allowed for such a claim. This Act was revised in 1977 and repealed and replaced in 1989 by the Maritime Zones Act.³⁰⁹

3.3.2 The Maritime Zones Act (Cap 371 Laws of Kenya)

The Maritime Zones Act was enacted in 1989 following Kenya's ratification of the LOSC in March of the same year.³¹⁰ The Act became operational in August 1989 and remains in force with regard to delimitation of maritime zones in Kenya. The object of this Act is given in its preamble which introduces the Act as:

An Act of Parliament to consolidate the law relating to the territorial waters and the continental shelf of Kenya; to provide for the establishment and delimitation of the exclusive economic zone of Kenya; to provide for the exploration and

³⁰⁸ Section 3 Territorial Waters Act. Under this section, a certificate by the Minister for Foreign Affairs as to whether an act or omission occurred within or without Kenya's territorial waters was conclusive evidence. The issuance of such certificates was a purely executive act.

³⁰⁹ See Section 13 Maritime Zones Act.

³¹⁰ Although Kenya signed LOSC in December 1982, it was not until March 1989 that she ratified the convention and July 1994 that she became bound by part IX of the Convention. Since Kenya is a dualist State, there was need to take some positive legislative step to domesticate LOSC and give it local application after the ratification was done. "DoD 2005. 1-M" available at http://www.dtic.mil/whs/directives/corres/20051m_062305/Kenya.doc accessed on 24/07/2007.

exploitation and conservation and management of the resources of the maritime zones; and for connected purposes

All other laws relating to maritime zones were either amended or repealed by a provision that 'any reference occurring in any written law to the exclusive economic zone and the territorial waters shall be construed subject to the provisions of this Act'.³¹¹

The Maritime Zones Act reiterates the provisions of LOSC on delimitation of maritime zones in a near verbatim manner but the statute does not provide a suitable institutional framework for implementation of the provisions. The Act retains the provision in the Territorial Waters Act where the Minister (not specified) can be called upon to resolve a dispute as to whether or not an act or omission occurred within or without Kenya's maritime zones yielding a similar effect of empowering the Minister to unilaterally fix the outer limits of the maritime zones.³¹²

The Maritime Zones Act lays claim on the ocean spaces contiguous to the Kenyan coast over which Kenya has jurisdiction and extends the jurisdiction of the Kenyan courts over these areas.³¹³ In delineating these maritime zones, Kenya has adopted the international nautical mile as the measure of distance.³¹⁴ The claims that Kenya has made under the Maritime Zones Act include the following:

(i) Territorial Sea

³¹¹ Section 13 Maritime Zones Act

³¹² Section 10 Maritime Zones Act.

³¹³ Sec. 2 Maritime Zones Act provides that "maritime zones" means the exclusive economic zone together with the territorial waters and the air space above the exclusive economic zone. Section 7 deals with jurisdiction of Kenyan courts over these areas.

³¹⁴ Sec. 2 Maritime Zones Act.

The Act claims a 12 nm territorial sea for Kenya.³¹⁵ The breadth of the territorial waters is to be measured in the manner set out in the First Schedule calculated in accordance with the provisions of LOSC agreed at Montego Bay on 10th December, 1982 except on the coastline adjacent to neighbouring states where the breadth of the territorial waters extends to every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial waters of each of respective states is measured.³¹⁶ The Schedule to the Act then fixes the territorial baseline using straight baselines, low water lines or low tide elevations.

(ii) Archipelagic, straight baselines and historic claims

The Maritime Zones Act retained the straight baseline system and the claim to Ungwana (Formosa) bay as a historic bay. The straight baseline system used and the historic bay claim are not recognized by USA and she conducted operational assertions in 1990 and 1998.³¹⁷ The Minister who for the time being is in charge of maritime zones is empowered by the Act to declare any other bay or waters to be historic bays or waters by way of a notice published in the Kenya Gazette.³¹⁸

The Kenyan coast is not heavily indented as such and USA may be justified in objecting to the straight baseline system. However, determining a baseline using the normal baseline system is not only an expensive and tedious exercise but also inaccurate owing

³¹⁵ Sec 3 Maritime Zones Act.

³¹⁶ *Ibid.*

³¹⁷ See "DoD 2005. 1-M" *supra* note 343

³¹⁸ Sec 3(3) Maritime Zones Act.

to the recently witnessed change in ocean levels occasioned by a consortium of factors amongst them the global warming phenomena.

USA's objection to Kenya's claim of Ungwana bay as a historic bay on the other hand is unfounded. As was shown above, Kenya has always claimed this bay as a historic bay from the time she became recognized as a maritime nation. Authority over Ungwana bay can be traced back to the Portuguese settlement on the adjacent town then called Hoja in the fifteenth century. The control continued through the Omani rule of eighteenth and nineteenth centuries, the British colonization of nineteenth and twentieth centuries up to the modern day independent Kenya. Kenya can therefore be said to have exercised continuous authority over this bay with the acquiescence of other States over a considerable amount of time and therefore has satisfied the criteria of the 1962 UN Secretariat study. Kenya can rely on the activities of the colonizers in demonstrating the continuous control just as Sri Lanka has done to claim Palk bay³¹⁹ to defeat the objections by USA and show the objections are not at all justified. It is worth noting that USA is the only country to have objected to this claim.

(iii) The EEZ/Fishing Zone

The Maritime Zones Act claims as an EEZ of Kenya those areas of the sea, seabed and subsoil that are beyond and adjacent to the territorial waters, having as their limits a line measured seaward from the baselines, low waterlines or low tide elevations described in

³¹⁹ *Supra* note 241 pp. 43-5

the First Schedule to the Act, every point of which is 200 nm from the point on the baselines, low water marks or low tide elevations.³²⁰

The southern boundary of the EEZ with Tanzania that was fixed in 1975 and 1976³²¹ was adopted by the Maritime Zones Act.³²²

The boundary was then taken to be:

(a) On the West: The median line between the Ras Jimbo beacon - Kisite Island/Ras Jimbo - Mwamba-wamba beacon base lines to a point 12 nautical miles from Ras Jimbo up to a point hereinafter referred to as

'A', located at 4° 49' 56" S and 39° 20' 58" E;

(b) On the East: The median line derived by the Intersection of two arcs each being 12 nautical miles drawn from Mpunguti ya Juu lighthouse and Ras Kigomasha lighthouse respectively hereinafter referred to as point

'B', located at 4° 53' 31" S and 39° 28' 40" E and point C, located at 4° 40' 52" S and 39° 36' 18" E;

(c) On the South: An arc with the centre as the Northern Intersection of arcs with radii 6 nautical miles from point 'A' as described in paragraph 2 (a) above and point 'B' which is

³²⁰ Sec 4 Maritime Zones Act.

³²¹ See diplomatic notes dated 17 December 1975 and 9 July 1976 exchanged between the two States. Boundary Report Number 4-5. See also Daniel T. "African Maritime Boundaries" in Colson D. and Smith R. (eds.) *International Maritime Boundaries* VOL V (2005) (Martinus Nijhoff Publishers) pp. 3436.

³²² The two States had agreed that the baseline would be:

- (a) Ras Jimbo beacon-Kisite Island (rock)
- (b) Ras Jimbo-Mwamba-wamba beacon
- (c) Mwamba-wamba beacon-fundo Island beacon (rock)
- (d) Fundo Island beacon (rock)-Ras Kigomasha lighthouse
- (e) Kisite Island (rock)-mpunguti ya Juu-lighthouse.

the Southern Intersection of arcs from Ras Kigomasha lighthouse and Mpunguti ya Juu lighthouse.

(d) The eastward boundary from point C, which is the Northern Intersection of arcs from Ras Kigomasha lighthouse and Mpunguti ya Juu lighthouse as described under paragraph 2 (b) above, shall be the latitude extending eastwards to a point where it intersects the outermost limits of territorial water boundary or areas of national jurisdiction of two States.

(e) The marine charts of 1:250,000 describing the co-ordinates of the above points shall form an intergral part of this agreement.

In the Maritime Zones Act therefore, the EEZ border is taken to be easterly latitude north of Pemba Island obtained by the northern intersection of two arcs one from the Kenya lighthouse at Mpunguti Ya Juu Island, and the other from Pemba Island lighthouse at Ras Kigomasha.³²³

The northern boundary of the EEZ with Somalia was left to be delimited by the Minister by notice in the Gazette pursuant to an agreement between Kenya and Somalia on the basis of international law.³²⁴ So far, no such agreement has been entered into mainly because for a long time Somalia has had no functioning government. Somalia is one of the eight States that have maintained a 200 nm territorial sea claim even after the coming into force of LOSC.³²⁵ This is of concern to Kenya and is a great hindrance to any

³²³ Sec 4 (3) Maritime Zones Act.

³²⁴ Sec 4 (4) Maritime Zones Act.

³²⁵ Somalia's claim was reasserted on 24th July 1989. Nhnyete I. K. "The Challenge of Charting African Maritime Zones" Sea Power for Africa Symposium, Breakwater Lodge, Cape Town South Africa^{28th}

agreement on the EEZ border since what Kenya regards as her EEZ is territorial sea to Somalia.

The Fish Industry Act was also repealed and replaced by the Fisheries Act³²⁶ simultaneously with the enactment of the Maritime Zones Act to align Kenya's fisheries jurisdiction with the newly proclaimed EEZ. Kenya claims the right to regulate passage of warships and military exercises in the EEZ, but does not set forth any regulation for that purpose.³²⁷ The basis of claiming such a right to which USA objects is not clear.³²⁸ LOSC confers such rights to coastal States to regulate passage of warships but only within the territorial sea.³²⁹ In fact, in exempting the application of regulation of passage of ships in international navigation routes that pass through EEZs, LOSC does not distinguish between warships and any other ships.³³⁰ Kenya therefore has no legal basis of extending her sovereign jurisdiction to her EEZ contrary to LOSC. However, military exercises may rightly be viewed to constitute a disturbance to the marine life and therefore well within the ambit of LOSC provisions.³³¹ The Kenyan courts are granted jurisdiction for trying offences and arbitration of disputes arising within the claimed EEZ.³³²

August - 1st September 2005. The others are: Benin, Congo, Liberia, Nicaragua, El Salvador, Ecuador and Peru. See "Decree in the Law of the Sea: National Claims to Maritime Jurisdiction, Excerpts of Legislation and Table of Claims," *United Nations Publication Sale No. E. 91 Vol. 15*, 1992.

³²⁶ Cap 378 Laws of Kenya.

³²⁷ Sec 5-6 Maritime Zones Act.

³²⁸ *Supra* note 344.

³²⁹ Art. 30 LOSC.

³³⁰ Art. 36 LOSC.

³³¹ Art. 56 LOSC.

³³² Sec 7 Maritime Zones Act. There have however been no documented cases of arbitral decisions owing partly to the reason that most of the cases of a criminal nature are tried by the lower courts whose decisions are not reported. This goes to further illustrate that the maritime zones and the management of marine resources of Kenya has been a forgotten province.

(iv) Continental Shelf

The Maritime Zones Act does no more than merely mention the continental shelf in its preamble. It contains no provisions on how to delimit the continental shelf in line with LOSC. The law in force with regard to the continental shelf therefore remains the Continental Shelf Act³³³ which was enacted before LOSC was negotiated and which the Maritime Zones Act does not repeal. Like any other law which predates LOSC, the Continental Shelf Act is dated and needs to be reviewed urgently to bring its provisions in line with the provisions of LOSC.

3.3.3 The Presidential Proclamation of 9th June 2005

One attribute that has often been cited as an inherent weakness in the Constitution of the Republic of Kenya is that aside from declaring Kenya to be a Republic, it falls short of delineating the geographical extent of the Republic.³³⁴ Kenya is a hybrid system of both the Presidential and Parliamentary systems of government.³³⁵ This in essence means that although the Constitution recognizes the supremacy of the legislature in enacting laws, the President as the embodiment of the executive authority of the people of Kenya and as a symbol of Kenya's sovereignty can and does issue directives, orders and proclamations that have the force of law.

³³³ Cap 312 Laws of Kenya.

³³⁴ This issue came up for discussion during the failed attempt to review the Constitution of Kenya. Both the Draft Constitution of Kenya of 2004 (Bomas Draft) and 2005 (Wako Draft) contained a provision that defined Kenya as the territory recognized by the international community as such.

³³⁵ Okoth-Ogendo H.W.O, "Constitutions Without Constitutionalism" in Greenberg D. et al. *Constitutionalism and Democracy in the Contemporary World* (1993) (Oxford) p. 70

It is on the basis of the foregoing that the president of Kenya made a proclamation on 9th June 2005 to replace the earlier proclamation of 1979. This proclamation is meant to lay claim on Kenya's EEZ and provide some certainty as to the limits of its boundaries. The proclamation provides that the EEZ of Kenya shall extend to 200 nautical miles measured from the appropriate baseline from where the territorial sea is measured. It recognizes the freedom of navigation, over flight, laying of sub-marine cables and pipelines and other internationally lawful recognized uses of the sea related to navigation and communication within the EEZ.

The proclamation further provides that the EEZ of Kenya shall:-

- a) In respect of its southern territorial waters boundary with the United Republic of Tanzania be eastern latitude north of Pemba Island to start at a point obtained by the northern intersection of two arcs one from the Kenya Light-house at Ras Kigomasha.
- b) In respect of its northern territorial waters boundary with Somalia Republic be on eastern latitude South of Diua Damascian Island being latitude 1° 39' 34" degrees south.

According to the proclamation, the area of the territorial waters of the Republic of Kenya extends to a point twelve international nautical miles from the straight baseline described as follows:

Diua Damasciaca	1° 39' 34.25344" S	41° 34' 44.19626" E
Kiungamwina Drying	1° 46' 39.55824" S	41° 30' 09.02159" E
Mwamba Haasani	2° 07' 04.15178" S	41° 11' 50.25051" E

Mwamba wa Punju	2° 36' 51.85347" S	40° 37' 01.06070" E
Ras Ngomeni	2° 58' 46.46191" S	40° 14' 24.69583" E
Leopard Reef	3° 16' 18.11141" S	40° 09' 42.26120" E
Jumba la Mtwana	3° 56' 23.60363" S	39° 47' 18.81358" E
Leven Reef	4° 03' 03.42975" S	39° 43' 21.75929" E
Chale Reef	4° 27' 37.64311" S	39° 32' 01.50853" E
Mwamba Kitungamwe	4° 48' 25.43385" S	39° 21' 32.85192" E

The proclamation described the EEZ of Kenya as the following points and 200 nm wide as measured from the baseline:-

Diua Damasciaca	1° 39' 34.253" S	41° 34' 44.196" E
E-Diua Damasciaca	1° 39' 36.000" S	44° 54' 47.520" E
E-Diua Damasciaca	1° 39' 36.000" S	44° 54' 47.520" E
E-A	2° 39' 36.000" S	44° 43' 19.092" E
E-B	3° 39' 36.000" S	44° 15' 13.896" E
E-C	4° 40' 53.004" S	43° 20' 36.204" E
T-C	4° 40' 55.740" S	39° 36' 30.240" E
T-B	4° 40' 52.000" S	39° 36' 18.000" E
T-A	4° 49' 56.000" S	39° 20' 58.000" E
B-MK	4° 49' 51.636" S	39° 20' 59.244" E

This proclamation defines Kenya's baseline with some degree of exactitude and also explicitly maps out the area of Kenya's EEZ. It does not radically depart from the 1979

proclamation save that it is more detailed. The proclamation however goes over and beyond the 1979 proclamation and the Maritime Zones Act in that it seeks to fix Kenya's maritime boundaries with both Tanzania and Somalia with scientific accuracy. The proclamation was made 'notwithstanding any rule of law or any practice which may hitherto have been observed in relation to Kenya or the waters beyond or adjacent to the territorial Sea of Kenya'. It was therefore not meant to replace the Maritime Zones Act nor does it purport to do so. It was made in circumvention of the Maritime Zones Act and both the Act and the proclamation apply equally, one being a legislative enactment which can only be repealed or amended by the legislature, while the other is an exercise of the inherent constitutional power of the president of the Republic of Kenya.³³⁶

The resultant situation is an untidy duplicity where a presidential proclamation seeks to address issues already provided for in a statute. It is not clear how any conflicts between the proclamation and the Act would be resolved were it to arise given the fact that both the president and the legislature exercised constitutional powers in making the proclamation and passing the legislation respectively. This issue should be addressed perhaps by amending the Maritime Zones Act to reflect the new boundaries or enacting a new statute to repeal and replace the current one.

3.3.4 The Continental Shelf Act (Cap 312 Laws of Kenya)

The Continental Shelf Act came into force in April 1975. The Act was enacted to give effect to the 1958 Continental Shelf Convention which Kenya had ratified in June 1969.

³³⁶ Presidential proclamations can be justified on grounds of emergency or where they seek to address issues of a temporal nature. Delimitation of Kenya's maritime boundaries is neither of these two scenarios.

The Act gives the government of Kenya rights in respect of the management and exploitation of natural resources of the continental shelf situated within Kenya's territorial waters.³³⁷ Such rights include the exploitation of living and non-living resources and the conduct of scientific research. The jurisdiction of Kenya's courts is extended to areas within Kenya's continental shelf.³³⁸

This Act however does not contain any provisions on the delimitation of the continental shelf because it was modeled along the 1958 Continental Shelf Convention which applied the 'exploitability' criterion and therefore had no clear rules of delimitation of the continental shelf.³³⁹ The only allusion to delimitation is the provision that:

*If in any proceedings, whether civil or criminal a question arises as to whether an act or omission occurred within or outside the area of the continental shelf, or on, under or above an installation or any waters within five hundred metres of an installation, a certificate to that effect signed by or on behalf of the Minister for the time being responsible for natural resources shall be received in evidence and be deemed to be so signed without further proof, and any such certificate shall constitute prima facie proof of the facts certified therein.*³⁴⁰

It would appear from this provision that the outer limit of the continental shelf remained uncertain until a dispute arose in which case the responsible Minister would fix the boundary without reference to any stipulated rules or procedure.

³³⁷ Section 2 and 3 Continental Shelf Act

³³⁸ Section 4 Continental Shelf Act

³³⁹ Art. 1 Continental Shelf Convention

³⁴⁰ Section 6 Continental Shelf Act

The Act was overtaken by LOSC and there was need to synchronize it with the provisions of LOSC especially after Kenya's ratification of the LOSC treaty. The Maritime Zones Act of 1989 was intended to supersede this legislation but fell short of expressly repealing it or making provisions which would cure its shortcomings.

As stated earlier, the Maritime Zones Act does no more than mention the continental shelf in passing. Other than the fact that Kenya has ratified LOSC, there is therefore no legislative framework for the delimitation of the continental shelf. Kenya's dualist approach to treaty implementation requires that a deliberate legislative step be taken to give positive recognition to the continental shelf concept as enunciated in LOSC.³⁴¹ The fact that the Continental Shelf Act has remained unaltered even after Kenya ratified LOSC and a shift in the international practice serves to demonstrate that the maritime zones and management of marine resources in Kenya is a forgotten province.

3.3.5 Attempts at Reviewing the Legal Framework on Delimitation of the maritime Zones

3.3.5.1 Task Force on the Review of Maritime Laws

The provisions of the Maritime Zones Act as it stands are seriously flawed. The Act fails to address the twin questions of enforcement mechanisms and institutional framework to ensure that the claims laid on Kenya's maritime zones are given effect. The Task Force

³⁴¹ Mwagiru and Hunja, "Aspects of Treaty Practice in Kenya" 6 *Lesotho Law Journal* 20, No. 2, 1990. This requirement is necessary where the treaty contains a provision or provisions not catered for by existing legislation or where it requires an act or omission not expressly authorized by the Laws of Kenya.

on Review of Maritime Laws³⁴² in its report presented to the Attorney General of Kenya, Hon. Amos Wako in May 2003 had recommended a total overhaul of the Maritime Zones Act.³⁴³ The Task Force went as far as drafting a proposed Maritime Zones Bill 2003 to replace the current Maritime Zones Act.³⁴⁴

One notable feature of the proposed Bill is that it includes the contiguous zone as one of the maritime zones that Kenya must lay claim to³⁴⁵ and also contains provisions for the delimitation of the continental shelf in line with the provisions LOSC.³⁴⁶ The Bill has given wide consideration to enforcement of the maritime zone claims particularly the EEZ and puts in place an institutional framework to oversee the actualization of the claims and also incorporates regulations to govern conduct within the maritime zones.³⁴⁷ Fisheries Officers are granted wide powers to search and seize vessels within Kenya's maritime zones that are found or suspected to be violating Kenyan laws and regulations³⁴⁸

The Bill can however be faulted in that it does not address the question duplicity of legislations over the maritime zones. In fact, the Bill lays great emphasis on management of fisheries resources which could be effectively covered by amending the relevant

³⁴² Appointed *vide* Gazette Notice No. 645 of 8th February 2002.

³⁴³ At pp. 35-9

³⁴⁴ Appendix IX to the Task Force on the Review of Maritime Laws Report.

³⁴⁵ See Sec 7, 8 and 9 of the proposed Maritime Zones Bill 2003.

³⁴⁶ Sec 11-12 of the proposed Maritime Zones Bill 2003.

³⁴⁷ Parts III, IV, V and VI of the proposed Maritime Zones Bill 2003.

³⁴⁸ Sections 29-33 Maritime Zones Bill. These Officers include the fisheries officers of the Ministry responsible for Fisheries; members of the Armed Forces of Kenya; members of the Police Force; officers of Customs; officers of the Coast Guard; and any other person approved by the Minister.

legislations which include the Fisheries Act³⁴⁹ and the Government (Fisheries Protection) Act³⁵⁰. The Bill also fails to conclusively address the long outstanding question of the delimitation of Kenya's outer continental shelf and only lays claim on the continental shelf that falls within the EEZ.³⁵¹ The Minister still wields great powers in fixing the outer limits of the maritime zones under the proposed Bill.³⁵²

The Bill has not yet been tabled in Parliament for enactment and, as it were, the Maritime Zones Act of 1989 remains in force as the key legislative framework on the delimitation of maritime zones in Kenya.

3.3.5.2 The Task Force on the Delineation of Kenya's Outer Continental Shelf

The report of the Task Force on Review of Maritime Laws engineered a reawakening in the realm of governance of maritime zones and subsequently the government of Kenya appointed a Task Force on the Delineation of Kenya's Outer Continental Shelf to come up with recommendations on how best to bring order and sound governance to the Kenyan Maritime Zones.³⁵³ The Task Force is mandated to: -

- a) Explore and recommend modalities for delineation of the country's Continental Shelf according to the provisions of the LOSC and in line with the best international practices;
- b) Examine and review laws relating to the sustainable utilization of resources within maritime zones of Kenya;

³⁴⁹ Cap 379 Laws of Kenya

³⁵⁰ Cap 378 Laws of Kenya

³⁵¹ Sections 11-2 Maritime Zones Bill 2003.

³⁵² Sections 36-8 Maritime Zones Bill

³⁵³ *vide* Kenya Gazette Notice No. 3929 of 2nd June 2006.

- c) Examine and make recommendations on the modalities for sustainable utilization of these resources including development of appropriate infrastructure, financial mechanisms, and institutional framework;
- d) Recommend a comprehensive management policy including institutional framework to guide use and management of ocean space and resources to ensure that present and future generations of Kenya benefit from the opportunities offered by the vast ocean frontier;
- e) Examine and make recommendations on such other matters related to or incidental to the foregoing.

The Task Force was appointed by the Minister for Provincial Administration and Internal Security. The Ministry of Transport under which governance of the maritime subsector is placed has no adequate representation in the Task Force. This poses a challenge in implementation of the recommendations of the Task Force as it is unlikely that the Ministry of Transport will readily implement recommendations of a Task Force in which it was not adequately represented and in respect of whose composition it was not consulted. The Task Force is empowered to appoint committees as it deems fit only for specialized aspects of its terms of reference and is required to submit quarterly reports to the Minister and the head of Public Service and the final report not later than November 2007. (The Task Force is yet to submit its final report).

Apart from the actual delimitation of Kenya's outer continental shelf there is likely to be no difference in the findings of this Task Force and those of the earlier one on Review of

Maritime Laws in so far as reforms in the legal, policy and institutional frameworks are concerned. It would have been more prudent to improve on the Report and Draft Bills prepared by the Task Force on Review of Maritime Laws rather than set up yet another Task Force. Nonetheless, the work of the Task Force is underway and hopefully after the Task Force submits its report Kenya will have appropriate recommendations on a suitable legal-policy framework on the delimitation of her maritime zones and sustainable exploitation of the resources therein.

Doubts are rife as to the capability of this Task Force to resolve with finality the issue of Kenya's claim to the outer Continental Shelf. The Task Force draws its composition from civil servants in the various government Ministries and is strictly speaking an inter-ministerial committee.³⁵⁴ The members of the Task Force therefore view their role in the committee as part of and secondary to their normal civil service duty and therefore are not able to pay full attention to the assignment. They have to divide their time and devotion between their routine civil service work and the onerous task of formulating a fool proof legal, policy and institutional framework for the delineation of Kenya's continental shelf.³⁵⁵

The team of scientists in the Task Force charged with the actual delimitation is doing a commendable job and unofficial reports have it that they have deposited an instrument

³⁵⁴ The members of the Task Force as per Kenya Gazette Notice No. 3929 of 2nd June 2006 are: Juster Nkoroi (AG's office) (Chairperson), Lt.-Col. Charles M. Kahari (Kenya Navy), Jonson W. Kariuki, Richard K. Mutai, Consolata Muriuki, Beatrice B. Manyonge, Dr. Daniel W. Ichang'i, Stephen K. Kirogo, Everisto N. Adambo, Harun R. Muturi, Mohammed Ali, Joseph G. Halake and Alfred Odawa. The joint Secretaries are John K. Kagasi, Stella K. Orina and Robert Kibiwot.

³⁵⁵ This information was acquired pursuant to an oral interview on 20/07/2007 with M/s Beatrice Manyonge, Chair Legal-Policy Committee, Task Force on Delineation of Kenya's Outer Continental Shelf.

with the Secretary-General of the United Nations on the proposed delimitation of the continental shelf. It is not clear what guidelines this team of scientists is using in delineating the boundaries of the continental shelf as there has been no legislative enactment in Kenya to give effect to the provisions of LOSC. This further underlines the half hearted approach the government of Kenya has continued to give to the management of the Maritime Zones and the resources therein.

The Legal-Policy Committee of the Task Force has a shortage of qualified personnel with only two of the members possessing the requisite legal knowledge for governance of ocean spaces.³⁵⁶ Although the relevant Gazette Notice gives the Task Force authority to co-opt members as it deems fit, the Task Force has not co-opted any experts to assist in the preparation of suitable policy and institutional frameworks. Presently the Task Force is planning to hold stakeholder consultations and meet with the experts in the areas of maritime law and governance.

3.6 Conclusion

This Chapter has examined the international practice and the provisions in LOSC for delimitation of maritime zones and given an appraisal of how the same have found application in the Kenyan context. The international practice favours bi-lateral agreements guided by LOSC in delimiting maritime boundaries between opposite or adjacent States. The International Court and tribunals may be invited, failing agreement, to resolve the question of maritime boundaries. At any rate, delimitation of maritime boundaries is an issue of international concern.

³⁵⁶ *Ibid.*

Kenya's maritime zones are not adequately delineated and the legal, policy and institutional frameworks for the delineation are scanty. The provisions of the Maritime Zones Act, which is the principal legislation for delimitation of maritime zones is poorly drafted, inadequate and does no more than outline the maritime zones without laying down a framework for delimiting the same or establishing the necessary institutions to undertake the delimitation. Some of the applicable statutes such as the Continental Shelf Act pre-date the LOSC and are therefore dated and of little use in modern day delimitation of Kenya's maritime zones. Even the latest attempts at reviewing the legislative framework by appointment of Task Forces though well intentioned have been uncoordinated and not based on sound LOSC compliant policies.

In order to ensure good governance and management of the marine resources within Kenya's maritime zones, it is imperative for Kenya to clearly demarcate or delimit her maritime zones in order to determine with some degree of exactitude the precise extent of these zones. It is also imperative that the government of Kenya should stop treating her maritime zones and the resources therein as a forgotten province and pay full attention and allocate sufficient resources to the proper management of these zones.

CHAPTER 4

GOVERNANCE OF KENYA'S LIVING AND NON-LIVING MARINE RESOURCES: A REVIEW OF EXISTING POLICY, LEGAL AND INSTITUTIONAL FRAMEWORKS

*Socially and politically, the problems of marine environment are very difficult [not only to conceptualize but also to solve]. The scale of processes and the transport of impacts in relation to jurisdictional boundaries present the challenge of developing effective and acceptable mechanisms for regulating human impact. ... Until recently, communities have been quite unaware of the concept and the costs of unmanaged and mismanaged marine environments. That awareness is growing, but acceptance of the inevitability of those costs in one form or the other has yet to penetrate community economic management.*³⁵⁷

*There is work to be done. The unity of oceans calls us to harmonize our activities and policies on the world's oceans and to create new arrangements suitable to the scale of the oceans. The issues are, of course, complex and they are many. We must encourage policy-makers to see their best advantage in an effort by international organizations at a harmonious ocean regime.*³⁵⁸

³⁵⁷ Kenchington R. A., in *supra* note 2 p. 2.

³⁵⁸ Scottat A., National Interests and Collective Security, *The Ocean Regime*, 12 Ocean Year Book 1996 at 19-31, 31.

4.1 Introduction

The above two quotations underscore the challenge of achieving a sound governance structure for marine resources due to the complexity of the processes involved. A sound governance structure requires a carefully thought out and harmonized policy, legal and institutional frameworks that ensure maximum utilization of the resources while at the same time conserving and preventing over-exploitation and exhaustion. In the preceding chapter we were able to demonstrate that the control and management of the maritime zones and the resources in Kenya is a forgotten province.

This chapter forms the substratum and core of this study and will explore and give a critical appraisal of the existing policy, legal and institutional frameworks for the control and management of the living and non-living marine resources within Kenya's maritime zones. The chapter will examine the level to which the principles of governance of marine resources that were discussed in chapter two have found effect in the control and management of living and non-living resources within Kenya's maritime zones.

4.2 The Existing Policy Framework Reviewed

In the *Economic Recovery Strategy for Wealth and Employment Creation, 2003-2007*,³⁵⁹ the Government of Kenya acknowledges that the poor performance of the maritime industry is a major cost to the economy in terms of impairing the competitiveness of the

³⁵⁹ Government of Kenya, *Economic Recovery Strategy for Wealth and Employment Creation 2003 – 2007*, June 2003.

country's industrial sector.³⁶⁰ It is a truism that effective legislative and institutional frameworks flow from the hub of a sound and well crafted policy framework. This fact holds true when dealing with issues of governance of marine resources. If the legislations and the structures of implementing institutions relevant to the governance of marine resources are premised on an infallible policy framework, then, the governance process will be a tremendous success and the converse is true. The policy framework is therefore the solid foundation on which the legislative and institutional frameworks are premised and it should therefore be given prominence in charting out the dimensions of governance of marine resources.

Agenda 21 adopted at the UNCED in Rio de Janeiro provides extensive guidelines on how Coastal States are expected to formulate policy frameworks for the governance of marine resources.³⁶¹ Chapter 17 of Agenda 21 augments LOSC. It calls for new approaches to marine and coastal area management and development that are integrated in content and are precautionary and anticipatory in ambit at the national, sub-regional, regional and global levels.

Under chapter 17, Coastal States commit themselves to integrated management and sustainable development of coastal areas and the marine environment under their national jurisdiction and undertake to *inter alia*:³⁶²

³⁶⁰ See Government of Kenya, Recommendations on Integrated National Transport Policy: Sub-Sector Policy Papers and Implementation Matrices Vol. II, February 2004, p. 41.

³⁶¹ See Vallega A. Sustainable Ocean Governance: A Geographical Perspective (2001) (Routledge, Francis & Taylor Group, New York NY) pp. 17-20 and also Falk R. and Elver H., "Comparing Global Perspectives: The 1982 UNCLOS and the 1992 UNCED" in Vidas D. and Ostreng W. (eds.) *Order for the Oceans at the Turn of the Century* (1999) (Kluwer Law International, The Hague) pp. 145-156.

³⁶² Agenda 21 at 17.5. See also Cicin-Sain B. and Knecht R. W. *Integrated Coastal and Ocean Management: Concepts and Practices* (1998) (Island Press, Washington DC) pp. 86-92.

- (a) Provide for an integrated policy and decision-making process, including all involved sectors, to promote compatibility and a balance of uses;
- (b) Identify existing and projected uses of coastal areas and their interactions;
- (c) Concentrate on well-defined issues concerning coastal management;
- (d) Apply preventive and precautionary approaches in project planning and implementation, including prior assessment and systematic observation of the impacts of major projects;
- (e) Promote the development and application of methods, such as national resource and environmental accounting, that reflect changes in value resulting from uses of coastal and marine areas, including pollution, marine erosion, loss of resources and habitat destruction;
- (f) Provide access, as far as possible, for concerned individuals, groups and organizations to relevant information and opportunities for consultation and participation in planning and decision-making at appropriate levels.

Kenya was among 178 Coastal States that endorsed and adopted Agenda 21 and in particular chapter 17. In terms of Agenda 21, Kenya was to develop a local Agenda 21 for the management of marine resources. After signing Agenda 21, Kenya came up with a strategy for sustainable development through the National Environmental Action Plan (NEAP) in 1993, which provided a framework for integrating environmental considerations into the country's 5-year development plans. The NEAP identified major environmental problems, laid out an overall strategy to deal with the problems and

include a very specific plan for action to be taken by government and the private sector, as well as NGOs.³⁶³

However, owing to the trend of the reverse order of legislating, where legislation precedes the mapping out of policies, realization of an effective governance regime for marine resources has been greatly hampered. To demonstrate this malady, this study will isolate some guiding principles in formulation of policy framework for the governance of the ocean spaces as discussed in Chapter two and examine how effectively they have been contextualized in the national policy for the management of Kenya's marine resources.

4.2.1 Sustainable use

The principle of sustainability in exploitation of marine resources is cross-cutting and is important to the governance of living as well as non-living resources within the maritime zones.

Kenya has been a member of IUCN since 1963.³⁶⁴ The IUCN has formulated guidelines on sustainable use of natural resources including marine resources. This section seeks to analyze how effective Kenya's policy framework has been in implementing these

³⁶³ Mailu G. M. "Implications of Agenda 21 of the United Nations Conference on Environment and Development on Marine Resources in East Africa with Particular Reference to Kenya and Tanzania" in Sherman et al (eds.) *Large Marine Ecosystems of the Indian Ocean: Assessment, Sustainability, and Management* (1998) (Blackwell Science, Inc., Oxford) pp. 313-326.

³⁶⁴ Kenya is a member of the Eastern Africa Regional Office alongside Ethiopia, Seychelles, Sudan, Tanzania and Uganda. See http://www.iucn.org/places/earo/earo_links/members.htm accessed on 1/11/2007.

guidelines in the governance of her living and non-living marine resources. The guidelines formulated by IUCN include³⁶⁵

- (a) In order to achieve sustainable use of marine resources, it is imperative to consider sociopolitical, economic, biological, and user factors, at the community, sub-national, national, and international levels.
- (b) Supportive incentives, policies, laws, and institutions at all levels of governance, and effective linkages between them enhance sustainable use of marine resources.
- (c) Local communities and other parties who have management responsibility for wild living marine resources must be supported by acknowledged rights and the means to manage the resources.
- (d) Allocation of the benefits from the use of marine resource must reflect the contribution and needs of those who manage the resources.
- (e) Adaptive management that places reliance on an iterative process of timely and transparent feedback from socio-economic, resource and ecological monitoring is essential for sustainable use.
- (f) Taking into account traditional/local knowledge enhances sustainable use of natural marine resources.
- (g) In order to achieve sustainable use of marine resources, it is necessary to match managerial jurisdictions to ecological and socio-economic scales.
- (h) Subsidies that distort markets, promote habitat alteration or destruction, and unsustainable use of natural marine resources should be eliminated.

³⁶⁵ *Supra* note 364. See also Friedheim R. L. "A Proper Order for the Oceans: An Agenda for the New Century" in Vidas D. and Ostreng W. (eds.) *Order for the Oceans at the Turn of the Century* (1999) (Kluwer Law International, The Hague) pp.537-557.

A Coastal State's sovereign rights with regard to living marine resources in the territorial waters and the EEZ first and foremost relate to exploring, exploiting, conserving and managing those resources.³⁶⁶ These sovereign rights are far-reaching and extensive. They encompass powers to determine the allowable catch, harvesting capacity, allocation of surpluses to other states and the imposition of terms and conditions geared towards conservation and management of the EEZ resources. Moreover, the coastal state has power to carry out economic activities geared towards the efficient and optimum exploitation of its living resources and to prescribe rules that govern its access and use.³⁶⁷ The exploitation of the resources is however subject to certain principles aimed at promoting their sustainable and optimum utilization.³⁶⁸

The essence of the criteria set out under LOSC is threefold. First, the coastal state determines the allowable catch of living resources from its EEZ, making sure that over-exploitation does not occur. Second, the coastal state must then determine its own capacity to exploit those resources. Lastly, if it lacks that capacity, it will give other states access to the surplus of the allowable catch within the general objective of the maximum utilization of the resources. The criteria for determining the allowable catch are fairly complex. However, they require a combination of the objective of maintaining the highest optimal yield with adequate conservation measures which take into account such

³⁶⁶ See Article 61 and 62 of LOSC

³⁶⁷ *Ibid.*

³⁶⁸ See Scheiber H. N. "The Biodiversity Convention and Access to Marine Genetic Materials in Ocean Law" in Vidas D. and Ostreng W. (eds.) *Order for the Oceans at the Turn of the Century* (1999) (Kluwer Law International, The Hague) pp. 187-201 on how the Biodiversity Convention has affected the implementation of LOSC

relevant factors as the environment, the economy and interdependence of stocks and generally recommended international standards.

Kenya has not succeeded in developing a comprehensive policy to govern the sustainable exploitation of living resources within her EEZ. Consequently, illegal fishing has continued unabated within Kenya's maritime zones.³⁶⁹ Illegal fishing is the greatest threat to sustainable use of living marine resources. For an act to amount to illegal fishing, it must breach the sovereign rights of the coastal state in that it is done without license, permission or consent of the coastal state exercising rights over the living resources within the EEZ. Further, fishing may be termed illegal if it breaches any of the rules laid down with regard to the allowable catch and the capacity of the coastal state to exploit such resources.³⁷⁰ In July 2005, the IOTC, of which Kenya is a member, listed names of a dozen vessels in connection with illegal, unreported and unregulated fishing in the Indian Ocean. The list was posted on the website of the Commission.³⁷¹

Kenya lacks a policy framework to govern fishing access agreements with DWFNs in accordance with the relevant provisions LOSC.³⁷² The country does not even have sufficient knowledge of its stocks. Although the Government of Kenya in a bid to create

³⁶⁹ Wambua P.M., in *supra* note 34 p. 6. The challenge of illegal fishing in the EEZs of most African states still persists.

³⁷⁰ See Edeson W. R. "A Brief Introduction to the Principal Provisions of the International Legal Regime Governing Fisheries in the EEZ" in Ebbin et al (eds.) *The Exclusive Economic Zone and Governance Institutions for Living Marine Resources* (2005) (Springer, Dordrecht) pp. 17-29.

³⁷¹ See *The Standard* Thursday July 7 2005, *Shipping Guide*, p. S6. Nine of the vessels were listed as having their home offices in Singapore while the other three had their base in Papua New Guinea. The vessels named were *TS Elegance*, *TS Emerald*, *TS Excellence*, *TS Prosperity*, *Blue Ocean Marine*, *Ocean Explorer/Ocean Pride Marine*, *Liberty*, *Ocean Lion*, *Ocean Star Marine*, *Feng Juan Chin I Wan Feng* and *Yu Fu II*.

³⁷² This information was obtained pursuant to an oral interview with Dr. Michael M. Nguli, a Senior Researcher at KMFRI on 9th July 2007. See also Art 62 LOSC

this knowledge base requested for technical assistance from the Commonwealth Secretariat and was provided with a consultant to carry out a desk study on stocks and come up with recommendations and costs for stock assessment project, the project did not amount to anything much.³⁷³

One of the greatest threats to marine resources is the lack of a sound policy framework to prevent over-harvesting in the reef areas that are also the areas rich in biodiversity.³⁷⁴ Along the more densely populated southern coast, serious reef area degradation brought on by overexploitation is becoming evident through diminishing abundance of finfish and coral and increased numbers of sea urchins, increased turf algae cover, and lowered coral cover.³⁷⁵ There is need for urgent measures and reforms to curb this practice before it occasions extensive and irreversible damage to the marine ecosystem.

In as far as the use of non-living marine resources in Kenya is concerned, no policy framework is in place to ensure sustainable exploitation of these resources. There has not been much activity with regard to the exploration and exploitation of the resources due to lack of technological capacity. Current reports indicate that NOCK has entered into prospecting agreements with foreign companies following recent amendments to the relevant law [the Petroleum (Exploration and Production) Act³⁷⁶] without first charting out a policy framework to ensure sustainable use. The actual details of these

³⁷³ Gitonga K.N and Achoki R "Fiscal reforms for Kenya Fisheries" [unpublished] Papers presented at the Workshop and Exchange of Views on Fiscal Reforms for Fisheries - to Promote Growth, Poverty Eradication and Sustainable Management (Rome, 13-15 October 2003)

³⁷⁴ See Ablan M. C. A. and Garces L. R. "Exclusive Economic Zones and the Management of Fisheries in the South China Sea" in Ebbin et al (eds.) *The Exclusive Economic Zone and Governance Institutions for Living Marine Resources* (2005) (Springer, Dordrecht) p. 139.

³⁷⁵ FAO, "Information on Fisheries Management in the Republic of Kenya". Available at www.fao.org/fi/fcp/en/KEN/body.htm accessed on 7/11/2007.

³⁷⁶ Cap 308 Laws of Kenya.

arrangements are subject to conjunctures as they have not been disclosed to the public and remain unclear.

Efforts at exploration of oil off the Kenyan shore have intensified over the recent past months.³⁷⁷ Calls by environmental lobby groups to have more environmental impact assessments undertaken prior to any such exploration have not been heeded.³⁷⁸ The Environmental Impact Assessment (EIA) process as provided for under the Environmental Management and Coordination Act (EMCA)³⁷⁹ is a conscious effort to determine the likely consequences on the environment of any policy or development decision; following which, ways and means are evaluated to avoid or minimize those impacts, such that they remain within predetermined, tolerable limits. The EIA Process also plans for monitoring to ensure that impacts do remain within these limits.

Although no oil deposits have been discovered yet, the process of exploration no doubt disturbs the balance in the marine eco-system not to mention the negative impact that would attend those eco-systems if actual discovery of deposits was forthcoming. The companies contracted to undertake the exploration are invariably foreign mainly due to lack of the requisite financial and technical capacity by local concerns to undertake

³⁷⁷ NOCK Home Page, <http://www.nockkenya.co.ke>. Accessed on 5/12/2008.

³⁷⁸ See Okidi C. O. "Legal Aspects of Management of Coastal and Marine Environment in Kenya" in Okidi C. O. et al (eds.) *Environmental Governance in Kenya: Implementing the Framework Law* (2008) (East Africa Educational Publishers Limited, Nairobi) pp. 465-7. There are numerous documented accounts of the negative impact of offshore oil exploration. See for instance Patin S., translation by Cascio E. *Accidents During the Offshore Oil and Gas Development* (1995) (EcoMonitor Publishing, New York, USA) and also Stedman B J et al *Assessing Environmental Impacts of Offshore Oil and Gas Exploration* (1983) (Plenum).

³⁷⁹ Act No. 8 of 1999.

projects of that magnitude.³⁸⁰ The companies are therefore motivated by profit maximization and retention and consequently pay little or no regard to the well-being of the marine environments and the living resources therein.

4.2.2 Integrated Management and Zoning Plans

Part of the preamble to LOSC reads ‘... CONSCIOUS that the problems of ocean space are closely interrelated and need to be considered as a whole’ This recital in a nutshell captures the theory of integrated management that is the guiding capstone in the governance of ocean spaces.

As has already been stated above, the Kenya Government signed Agenda 21 of the Rio Conference in 1992 thereby committing herself to protect the coastal marine environment in its development agenda. Subsequently, Kenya signed the Arusha Resolution on Integrated Coastal Area Management (ICAM) in Eastern Africa in 1993. The resolution prompted individual countries to institutionalize ICAM as a tool for the sustainable utilization of coastal resources.³⁸¹

In a bid to come up with an ICAM policy framework the Coast Development Authority (CDA) initiated the ICAM program in 1994, with five other key stakeholders, to provide a holistic approach towards management & sustainable development of the coastal and

³⁸⁰ *Supra* note 377. These include the China National Offshore Oil Corporation and Woodside Energy. See also the stand off on titanium mining in Kenya’s coastal zone “Titanium in Kenya: Creating a Balanced Solution” Available at <http://www.ifaw.org/ifaw/general/default.aspx?oid=12849> accessed on 11/12/2008.

³⁸¹ www.oop.go.ke/regional-dev.go.ke/cda/icam.htm - 12k Accessed on 12/11/2008.

marine resources.³⁸² In 1995, CDA initiated a pilot ICAM project in the Bamburi-Shanzu area.³⁸³ The main objective of this project was to demonstrate the ICAM concept to the relevant government institutions in Kenya. CDA, KWS, the Fisheries Department, KMFRI and the Mombasa Municipal Council were the key institutions involved in the project.

Initial profiling of the area identified the key issues and several demonstration projects were implemented. This included working with the fisher community to build a fish landing base, the boat operators to build a management building, the Jomo Kenyatta self-help group to rehabilitate recreational infrastructure at the Bamburi public beach and KWS was to initiate mooring installation. Success of the program depended on multi-sectoral involvement and commitment. CDA also initiated and hosts a multi-institutional and multi-sectoral planning team (ICAM Secretariat).³⁸⁴

The ICAM has not been successful owing to a number of challenges that have inhibited its implementation which include:

- i. Inadequate funding for identified program activities
- ii. Delay in disbursement of committed activity funds resulting to time constraints and some activities left pending
- iii. Accommodating high expectations/interests from Partners and the Coastal community in the implementation of the program

³⁸² www.regional-dev.go.ke/cda/projects.htm - 13k Accessed on 12/11/2008.

³⁸³ *Ibid.*

³⁸⁴ Information obtained pursuant to an interview with Agnes Mwakuli, the Fisheries Officer CDA on 6th July 2007.

- iv. The frequent changes in the political and management offices of the partners.
This has adversely affected the progress towards development of the ICAM policy.
- v. Implementing officers working under pressure to perform ICAM program activities in addition to their normal duties.³⁸⁵

In as far as zoning in the governance of marine resources is concerned, KWS is the body charged under the Wildlife (Management and Conservation) Act with the mandate of protecting wild flora and fauna including wild marine flora and fauna. KWS has established four MPAs namely: Watamu Marine National Park; Mombasa Marine National Park and Reserve; Kiunga Marine National Reserve; and Kisite Marine Park and Mpunguti Reserve.³⁸⁶

The management of these MPAs has registered a considerable degree of success owing to the emphasis that is currently being placed on tourism as a foreign exchange earning activity in Kenya.³⁸⁷ However, threats continue to exist as there are no buffer zones around the MPAs and owing to the migratory nature of most of the sea creatures, there is the risk of them being extracted outside the MPAs reducing their abundance. The straddling stocks often find their way outside the MPAs into areas under the jurisdiction of private owners and parastatal bodies. Although KWS has made efforts to consolidate the ICAM to ensure that these straddling stocks are not depleted within the areas outside the MPAs, there is need for a policy framework to guide the exploitation of these

³⁸⁵ *Ibid.*

³⁸⁶ *Ibid.* Discussed further and comprehensively in this chapter under the section on Institutional Framework.

³⁸⁷ This information was obtained pursuant to an oral interview with Richard Odongo, a Senior Research Scientist at KWS on 10th July 2007.

resources in such jurisdictions outside the MPAs.

4.2.3 Coordination of Stakeholder Interests and Public Participation

Long-term success in implementing national policies promoting sustainable use of marine resources will be determined to a great extent by the public's acceptance of the concept and understanding of the benefits and risks associated with it. In order to achieve this support, there must be in place a comprehensive policy on public education geared towards informing people of the role sustainable use plays in promoting conservation while aiding development.

In Kenya there is an inherent disconnect in calling for more participatory forms of management of marine resources when the specific goals are predetermined.³⁸⁸ Under such conditions local people's role in the management process necessarily remains prescribed and largely symbolic. Whereas there is a discourse of participatory marine management, the practice remains hierarchical and inclined towards use of the knowledge of those with the most formal education and the least experience at sea.

Although stakeholder groups in marine resource management in Kenya often share the long-term goal of sustainable use of the resources, they differ on the best means of achieving it. The Kenyan government has relied on large-scale management plans, mapped the seas, licensed fishers and boats, and felt little threat from scattered informal fishing and seafood industry organizations although they are major stakeholder's in the management of marine resources.

³⁸⁸ www.unesco.org/csi/wise/fishersmngt.htm - 66k Accessed on 16/11/2008.

The discourse on participatory management of marine resources has been in place in Kenya since the 1970s, but authentic bottom-up management has yet to be implemented.³⁸⁹ There is also need to build capacity of the community to participate in the marine resource governance process through education and creation of awareness.

The first notable move towards potentially giving local people greater voice in marine management came in 1979 when two of Kenya's conflict-laden marine parks, Malindi and Watamu, were re-zoned and designated biosphere reserves in which traditional forms of fishing were allowed.³⁹⁰

By the mid-1990s, additional areas had been set aside as parks without consulting the local communities they displaced.³⁹¹ Tensions with local communities had mounted to the point of armed assaults on marine park rangers, arson of beachfront park structures, and blatant poaching, all of which pose a threat to Kenya's tourism industry. To gain control of the situation, the then director of KWS who publicly opposed participatory management was replaced with a man known for his people-friendlier approach³⁹² and a seven million dollar World Bank loan was utilized to implement a Community Wildlife Officer (CWO) program at each protected area. The sole CWO duty was to understand

³⁸⁹ Peluso, N. L. "Coercing Conservation? The Politics of State Resource Control" *Global Environmental Change*, June 1993 pp. 199-217.

³⁹⁰ Supra note 387.

³⁹¹ KWS has too broad a mandate as stated in sec 3 of the Wildlife (conservation and management) Act and has often been accused to be too pro-preservation of species and not suited to deal with sustainable use. Cases of human-wildlife conflict have over the years characterized the operations of KWS.

³⁹² Baskin, Y., "There's a New Wildlife Policy in Kenya" *Science*, Vol. 265, No. 5173, 1994 p. 733

and assist resident communities to meet their needs.³⁹³ However, the CWO has failed to bring about the desired effect and conflicts between stakeholders persist.

The process towards initiation of an MPA has a great impact on enforcement. For example the Mombasa MPA was initiated without adequate consultation and participation of the local community.³⁹⁴ This led to serious conflict and slow implementation of project. It took several years of dialogue and support of community projects including assistance with boats and fishing gears, awareness raising programs and involvement in MPA management initiatives including the installation of mooring to win the support of these groups.

When communities perceive tangible benefits of MPAs they are more likely to comply. It is also important to identify the key stakeholder and this is sometimes not the stakeholder that will bring in the greatest monetary benefit. The Diani marine reserve which stalled due to strong resistance from the fisher community whose perception that they would lose their fishing grounds and that mainly the tourism sector is a good example of how local community perception can impact on the success of MPAs.³⁹⁵

"Participation" of local communities in the marine management process in Kenya is thus a limited type of pseudo-participation which includes consultation and informing but precludes true partnership through delegated power, sharing of responsibility and cooperation. Local input into marine management is even more restricted along the

³⁹³ Snelson, D., "Protected Area Conservation Strategy: Assessing the Training Needs of Protected Area Managers in Africa. Country Report: Kenya" *United States Agency for International Development (USAID), World Wide Fund for Nature, African Wildlife Foundation, Wildlife Conservation Society*, 1993.

³⁹⁴ iodweb1.vliz.be/odin/bitstream/1834/772/1/KeMPAs.pdf Accessed on 16/11/2008

³⁹⁵ linkinghub.elsevier.com/retrieve/pii/S0964569105000505 Accessed on 16.11.2008.

approximately 95 percent of the Kenyan coast where there are no marine parks or reserves. In this substantial area, the understaffed Ministry of Fisheries Development oversees governance of fisheries resource. Whereas many officials of KWS express interest in participatory management, those in the Ministry of Fisheries Development generally do not. Indeed, several Fisheries Department officials openly express disrespect for fishers and do not believe that they might have anything to learn from unlettered people.³⁹⁶ This conflict in ideology and approach of involving local communities in conservation efforts between the two government agencies has undermined the success of proper management of living marine resources in Kenya.

The KWS, the Ministry of Fisheries Development, and multi-national organizations dictate how Kenya's marine resources will be managed. Local knowledge, when formally gathered is generally undertaken by social scientists, but it is knowledge gained by narrowly defined experts in the "hard" sciences that informs policy making.³⁹⁷ Fishers and other interested parties understand their place in this information hierarchy and see little practical benefit from individual efforts or supporting association efforts when those actions continue to be viewed as producing knowledge that is illegitimate in the current system. Although there are a few community based initiatives that compliment the role of KWS in the ICAM of the MPAs,³⁹⁸ local communities have remained largely indifferent to the management process.

³⁹⁶ Glaesel, H., "State and Local Resistance to the Expansion of Two Environmentally Harmful Marine Fishing Techniques in Kenya", *Society and Natural Resources*, Vol. 13, 2000, pp. 321-338.

³⁹⁷ Huntington, H.P., "Using Traditional Ecological Knowledge in Science: Methods and Applications" *Ecological Applications*, Vol. 10, No. 5, 2000 pp. 1270-1274.

³⁹⁸ Information obtained pursuant to an interview with Richard Odongo Senior Research Scientist with KWS on 10th July 2007.

Without involving the local communities, KWS would need a large work force and expensive infrastructure to manage MPAs. The recently completed management plans recognize this fact and recommend the implementation of an advisory body that will include relevant stakeholders to assist in the management of MPAs in Kenya.³⁹⁹ The main community that needs this kind of incentive in MPAs is the fisher community.

4.2.4 Compensation and financial accountability

Financial accountability has already been identified as a necessary element for the success of any policy including the management of marine resources. Where organizationally established local rights and practices are disturbed by the mode of management opted for, there should be arrangement for specific benefit to local inhabitants in terms of employment or of compensation of lost rights.

Other than shipping, the main economic activity that is undertaken within Kenya's maritime zones is fishing. Kenya's Fisheries sub-sector has the potential of significantly contributing to the national economy through employment creation, foreign exchange earnings, poverty reduction and food security support. The annual fish production in Kenya is approximately 200 000 tonnes earning the fishers over Kshs 7 billion (approximately US\$90 million).⁴⁰⁰

³⁹⁹ *Supra* note 398.

⁴⁰⁰ www.fao.org/docrep/007/y5718e/y5718e04.htm - 37k Accessed on 16/11/2008

The contribution of the marine sector to overall national fisheries production is very modest, accounting for only 3% to 4% of the annual catch. Although accounting for just about 4% of total national fish catch, marine fisheries represents unique and very diverse resources with potential for growth. In Kenya, marine fishing activities are practiced by both artisanal and industrial fishers. Artisanal fishing dominates the subsector fishing activities which is concentrated in the inshore part of Indian Ocean. Offshore fishing is primarily undertaken by industrial fishers who are supposed to operate beyond the 5 nautical miles offshore region of the Ocean including the 200 nautical miles of the Exclusive Economic Zone (EEZ).⁴⁰¹

Kenya's known marine inshore fishing grounds include the rich inshore grounds around Lamu Archipelago, Ungwana Bay, North Kenya Bank and Malindi Bank.⁴⁰² The bulk of the marine catch is taken in shallow inshore waters, mainly by artisanal fishers using simple boats and gears including gillnets, shark nets, hook-and-line and traps. These fishers operate some 4800 mostly unmotorized boats to produce around 6000-7000 tonnes of fish annually, valued at over Kshs 500 million. The annual catches have fluctuated between 4000 and 10000 tonnes over more than a 20-year period. The prawn fisheries from which approximately 400 tonnes are landed each year are fished by commercial trawlers from the two fishing grounds with brackish waters.⁴⁰³

⁴⁰¹ KCSSP – NRM, Business Sector Study *Abridged Version 20*, May 2007. The main marine landed fish groups include Demersal species (about 42% of the total marine output); Pelagic species (18%); Shark and rays, sardines and similar species (18%); Crustaceans (11%); and Molluscs (4%).

⁴⁰² Gitonga K.N and Achoki R in R. "Fiscal reforms for Kenya fisheries" [unpublished] *Workshop and Exchange of Views on Fiscal Reforms for Fisheries - to Promote Growth, Poverty Eradication and Sustainable Management*, Rome, 13-15 October 2003.

⁴⁰³ *Ibid.*

Sometimes conflicts between the commercial trawlers and artisanal fishers arise when the latter's nets are destroyed.⁴⁰⁴ There is no mechanism for resolving such disputes between the commercial and subsistence fishers and the persistence of these disputes has generated a lot of animosity between the two communities.

Kenya's fisheries sub-sector has been operating without a formal policy guideline, relying only on the legislative framework provided by the Fisheries Act and subsidiary legislation. This has affected the proper delivery of services by the Fisheries Department and development of the sector in line with the national development goals. The Government initiated a process of developing a National Fisheries Policy in 2003; however, this has not been completed though a more detailed draft document dated January 2006 has been prepared.⁴⁰⁵

There are also present a number of marine based tourism and recreation enterprises in the Kenyan coast.⁴⁰⁶ These enterprises range from boat excursion operators, water sports operators – scuba diving/snorkelling, sport fishing, tube renters, beach hawkers who specialize in selling handicrafts and food stuff.⁴⁰⁷ Previously, these enterprises were solely subsidiaries of large tourist hotels. However, in the recent years, similar enterprises have emerged which are owned and managed by local individuals. The latter are smaller in scale and mostly informal operating without any policy framework. A high number of

⁴⁰⁴ *Ibid.*

⁴⁰⁵ KCSSP - NRM Business Sector Study *Abridged Version 21*, May 2007.

⁴⁰⁶ These recreational facilities are privately owned and, given the current notion of land ownership in Kenya where titles are indefeasible, the freehold titles hinder the effective management of these parts of the forgotten province. For a clear analysis of the land problem in Kenya, see Government of Kenya, Land Policy, May 2007.

⁴⁰⁷ unesdoc.unesco.org/images/0013/001383/138391eo.pdf Accessed on 16/11/2008.

people from the coastal communities draw their living from both the formal and small informal tourism and recreation enterprises.

The enterprises do not directly pose a threat to biodiversity, and as a matter of fact their businesses are highly dependent on intact marine areas to which tourists are drawn. Although conservation has not been an integral activity of these enterprises, the businesses are negatively affected by the degradation of the marine areas within which they operate, so that they have to take contingency measures such as relocating to more intact marine areas. Marine park tours and marine wildlife viewing and water sports are the main marine tourism and recreation enterprises. The operators would therefore no doubt support conservation efforts. There had been established a fund to which these operators would contribute for the conservation of the marine environment. These efforts were however frustrated following the 1997 Likoni clashes that saw income from tourism plummet to an all-time low.⁴⁰⁸

Fishing and other income generating activities are proscribed within the MPAs. There is currently no policy framework for compensating local communities whenever their inherent rights are infringed or curtailed by the marine resources governance process. Where for instance the fishing rights of a community are limited by the establishment of an MPA, there is no policy framework in place to ensure that the community benefits from the income generated by the MPA in lieu of the fishing rights lost. This appears to

⁴⁰⁸ McClanahan T.R. et al "Management of the Kenyan Coast" Available at cat.inist.fr/?aModele=afficheN&cpsidt=17589633. Accessed on 12/11/2008.

be the main reason why the local communities have in some instances been antagonistic to the establishment of MPAs as was discussed above.

Kenya also has a vibrant maritime transport sector which generates a considerable amount of revenue. KPA is the statutory body under the Ministry of Transport mandated to maintain, operate, improve, and regulate all seaports. KPA is also the Ministry of Transport's recognized maritime security organization as per the requirements of the International Shipping Port Security (ISPS) Code. The Customs and Excise Department (CED) of the Kenya Revenue Authority, under the Ministry of Finance, is responsible for the control of inward and outward-bound cargo in Kenya through the various ports of entry. KPA manages the port of Mombasa and also the small sea ports of Kiunga, Lamu, Malindi, Kilifi, Mtwapa, Funzi, Shimoni, and Vanga.⁴⁰⁹

The Port of Mombasa is the Principal Kenyan seaport and the largest port in Eastern Africa. A major port of call for international shipping lines and increasingly passenger liners, Mombasa serves the needs of government, business, and industry in Kenya and neighboring countries including Uganda, Rwanda, Burundi, the Democratic Republic of Congo, Sudan, Ethiopia, Somalia, and Tanzania. The Port of Mombasa includes Kilindini Harbour, Port Reitz, the historic Old Port, Port Tudor, and all of the tidal waters encircling Mombasa Island.⁴¹⁰ A major challenge that has faced the port is the shallow depth of the Likoni Channel which requires constant dredging. Consequently, post-Panama ships cannot call at the port. There are ongoing consultations on the possibility of

⁴⁰⁹ See <http://www.kpa.co.ke> accessed on 17/11/2008

⁴¹⁰ *Ibid.*

dredging the channel to a greater depth or in the alternative to develop Lamu into a major seaport.⁴¹¹

The other significant seaport is located in Lamu. Lamu is a small historic town port popular with international cruise ships. Lamu town was declared as a World Heritage site by UNESCO in 2001.⁴¹² Lamu has a secure port with safe anchorages deep enough for vessels of up to 100 metres length and 5.2 meters draught. Maximum tidal range is 3.5 metres. Inner anchorage depths vary between 6.0 meters and 8.0 meters. There are small jetties at Lamu, Shella and Manda Island used by local dhows and small craft for landing goods and passengers. Mokowe Jetty with a Draft 5.0 meters is the main jetty linking the mainland and Lamu Island.⁴¹³

Port activities generate colossal amounts of revenue. Since KPA is a government parastatal, this revenue is remitted to the Central Government and little if any goes to improving the livelihood of the community around the port who might have to bear the brunt of attendant negative effects such as pollution of marine environments. Kenya Ports Authority has also been rated as the most corruption prone state corporation with an annual corruption turnover of over Kshs. 8.2 million.⁴¹⁴

⁴¹¹ Information obtained pursuant to an oral interview with Philomena Koech, Deputy Permanent Secretary, Ministry of Trade on 18th September 2007.

⁴¹² portal.unesco.org/en/ev.php-URL_ID=4810&URL_DO=DO_TOPIC&URL_SECTION=201.html - 40k Accessed on 16/11/2008.

⁴¹³ *Supra* note 409.

⁴¹⁴ Transparency International, Kenya Urban Bribery Index (KUBI) Survey in Nairobi, Mombasa, Kisumu, Eldoret, Nyeri and Machakos, March and April 2001 available at www.tikenya.org/documents/urban_bribery_index.doc Accessed on 20/11/2008.

Most of the shipping companies are foreign-owned and often fly a flag of convenience. The Modalities for Implementation of the Merchant Shipping (Code of Conduct for Liner Conferences) Regulations, 1989 remains the only attempt by Kenya to ensure that Kenyans participate in the carriage by the shipping lines although it has largely been unsuccessful.

4.2.5 Regulation of Extra-Marine Activities

There are some activities which, even though occurring outside the marine environment, have a direct impact on the marine resources, both living and non-living. These are either land-based activities which pollute the marine environments directly or through effluent discharge into rivers that eventually flow into the oceans, or activities aboard ships whose net effect is pollution of marine environments.

At the regional level, the United Nations Environment Programme (UNEP) has made efforts at formulating a regional policy for addressing extra-marine activities that pollute marine environments. Since 2005, UNEP in collaboration with the countries of the Western Indian Ocean (WIO) region has been implementing a project known as “Addressing Land-based Activities in the Western Indian Ocean”, also referred to as “WIO-LaB Project” funded by the Global Environment Facility (GEF) and the Norwegian Government. The project which forms a practical guide on which national policies for addressing extra-marine activities in the governance of marine resources within the WIO region could be based aims at achieving three major objectives namely:

- 1) Minimize stress on the ecosystem by improving water and sediment quality

- 2) Strengthen regional legal basis for preventing land-based sources of pollution
- 3) Develop regional capacity and strengthen institutions for sustainable, less polluting development.⁴¹⁵

The project is also a demonstration project for the UNEP Global Programme of Action for the Protection of the Marine Environment from Land-Based Activities (GPA) and is executed within the framework of the work programme of the UNEP/Nairobi Convention for the protection, management and development of the coastal and marine environment in the Eastern Africa region.⁴¹⁶

At the national level, there is no clearly spelt out national policy for addressing extra-marine activities that have an impact on the governance of marine resources. However, there are legislative enactments which implicitly protect marine environments by regulating harmful extra-marine activities.⁴¹⁷ The lack of a policy on regulation of extra-marine activities is a reflection of the reverse order of legislation in Kenya where policies are “formulated” through legislation. Inadequate capacity and lack of information have been identified as the main barriers to formulation of policies for measures to protect the marine environment from extra-marine activities.⁴¹⁸

4.2.6 Monitoring, Research and Review

It has been already been pointed out that surveillance is important in order to determine the extent of adherence to components of management. The policy framework should

⁴¹⁵ <http://www.wiolab.org/> Accessed on 16/11/2008.

⁴¹⁶ *Ibid.*

⁴¹⁷ Discussed further under the section on Legal Framework in this chapter.

⁴¹⁸ *Supra* note 402.

make provisions for periodic review of management and zoning plans in order to update them and incorporate pertinent modifications based on the findings of surveillance, monitoring and research. Just as in the initial plan formulation, public participation should be accommodated in the review.⁴¹⁹

The policy for monitoring, researching and reviewing the exploration and exploitation of marine resources in Kenya, if any, has mainly focused on the living marine resources.⁴²⁰

There have been hardly any efforts to map out a policy framework for monitoring, research and review with regard to non-living marine resources due to the fact that, until recently, little attention has been paid to the exploration and exploitation of off-shore non-living resources in Kenya's forgotten province.

Due to this lack of a policy framework for monitoring, researching and reviewing of the abundance of marine resources in Kenya, the offshore fisheries zone is exploited by vessels from DWFNs without any local component on the catch and effort.⁴²¹ Very little

⁴¹⁹ ⁴¹⁹ Kenchington R. A., in *supra* note 2 p. 67.

⁴²⁰ The Ministry of Fisheries Development is mandated to facilitate the development and management of the fisheries sub-sector. The potential of the sub-sector has not been fully realized due to relegation of the sector by policy makers, perhaps due to general ignorance on the sector's potential. The current top-down management policy approach, which does not involve stakeholders in decision making, lack of coherent development plan, and the non-prioritization of the sector in terms of resource allocation have adversely affected its growth. Frequent transfer of the Department of Fisheries from Ministry to Ministry has further frustrated efforts to streamline the operations of the sector.

⁴²¹ Gitonga K.N and Achoki R in *supra* note 402. The main species sought are the highly migratory tunas including skipjack, yellow fin and big eye tuna. Some of the fish are landed in Kenya and transshipped overseas. Others are landed directly in the Distant Nations by the fishing vessels. A tuna factory in Mombasa partly processes the catch from the foreign vessels and the product is exported as tuna loins. Up to 38 foreign fishing vessels have been licensed to fish in the Kenya EEZ. License fees earn the Government on average Kshs 30 million per year (approximately US\$400 000). The fees charged are US\$20 000 per vessel for all foreign fishing vessels, but only purse-seiners pay for their licenses. The longliners may find fees inhibitive because according to them, fish is available in Kenyan waters only approximately 3 months a year. However, Dr Simonit Hemphill the chairman of the Kenya Association of Sea Anglers was recently quoted in media reports expressing dissatisfaction in the manner in which these licenses are issued deriding the licensing fee as being "only a pittance" See, *The Standard*, 9th February 2007.

work has been done on fishery resources in the deeper waters of the Kenyan zone as to establish species composition, distribution, behaviour, and migration.

If Kenya is to maximize on the economic value of her marine resources, she must find out more about them.

4.2.7 Attempts at Reviewing The Policy Framework

There lacks in Kenya a mechanism for reviewing the policy framework for the governance of marine resources. Although awareness levels have increased thereby leading to calls for a more integrated approach towards the issue of governance of marine resources, there have been no formal efforts targeted at reviewing the policy framework.

The Task Force on Review of Maritime Laws was appointed on 8th February 2002 to review maritime laws and institutions in Kenya and make appropriate recommendations.⁴²² The Task Force in its report presented to the Attorney General of Kenya, in May 2003 had recommended the formulation and development of a national maritime policy to provide guidelines on administration and regulation of the maritime industry, maritime trade, maritime services, port infrastructure, maritime security, admiralty jurisdiction, maritime education, training and research, marine pollution and an

⁴²² *vide* Gazette Notice No. 645 of 8th February 2002. The Terms of Reference included the review of legislation and conventions relating to ship safety, marine pollution and the preservation of marine environment; setting up of legislative and institutional framework for maritime administration; and maritime security.

appropriate legislative framework.⁴²³ However, these recommendations were never acted on and the policy framework remains wanting.

The closest Kenya has come to reviewing the policy framework for the governance of marine resources is the Ministry of Transport's proposed draft Integrated National Transport policy document which includes in its purview maritime transport.⁴²⁴ This draft policy document has not even been presented to the relevant authorities for ratification and, given the history of the slow pace of legislating in the Kenyan Parliament, the draft policy might not come into force in the foreseeable future. The inclusion of a policy on marine resources in a report by a Committee of government dealing with a national transport policy further emphasizes the fact that the marine sector in Kenya is indeed a forgotten province.

The Government is currently focusing on the aquaculture development and exploitation of the EEZ to bring rapid development in fisheries sub-sector, with a view to alleviating rural poverty, and expediting economic growth.⁴²⁵ The demarcation of the EEZ and the outer continental shelf in accordance with provisions of the LOSC is in progress and strategies to ensure profitable exploitation of the Zone are being put in place.⁴²⁶ Recently, a Task Force on the Delineation of Kenya's Outer Continental Shelf⁴²⁷ was appointed to among other things: explore and recommend modalities for delineation of the country's

⁴²³ Government of Kenya Report of the Task Force on the Review of Maritime Laws of Kenya, May 2003 p. xiv.

⁴²⁴ Government of Kenya, Recommendations on Integrated National Transport Policy Vols. I-III, February 2004

⁴²⁵ *Ibid.*

⁴²⁶ To facilitate this, a Task Force was appointed *vide* Kenya Gazette Notice No. 3929 of 2nd June 2006.

⁴²⁷ *vide* Kenya Gazette Notice No. 3929 of 2nd June 2006.

Continental Shelf according to the provisions of LOSC and in line with the best international practices; examine and make recommendations on the modalities for sustainable utilization of these resources including development of appropriate infrastructure, financial mechanisms, and institutional framework; recommend a comprehensive management policy including institutional framework to guide use and management of ocean space and resources to ensure that present and future generations of Kenya benefit from the opportunities offered by the vast ocean frontier. The Task Force's work is underway although doubts are rife concerning its ability to execute the mandate.⁴²⁸

4.3 A Review of the Current Legal Framework

A good legislative framework for a proper management of marine resources is always underpinned by a sound policy framework base.⁴²⁹ Due to the absence of a comprehensive policy framework in Kenya for the governance of marine resources, as was demonstrated in the foregoing paragraphs, the current legislative regime is also fundamentally flawed, inconsistent and dogged by inherent inconsistencies and weaknesses. In the following paragraphs, this study will outline some negative elements that have resulted from failure to map out a comprehensive coherent and consistent legislative framework for the governance of marine resources.

⁴²⁸ Discussed in details in chapter three.

⁴²⁹ This has proven to be the best approach and has registered immense success in the case of the management of the Great Barrier Reef in Australia. See also Kenchington R. A., in *supra* note 2 p. 109 – 183 and also Great Barrier Reef Marine Park Authority Protecting Biodiversity Brochure 2005.

4.3.1 Overlap and duplicity in the legislative framework

As was stated in Chapter One, a large body of statutes has attempted to deal with Kenya's challenges regarding the governance of the maritime zones in general and the question of management and control of marine resources in particular, albeit in an uncoordinated and piecemeal manner. The fundamental flaw in these laws is that they predate the 1982 LOSC and attempts at piecemeal grafting have failed to capture the Convention's spirit. In a nutshell, the legislative agenda has been utilitarian without being LOSC-compliant.⁴³⁰

An analysis of the legislative framework for the governance of marine resources in Kenya reveals duplicity and overlap in the provisions of the various legislations and hence inconsistency and inefficiency. There is need to harmonize these legislations to avoid the rather clumsy scenario of having provisions on management of marine resources being duplicated in several legislations and the enforcement mandate being vested in diverse bodies with a potential for conflict. The applicable legislations in the management of marine resources include *inter alia*:-

- (a) **The Water Act 2002:** The Water Act Cap 732 was repealed and replaced by the Water Act 2002. The Water Act 2002 provides for the conservation and controlled use of water resources in Kenya. The implementation of this Act falls within the mandate of the Ministry of Water and Irrigation (formerly the Ministry of Land Reclamation, Regional and Water Development). The Act prohibits pollution of water resources and controls the discharge of industrial and municipal

⁴³⁰ Lumumba, P. L. O., in *supra* note 21 p. 268

effluents into rivers and the ocean. However the Act does not have specific provisions on the management of marine resources.

(b) Government Fisheries Protection Act (Cap 379): The Government Fisheries Protection Act is implemented through the Ministry of Fisheries Development. It has provisions for the control and management of certain coastal and marine species such as the pearl oyster and other resources which are threatened with depletion through commercial exploitation.

(c) Maritime Zones Act (Cap 371): The Maritime Zones Act gives the government of Kenya greater rights on the control of marine resources situated within Kenya's territorial waters as well as Kenya's EEZ. The government has rights on the exploitation and exploration of marine resources and over the conduct of research by international research agencies. The statute does not specifically name the implementing authority but the Coast Development Authority Act (Cap 249) (section...) provides that the CDA should be the implementing/managing agency of the EEZ.

(d) Fisheries Act (Cap 378): The Fisheries Act has provisions for control of fishing activities and subsequent processing in both inland and coastal waters of Kenya. The Act was initially implemented by the Ministry of Tourism and Wildlife but is currently being enforced by the Ministry of Fisheries Development in conjunction with other state agencies. The Act has great relevance for the management of Kenya's marine fisheries resources and guards against over-exploitation through overfishing and the use of harmful fishing methods. This Act amended the earlier

Fish Industry Act in 1989 following the revision of the Maritime Zones Act to align its provisions with those of LOSC.

(e) Merchant Shipping Act (Cap 389): The Merchant Shipping Act which is implemented by the Ministry of Transport in conjunction with other Ministries is the statute which provides for the control of pollution of the sea by oil from ships. The Act can be considered as the mechanism for regulating the pollution of Kenya's territorial waters arising from marine vessel-based sources. The Merchant Shipping Superintendent was mandated to administer the Merchant Shipping Act but the role is now vested in KMA. Enacted in 1967 this Act is a derivative of the UK Merchant Shipping Act of 1894, which has since been amended severally while Kenya's Act has remained the same. The Act is over 30 years old, dated, and does not cover the important international shipping and maritime conventions to which Kenya is a party.

(f) The Carriage of Goods by Sea Act (Cap 392): This Act which was enacted in 1926 is meant to regulate sea transport and contains provisions pertaining to Bills of Lading. The Act expressly states that it does not affect the regulation of carriage of dangerous goods by sea as provided for under the Merchant Shipping Act.⁴³¹

(g) Wildlife Conservation and Management Act (Cap 376): This Act of parliament is implemented by the government of Kenya through the Ministry of Environment and Natural Resources in conjunction with other relevant government agencies such as Kenya Wildlife Service. The Act has provisions for the preservation and control of wild fauna and flora. The Act is intended to ensure Kenya's fauna and

⁴³¹ See Section of the Act.

flora flourish naturally in their habitats. Various marine parks otherwise called Marine Protected Areas (MPAs) fall within the ambit of the Act.

(h) The Continental Shelf Act (Cap 312): The Continental Shelf Act came into force in 1975. It gives the government of Kenya rights in respect of the management and exploitation of natural resources of the continental shelf situated within Kenya's maritime jurisdiction. Such rights include the exploitation of living and non-living resources and the conduct of scientific research.

(i) Coast Development Authority Act (Cap 449): This Act provides for the establishment of the Coast Planning Authority to plan and coordinate the implementation of development projects in the whole of Coast Province and the EEZ. The Act gives powers to the Authority to plan, coordinate, gather and disseminate information, and to generally manage and develop coastal resources in a sustainable manner. CDA as a regional body falls within the ambit of the Ministry of Regional Development.

(j) The Environmental Management and Coordination Act (Act No. 8 of 1999) (EMCA): This Act provides for Kenya's legislative framework for environmental management. It was adopted by parliament in 1999 and came into force in 2000. Before then all that existed were sectoral laws governing different aspects of the environment but not one was a comprehensive legislation dealing with the environment as a whole. The Act established the National Environmental Management Authority (NEMA) which is charged with the enforcement of regulation under the Act with respect to conservation of the environment including marine environments.

(k) Kenya Ports Authority Act (Cap 391): This Act provides for the establishment of the Kenya Ports Authority (KPA)⁴³² and gives it power to set up, maintain and regulate port facilities in Kenya. Under the Act, KPA is both a provider of port facilities (and services) and a regulator of maritime transport thereby creating a potential of conflict between the two roles. KPA is currently placed under the Ministry of Transport.

(l) The Kenya Maritime Authority Act (Act No. 5 of 2006): The Kenya Maritime Authority Act replaced a Presidential Executive Order issued under the State Corporations Act⁴³³ under which KMA had for a long time operated thereby formalizing its existence. Under the Act, KMA is charged with the mandate of overseeing operations of the maritime sector generally and is expected to work jointly with Kenya Ports Authority (KPA) and other institutions which have authority over Kenya's maritime zones. The Act however falls short of laying down a comprehensive framework for the co-ordination of the activities of the multiple agencies which are mandated to govern activities within Kenya's maritime zones and did not amend or repeal Acts that grant similar mandates to other government agencies.

With regard to the governance of non-living marine resources, two pieces of legislation govern the exploitation of mineral resources in the sub- marine areas of the EEZ:

⁴³² See section 3 of the Act.

⁴³³ Cap 446 of the Laws of Kenya. The Order was issued pursuant to Section 3 of the Act and was contained in Legal Notice No. 79 of 25th June 2004.

(i) **The Petroleum (Exploration and Production) Act (Cap 308)** seeks to regulate Government negotiation and conclusion of agreements on the exploration for development, production and transportation of petroleum and related purposes and vests petroleum property in the Government. The Act constitutes the Minister for Energy as the Chief Government Officer responsible for all petroleum operations.

(ii) **The Mining Act (Cap 306)** makes provisions on all mineral and mineral substances other than petroleum. It establishes a license control mechanism for exploiting mineral resources and establishes the office of the Commissioner of Mines and Geology as the Chief Implementing Officer. Any interested person must apply for a prospecting right, then an exclusive prospecting license and finally, the registration of locations for mining.

These two legislations do not provide a suitable legal framework to govern the exploitation of mineral resources in Kenya's maritime zones because there is no underlying policy and supporting institutional framework to govern such exploitation. The provisions of the two legislations are inadequate and do not encompass an all inclusive and comprehensive legal regime relevant to the modern management of maritime zones as referred to in chapter two and three.

The Judicature Act (Cap 8), imports English law into Kenyan courts. Litigants and Judges are often thrown into a quandary while trying to keep with the ever-changing

procedures and provisions of Admiralty law in England. Some of these changes have no relevance to the Kenyan situation but have to be applied nonetheless, making the process of handling maritime disputes/claims unpredictable. There is therefore lack of an appropriate comprehensive local legislation for the adjudication of maritime claims. The court of appeal expressed dissatisfaction with this arrangement in the often quoted case of *The Owners of the Motor Vessel "The Lillian" and Caltex Oil Kenya Limited*⁴³⁴ where Nyarangi, Masime JJA and Kwach Ag. JA stated *obiter*:

It remains for us to comment briefly on a secondary question which the court raised, that is whether it is always in the national interest for the High Court to exercise its Admiralty jurisdiction in accordance with English Procedure as is provided in Section 4 of the Judicature Act.

... It is our considered view that, after 25 years of independence, there is not the justification for Kenya... to depend wholly on the English procedure. The fact of the existing situation is that a committee of Rules, sitting in London, making rules and laying procedure for the benefit of U. K. in effect tells the High Court in Kenya what procedure to follow in admiralty matters ... The High Court of Kenya applies the English procedure without having regard to our circumstances. We know of no other provisions in our laws, which ties to English law the Kenyan High Court or any other Courts firmly as Section 4 of the Judicature Act does. We are concerned that a situation might arise which the Kenya High Court must apply English procedure to our own cases in a manner injurious to our national interest.

⁴³⁴ [1986-1989] EA 305

From the above analysis, it is clear that the legislative framework for the governance of Kenya's marine resources is full of duplicity and overlap. The scattered legislative enactments give the implementation mandate to different Government Ministries and statutory bodies although the provisions are by and large the same. Statutory bodies with overlapping mandate but different objectives such as NEMA and CDA have found themselves often in conflict in their endeavor to carry out their duties.⁴³⁵ Although the bodies have tried to coordinate their operations to ensure the best results, this has been done on an *ad hoc* basis and the objectives as stated in their respective enabling statutes have remained a great obstacle in their efforts to achieve unity of purpose.⁴³⁶

Due to the lack of a broad, comprehensive and integrated National Policy on governance of marine resources, most maritime laws have remained unchanged for years and are ill-suited for modern day sustainable use of marine areas and the resources therein. Kenya still operates under archaic legislations that were inherited from colonial Britain and therefore lack a home-grown character. It is only in 2002 that the Government woke up to the reality of the situation and set up a Task Force to report on the reform of maritime laws.⁴³⁷ The Task Force recommended a complete overhaul of the legislative framework for the governance of marine resources in Kenya but the government is yet to act on its recommendations.

⁴³⁵ Information obtained pursuant to an interview with Caroline Anyango, Senior Coordinator Marine Department NEMA on 18th June 2007.

⁴³⁶ *Ibid.*

⁴³⁷ *vide* Gazette Notice No. 645 of 8th February 2002.

4.3.2 Regulations on Governance of Marine Resources

Regulations on the management of marine resources have been wanting since they flow from and are founded on an already flawed legislative framework. The internal inconsistencies in the regulations have in some instances led to serious threats to marine environments where stakeholders who are motivated by profits are left to self-regulate themselves.⁴³⁸

For the regulation of living marine resources, the principal governing legislation is the Fisheries Act, which is the principal legislation that governs marine fisheries resources. This Act governs the management, conservation and utilization of fisheries resources, including marketing and licensing fishermen and traders. It prescribes the types and sizes of fishing gears and practices, fisheries management institutions, conduct of fishermen and other fisheries control measures.⁴³⁹

The Fisheries (Fish Quality Assurance) Regulations 2000 specifically focuses on the quality assurance measures and standards for fisheries products. This regulation creates the Fisheries Department as the recognized and competent authority, on matters of fisheries quality assurance, setting of standards, carrying out inspection and certification. The key feature of this regulation is that it aims to achieve highest standards for fishery

⁴³⁸ *Supra* note 435.

⁴³⁹ Section 15 Fisheries Act Cap 378 laws of Kenya.

products and all support materials utilized in the preparation, processing, packaging, storage and transportation of the product.⁴⁴⁰

With regard to regulation of land-based activities that have an impact on marine sources, the Water Act (2000) provides for the conservation and controlled use of water resources in Kenya. The Act prohibits pollution of water resources and controls the discharge of industrial and municipal effluents into rivers and the ocean.

The regulation for ship-based activities that may injure marine environments is contained in regulations made under the Environmental Management and Co-ordination Act (1999).

The regulations provide as follows:

3 (1). No ship or any other person in Kenya shall be allowed to discharge any hazardous substance, chemical, oil or oily mixture into the territorial waters of Kenya or any segment of the environment contrary to the provisions of these Regulations.

(2). All ships in the territorial waters of Kenya shall off-load oil or oily mixture, sludge, bilge water, ballast water, waste and sewage to the certified Port Waste Reception Facility at the Port of Mombasa.

"discharge" in relation to harmful substances or effluents containing such substances, means any release howsoever caused from a ship and includes any escape, disposal, spilling, leaking, pumping, emitting, or emptying but does not include-

⁴⁴⁰ Legal Notice No. 99 11th August 2000.

- (a) release of harmful substances directly arising from the exploration, exploitation and associated offshore processing of seabed mineral resources; or*
- (b) release of harmful substances for purposes of legitimate scientific research into pollution abatement or control.*⁴⁴¹

For exploration and exploitation of non-living marine resources, the EMCA will require that Environment Impact Assessments be conducted before such activities are undertaken. NEMA is charged with the responsibility of ensuring that this requirement is met. Failure to observe this requirement can lead to serious consequences including cancellation of licenses and prosecution of offenders. However, regulations under this Act were made for terrestrial projects and do not contain specific provisions on issues that are unique to marine environments such as destruction of habitats for marine life that, unlike terrestrial habitats that can be rehabilitated, is irreversible. The regulations are also silent on how pollution arising from scientific research and exploration and exploitation of minerals within EEZ is to be regulated.

The Kenya Maritime Authority Act also contains regulatory provisions.⁴⁴² Under the Act, KMA is empowered to:

- (a) administer and enforce the provisions of the Merchant Shipping Act and any other legislation relating to the maritime sector for the time being in force;*
- (b) co-ordinate the implementation of policies relating to maritime affairs and promote the integration of such policies into the national development plan;*

⁴⁴¹ The Environmental (Prevention of Pollution in Coastal Zone and Other Segments of the Environment) Regulation, Legal Notice No. 159 of 19th September 2003.

⁴⁴² See Section 5 of the Act.

- (c) advise government on legislative and other measures necessary for the implementation of relevant international conventions, treaties, and agreements to which Kenya is a party;*
- (d) undertake and coordinate research, investigation, and surveys in the maritime field;*
- (e) discharge flag State and Port State responsibilities in an efficient and effective manner having regard to international maritime conventions, treaties, agreements and other instruments to which Kenya is a party;*
- (f) develop, co-ordinate and manage a national oil spill contingency plan for both coastal and inland waters and shall in the discharge of this responsibility be designated as the - competent oil spill authority;*
- (g) maintain and administer a ship register;*
- (h) deal with matters pertaining to maritime search and rescue and co-ordinate the activities of the Kenya Ports Authority, the Kenya Navy and any other body engaged during search and rescue operations ;*
- (i) enforce safety of shipping, including compliance with construction regulations, maintenance of safety standards and safety navigation rules;*
- (j) conduct regular inspection of ships to ensure maritime safety and prevention of marine pollution;*
- (k) oversee matters pertaining to the training, recruitment and welfare of seafarers;*
- (l) plan, monitor and evaluate training programmes to ensure conformity with standards laid down in international maritime conventions;*
- (m) conduct investigations into maritime casualties including wreck;*

- (n) undertake enquiries with respect to charges of incompetence and misconduct on the part of seafarers;*
- (o) ensure, in collaboration with such other public agencies and institutions, the prevention of marine source pollution, protection of the marine environment and response to marine environment incidents;*
- (p) regulate activities with regard to shipping in the inland waterways including the safety of navigation; and*
- (q) undertake any other business which is incidental to the performance of any of the foregoing functions.*

These provisions are a duplication of provisions found in other legislations such as the EMCA, the Merchant Shipping Act (Cap 389) and the Kenya Ports Authority Act. The Kenya Maritime Authority Act did not repeal or amend the provisions in the preceding statutes and therefore created an overlap between the mandate of KMA and that of the already existing regulatory bodies.

4.3.3 Enforcement Mechanism and Penalties

It has already been stated that effective legislation must provide adequate enforcement mechanisms, powers, and duties. Penalties for breach of regulations, incentives for compliance, adequate powers for enforcement agencies to take necessary enforcement action such as arresting of violators, gathering of evidence, confiscation of equipment and evidence, prosecutorial powers and where practicable, powers for local people to reinforce or provide enforcement are among the things that the legislation should

contain.⁴⁴³ Enforcement falls into three broad categories: MPAs; protection of marine environment; and maritime transport regulation.

KWS is the statutory body mandated to enforce regulations within Kenya's MPAs. Protected areas are managed by wardens and rangers who are required to have a basic training in wildlife management upon recruitment by KWS. These officials are then sent to the KWS paramilitary school (Manyani) for acquisition of further skills including law enforcement, weapons use and maintenance, ecology and survival techniques. These skills are required because rangers are periodically deployed in the Anti-Poaching Unit and animal control requiring a high level of paramilitary skills. Until recently the courses at the paramilitary school at Manyani were geared towards terrestrial protected areas. The Wetlands program has however been funding courses in marine ecology, scuba and ICAM. Most managers now have a basic background in marine issues.⁴⁴⁴

Much of the enforcement includes daily patrols of the MPAs by boat, foot patrols and night patrols all geared towards minimizing poaching, checking to ensure that visitors have paid the appropriate fee and fishers are licensed and using the appropriate gears. Infringement of regulations is recorded in an occurrence book and persons arrested are usually handed over to the Police for prosecution.⁴⁴⁵ Unfortunately, lack of adequate

⁴⁴³ Kenchington R. A., in *supra* note 2 p. 67

⁴⁴⁴ iodeweb1.vliz.be/odin/bitstream/1834/772/1/KeMPAs.pdf Accessed on 16/11/2008.

⁴⁴⁵ This is anomalous as the Police are mandated under the Police Act Cap 84 laws of Kenya to maintain general law and order. Offences under the Wildlife and Conservation Act are specific and should therefore be dealt with by persons trained to handle such crimes under the legal department of KWS.

awareness and weak laws usually mean that fines are low and are often not a sufficient deterrent making enforcement an inefficient and expensive process.⁴⁴⁶

There is no formal program that has been implemented to involve communities in enforcement although Wardens often depend on information from community elders especially when ‘foreign fishers’ are involved. The level of community involvement is often a reflection of how well the Warden interacts with the community. In the older parks and where Wardens have been present for an extended period, communities are more forthcoming with information. Unfortunately KWS often goes through periods of restructuring that cause the transfer of Wardens and this has often disrupted relationships and hence decreased efficiency of enforcement.⁴⁴⁷

In the realm of fishing activities, the Fisheries Act gives “authorized officers”⁴⁴⁸ the power to control fishery and related matters. These officers are the only medium through which regulations in fishing within the maritime zones are enforced. The major problem is that the officers lack the technical capacity to achieve the intended objectives. This has caused illegal fishing activities to continue unabated within Kenya’s maritime zones, a state of affairs that places Kenya in a very precarious position, given the already emerging evidence of pirate fishing along the East Coast of Africa and the high

⁴⁴⁶ *Ibid.*

⁴⁴⁷ *Ibid.*

⁴⁴⁸ Defined under Section 2 of the Act as a police officer of or above the rank of inspector, an officer of the Kenya Navy or other armed forces or a person appointed by the Minister, by notice in the Gazette, to be an authorized officer for the purposes of the Act.

likelihood of pollution from vessels plying the Indian Ocean Maritime routes, already recognized as the heaviest tanker route in the world.⁴⁴⁹

In Kenya, maritime administration is the joint responsibility of the Kenya Ports Authority and KMA. The Merchant Shipping Act as it currently exists does not incorporate several important guidelines, codes and procedures on port state control, safe management of ships, the handling of dangerous and hazardous cargoes and the global maritime distress safety system (GMDSS). This leaves a gaping hole in the enforcement mechanism as ships violating international standards can easily get away scot free as they will have violated no known Kenyan law and given the dualist mode of domestication of international conventions in Kenya and the fact that Kenya has not domesticated international maritime conventions, such violators cannot even be charged in Kenyan courts for the violations.

Kenya is a signatory to the Indian Ocean Memorandum of Understanding (IMOU) on port state control. Under the MOU, the Merchant Shipping Superintendent (MSS) is obliged to inspect 15% of all the ships that call on Kenyan ports in order to enhance safety of shipping. The Merchant Shipping Act does not have the legal framework for such inspections and therefore Kenya cannot meet her obligations under the MOU.⁴⁵⁰ This failure at legislation underscores the clear lack of coordination in the enforcement of

⁴⁴⁹ UNEP, East Africa Atlas of Coastal Resources, 1998 p. 73. See Lumumba P. L. O., in *supra* note 21 p. 121 and Angwenyi A., "Environmental Legislation and Domestication of International Environmental Law in Kenya" [unpublished] *Sesei Programme Sub-Regional Legal Workshop*, Nairobi 13th -17th December 2004.

⁴⁵⁰ www.iomou.org/ - 12k Accessed on 16/11/2008.

regulation for the governance of marine resources in Kenya and is a clear reflection that management of the maritime zones and the resources therein is a forgotten province.

The regulations made under EMCA also have some enforcement mechanisms.⁴⁵¹ A ship to which these regulations apply may in any port or offshore terminal in Kenya be subject to inspection by officers appointed or authorized by the Director-General of NEMA for the purpose of verifying whether the ship has discharged any harmful substances in violation of the Regulation. Whenever visible traces of oil are observed on or below the surface of the water in the immediate vicinity of a ship or its wake the Director-General of the NEMA shall promptly carry out an investigation of the facts bearing on the issue of whether there has been a violation of these regulations.⁴⁵² Any person who contravenes the provisions of these regulations is guilty of an offence and is liable upon conviction to imprisonment for a term of not more than eighteen months or to a fine of not more than three hundred and fifty thousand shillings or to both such fine and imprisonment.⁴⁵³

4.3.4 Attempts at Reviewing the Legislative Framework

The Task Force on the Review of Maritime Laws in Kenya recommended a total overhaul of the maritime laws in Kenya. The acts that the Task Force proposed to be repealed and replaced with new Acts include the Marine Zones Act (Cap 371); Carriage of Goods by Sea Act (Cap 392); Fisheries Act (Cap 378); Ferries Ordinance (Cap 410);

⁴⁵¹ The Environmental (Prevention of Pollution In Coastal Zone and Other Segments of the Environment) Regulation, 2003.

⁴⁵² *Ibid* at Section 8.

⁴⁵³ *Ibid* at Section 9.

and the Marine Insurance Act (Cap 390). The Task Force went as far as drafting some of the Bills that it proposed to be enacted.⁴⁵⁴ The Task Force also noted that some of the issues involved in the formulation of laws for the governance of marine resources required further study and research and wider consultations with stakeholders than it had done.⁴⁵⁵ Of all the Bills proposed by the Task Force, the Maritime Authority Bill was adopted and enacted by parliament⁴⁵⁶ thereby granting the Maritime Authority some autonomy from KPA.⁴⁵⁷

Notable among the proposed Bills was the Maritime Zones Bill which was proposed to act as the basis of delimitation of the maritime zones within Kenya's jurisdiction. The Bill though well intentioned fell short of addressing the duplicity in the legislative framework for the governance of marine resources in Kenya. In fact, it contained detailed provisions on management and conservation of fisheries thereby overlapping with the provisions of the Fisheries Act.⁴⁵⁸

As a result of the work of the Task Force, the Merchant Shipping Bill 2007⁴⁵⁹ was tabled in Parliament generating a lot of excitement amongst stakeholders in the maritime industry. This Bill would have seen Kenya comply with international standards with

⁴⁵⁴ Among them were The Maritime Zones Bill, The Maritime Regulatory Authority Bill, The Merchant Shipping Bill, The Ferries Corporation Bill, The Kenya Ports Authority (Amendment) Bill, The Carriage of Goods by Sea Bill, The High Court (Admiralty Jurisdiction) Bill, The Marine Pollution Bill and proposed amendments to The Marine Insurance Act.

⁴⁵⁵ *Supra* note 423.

⁴⁵⁶ Enacted as Act No. 6 of 2006.

⁴⁵⁷ KMA had been placed under KPA when it operated under a Presidential Executive Order issued under the State Corporations Act

⁴⁵⁸ Sections 22-35 of the Maritime Zones Bill 2003.

⁴⁵⁹ The Bill had 450 sections and is so far the most conscious and deliberate effort that has been made towards reforming the legislative framework for the governance of the maritime industry in Kenya.

regard to maritime industry, safety and training of seafarers besides providing a sound regulatory framework for the maritime sector. The pre-amble of the Bill reads:

'AN ACT of Parliament to make provision for the registration and licensing of Kenyan ships, to regulate proprietary interests in ships and the terms of engagement of masters and seafarers and matters ancillary thereto; to provide for the prevention of collisions, the safety of navigation, the safety of cargoes, the carriage of bulk and dangerous cargoes, the liability of shipowners and others, and inquiries and investigations into marine casualties; to consolidate the law relating to shipping, and for connected purposes'

Unfortunately, the 9th Parliament was dissolved before it could enact this Bill which in effect means that the Bill has lapsed and will have to be tabled afresh once the 10th Parliament is constituted early in 2008.

Before the recommendations of the Task Force on the Review of Maritime Laws in Kenya could be implemented, another committee with almost similar mandate was appointed in 2006. The Task Force on the Delineation of Kenya's Outer Continental Shelf was mandated to come up with recommendations on how best to bring order and sound governance to the Kenyan Maritime Zones.⁴⁶⁰ It is intriguing that the Kenya government chose to appoint a successive Task Force with the same or similar mandate without implementing the recommendations of the earlier one. It would have been prudent to first implement the recommendations of the Task Force whose work is already complete and thereafter, if there be need for another Task Force to resolve some

⁴⁶⁰ vide Kenya Gazette Notice No. 3929 of 2nd June 2006.

outstanding issues, establish another one. The existing quagmire in the legislative framework can only be resolved if the government commits itself to formulating an integrated and comprehensive policy on the governance of marine resources. Once such policy framework is in place the legislative agenda for the government will be clear cut and easy to implement.

There is also effort to reform the Wildlife Act by the government and a draft Wildlife (Conservation and Management) Bill 2007 has already been prepared by the Ministry of Tourism and Wildlife. This draft Bill notably addresses among other issues community participation and management of wildlife outside protected areas such as MPAs. The draft also has elaborate provisions on compensation for damage occasioned by wildlife. Although it is a step in the right direction, the draft Bill is however tailored for management of wildlife within terrestrial parks and lacks specific provisions for the management of marine wildlife. The Bill is yet to be tabled in Parliament for enactment and it will therefore take some time before it becomes law.

4.4 A Review of Institutional Framework

A good legislative framework requires efficient and well managed institutions for implementation. If the legislative framework is flawed, the institutional framework will be handicapped as it can only implement what is already law. Kenya has no shortage of institutions that are involved in the management of marine resources. However, owing to the flawed legislative framework, the mandate of such institutions often overlap and in other instances there is a lacuna where no specific institutions are mandated to undertake

the required role in the governance of marine resources process. In the following paragraphs, this study examines the institutional framework in Kenya for governance of marine resources with regard to some key aspects namely: training and education; exploration and research; regulation and enforcement; regional cooperation; and involvement of Non-Governmental Institutions (NGOs).

4.4.1 Training and educational institutions

Despite its strategic geographical location, Kenya has not achieved her potential in international shipping, mainly due to the lack of a coherent maritime policy and failure to set up appropriate legal and institutional frameworks for the training of seafarers. Because of this failure, Kenya has not kept pace with technological developments at the international maritime arena. Thus major international conventions which have a bearing on trade, safety at sea, marine pollution, training and certification of seafarers, fishers and salvage at sea, preservation of the marine environment and maritime security have not been domesticated in the country, leading to stagnation in the development of the maritime industry.

Apart from the University of Nairobi which has recently started offering a few courses on maritime law and administration both at the undergraduate and postgraduate levels, there is no credible institutional framework for education and training of marine administrators in Kenya. Bandari College has the required minimum capacity to meet the emerging training requirements and trends within the entire spectrum of the maritime industry.⁴⁶¹ The college has however not been granted the legal mandate to carry out certification

⁴⁶¹ Government of Kenya, A Report on Maritime Education, May 2005 p. 10.

under the Standards of Training, Certification and Watchkeeping'95 (STCW '95) Convention. The Jomo Kenyatta University of Agriculture and Technology (JKUAT) has been utilizing the idle facilities at Bandari College to offer a bridging course on mathematics and a diploma course in Information Technology which are both unrelated to training of seafarers.⁴⁶²

The inadequacy of the Merchant Shipping Act has meant that Kenya does not meet the minimum STCW '95 requirements for the acceptance into the IMO "white list" of nations that have complied with the convention. This exclusion from the "white list" means that the certificates offered by Bandari College in Mombasa are not recognized by IMO and other member states. This has forced Kenyan seafarers out of employment on foreign ocean-going vessels. More serious repercussions may occur as Kenyan registered ships may be refused entry to other ports.

Although the Minister of Transport in 2000 promulgated the Merchant Shipping (Training, Certification, Watchkeeping and Safemanning) Regulations,⁴⁶³ statistics reveal that 80% of Kenyan seafarers are unemployed due to poor training and those employed are, in effect, dispossessed people deprived of basic rights and lacking any recourse to normal grievance procedures. The 2000 Merchant Shipping Regulations were superimposed on the archaic structure of the Merchant Shipping Act and the two have not been harmoniously merged.

⁴⁶² *Ibid.*

⁴⁶³ Legal Notice No. 35 of 20th April 2000.

Kenya is a party to 19 of the 50 international maritime conventions signed under the auspices of the IMO, and thirteen conventions/recommendations under ILO that have a bearing on the seafarers. These conventions impose international obligations on the country, the main one of which is to create national legislation for their domestication.⁴⁶⁴ The lack of domestication of ratified international conventions and protocols as well as lack of updated legal instruments in tune with modern challenges and development has meant that Kenyan seafarers continue to be ill-trained and exploited with often tragic results.

The signing by the Kenyan Government of a Memorandum of Understanding with the Government of Tanzania to train Kenyan seafarers at the Dar es Salaam Maritime Institute augurs very well in fulfilling the country's maritime aspirations and will, certainly, facilitate the conditions for Kenya to qualify for the "White List" of countries deemed to be properly fulfilling their obligations under the STCW convention. However, more needs to be done as Kenya cannot rely on Tanzania to meet her maritime training needs indefinitely. Besides, the courses are very expensive as Kenyan students who enroll at the Tanzanian institute are not given preferential treatment and have to pay fees in foreign currency (U.S. Dollars) notwithstanding that they are from the East African Community.⁴⁶⁵

⁴⁶⁴ *Supra* note 461 p. 44.

⁴⁶⁵ Figures and information derived from Dar es Salaam Maritime Institute List of Course (Duration, Tuition and Examination Fees) for Academic Year 2006/07.

4.4.2 Exploration and Research Institutions

The exploration and research institutions involved in the governance of marine resources in Kenya have been faced with the perennial problems of lack of funds and trained man power. The over reliance on donor funding and grants from the central government has denied the institutions autonomy and this has negatively affected their work. There are two main institutions involved in the exploration and research on marine resources in Kenya: KMFRI and the NOCK.

KMFRI undertakes research on behalf of the Kenyan government in the field of living marine resources. KMFRI is a State Corporation under the Ministry of Fisheries Development of the Government of Kenya. It is mandated to conduct aquatic research covering all the Kenya's Indian Ocean waters including the EEZ and the corresponding riparian areas. The Institute was established by an Act of Parliament (Science and Technology Act⁴⁶⁶) in 1979 and is run by a Board of Management.

The Institute conducts research and survey work on various aspects of aquatic science. These include marine and freshwater fisheries, aquatic biology including environmental and ecological studies and chemical and physical oceanography. The Institute also monitors pollution, investigates and promotes aquaculture and carries out socioeconomic research on topics related to fisheries and aquaculture.⁴⁶⁷ The Institute is also the repository and manager of the Kenya Geographic Information System for the Eastern African Coastal and Marine Environment Resources Database. The Institute is

⁴⁶⁶ Cap 250 of the Laws of Kenya. See also <http://www.kmfri.co.ke> Accessed on 16/11/2008.

⁴⁶⁷ *Ibid.*

empowered to carry out research in Marine and Freshwater fisheries, Aquatic biology, Aquaculture, Environmental Chemistry, Ecological, Geological and Hydrological studies, as well as Chemical and Physical Oceanography.⁴⁶⁸

Some of the challenges facing KMFRI in its research work include:

- (a) Lack of research funds. The government pays salary only, but there is need to have at least some seed research funds to facilitate capacity building collaborations and also to compliment donor backed research. Acquisition of knowledge is too valuable only to non-government donors;
- (b) Lack of a research vessel that is big enough to operate offshore-where big fish like Tuna are caught;
- (c) Lack of suitably trained man power to carry out research (although KMFRI embarked right from the start on 'Capacity training' and now can boast of the largest trained personnel in the country (40% PhD level, 45% MSc level);
- (d) The problem of trained scientists leaving the institute for greener pastures because of poor salary package coupled with lack of upward mobility;

⁴⁶⁸ The research mandate of KMFRI is contained in the Fourth and Fifth Schedules to the Science and Technology Act Cap 250 Laws of Kenya. The functions of KMFRI includes

- (a) Research on fish population dynamics and general water ecology, including identification of commercially and ecologically important species, their distribution and stock assessment.
- (b) Collecting and disseminating scientific information on fisheries resources which will form the basis for their utilization.
- (c) Studying and isolating suitable fish species for culture both in marine and freshwater and develop or adopt rearing technology and procedures;
- (d) Establishing a marine and freshwater collection to be used for research and training purposes;
- (e) Carrying out studies on other marine and freshwater resources including algae and minerals;
- (f) Offering its facilities for training of personnel;
- (g) Monitoring pollution in fresh and marine waters;
- (h) Study chemical and physical processes identified as important to aquatic productivity;
- (i) Carry out socio-economic research on topics related to fisheries environment and other aquatic resources.

- (e) Lack of basic research facilities owing to the over reliance on donor funded projects;
- (f) Inadequate purchase of 'up to date' core Scientific Journals.⁴⁶⁹

The National Oil Corporation of Kenya Limited (NOCK) is the institution charged with exploration and research on non-living marine resources within Kenya's maritime zones. NOCK was incorporated in 1981 under the Companies Act⁴⁷⁰ with 100% government ownership. It is rather curious that the government opted to incorporate NOCK as a private company rather than incorporate it as a state corporation. This was perhaps to remove NOCK from the reach of political influences which have informed decision making in state corporations, at times stalling their operations. Political influence has nonetheless infiltrated NOCK as the government as the majority shareholder has considerable influence in the composition of the management board.

The company's main objective at incorporation was to coordinate oil exploration (upstream) activities. However in 1988 the company was mandated on behalf of the government to supply 30% of the country's crude oil requirements that would in turn be sold to oil marketing companies for refining and onward sale to consumers. Following the de-regulation of the oil industry in 1994 the company lost that mandate, and had to formulate new survival strategies that saw its entry into downstream operations.⁴⁷¹

⁴⁶⁹ *Supra* note 372.

⁴⁷⁰ Cap 486 Laws of Kenya.

⁴⁷¹ www.nockkenya.co.ke/content.asp?ctid=3&title=Upstream+Activities - 19k Accessed on 16/11/2008.

From 1984, when NOCK became operational, one of its major activities has been the spearheading of petroleum exploration on behalf of the Kenya government. Even though there has been no discovery of commercially viable oil deposits to date, a lot of data showing positive prospects have been acquired.⁴⁷²

Since NOCK is a company and not a state corporation, it receives no funding from the Exchequer. NOCK operates outside the purview of the State Corporations Act and hence not subject to the rigors that attend the corporate governance of State Corporations which are subject to Parliamentary control. NOCK has been struggling to remain afloat since it is expected to fund its operations and the exploration process is expensive.

4.4.3 Regulatory and Enforcement Institutions

The functions of regulatory and enforcement institutions in the governance of marine resources are three fold: Surveillance to ensure compliance; security and safety; and prevention of environmental degradation. In the following paragraphs, the study examines the institutional framework for the carrying out of these three functions in the governance of marine resources in Kenya.

⁴⁷² *Ibid.* The role of NOCK in petroleum exploration includes:

- (a) Overseeing the fulfillment of petroleum exploration companies' obligations in accordance with contracts signed with the Kenya Government.
- (b) Providing and disseminating exploration data from various exploration activities in form of reports and promoting the same to oil companies in order to attract them to do exploration in Kenya.
- (c) Undertaking various exploration works in various basins in accordance with available capital outlay, technical expertise and equipment available. Due to limitations of risk capital from government, to date some exploration activities such as exploration drilling have been left mostly to international oil companies.
- (d) To manage on behalf of the government storage and disposal of government's share of oil after discovery

With regard to surveillance to ensure compliance, reefs associated ecosystems of Kenya fall under the jurisdiction of several government departments hence enforcement of regulations is often a challenge. The Ministry of Fisheries Development has jurisdiction over fishing activities, the forestry department (under the Ministry of Environment and Natural Resources) manages the mangrove resources while Tourism Department (under the Ministry of Tourism) licences all tourism activities. Often there is little consultation between these departments leading to user conflicts in the MPAs.⁴⁷³

KWS is charged with the duty of protection and conservation of the country's biodiversity as presented by its fauna and flora. KWS's role is as diverse as the country itself. It is responsible for the protection of Kenya's indigenous animals and plants and their habitats including marine wildlife. It achieves this through the management of Kenya's parks and reserves which have been set aside as protected areas under the Wildlife Conservation and Management Act. KWS has established four MPAs where it highly regulates activities that threaten or diminish the marine wildlife. These are: Watamu National Park; Mombasa Marine Park; Kiunga Marine National Reserve and Kisite and Mpunguti Marine Parks.⁴⁷⁴

- (a) Watamu National Park is part of a complex of marine and tidal habitats on Kenya's North coast stretching from Malindi town to beyond the entrance to Mida creek. It is enclosed by the Malindi Marine National Reserve which also encloses Malindi

⁴⁷³ See *supra* note 153.

⁴⁷⁴ *Ibid.*

Marine National Park. Habitats include intertidal rock, sand and mud; fringing reefs and coral gardens; beds of sea grass; coral cliffs, platforms and islets; sandy beaches and Mida Creek mangrove forest. The park was designated as a Biosphere reserve in 1979. Mida creek is a large, almost land locked expanse of saline water, mangrove and intertidal mud. Its extensive forests are gazetted as forest reserves and the extreme western tip of Mida Creek is part of the Arabuko Sokoke Forest Reserve.

- (b) Mombasa Marine Park covers 10 square kilometers while the reserve is 200 square kilometers. Both the park and reserve are the most highly utilized among MPAs . Their coastline is heavily developed with tourist facilities. There are various agents who offer for hire boats to get into the Marine Park. There are quite a good number of companies offering water sports facilities. These firms are spread along the beach. The park is ideal for diving. Diving gears are easily available from water sports desks.
- (c) Kiunga Marine National Reserve incorporates a chain of about 50 calcareous offshore islands and coral reefs in the Lamu Archipelago, running for some 60km parallel to the coastline off the northern most coast of Kenya and adjacent to Dodori and Boni National Reserves on the mainland. Composed of old, eroded coral, the islands mainly lie inland around 2km offshore and inshore of the fringing reef. They vary in size from a few hundred square metres to 100 hectares or more. Their walls rise from the surrounding seabed and are usually deeply undercut on the landward side. The larger islands and the more sheltered inner islands are covered with low, tangled thorny vegetation including grass, aloes and creepers. The small outer islands provide

nest sites for migratory seabirds. The reserve conserves valuable coral reefs, sea grass meadows and extensive areas of dugong grass (green algae) and *Zostera* spp.

(d) Kisite and Mpunguti Marine Parks are located on the south coast off Shimoni and south of Wasini Island in Kwale District on the south Kenyan coast near the Tanzanian border. Kisite Park covers 11 square kilometres while Mpunguti reserve covers 28 square kilometres. The complex covers a marine area with four small islands surrounded by coral-reef. Kisite island is a small waterless coral island, 8 km offshore in the Marine Park. Coral platforms around the raised central portion are exposed at low tide. The three other coral islets in the park (Mpunguti ya Juu, Mpunguti ya Chini and Liwe la Jahazi) lie closer to the larger Wasini Island, are scrub covered and support no significant wildlife or birds. The surrounding waters have well developed coral gardens and a large variety of fish.

KWS just like the other bodies involved in the management of marine resources in Kenya, has had its share of challenges and difficulties. The key challenge has been the lack of funds as only 6 out of the 23 protected areas under KWS generate income. Political influence has also seen KWS experience a frequent turn over of chief executives as and when they fall out of favour with the politicians in power which has greatly interfered with its operation.⁴⁷⁵

⁴⁷⁵ Information obtained pursuant to an interview with Richard Odongo, a Senior Research Scientist with KWS on 10th July 2007.

Regulation and enforcement is also of importance where matters of maritime security are concerned. Kenya as a major maritime nation in the Eastern Africa region has a coastline stretching about 480 km on the Indian Ocean.

Kenya National Shipping Line Ltd was formed in 1989 under the Merchant Shipping Act and is the only National Carrier of the Kenya Government. At the time, the Shareholders included the Kenya Government through KPA with Majority shares together with two foreign investors DEG and UNIMAR.⁴⁷⁶ Later on in 1997 the company's shareholding was re-organized to bring into the fold a strategic partner Mediterranean Shipping Company (MSC) through Heywood Shipping Co. Ltd as additional shareholder.⁴⁷⁷ The line has chartered space in the lines serving Kenya and Europe on the one hand and Kenya and the Far East on the other.⁴⁷⁸ The Task Force on Review of Maritime Laws in Kenya rated the performance of this company as unsatisfactory.⁴⁷⁹ The company though enjoying some form of a monopoly has been riddled with problems of mismanagement and has been run aground to a point of near insolvency.

To address the issue of marine pollution, NEMA has created the Sub-Coastal, Marine and Freshwater (CMF) Department, which is charged with the development and coordination of the management plans for marine, coastal, seas, lakes, rivers and wetland ecosystems. These aquatic ecosystems play significant roles in biodiversity conservation, in

⁴⁷⁶ Unimar Company is a U.S based partnership while DEG (Deutsche Investitions – UND entwicklungsgesellschaft) is a German based company dealing with oil and petroleum products.

⁴⁷⁷ <http://www.knsl-kenya.com/aboutus.htm> Accessed on 16/11/2007.

⁴⁷⁸ *Supra* note 423 p. 42.

⁴⁷⁹ *Supra* note 423 p.2.

supporting tourism and in sustaining livelihoods of the fishing communities.⁴⁸⁰ The “Polluter Pays”⁴⁸¹ principle that is employed has so far registered a degree of success although the inadequacies of the Merchant Shipping Act imply that the amount of compensation is limited as Kenya cannot invoke provisions of the international instruments as to pollution of marine environments which have not been domesticated.⁴⁸²

The National Oil Spills Response Committee which comprises representatives of the oil industry, the Kenya Ports Authority and scientific and related institutions, is responsible for responding to and coping with oil spills of any magnitude. KMA is also involved in the control of pollution of marine environments.⁴⁸³ There is therefore duplicity as the three bodies (NEMA, National Oil Spills Response Committee and KMA) have similar mandates in the prevention of pollution of marine environments. Despite duplicity in mandate there is little coordination and or harmonization in the operations of these agencies in responding to oil spills.

With regard to maritime safety and security, the coast of Somalia, and by extension the whole of the East African region has been having a perennially unique problem. Indeed, both the International Maritime Bureau (IMB) and the International Maritime Organization (IMO) have classified the Somali coast as the most dangerous in the Indian

⁴⁸⁰ <http://www.nema.go.ke/envagree.html>

⁴⁸¹ Under this principle, persons who discharge pollutants into marine environments are made to bear the cost of removing the pollutant and cleaning up the environment.

⁴⁸² This information was obtained pursuant to a structured interview on Mrs. Philomena Koech, Deputy Permanent Secretary, Ministry of Transport on 18th October 2007.

⁴⁸³ Information obtained pursuant to an interview with Charles Iregi, Pollution Control Officer KMA on 6th July 2007.

Ocean region and its marine environment.⁴⁸⁴ But what is most perturbing is not the prevalence of atrocities at sea but the sporadic, lethargic and uncoordinated reaction whenever the Government finds itself in a dilemma.

The Ministry of Transport is responsible for matters related to maritime security. In June 2004, the government established KMA to regulate the activities of the maritime sector.⁴⁸⁵ However, there still exists a challenge in the regulation and enforcement of Kenya's maritime laws as there is not much in terms of appropriate institutional framework to undertake this broad mandate given to KMA. Even with the coming into being of KMA which has now taken over most of regulatory roles including licensing of seafarers and the coordination of Search and Rescue (SAR), a lot still remains outstanding to bring the enforcement mechanism to the desired levels for effective governance of the maritime zones.⁴⁸⁶ As was stated in Chapter One, KMA is bedeviled with a number of serious operational and logistical problems and difficulties mainly due to under-funding. In June 2005, KMA received funding to the tune of Ksh. 120 Million from the Government against the expected first funding of Ksh. 240 Million to enable it to establish its structures and commence operations.⁴⁸⁷

The Kenya Navy has for a long time operated like a coastguard. Although the primary responsibility is that of defence of the country, the Kenya Navy has a secondary duty of

⁴⁸⁴ Currently, the waters off the Somalia coast are rated third in the International Maritime Bureau Piracy Attack index Map. See www.icc-ccs.org Accessed on 21/01/2008.

⁴⁸⁵ *Supra* note 565.

⁴⁸⁶ Information obtained pursuant to a structured interview with Captain Muli (Manager Search and Rescue, KMA) and Captain S. W. Kambo (Nautical Surveyor, KMA) on 6th July 2007.

⁴⁸⁷ *Supra* note 32.

aiding civil authority, that is, 'support of the civil power in the maintenance of order.'⁴⁸⁸

The coast guard role is what pre-occupies the day to day operations of the Kenya Navy and therefore what was intended to be its secondary role has, in practice, turned out to be its primary role.

None of Kenya's ports can boast of any significant safety and security measures in place to facilitate an environment conducive for maritime or sea-borne trade. Not only is there the sheer size of the maritime zones to be covered by the Kenya Navy but there is also the strained financial circumstance.

To create a response capability able to match the pirate world requires expenditure of considerable resources and Kenya just does not have that kind of money. Even where funds are devoted to marine security, corruption hampers the efficacy of the security agencies. A good example of how corruption has adversely affected control and management of Kenya's maritime zones is the controversial purchase of a Sh4.2 billion Naval ship in June 2003 that was due to be delivered at the end of June 2005.⁴⁸⁹ The procurement deal became the subject of investigation by the Kenya Anti-Corruption Commission (KACC) after it was suspected to have been tainted with corruption. The tender which had been awarded to Euromarine Industries was cancelled. The cancellation of that tender threatened to become a subject of an international court tussle at The Hague, between the Government and the company.⁴⁹⁰

⁴⁸⁸ See Section 3 (2) of the Armed Forces Act Cap 199 Laws of Kenya.

⁴⁸⁹ *The Standard*, 9th October 2006.

⁴⁹⁰ *Ibid.*

4.4.4 Regional Institutions

Under the LOSC regime, which is the global regime for ocean management, it is explicit that countries can enter into co-operation agreements with other countries, international development agencies and developed-world governments to realize their maritime potential.⁴⁹¹

Kenya is a member of the South West Indian Ocean Fisheries Commission (SWIOFC).⁴⁹²

The general purpose of the commission is expressed as “[to] have due regard for and promote the application of the provisions of the FAO Code of Conduct on Responsible Fisheries, including the precautionary approach and the ecosystem approach to fisheries management”.⁴⁹³

SWIOFC seeks to support the management responsibilities and mandates of other existing fisheries and living marine resources management organizations in the SWIO region. It seeks to promote the sustainable use of the living marine resources of the SWIO region through proper governance of the living marine resources and to seek solutions to common challenges faced by members in the governance of living marine resources.⁴⁹⁴

⁴⁹¹ Art 118 LOSC

⁴⁹² The other members are Comoros, France, Madagascar, Mauritius, Mozambique, Seychelles, Somalia and Tanzania.

⁴⁹³ Resolution and Statutes of the South West Indian Ocean Fisheries Commission, First session Mombasa, Kenya, 18-20 April 2005.

⁴⁹⁴ *Ibid.* The other project is the West Indian Ocean Land Based Sources of Pollution (WIOLaB) implemented by United Nations Environment Programme (UNEP)

Another regional institution involved in the management of marine resources of which Kenya is a member is The Indian Ocean Tuna Commission (IOTC).⁴⁹⁵ IOTC is an intergovernmental organization established under Article XIV of the FAO constitution. It is mandated to manage tuna and tuna-like species in the Indian Ocean and adjacent seas. The objective of the Commission is to promote cooperation among its members with a view to ensuring, through appropriate management, the conservation and optimum utilization of stocks covered by this Agreement and encouraging sustainable development of fisheries based on such stocks.⁴⁹⁶

The major challenges facing these regional bodies are lack of commitment by the member states. There has been little or no assistance rendered to these institutions by the Government of Kenya in terms of enacting a suitable legislative framework within which the institutions can operate to ensure that their roles do not conflict with those of local institutions. The regional institutions also suffer from overlapping mandate since they are mainly focused on living marine resources. Few, if any, have ventured into the field of governance of non-living marine resources. The institutions also lack sufficient funding as the member states are unable to commit funds towards their projects and therefore have to rely on donor funding.

With regard to international port security, the Safety of Life at Sea Convention (SOLAS), especially the 2002 amendment to Chapter 11 has introduced significant maritime

⁴⁹⁵ www.iotc.org/English/index.php - 22k Accessed on 16/11/2008.

⁴⁹⁶ See <http://www.fao.org> / accessed on 16/11/2008.

security measures which no port state can afford to ignore.⁴⁹⁷ Kenya hosts sub-regional Maritime Rescue Coordination Centre (MRCC) at Mombasa. The MRCC is administered from Mombasa with associated Maritime Rescue Sub-Centres (MRSCs) in Victoria (Seychelles) and Dar es Salaam (Tanzania),⁴⁹⁸ The Mombasa MRCC and the two MRSCs were funded through the International SAR Fund.⁴⁹⁹

The Mombasa MRCC provides a much-needed search and rescue capability along the coastline of East Africa and improved security for seafarers not just from Africa but from all nations whose vessels transit the SWIO region waters.

4.4.5 Involvement of Non-Governmental Institutions

In Chapter two, it was stated that traditional village community bodies, individual citizens, clubs and associations with compatible goals, objectives and responsibilities should be involved in the management of marine resources whenever practicable to supplement government agencies, local government and administration.⁵⁰⁰

Apart from the few community-based organizations that are involved in the protection of marine wildlife,⁵⁰¹ local NGOs in Kenya have shown little or no interest in the management of marine resources except where matters of environment are concerned.

This lack of interest may be attributed to the low levels of awareness of the wealth of

⁴⁹⁷ The SOLAS Convention in its successive forms is generally regarded as the most important of all international treaties concerning the safety of merchant ships. The first version was adopted in 1914, in response to the Titanic disaster, the second in 1929, the third in 1948, and the fourth in 1960.

⁴⁹⁸ http://www.imo.org/about/mainframe.asp?topic_id=1320&doc_id=6291 Accessed on 16/11/2008.

⁴⁹⁹ *Ibid.*

⁵⁰⁰ Kenchington R. A., in *supra* note 2 p. 64

⁵⁰¹ These are The Beach Management committees and Turtle Conservation Groups. Information provided in an interview with Richard Odongo, Senior Research Scientist KWS.

resources within Kenya's maritime zones and the importance of sustainable exploitation of these resources to allow continued abundance. Environmental lobby groups and NGOs have often been quoted in media reports calling for more environmental impact assessments before exploitation of marine resources such as the off shore oil exploration.⁵⁰²

There is however a number of international NGOs involved in the governance of marine resources within Kenya's maritime zones. The work of these NGOs has been instrumental in the collection of data on Kenya's marine resources especially with regard to fishery resources. The work of these NGOs has often been hampered by lack of an enabling environment and suitable legislative framework to operate in. Some of the NGOs involved in the process of governance within Kenya's maritime zones include:

(b) The Ocean Data and Information Network for Africa (ODINAFRICA)

ODINAFRICA brings together marine institutions from twenty-five Member States of the Intergovernmental Oceanographic Commission of UNESCO from Africa (Algeria, Angola, Benin, Cameroon, Comoros, Congo, Cote d'Ivoire, Egypt, Gabon, Ghana, Guinea, Kenya, Madagascar, Mauritania, Mauritius, Morocco, Mozambique, Namibia, Nigeria, Senegal, Seychelles, South Africa, United Republic of Tanzania, Togo, and Tunisia).⁵⁰³

⁵⁰² See for example NOCK Home Page, <http://www.nockkenya.co.ke>. Accessed on 29/05/2008.

⁵⁰³ <http://www.odinafrica.org/> Accessed on 10/11/2008.

Initially, ODINAFRICA aimed at enabling the participating member states to access data available in other data centres worldwide, develop skills for manipulation of data and preparation of data and information products, and develop infrastructure for archival, analysis and dissemination of the data and information products.⁵⁰⁴

Currently, ODINAFRICA is geared towards improving the management of coastal and marine resources and the environment in participating countries by: enhancing data flows into the national oceanographic data and information centres in the participating countries; strengthening the capacity of these centres to analyze and interpret the data so as to develop products required for integrated management of the coastal areas of Africa; and increase the delivery of services to end users.⁵⁰⁵

(c) Oceanographic Research Institute(ORI)

The Oceanographic Research Institute is non-profit organization located in Durban, South Africa. The organization covers Namibia, Kenya, Tanzania, Mozambique, Eritrea, Somalia and other countries of the western Indian Ocean region.⁵⁰⁶

ORI is affiliated to the University of KwaZulu-Natal, where it plays a role in the training of post-graduate students in marine science. ORI also seeks to contribute to awareness

⁵⁰⁴ www.iode.org/index.php?option=com_oe&task=viewEventRecord&eventID=94 - 15k Accessed on 10/11/2008.

⁵⁰⁵ *Ibid.*

⁵⁰⁶ www.iode.org/oceanportal/detail.php?id=3770 - 9k Accessed on 16/11/2008.

and capacity building in marine science at various other levels in society through participation in regional and international activities.⁵⁰⁷

Despite their impressive numbers, these NGOs have achieved little in terms of effective governance of marine resources in Kenya. The dismal performance of the NGOs may be attributed to the following factors:

- (a) Lack of local financial input. The NGOs are foreign-based and rely on donor funding to undertake their projects. Most of them are not income generating and the funds collected from donors are hardly enough to finance their operations.
- (b) There is no enabling legislative framework within which these NGOs are supposed to operate. The NGOs have to link up with the relevant Government Ministries in their operations, most of which are not directly concerned with the governance of marine resources. ODINAFRICA and ORI have for instance to link up with the Ministry of Science and Technology while SWIOFC has to link up with the Ministry of Fisheries Development. SWIOFC was established under FAO which would ordinarily work with the Ministry of Agriculture. This disjointed approach to coordination of the activities of these NGOs has greatly hampered their efficiency as the different Ministries are guided by different objectives which may not necessarily tally with those of the NGOs.
- (c) The NGOs overlap in their operations. Most, if not all, of them focus on the governance of living marine resources and they have not established a strategy on how to harmonize their activities. The NGOs therefore end up with piecemeal

⁵⁰⁷ *Ibid.*

information as opposed to what the case would be were they to pool their resources together towards a common goal.

4.4.6 Attempts at Reviewing the Institutional Framework

The Task Force on Review of Maritime Laws made recommendations on the review of the institutional framework. It was as a result of the recommendations of the Task Force that the University of Nairobi commenced Masters of Law degree programme on maritime law which focused on governance of marine resources.⁵⁰⁸ Although KMA has already developed an IMO compliant curriculum for the training of seafarers, the curriculum cannot be implemented without a review of the Merchant Shipping Act and the regulations made pursuant there to.⁵⁰⁹

Another step towards reforming the institutional framework in the governance of marine resources was the granting of autonomy to KMA by way of enactment of the Kenya Maritime Authority Act in 2006. This gave KMA the status of a full-fledged parastatal with a Director-General and members of directly under the employment of KMA. This however had the unfortunate effect of creating potential for overlap and conflict between the roles of KPA and KMA as both bodies are independent of each other but with similar mandates. KPA under the Kenya Ports Authority Act continues to be a provider of port services and regulator since the Act has not been amended even after the enactment of the Kenya Maritime Authority Act. Although the two sister bodies have endeavored to work

⁵⁰⁸ Other recommendations (such as the upgrading of Bandari College to a Maritime Institute offering middle level courses for various cadre in the maritime industry, particularly the professional class to meet STCW' 95 requirements) amounted to naught as the Merchant Shipping Act continues to stand in the way of a sound institutional framework for the training of personnel employed in the maritime industry.

⁵⁰⁹ Information obtained pursuant to an interview with Edward Mulongo, the Assistant Registrar of Seafarers and Ships at KMA on 6th July 2007.

in harmony,⁵¹⁰ there is potential for conflict since the enabling statutes have not been harmonized.

With regard to the living resources, the Government is now aware of the potential of the marine fisheries resources and has started putting measures in place aimed at realizing this potential in the short and medium terms. The first commitment towards achieving this target has been the recent deliberate split of Ministry of Agriculture and Livestock Development into two Ministries in order to bring out the fisheries and livestock potential. The newly created ministry is now named Ministry of Fisheries Development and for the first time in the History of Kenya “fisheries” appears in the name of a parent ministry, a significant step towards realization of fisheries potential. The increase in the number of Ministries has the effect of increasing the centers of power to which the officers in the field in charge of the various bodies involved in the governance of marine resources are answerable and therefore although well intentioned does not resolve the question of duplicity unless and until the legislative framework is reformed to create harmony.

The draft Wildlife (Conservation and Management) Bill 2007 has provisions on reform of the institutional framework for governance of wildlife in general which includes the governance of wild marine fauna and flora. The Bill includes provisions for devolved institutional framework for community participation which would greatly improve the institutional framework. However, the Bill is as earlier mentioned tailored for

⁵¹⁰ Information obtained pursuant to a n interview with Margaret Mwangi, the Corporation Secretary KMA on 6th July 2007.

management of land-based wildlife and therefore ill-suited to tackle the challenges of managing marine wildlife.

A lot still remains outstanding in reforming the institutional framework for the governance of marine resources to harmonize the operations of the various institutions, eliminate duplicity and enhance efficiency. Although the institutions are numerous, efficient governance of marine resources has not been achieved owing to lack of clear mandates and in some instances duplicity. There is therefore need to harmonize the operations of the institutions involved in this governance process to avoid overlap and hence enhance efficiency. This can only be done if the government realizes that maritime zones and the resources therein are a forgotten province and stakes steps to review the legislative framework on which these institutions operate.

4.6 Conclusion

This chapter has undertaken a critical analysis of the policy, legal and institutional frameworks in the governance of marine resources found within Kenya's maritime zones. A good policy framework is key to formulation of workable and efficient legislations which in turn engender a sound institutional framework in the governance structure.

In Kenya, the reverse order of legislation where legislative action precedes formulation of policies has meant that the policy framework in the management of marine resources is fundamentally flawed if not altogether non-existent. The failure to map out a clear policy on the governance of marine resources to guide the enactment of relevant legislations has often led to scattered and uncoordinated legislations with similar provisions thereby

creating duplicity, overlap and confusion in the legislative framework for the governance of the marine sector.

Legislation has been more utilitarian than LOSC compliant and laws on governance of marine resources have intermittently been enacted as a reaction to pressure from the international regulatory bodies such as IMO. The lack of a sound legal base for governance institutions in the management of marine resources has greatly hampered their operation. The duplicity that has been attendant to the legislative framework has in turn been manifested in the institutional framework. Several institutions are mandated to control, manage and oversee the governance of marine resources.

There is work to be done to bring order in the policy, legal and institutional frameworks for the governance of marine resources in Kenya. The first step towards this journey of reforming and re-charting the order for the oceans in Kenya is the creation of awareness of the need for reforms. However in order for such reforms to be achieved, the government must stop treating the maritime zones and the resources found therein as a forgotten province and must pay due attention to this province by allocating sufficient attention and resources to it just like any other terrestrial province of the country.

CHAPTER 5

TOWARDS A NEW MARITIME GOVERNANCE SYSTEM IN KENYA

The changes in the interests of coastal and maritime states, and the increasing sophistication of technology which may facilitate the realization of these interests, have necessitated the reformulation of national and international concepts and policies concerning the sea. ...

Apart from the urgent need for clearly defined concepts and standards for conservation and development of economically valuable coastal and off-shore resources, there are also security and political interests which require negotiation and agreement.⁵¹¹

5.1 Introduction

The quotation above in a nutshell captures the constant need to refocus and reformulate policies and concepts for the governance of ocean spaces and marine resources in tandem with the ever changing interests of maritime nations and technological advancement. There is always need to re-evaluate the existing policy, legal and legislative frameworks to determine whether they need reform. A thorough analysis is necessary not just on an *ad hoc* basis but on a well thought out and continuous programme of periodical and constant evaluation.

⁵¹¹ Okidi C. O. and Westley S., "Management of Coastal and Offshore Resources in Eastern Africa" [unpublished] *Workshop held at the Institute for Development Studies, University of Nairobi, April 1977* pp. 26-29.

This chapter builds up on the analysis in the preceding chapters of the existing policy, legal and institutional frameworks for the governance of marine resources in Kenya and make recommendations for reforms. The chapter is premised on the finding that the existing policy, legal and institutional frameworks in the governance of marine resources in Kenya are fundamentally flawed and proposes the creation of a new governance regime in Kenya that incorporates the culture of responsible corporate governance to control, govern and manage the sustainable exploitation of the marine resources present within Kenya's maritime jurisdiction.

5.2 Policy Reforms: Towards an Integrated Marine Resources Management Framework

It has already been demonstrated in the preceding chapter that there is lack of a sound policy framework for the governance of marine resources in Kenya. The practice has been to introduce policies through legislation rather than the legislation flowing from a solid policy framework. The result has been lack of clear agenda in the governance of resources within Kenya's maritime zones. There is urgent need to formulate a policy framework to guide planners and legislators in the enactment of laws, formulation of regulations and establishment of institutions for the governance of marine resources in Kenya.

Although the Task Force on Delineation of Kenya's Outer Continental Shelf was mandated to among other things come up with recommendations on a comprehensive

management policy including institutional framework to guide use and management of ocean space and resources to ensure that present and future generations of Kenya benefit from the opportunities offered by the vast ocean frontier,⁵¹² there is still more that needs to be done to ensure that the policy framework for the management of marine resources in Kenya is based on sound principles of sustainable use and in compliance with the international law and practice. The Task Force is yet to table its findings and even when the Task force eventually makes its recommendations, there is no guarantee that the recommendations will be acted on pronto. There is therefore need to mobilize the stakeholders in the marine resources governance process to first and foremost map out a policy on which the legislative and institutional frameworks in this governance process shall be hinged. The ultimate goal should be to entrench the ethos of corporate governance in the governance of marine resources in Kenya.

5.2.1 Policy Formulation

Kenya should formulate and develop an integrated national maritime policy which should provide comprehensive and consistent guidelines on the administration and regulation of the maritime industry, maritime trade, maritime services, port infrastructure, maritime security, admiralty jurisdiction, maritime education, training and research and marine pollution. In formulating a policy for the governance of marine resources, piecemeal and *ad hoc* approaches to the marine resources development should be discouraged in favour of an approach that balances between a variety of compatible uses whereby economic and

⁵¹² Appointed *vide* Kenya Gazette Notice No. 3929 of 2nd June 2006.

social benefits are maximized and conservation and development become compatible goals.

An evaluation of any existing policy should be the first step. Creation of new policy to fill gaps and integrate existing policy is the second step to follow.⁵¹³ Marine resources development policy should emphasize that it is in the best interests of the country to achieve sustainability of its resources and long-term protection of its natural assets.

The proposed marine resources governance policy should closely reflect and be in tandem with the general governmental economic policy. The policy should incorporate and seek to optimize the long term economic benefits to society from the marine zones under Kenya's jurisdiction and guide development and use of the country's marine resources in a rational and efficient manner.. .

The proposed policy should establish goals, objectives and priorities and lay down basic principles and criteria which will provide guidance for the formulation of plans and programmes and a marine resources development strategy. The policy should outline a framework that identifies the financial, human, technical and institutional resources needed for its implementation. The policies must also include a plan of action through which the goals and objectives are to be achieved and timelines within which these goals

⁵¹³ The Philippines has often been cited as an example of a developing country that has attempted to develop a National Marine Policy since 1994. The policy has however been criticized as having failed to bring about the desired results since there has not been adequate attention paid to marine resources owing to the over-emphasis on land-based resources. See Nisperos G. O. "Marine Resources of the Philippines: Overview and Responses in *Integrated Coastal Zone and Non-Living Marine Resources Development in Asia and the Pacific* VOL 4 (1999) (United Nations, New York) pp. 207-217

and objectives are to be realized. The setting of timelines will assist to curb the rampant practice where the best policies and strategies remain in shelves unimplemented owing to lethargy on the part of those involved in the implementation. Regular reviews should be conducted on the policy framework to ensure that the objectives are being realized and that the governance activities are in line with the policies laid down. To this end, the celebrated performance contracts that have proven to work well in the civil service sector of Kenya in the past few years should be imported to the governance of marine resources in Kenya. The key components of this contract are displayed in Appendix II and bind the relevant institutions to specific reasonable targets within a given year.

Where government agencies and institutions are to be involved in the marine resources governance exercise, there should be clearly spelt out modalities to ensure that corporate governance takes root in these institutions and standards of corporate governance set against which the level of compliance by these agencies is to be evaluated. The OECD guidelines on corporate governance could form the basis on which a policy for corporate governance of marine resources in Kenya can be implemented.

5.2.1.1 Sustainable Use

The **policy statement** should declare in the strongest terms possible that it is the intention of Government of Kenya to monitor and exercise control over developmental activities affecting the sustainability of marine resources.⁵¹⁴ The goal should be maintenance of the optimum sustainable use of marine natural resources, in both the economic and social

⁵¹⁴ See for example Geoghegan T., *Environmental Guidelines for Marine Development in the Lesser Antilles Eastern Caribbean Natural Areas Management Program* St. Croix USVI p. 44.

context. The policy should then list specific national maritime concerns and issues to be addressed and state the priorities of Kenya towards marine resources conservation.

The policy statement should also state the actions that the government expects its various agencies to undertake in order to achieve sustainability in the use of marine resources. In addition to specific assignments to governmental agencies for the strategic planning stage to follow, there should be assurance that funds are authorized and available to pay for the tasks that must be undertaken.

5.2.2 Strategic Planning

Kenya should embark on strategic planning process that considers problems and opportunities regarding resources, economic development activities, and societal needs in the maritime zones and devise a strategy to accomplish the objectives of integrated marine resources governance. The strategic planning should devise a programme that will promote compatibility between economic development and the long term environmental and socio-economic needs of the local communities. Compatible multiple-use objectives should be the main focus and the strategic plan should establish a method to avoid short-term development tactics in favour of long-term development and resource conservation strategies. The strategic plan should take an inter-ministerial dimension and should involve all relevant ministries involved in the governance of marine resources.

It is commonplace that the best of plans often remain on bookshelves to gather dust and are not put into practice, usually because of lack of political commitment to the socio-

economic changes the plan would require. Experience has shown that it is always much easier for decision-makers to authorize a planning initiative than to implement its provisions or recommendations.⁵¹⁵ In view of this fact, maximum commitment to the implementation of the strategic plan should be secured from decision-makers right from the onset.

The proposed strategic plan should seek to address the following questions:

- (i) Which marine resources are seriously degraded; to what level have yields fallen; what are the economic consequences; what actions are needed to correct this situation?
- (ii) What are the causes of the degradation; what type of developments and activities need to be controlled; what are the economic effects of the controls; in consideration of the variety of possible trade-offs and their effects, what actions are recommended?
- (iii) Who are the principal users of marine resources; how many jobs are at stake; how much income and foreign exchange earnings are involved, that is, fisheries and other resource dependent industries; what further losses are expected if the governance programme is not implemented?
- (iv) What are the priority issues; what critical habitats and species need protection; what is the best approach, general regulation or creation of protected areas?
- (v) What can the proposed governance programme do to prevent loss of life and property from marine natural hazards such as sea storms and beach erosion; what

⁵¹⁵ A good example is the lethargy that has visited the implementation of the recommendations of the Task Force on Review of Maritime laws that was appointed *vide* Gazette Notice No. 645 of 8th February 2002 and presented its report to the Attorney General in May 2003.

are the benefits of combining hazards protection and resource conservation in a single coastal programme?

- (vi) What are the existing governance programmes for marine resources conservation at national and local levels; how effective are they; what are the shortfalls; what changes in governance are recommended?
- (vii) How effective are the existing mechanisms for interagency and intersectoral coordination on maritime matters; what can be done to improve the situation; what actions are recommended?
- (viii) What are the expected net economic and social benefits of an integrated marine resources governance programme; how can the governance programme be funded?
- (ix) Who are the major proponents and opponents of the proposed governance programme?
- (x) What is the status of personnel training for the governance programme; is there sufficient expertise; what can be done to improve the situation?

In addition to control of development, the strategic planning process has to consider the protection of environmental values. Environmental protection enters into the management equation as including the important, but less tangible, values of protection of nature and biodiversity conservation.

The proposed comprehensive strategic plan should lay the foundation for the legislation or necessary regulations that are needed to authorize and effectuate the governance programme. The plan should specifically:

- (i) assign responsibility for the implementation of the proposed marine resources governance programme to a particular agency or specifically named agencies jointly;
- (ii) authorize the funding necessary for the programme development;
- (iii) state clearly the objectives of the governance programme;
- (iv) recommend a method for collaboration among the various sectoral agencies and private interests involved;
- (v) state the time limits involved for various stages of programme development; and
- (vi) require a specific programme development, or tactical planning and organizing process.

5.2.3 Development of an Integrated Coastal Zone Management (ICZM) Plan

It was stated in chapter two that the overall objective of an ICZM, is to provide for the best long-term and sustained use of marine natural resources and for perpetual maintenance of the most beneficial natural environment. As such, the ICZM should incorporate modern principles of planning and resources management, intensive information bases and interdisciplinary processes.

Although there are some tangible efforts in Kenya towards ICZM, the efforts have not been concerted and have therefore failed to register any considerable success.⁵¹⁶ To be successful, ICZM has to be a distinct process focusing on distinct issues. Its goals must be clear and unambiguous.

⁵¹⁶ See www.regional-dev.go.ke/cda/projects.htm - 13k Accessed on 12/11/2008.

The ICZM should focus most sharply on management of the physical development process using planning procedures and government regulations. ICZM must be interdisciplinary. It must consider, coordinate, and integrate the interests of all appropriate economic sectors.⁵¹⁷ The ICZM is necessary in order to cope with special conditions of marine resources conservation and economic development.⁵¹⁸ It will be particularly useful in solving problems that exist between the various sectors; for example, in resolving conflicts among fisheries, tourism, oil and gas exploration, maritime transport and public works where these sectors are all concurrently attempting to use the maritime zones.⁵¹⁹

5.2.3.1 Regulation of Extra-marine Activities

There is also need to formulate a comprehensive policy for the regulation of extra-marine activities that have impact on the governance of marine resources in Kenya. The regulation of land-based activities that pollute marine environments has mainly been dominated by the international community in particular the United Nations West Indian Ocean Land Based (WIO-LaB) programme. This is too important an area to be left entirely to non-governmental agencies. The government through the relevant ministries should issue guidelines to be followed in the carrying out extra-marine activities that negatively affect marine resources and marine environments such as cultivation along

⁵¹⁷ Caddy J. F. Enclosed and Semi-closed Seas; Principal Issues and Future Actions *UN/FAO, Fishery and Environmental Division, Informal Paper*, 199) p. 5.

⁵¹⁸ See Sain-Cicin B. and Knecht R. Integrated Coastal and Ocean Management: Concepts and Practices (1998) (Island Press, Washington DC) pp. 387-432 for how integrated coastal zone management strategies have worked in China, Sri Lanka, Phillipines and Micronesia among others.

⁵¹⁹ See Sorensen J. C. and McCreary S. T. Institutional Arrangements for Management of Coastal Resources *Coastal Management* Publication No. 1, Rev. edn., U. S. Nat. Pk. Serv/USAID Series, 1990 p. 194. See also Sesabo J., Marine Resources Conservation and Poverty Reduction Strategies in Tanzania (2007) (Springer, New York, NY).

river banks which lead to siltation at estuaries and deltas and discharge of effluent into rivers that eventually drain their waters into the ocean.

Control of land-based pollutants of marine environments is very complex. It requires major changes in agricultural and industrial practices, as well as the development of waste treatment technology, according to the IUCN draft world conservation strategy.⁵²⁰

The main changes needed are stated to include: comprehensive control of sewage discharges; reducing runoff of fertilizers and livestock wastes from agricultural land through the adoption of high standards of land husbandry; and limiting industrial effluents through more efficient use of resources. Special attention should be paid to controlling industrial wastes and improving sewage treatment to reduce risks to public health from consuming seafood and bathing in contaminated water.⁵²¹

The ICZM programmes should focus on special marine pollution sources not presently addressed, perhaps those caused by watershed disturbance and runoff and, especially, those that affect critical habitats. Of particular concern is sediment runoff from construction sites, farmlands, forest-cutting and land-clearing operations. When any one sector attempts to gain the highest economic yield from its activities and attempts to avoid responsibility for its external effects, the sector should be made to bear the cost of making good any negative effects that it might occasion to marine environments. For

⁵²⁰ IUCN, *Caring for the World: A Strategy for Sustainability*, Gland Switzerland, June 1990 p. 135

⁵²¹ See Mailu G. B. "Implications of Agenda 21 of the United Nations Conference on Environmental and Development of Marine Resources in East Africa with Particular reference to Kenya and Tanzania" in Shermann K. et al (eds.) *Large Marine Ecosystems of the Indian Ocean: Assessment, Sustainability and Management* (1998) (Backwell Science Inc., London) pp. 313-326 where the author identifies some of the challenges facing the management of Kenya's marine environment as the pollution from surface run off and leachates that continue to be dumped off the Makupa creek.

example, a factory operator may wish to avoid financial responsibility for the degradation of fisheries or inhibition of tourism caused by his factory wastes polluting a bay. Whether the pollution is from oxygen-depleting organic waste (e.g., sewage) or from toxic industrial wastes, it is damaging to coastal environments and resources as well as being a risk to human health. Therefore, harbour projects should be intensively studied in the project review element and a maximum of conservation safeguards employed.

Another pollution source of particular relevance to ICZM is oil pollution that originates from the exploration, production and transportation phases of the oil industry. Although no oil has yet been discovered in Kenya's maritime zones, there is on going exploration and there is an urgent need to put a policy framework in place for the exploration, production and transportation of oil in the event that oil deposits were to be discovered off the Kenyan coast.⁵²²

The ICZM should be able to sufficiently address these challenges by formulating a policy that will make the sectors that are responsible for polluting marine environments accountable. An overall precautionary approach that has proven to work in other jurisdictions should be employed to stem the pollution from the source rather than wait to deal with it when it has already reached the marine environment.⁵²³ The "polluter pays"

⁵²² Chua T. E. and Charles J. R. Coastal Resources of East Coast Peninsular Malaysia (1984) (Penerbit Universiti Sains Malaysia) p. 306

⁵²³ See Vanderzwaag et al "Canada and the Precautionary Principle/Approach in Ocean and Coastal Management: Wading and Wandering in Tricky Currents" in Rothwell D. R. and Vanderzwaag D. L. (eds.) *Towards Principled Oceans Governance: Australian and Canadian Approaches and Challenges* (2006) (Routledge, Francis & Taylor Group, New York, NY) pp.145-180 and Kriwoken L.K et al "Australia and the Precautionary Principle; Moving from International Principles to Domestic and Local Implementation" in Rothwell D. R. and Vanderzwaag D. L. (eds.) *Towards Principled Oceans Governance: Australian and Canadian Approaches and Challenges* (2006) (Routledge, Francis & Taylor Group, New York, NY) pp.

principle employed for dealing with pollution of marine environments from oil spills and ship-based activities should be extended to other extra-marine activities that negatively impact on marine environments. Industries which discharge industrial waste into oceans should be made accountable for the negative effects the effluence might have on the marine living resources. No industrial waste should be discharged into rivers before it is treated and certified not harmful to marine life. In this regard, the NEMA should be facilitated and empowered to penalize industries that discharge effluent into rivers and the sea.

Although the polluter pays policy with regard to ship-based marine pollution and oil spills has so far proven viable in dealing with pollution of marine environments from vessels, there is need to expand the scope to include not only an indemnity for the cost of removing the contaminant but also for restoring the marine environment to its original state. Where quantification of the loss occasioned to the marine habitat is possible, the polluter should also be made to make good such losses.

5.2.4 Creation of Marine Protected Areas (MPAs)

As has already been discussed, in Kenya, MPAs have in certain instances been created without adequate consultation with the local communities. This has often led to the local communities being antagonistic to the implementation of the MPAs where their normal lives are unnecessarily disrupted. There is therefore need to reconsider Kenya's MPAs in

181-201 on how the precautionary approach has been adopted with considerable success in other commonwealth jurisdictions.

order to take into account the view and opinions of the local communities who are expected to live within or adjacent to these MPAs.⁵²⁴

Marine tourism has become a key income earner within the MPAs. However, the tourism activities have occasioned environmental changes that at times disrupt the ecological balance within the maritime zones. Whereas these environmental changes are an unavoidable consequence of the growth of marine tourism, it is necessary to keep the change within acceptable bounds.

If marine tourism development is to be controlled, plans have to be formulated, guidelines and standards derived, parks and reserves have to be created, and rules have to be formulated, implemented, and enforced by the government of Kenya. These should be based on knowledge of social and environmental carrying capacity and proved methods of visitor management.⁵²⁵ The idea of declaring closed seasons can be adopted if excessive strain on the carrying capacity is noted within the MPAs.⁵²⁶

⁵²⁴ See Mascia M. "Social Dimensions of Marine Reserves" in Sobel J. and Dahlgren C. *Marine Reserves; A Guide to Science, Design and Use* (2004) (Island Press Washington DC) pp. 164-186 where the author argues that marine reserves designs are underpinned by human beliefs that inevitably affect their efficiency. See also Sesabo J., *Marine Resources Conservation and Poverty Reduction Strategies in Tanzania* (2007) (Springer, New York)

⁵²⁵ Carrying capacity refers to the capacity of an ecosystem to sustain specified resource uses. Clark J. R. *Carrying Capacity and Tourism in Coastal and Marine Areas* (1992) (Marine Park Journal, Tokyo) p. 95. See also Sadler B. *Sustaining Tomorrow and Endless Summer: On Linking Tourism and Environment in the Caribbean* in F. Edwards (ed.) *Environmentally Sound Tourism in the Caribbean* (University of Calgary Press, Alberta Canada, 1988). The idea of carrying capacity provides a frame of reference for tourism and is widely used to underline the importance of maintaining a level and mix of development which is environmentally and culturally sustainable.

⁵²⁶ See Sobel J. and Dahlgren C. *Marine Reserves; A Guide to Science, Design, and Use* (2004) (Island Press Washington DC) pp. 316-366. This principle has proven to work elsewhere. Seychelles had at one point declared that their tourist capacity had been reached and announced a prohibition on future increases. Ecuador set a limit for the Galapagos Island national Park of 12 000 visitors/year in 1973; raised it to 25 000 in 1982 but actually allowed 47 000 in 1990. Everglades National Park (Florida, USA) was unable to set a carrying-capacity for the fishery in Florida Bay, so banned it completely. Costa Rica has set limits on the number of tourists that can visit sea turtle nesting beaches; for example - 25 per night at Nancite Beach

Special boat moorings should be installed in visited areas within the MPAs to discourage visitors from free-anchoring. In this way, the visiting boats can be limited in number and located appropriately - when the time comes for control.⁵²⁷

5.2.5 Public Participation and Coordination of Stakeholder Interests in the ICZM

Governance of marine resources requires the highest level of public participation possible. Communities who live along the Kenyan coast and have traditionally used marine resources may be greatly affected by new rules and procedures. Therefore they must be involved in the formation of new coastal policies and rules on resource use, if they are to support such policies.⁵²⁸

Participation should not be used as a last resort in instances where a particular management decision is difficult to enforce or encounters opposition. Nor should it be a means to get a particular group or sector amenable to the needs of another group.⁵²⁹ The

(Santa Rosa National Park), to protect seabirds; Queensland (Australia) limits beach occupancy to 100 persons at Michelmas Cay. See <http://www.fao.org/DOCREP/003/T0708E/T0708E01.htm#ch1>. Accessed on 14/12/2008.

⁵²⁷ Looe Key Marine Sanctuary (Florida, USA), with 52 such moorings, is a good example of this approach. *Ibid.*

⁵²⁸ Traditionally, these communities understand the limits to natural marine ecosystems and productivity, but in the modern, overpopulated world, this tradition is being lost. White A. T. Why Public Participation is Important for Marine Protected Areas *CAMPNET Newsletter*, National Park Services, Office of International Affairs, Washington DC, August 1987 pp. 5-6. According to White, education and good examples (pilot projects) can show and remind people what is possible in terms of sustainable use and the value of protected areas. But education is not participation. Participation comes from wanting to support common values to gain some real or perceived benefit for the individual and community. Without it, marine resources can never be conserved and sustained because "enforcement" of laws in such a commons is not practicable. When people decide to "participate", they as resource users will make the real difference in protected area management. The solution thus lies in helping people to decide to participate in a constructive manner. Once resource users decide to do so and receive the associated benefits, the process will perpetuate itself."

⁵²⁹ See Hilebrand L. P. "Participation of Local Communities in Integrated Coastal Zone Management" in

participation should be aimed at ensuring that Kenya moves from single sectoral concerns and individual concerns to a collective agenda which all stakeholders will be better suited to address in the governance of marine resources. Participation should serve to unite people in the sharing of needs and ideas and in the working of solutions to address issues of marine resources governance in Kenya.⁵³⁰

More specifically, the objectives of participation should be:⁵³¹

- (i) to ensure that popular knowledge and experience is indeed integrated into the planning and management process;
- (ii) ensure that all needs and priorities are taken into account in the formulation of management decisions;
- (iii) give a better guarantee for the quality of the solution identified and for its adaptation to a particular condition;
- (iv) promote involvement in the actual implementation of decisions.

Broad participation of the citizenry should be encouraged. This can be done through involvement of non-governmental organizations. In Kenya, NGOs especially those involved in human rights and governance have been known to have a wide grass root network and skills to mobilize. A similar success can be achieved in the governance of marine resources if the NGOs involved are funded and properly motivated and their

Haq B. U. et al (eds.) *Coastal Zone Management Imperative for Developing Nations* (1997) (Kluwer Academic Publishers, Dordrecht) pp. 43-54.

⁵³⁰ See for example Newman C. M. "Towards Community and Scientific – based Information Integration in Marine Resources Management in Indonesia: Bunaken National Park Case Study" in *Environments* August 1, 2005.

⁵³¹ Sain-Cicin B. and Knecht R. *Integrated Coastal and Ocean Management: Concepts and Practices* (1998) (Island Press, Washington DC) pp. 237-240.

efforts coordinated to involve the citizenry in the policy formulation. The NGOs use informal consultative forums which are very successful. The coordination of stakeholder participation can be done by the provincial administration which also has good grass root network in consultation with the lead agency. Chief *barazas* [public meetings] could also be used to disseminate the requisite information to the stakeholders to ensure that the stakeholders are adequately educated to enable them participate in the policy formulation consultation exercise.⁵³²

Beginning with the policy formulation stage and continuing through each subsequent stage of the marine resources governance process, interested citizen groups should be continuously and frequently consulted. The following broad themes should be addressed in engaging the participation of the citizenry⁵³³:

- (i) Identification of economic, social, political and cultural interests;
- (ii) Recognition and support for aboriginal rights and culture;
- (iii) Dialogue, sharing of agendas and mobilization;
- (iv) Integrated rather than sectoral approach i.e. multidisciplinary and multisectoral approaches;
- (v) Participatory research, use of local and traditional knowledge and permanent redistribution;

⁵³² This approach has proven viable in Madagascar where an impressive blend between the traditional code known as *Dina* and the French Civil Law system which is Madagascar's colonial heritage has been achieved through interactive dialogue between stakeholders and policy makers. See Rakotoson L. R. and Tanner K. "Community-based Governance of Coastal Zone and marine Resources in Madagascar" in *Environmental Issues in the West Indian Ocean* Ocean & Coastal Management, VOL 49, Issue 11 (2006) pp. 855-872.

⁵³³ Renard, Y., "Citizen Participation in Coastal Area Planning and Management" *CAMP Newsletter* National Park Service, Office of International Affairs, Washington, DC, 1986 pp. 1-3

- (vi) Harmonization and consensus building amongst the various competing stakeholder interests.

A policy should also be developed where the communities whose lives are irrevocably disrupted or altered by the governance process for instance the creation of MPAs and the adverse effect of exploration and exploitation of offshore minerals on marine ecosystems, are compensated for the disruption of their lives. These communities should at least benefit from improved infrastructure for the price they have to pay for effective governance of marine resources. The corporations and agencies involved in the disruptive activities should be made to give back to the communities by developing their infrastructure and other community based projects such as schools and hospitals. Adequate and prompt compensation should be given to those whose lives are severely and more directly affected such as communities which have to be relocated to give room for MPAs.

5.3 Legislative Reforms

The preceding chapter discussed at length how duplicity and overlap has greatly hampered the effective operation of the various legal regimes responsible for the governance of marine resources in Kenya. It was also demonstrated that there is lack of a clear policy on which international instruments that govern exploration and exploitation of marine resources that Kenya is party to can be domesticated. Owing to the dualist nature of the Kenyan legislation, these instruments and treaties continue to have little or no impact in the governance of marine resources within Kenya's maritime zones. The

lack of domestication of ratified international conventions and protocols as well as updated legal instruments capable of addressing modern development in the marine sector has been identified as a major bar to effective governance of marine resources in Kenya.

There is urgent need to chart out modalities for the domestication of the various treaties that Kenya has ratified in relation to the governance of marine resources.⁵³⁴ The government should review existing maritime legislation, particularly the Merchant Shipping Act, to incorporate international and regional conventions, protocols, instruments and agreements on a continuous basis. Draftsmen at the Attorney-General Chambers should be trained on maritime law so as to enable them prepare comprehensive and workable draft legislations on governance of marine resources for enactment by Parliament. The following paragraphs consider certain areas in the governance of marine resources in Kenya in which urgent legislative reforms are required to eliminate duplicity and synchronize the Kenyan law with her international obligation.

5.3.1 Delimitation of Maritime Boundaries

The first step toward realization of the potential within Kenya's maritime zones is to delimit the zones with accuracy and certainty. A legal framework should be worked out

⁵³⁴ Some of the treaties that Kenya has ratified but failed to domesticate include the LOSC (1982), the International Convention for the Prevention of Pollution from Ships, The International Convention for Safety of Life at Sea 1974 (as amended), the International Ships and Port Security Code and the Convention for the Standard of Training, Certification and Watchkeeping 1978 (as amended). The STWC was domesticated by inclusion as a subsidiary legislation under the Merchant Shipping Act. The infrastructure of this legislation is in disharmony with the provisions of STWC.

for the delimitation of the territorial sea, the contiguous zone, EEZ and the continental shelf of Kenya's jurisdiction in accordance with LOSC.

The maritime boundary zones may be based on bilateral agreements between Kenya and her maritime neighbours namely Tanzania and Somalia. There is already in place such an agreement between Kenya and Tanzania but the absence of a stable government in Somalia has hindered any efforts towards mutually agreeing on a common maritime border.

The delimitation legislation regimes must be based on LOSC taking into account the permitted modes of delimitation and extent of maritime zones. In any event, the concept of maritime zones should reflect all the different legal regimes within it, such as, internal waters, territorial seas, contiguous zone, continental shelf, EEZ, and also, where they might be useful, straits, regime of islands, archipelagic states, etc. A single delimitation legislation that contains guidelines for delimitation of all the recognized maritime zones is more expedient than the current trend of providing for delimitation of the various maritime zones in scattered pieces of legislations. It is high time Kenya came up with a maritime legislation that fixes internationally recognized and accepted boundaries of her maritime zones with a measure of accuracy and certainty so as to know the extent of the zones and thus be able to adequately plan for and exercise control over them. The annexed proposed Maritime Zones Bill could form a good basis for the proposed delimitation legislation. The Bill seeks to consolidate the laws on delimitation of Kenya's maritime zones into a single legislation that is LOSC compliant.

5.3.2 Legislative Reforms on Exploration, Research and Exploitation of marine Resources

There is a legislative lacuna with regard to research, exploration and exploitation of marine resources in Kenya. The exploration and research institutions that operate within Kenya's maritime zones are created under legislation that have little to do with maritime affairs. Kenya Marine Fisheries Research Institute (KMFRI) operates under the Science and Technology Act while National Oil Corporation of Kenya (NOCK) is a company whose operations are regulated by the Companies Act⁵³⁵. The Petroleum (Exploration and Production) Act⁵³⁶ is also not oriented towards governance of marine resources and only provides for exploration of oil and gas resources in general. The Mining Act has also been demonstrated to be terrestrially inclined leaving exploration of mineral resources of the continental shelf unregulated by any legislative enactment.

There is therefore need to enact a law to govern exploration and research within Kenya's maritime zones. A law should be promulgated for the conservation and optimal utilization of the living and non-living marine resources within Kenya's maritime zones. This need is further manifested by the failure of the piecemeal legislations discussed in chapter four to comply with the exploration and research guidelines set out under LOSC. The new legislation should provide guidelines for the operation of all institutions conducting research and or exploration within Kenya's maritime zones and should be in

⁵³⁵ Cap 486 Laws of Kenya.

⁵³⁶ Cap 308 Laws of Kenya.

line with the provisions of LOSC. Rules on marine scientific research which strike an equitable balance between the interests of Kenya and other states interested in the research within Kenya's Exclusive EEZ and the continental shelf should be established.

The establishment of KMFRI should be removed from the Science and Technology Act and instead placed under a specific Act of Parliament to be passed for purposes of establishing the body. KMFRI should be the lead research agency within Kenya's maritime zones and should be empowered to even carry out oceanography. The role and mandate of NOCK in the exploration and exploitation process should also be defined in the Petroleum (Exploration and Production) Act or another specific statute for the establishment of the corporation rather than the current situation where NOCK is a company under the companies Act.

5.3.2.1 Exploitation of Marine Fishery Resources

The Fisheries Act should also be reviewed to include more regulations on culling of marine fishery resources. It should expressly proscribe methods of fishing that are proven harmful to the continued regeneration of the fishery resources such as poisoning and trawling. Overfishing should at any rate be curbed through strict legislation which should also contain in it enforcement mechanism which have been missing in previous legislations. Offences should be created under the Fisheries Act and strict penalties prescribed to ensure strict adherence to the rules and regulations set there under.

As stated earlier in chapter three, most of the fish stocks are found within the EEZ. EEZs form about 30% of the total area of the sea. This area contains over 90% of commercially exploitable fish stocks, about 87% of the world's known submarine oil deposits and about 10% of manganese nodules. A lot of marine scientific research takes place within EEZs and virtually all major shipping routes of the world pass through the EEZs of States other than those in which the ports of departure and destination are situated.⁵³⁷

The LOSC requires a coastal state to declare its capacity to harvest the fish stock within its EEZ.⁵³⁸ The surplus can then be harvested by DWFNs pursuant to an agreement with the coastal state. DWFNs should be allowed to fish in the Kenyan EEZ only where the allowable catch has not been exceeded and the country lacks capacity to further exploit the remaining portion. Even in such a scenario, the law should be explicit on what modalities should be worked out before such a nation is allowed to venture into Kenyan waters. A legislation should be enacted to require the DWFNs to land and process part of their catch in Kenya so as to benefit the country from the technological advancement as well as job creation that would flow from such a venture.

5.3.2.2 Prevention of Marine Pollution

Measures and mechanisms to prevent pollution of marine resources and marine environments from the exploration, research and exploitation of marine resources within Kenya's maritime zones should be put in place. As explained in chapter four, there is a nexus between land pollution and marine pollution in that most of the effluents from

⁵³⁷ See 3.2.3.

⁵³⁸ Article 62 LOSC.

land-based industrial and service delivery units like hotels is discharged directly into the sea. Marine pollution from land-based sources greatly contributes to destruction of the marine eco-system.

A comprehensive marine pollution legal regime should therefore be developed to regulate pollution of marine environments by land based sources. The Montreal Guidelines for the Protection of the Marine Environment against Pollution from Land-based Sources (MARPOL), drafted by UNEP, could be the basis for this legal regime. Although EMCA empowers NEMA to enforce regulations geared towards prevention of pollution, there is need to expand NEMA's mandate to ensure that NEMA is able to act and curb activities that are potential source of land-based pollution to marine environments before they are undertaken. The mandate should be wide enough to cover even river bank cultivation which leads to siltation at estuaries and deltas.

KMA should be mandated under EMCA to compliment the work of NEMA in enforcing the measures to curb vessel-based pollution of marine environments as opposed to the current scenario where KMA's mandate is contained in a the KMA Act. KMA should be empowered to issue licenses for seaworthiness in consultation with the relevant bodies governing the exploitation of marine resources. The potential to pollute should form one of the criteria in assessing seaworthiness of vessels. KMA should be empowered to arrest and detain vessels not conforming to set standards.

5.3.3 Maritime Transport

The efficacy of KPA as the only government agency which deals with matters of maritime transport will largely depend on the recognition that maritime transport and trade is constantly affected by international procedures and practice. KPA has to adopt and conform to world technological changes and practices which calls for a constant review of the KPA Act.

The KPA Act should be reviewed in order to enhance the capacity of KPA to render effective services as a regulator of an international port. The role of KPA as a regulator should be scrapped and the organization should be left to operate only as a service provider. The benchmark for appointment of KPA management officials should be pegged on merits rather than political patronage and ethnic or regional considerations that has characterized recent appointments to root out the rampant corruption at the ports facilities and entrench a culture of corporate governance. The employees o KPA should be required to sign performance contracts just like the other officials in the transport sector. The performance of these employees should be evaluated against these performance contracts.

Kenya currently operates a closed Ship Register. The government should put in place legislative framework to enable and encourage ships trading internationally to fly the Kenyan flag and at the same time develop appropriate institutional and human resource base to sustain the Registry. KMA should develop and operate an Open Ship Register with as wide on ownership base as possible. Such a register should conform to the

requirements of LOSC so as not to allow the flying of flags for convenience.⁵³⁹ KMA should also develop and implement a special fiscal and tax regime designed to encourage ship registration in Kenya.

5.3.3.1 Maritime Security

Kenya should also enact appropriate legislation to deal with maritime security having regard to existing IMO and other International and Regional Agreements and should continuously domesticate IMO and other International Agreements relating to maritime security. There should be enacted a law for port and maritime security. This legislation should be the instrument through which the requirements of the ISPS Code and the Convention on Safety Of Life At Sea (SOLAS) as amended are implemented. The enactment should also contain provisions on training of the personnel involved in security issues, formulation of security policies and strategies.

The Armed Forces Act could be amended to provide that the Kenya Navy undertake coast guard duties and offer surveillance of the Kenya maritime zones to ensure that piracy and illegal fishing within Kenya's EEZ is dealt with.

5.3.3.1 Maritime Sector Employment Regulation

With regard to the affairs of Kenyan seafarers, there is need to domesticate and implement the International Labour Organization (ILO) and IMO Conventions aimed at the protection and development of seafarers and Fishers. Kenya should promulgate a law on Cabotage which should domesticate the relevant ILO and IMO conventions to ensure

⁵³⁹ Articles 91(2) LOSC.

that seafarers are equipped with adequate skills and that Kenya is included in the “White List”. This will ensure that the Kenyan seafarers aboard foreign vessels are paid in line with ILO and IMO wage standards.

KMA should ensure that crew agreements are signed according to the proposed Merchant Shipping Act and that the owners of ships who fail to adhere to the regulations are punished in accordance with the requirements of the Act. The new legislation should be aimed at promotion and implementation of Port State control and encouraging the local ship owners to switch their ships back to the national flag so as to boost the domestic register and create employment for Kenyans.

5.3.4 Admiralty Jurisdiction

Kenya should urgently enact appropriate comprehensive local maritime legislation and establish by law an admiralty division of the High Court to have jurisdiction over all maritime claims and related matters. In so doing, the country should maintain conformity with the Brussels Arrest Convention of 1952.⁵⁴⁰ The admiralty jurisdiction should address the following issues⁵⁴¹:

- (i) the establishment of a specialized court to hear and determine Admiralty claims;
- (ii) appointment of specially trained judges and Admiralty Marshal and Admiralty Registrar to preside over the Admiralty Court, in their respective capacities;

⁵⁴⁰ The 1952 Arrest Convention was created in order to unify the rules relating to arrest of ships around the world. Before the Convention, the rules relating to arrest of ship were governed by the national laws and rules of different countries. This situation gave rise to problems for the shipping industry as a ship could be arrested in relation to any claim whatsoever if it was permitted by the domestic law of the country where the ship was. Also considering that many countries have exorbitant jurisdictional rules and sometimes on very loose grounds claim jurisdiction, this presented a problem.

⁵⁴¹ See for example The Supreme Court Practice 1997 Vol. 2 (1996) (Sweet & Maxwell, London) paras. 1301-1419 for an example of how Admiralty jurisdiction can be entrenched in the Kenyan statutes.

- (iii) the appointment and training of officers such as the Admiralty Marshal and Admiralty Registrar and assign appropriate duties to such officers, under the Admiralty rules which should also cover administrative duties in the administration of the Admiralty registry and the Admiralty Court;
- (iv) the establishment of an Admiralty Registry for the filing of Admiralty suits and to ensure the proper maintenance of, among other things, a “caveat book” for the purpose of registering a caveat against the arrest or release of a vessel by any party who wants to bring an action against the owner of any particular vessel;
- (v) the service and enforcement mechanism of a warrant of arrest by designating an officer or officers to effect such arrest;
- (vi) standard forms to be used in admiralty proceedings.

In this regard, there should be formulated Admiralty Jurisdiction Rules of procedure and practice to facilitate Admiralty proceedings. There should be established an Admiralty Jurisdiction Rules Committee akin to the Rules Committee established under the Civil Procedure Act⁵⁴² with powers to issue practice directions or amend the rules of Admiralty practice from time to time and as circumstances dictate. The committee is to ensure that the rules are amended to keep pace with developments in maritime industry and changes in practice and procedure in other parts of the world.

⁵⁴² Section 81 Cap 21 Laws of Kenya. The Rules Committee is empowered to make and review rules to govern the conduct of civil litigation in Kenya.

5.4 Reforms in the Institutional Framework

As has been demonstrated, there are government agencies in operation for the governance of marine resources in Kenya even without the ICZM. It is not easy to change these mandates and therefore the agencies should be left to run their respective management areas. Management of fisheries and mangrove forest harvests should remain with KMFRI and CDA respectively. Parks and reserves also may continue to be managed by KWS. Pollution control may remain with NEMA as national agency responsible for environmental protection. This is because these agencies have over time perfected their various roles in the governance of marine resources and an attempt to shift the roles to other institutions would be counter productive.

However, an integrated and comprehensive management structure with a lead agency having clearly spelt out mandate is necessary. In addition to its regulatory role, KMA should come in as the lead agency to coordinate the operation of the various agencies. However, there is need to harmonize the operation of these institutions to avoid duplicity and overlap. There is also need to further extend the mandate of KMA to oversee the comprehensive and integrated exploitation, management and conservation of the resources within Kenya's maritime zones.

This proposed integrated structure can be achieved through the ICZM. The ICZM should be seen as a multi-sectoral process created to improve development planning and resource conservation through integration and cooperation. It should neither be seen as a substitute for uni-sectoral programmes such as tourism or maritime administration, nor as

a substitute for fisheries or off-shore mineral exploration. ICZM must address management of marine resources in a single unified programme.

At any rate, the reforms in the institutional framework responsible for the governance of marine resources should be geared towards entrenching the culture of corporate governance within the institutions involved in this governance exercise. Corporate governance whenever adopted invariably leads to success in the implementation of strategies and realization of aims and objectives.

5.4.1 Inter-Ministerial Coordination and Involvement of Local Authorities

Marine resources management should involve both levels of government. The local governments should be involved because they govern where development takes place, where resources are found, and where the benefits or penalties are mainly to be felt. The central government has to be involved because responsibility and authority for marine affairs inevitably rests with it (navigation, national security, fisheries, international relations, etc.). Therefore, ICZM activities will require the involvement of all levels from national to local governments.

Because all levels of government must be involved in ICZM along with development interests and resource users, the decision-making and implementation processes must be shared among these interests, requiring efficient communication and effective dialogue. Information-sharing is especially important. It is desirable, if not essential, to establish an interministerial coordinating committee to review progress, consider changes, discuss

proposed new rules, receive advice, and consider actions on specific development applications and marine resources management proposals.

The greater the number of sectoral divisions within the ICZM, the greater the potential for fragmentation of governmental responsibility and hence duplication of effort such as has been witnessed in Kenya. Therefore, new agencies should be created only where existing agencies within the relevant ministries and the local authorities cannot be adapted, motivated, and empowered to adequately carry out the task. Existing agencies with jurisdiction over marine activities should be involved through interministerial and interagency agreement as necessary and appropriate to meet the conservation objectives.

The ICZM must bring together several government levels and departments in the governance of marine resources. A lead agency with an interagency mandate should be established to coordinate, manage and plan functions of ICZM. Alternatively, the mandate of KMA should be expanded so as to constitute it the lead agency to coordinate the activities of other agencies and institutions in the management of marine resources in Kenya.

In all, the culture of corporate governance should be encouraged. The managers in the various governmental and local authority institutions with maritime interests should constantly be trained on the ethos of good governance, corporate governance and sound management.

5.4.2 Regional and International Cooperation

Transnational issues related to governance of marine resources requiring international cooperation include shared stocks, highly migratory species and transboundary stock, maritime stock, maritime boundary resolution, straddling oil and gas deposits, and transboundary pollution. Regional cooperation is therefore essential for sound governance of marine resources.⁵⁴³

Although Kenya is party to several regional and international agreements based on which various regional and international bodies have been set up to coordinate the efforts at addressing marine resources governance issues of regional and international importance, Kenya has not fully benefited from these institutional arrangements owing to the haphazard manner in which the issues of governance of marine resources has been handled. There is need to identify local institutions to liaise with the regional and international bodies for optimum results in an effort to address maritime issues of transboundary importance. KMFRI should be mandated to be the liaison institution for all research bodies whether non-governmental, national, regional or international.

Kenya should enact a new law or amend the existing law on non-governmental organizations (NGOs) to create a conducive environment for their operations. The bureaucratic procedure of registering NGOs in Kenya should be relaxed to encourage the mushrooming of NGOs interested in the governance of marine resources. However, care should be taken not to duplicate efforts or inculcate a culture of sham NGOs that use the

⁵⁴³ See for instance Laine A. and Kronholm M. "Bothnian Bay Life: Towards Integrated Coastal Zone Management" in *Environment Science & Policy* VOL 8, Issue 3, June 2005, pp. 259-262 for how information exchange and regional co-operation can enhance effective governance of marine resources.

governance of marine resources as a cloak to disguise their otherwise retrogressive operations for instance child sex tourism and drug trafficking which is now rampant within the tourist resorts along the Kenyan coast.

5.4.2 Maritime Security

There is need to set up a full fledged coast guard to compliment the role played by the Navy in the surveillance and maintenance of security along the Kenyan coast and within Kenya's maritime zones. Although the establishment of the marine police unit alongside the tourist police has improved the situation with regard to security along the Kenyan coastal beach tourist resorts, there are still security concerns that serve to militate against these efforts. Some of these concerns such as the piracy within the adjacent Somali coastal waters cannot be handled by the ill-equipped police units who are hardly trained to deal with off-shore security issues.

This leaves the Kenya Navy as the only credible security agency operating within Kenya's maritime zones. The Kenya Navy is also limited in that its primary mandate is national security and matters that are illegal but do not pose an immediate threat to national security such as non-observance of fishing regulations by local fishermen are not within its jurisdiction.

There is therefore need for the establishment of a coast guard to take up the role of enforcement of the Kenyan law and maintenance of order within the maritime zones of Kenya's jurisdiction. Since the establishment of a full fledged coast guard is a costly affair, Kenya could initially start by converting a portion of the Navy into a coast

guard.⁵⁴⁴ The Armed Forces Act should be amended to create a coast guard unit within the Navy and make provisions for specific coast guard mandate. The equipment for the coast guard operation should be a donation from the Navy since most of the Navy equipment is idle. Since the regular police force lack the expertise on marine governance and maritime law, the coast guard should have powers to arrest and prosecute persons suspected to have violated any of the maritime regulations in Kenya. The coast guard services should include impounding contraband, hot pursuit and enforcement of fishing regulation. In the long term, the coast guard could also be responsible for enforcement of customs and fiscal regulations and the MPAs working closely with KMA. The coast guard staff should be on secondment from the Navy who then should be specially trained. Posts should be created within the coast guard to enable those who opt to join the coast guard to be delinked from the mainstream Navy and also to rise to the same cadre they would have risen to had they stuck with the Navy. Eventually, the coast guard should be detached from the Navy and become a full-fledged force with minimal cost implications. This transformation of the coast guard into a non-military organization could have far-reaching positive implications as even donors who would be reluctant to fund military operations would readily offer technical, equipment, services, cooperation and other much needed assistance.

A National Maritime Security Committee should also be established to coordinate and advise KMA on maritime security issues as well as liaise with the National Security Committee. A mechanism that will ensure the implementation of the amended SOLAS

⁵⁴⁴ This approach has proven to work best for developing coastal states where costs of establishing a coast guard unit could be overwhelming. See for instance the history of the Philippine Coast Guard available at <http://www.coastguard.gov> Accessed on 21/11/2008.

Convention⁵⁴⁵, LOSC and Convention on Suppression of Unlawful Acts Against the Safety of maritime Navigation (SUA) 1988⁵⁴⁶ should be put in place. Regulations developed under the ISPS code should be given local application.

5.4.3 Reforms in the Educational Institutions

Kenya should establish a self-funding maritime education board responsible for the establishment, development and promotion of marine and maritime education Bandari College should be upgraded and turned into a regional maritime institution with an international character offering middle level courses for various cadre in the maritime industry. This can only be achieved through a total repeal of the current Merchant Shipping Act to bring it in line with the STCW' 95 requirements and hence gain inclusion in the white list.

Local universities should be encouraged to teach specialized maritime subjects. A specialized Maritime Research and Development unit should be established under the auspices of ICZM. Accreditation with other reputable regional and international maritime training institutions should also be encouraged. The government should develop a mechanism to increase merchant navy officer training to ensure there are skills to support the long-term expansion of Kenyan Shipping Industry and the preservation of marine resources.

⁵⁴⁵ Particularly Chapter XI-2. The regulation in this Chapter requires Administrations to set security levels and ensure the provision of security level information to ships entitled to fly their flag. Prior to entering a port, or whilst in a port, within the territory of a Contracting Government, a ship shall comply with the requirements for the security level set by that Contracting Government, if that security level is higher than the security level set by the Administration for that ship.

⁵⁴⁶ This convention entered into force on 1st March 1992. It had been necessitated by an increase in security threats for life at sea in the 1980s.

5.4.4 Institutional Reforms on Marine Resources Research and Exploration Institutions

Kenya should develop her capacity to be able to exploit the living marine resource in its EEZ as well as in high seas much like the DWFNs. Kenya should buy one or so small trawlers for the Fishery Department or enter into a viable partnership with other countries. Universities and research institutes should be encouraged to have a Research Vessel that can also be used for stock assessment research and when not researching, to carry out fishing operations. The vessel can be multi-owned by several Universities or research institutions with interest in marine science as well as other stakeholder institutions.

Communities need to be educated about marine environment and its resources, and sustainable marine technologies should be acquired, innovated or transferred so that communities can know the value of protecting the marine environment and using it sustainably. Fisheries are not the only marine resource. The coastal and marine resources should be considered in totality when considering poverty alleviation.

KMFRI should be converted into the lead research agency within Kenya's maritime zones and its research mandate should be extended to include oceanographic studies. KMFRI has the physical facilities to accommodate this role and with adequate funding can carry out such a mandate effectively. In line with this broad mandate, the agency's name should be changed to Kenya Marine Research Institute (KMRI) and all other research bodies involved in marine research including regional bodies and NGOs should

work closely and in consultation with this agency. Donor funding towards marine research should be channeled through KMRI which should also be the liaison agency to cooperate with regional institutions in marine research. A levy should be imposed on hotels and other tourist establishments operating within Kenya's maritime zones so as to provide funding for KMRI's research projects. Such a levy has proved to work well in the hotel industry through the Catering Levy Trustee established under the Hotels and Restaurant Act (Cap 494 Laws of Kenya).

5.5 Conclusion

This chapter has laid out some useful recommendations that could help bring order to the governance of marine resources in Kenya. It has borrowed heavily from experience of other maritime nations where governance of marine resources has registered considerable success and attempted to modify these practices to suit the local situation in Kenya.

There is need at the policy level to map out comprehensive, clear and detailed policies. Policies should be formulated so that specific programmes and projects that would bring about full implementation are incorporated. The policy framework should include a well thought out implementation mechanism which should be time bound, that is to say, a predetermined timetable should be in place together with specified targets so that implementation can be monitored and evaluated. The performance of policies must be periodically evaluated by comparing original targets and goals with the actual results and any necessary remedial action put in place.

The government should treat matters on governance of marine resources with the same seriousness as it treats the agricultural sector. A lot of lives are dependant on marine resources and these resources are loaded with potential which if well managed can lead to creation of wealth and alleviation of poverty amongst the communities that are directly and indirectly dependent on the ocean for their livelihood. A shift from the traditional *ad hoc* and subsistence exploitation of marine resources in Kenya to a more modernized and technologically up-to-date approach could generate a lot of revenue for the nation. Maritime transport, tourism and fisheries have the capacity to create many job opportunities and probably even replace agriculture as the main foreign exchange earner in Kenya.

Contrary to some current impressions, conservation of marine resources and economic development are not conflicting ideas. In fact, well-planned conservation-oriented development will add to the general economic and social prosperity of a coastal community, while inappropriate development will sooner or later have a negative effect.

The simultaneous achievement of development goals and resource conservation goals may require that communities modify development patterns. However, with innovative management based upon sustainable use, communities may be able to achieve a desirable balance without serious sacrifice to either short term development progress or longer term conservation needs.

CHAPTER 6

CONCLUSIONS AND RECOMMENDATIONS

6.1 Introduction

This study set out to examine and critically analyze the existing legal, policy and institutional frameworks for the control and management of Kenya's maritime zones with a view to establishing whether in deed Kenya's maritime zones are as it were, a forgotten province. The study has been able to demonstrate that the problems of governance of marine resources are often greater than those of governance of land-based resources. The complexity of governance of marine resources can be partly attributed to the intense pressure of competing demands, all appearing to converge on relatively small areas and the cost of operating vessels and conducting surveillance and monitoring. The study has further revealed how in Kenya these problems are compounded by lack of an appropriate legal, policy and institutional frameworks for governance of marine resources.

6.2 Summary of Findings

It has been revealed by the study that the challenge in the governance of marine resources has invariably been to build into initial planning a realistic basis for perpetual support of sound governance and adequate management which should be tied to economic developments that use or have impacts upon the resources of the maritime jurisdiction of a coastal state. Priority at the inception should include public education

and, possibly, economic adjustment so that the local communities and users of marine resources are generally motivated to support the objects of the marine resource governance structure.

It has been shown that Kenyan experience in the management of marine resources has been characterized by duplicity, overlap and inconsistency due to the multi-agency approach and scattered and often inconsistent legislative provisions. Each of the various agencies charged with the control and management of Kenya's marine resources seeks to implement its mandate without harmonizing its activities with those of the other relevant agencies. The response of the government has been to focus undue attention to the land-based resources while neglecting marine in effect making the sea and its resources a "forgotten province".

On matters of delimitation of maritime boundaries, the study has illustrated how international trends seem to favour bi-lateral agreements guided by LOSC in delimiting maritime boundaries between opposite or adjacent States. The International Court and tribunals may be invited, failing agreement, to resolve the question of maritime boundaries. At any rate, delimitation of maritime boundaries is an issue of international concern. In delimiting the maritime boundaries, Kenya has to pay attention to international trends and the provisions of LOSC in this regard.

The study has shown that Kenya's maritime zones are not adequately delineated and the legal, policy and institutional frameworks for the delineation are scanty. The Maritime

Zones Act which is the principal legislation for delimitation is poorly drafted and does no more than outline the maritime zones without laying down a framework for delimiting the same or establishing institutions to undertake the delimitation. Some of the applicable statutes such as the Continental Shelf Act pre-date the LOSC and are therefore dated and of little use in modern day delimitation of Kenya's maritime zones. Moreover the latest attempts at reviewing the legislative framework, though well intentioned, have been uncoordinated and not based on sound LOSC compliant policies.

With regard to the actual governance of marine resources of a coastal state, a good policy framework has been shown to be key to formulation of workable and efficient legislations which in turn engender a sound institutional framework in the governance structure. In Kenya, the reverse order of legislation where legislative action precedes formulation of policies has meant that the policy framework in the management of marine resources is fundamentally flawed if not altogether non-existent. The failure to map out a clear policy on the governance of marine resources to guide the enactment of relevant legislations has often led to scattered and uncoordinated legislations with similar or at times inconsistent provisions thereby creating duplicity, overlap and confusion in the legislative framework for the governance of Kenya's marine resources.

Legislation has been more utilitarian than LOSC compliant and laws on governance of marine resources have intermittently been enacted as a reaction to pressure from the international regulatory bodies such as IMO. The lack of a sound legal base for governance institutions in the management of marine resources has greatly hampered

their operation. The duplicity that has characterized the legislative framework has in turn been manifested in the institutional framework. Several institutions are mandated to control, manage and oversee the governance of marine resources. The mandates of these institutions often overlap and at times conflict as a direct consequence of the duplicity. The net result, as has been demonstrated by the study, is that there is inefficiency in the operation of these institutions leading to chaos in the governance of marine resources in Kenya.

6.3 Recommendations

6.3.1 Reforms in the Policy Framework

This thesis recommends that Kenya should formulate and develop an integrated national maritime policy encompassing comprehensive and consistent guidelines on the administration and regulation of the maritime industry, maritime trade, maritime services, port infrastructure, maritime security, admiralty jurisdiction, maritime education, training and research and marine pollution. In formulating a policy for the governance of marine resources, piecemeal and *ad hoc* approaches to the marine resources development should be discouraged in favour of an approach that balances between a variety of compatible uses whereby economic and social benefits are maximized and conservation and development become compatible goals.

An evaluation of any existing policy should be the first step. Creation of new policy to fill gaps and integrate existing policy is the second step to follow. Marine resources development policy should emphasize that it is in the best interests of the country to

achieve sustainability of its resources and long-term protection of its natural assets. This can be achieved through stakeholder consultation at every stage of the policy formulation. As the study has shown, stakeholder consultation is especially of importance when it comes to creation of Marine Protected Areas (MPAs) since the degree of success of the implementation of the regulation within the MPAs will largely depend on the reaction of the communities interacting and directly affected by the MPAs.

Although stakeholder involvement could be a circuitous affair, it can be done through involvement of non-governmental organizations since NGOs in Kenya are reputed to have a wide grass root network and exceptional skills to mobilize. The coordination of the stakeholder involvement can be done by the provincial administration within the Office of the President which also has good grass root network in consultation with the lead agency.

The proposed marine resources governance policy should closely reflect and be in tandem with the general governmental economic policy. It should establish goals, objectives and priorities and lay down basic principles and criteria which provide guidance for the formulation of plans and programmes and a marine resources development strategy. The policy should outline a framework that identifies the financial, human, technical and institutional resources needed.

A strategic planning process that considers problems and opportunities regarding resources, economic development activities, and societal needs in the maritime zones and

devises a strategy to accomplish the objectives of integrated marine resources governance structure should be initiated. In addition to controlling development, the strategic planning process has to consider the protection of environmental values. Environmental protection enters into the management equation as including the important, but less tangible, values of protection of nature and biodiversity conservation. The strategic planning should devise a programme that will promote compatibility between economic development and the long term environmental and socio-economic needs of the local communities. Compatible multiple-use objectives should be the main focus and the strategic plan should establish a method to avoid short-term development tactics in favour of long-term development and resource conservation strategies.

The proposed comprehensive strategic plan should lay the foundation for the legislation or necessary regulations that are needed to authorize and effectuate the governance programme. Ultimately, there should be formulated an Integrated Coastal Zone Management (ICZM) plan to guide in the governance of marine resources within Kenya's maritime zones.

6.3.2 Legislative Reforms

There is urgent need to synchronize Kenyan law on governance of marine resources with international law and treaties that Kenya has ratified or is party to particularly the LOSC.

The first step should entail legislation of a single comprehensive law on delimitation of Kenya's maritime zones in accordance with the provisions of LOSC. The annexed Maritime Zones Bill should form a guide of the proposed delimitation legislation.

The KMA Act should be amended so as to further extend the mandate of KMA and constitute it as the lead agency in the governance of marine resources in Kenya. The role of KMA should be clearly defined to include coordination of the activities of the other agencies and bodies exercising authority over the governance of marine resources in Kenya. Agencies such as NEMA which deals with marine pollution, KMFRI which deals with marine research and KPA which is involved in maritime transport should by statute be required to work closely and in consultation with KMA as the lead agency. The role of CDA over marine resources should be scrapped and CDA should be left to concentrate on terrestrial coastal resources.

In as far as exploitation of marine resources in Kenya is concerned, the two main applicable legislations, that is the Fisheries Act and the Petroleum (Exploration and Production) Act should be amended to include more precise provisions with regard to the exploration and exploitation of the living and non-living marine resources of Kenya's maritime zones. Fishing regulations should be clearly spelt out and penalties for non-compliance prescribed. Under the amended Fisheries Act, no DWFN should be allowed to fish within Kenya's EEZ without first being cleared by the relevant governmental agency or Ministry as having satisfied the requirements set out under the Act. In any event, such kind of an arrangement should only be entered into in line with LOSC

provisions and so long as the maximum yield has not been exceeded and there is a surplus after Kenya has declared her harvest capacity.

Under the Petroleum (Exploration and Production) Act, institutions involved in exploration and exploitation of offshore oil deposits and mineral resources within Kenya's maritime zones should be made to account for the damage they occasion the marine ecosystem. The 'polluter pays' principle should be entrenched in statute so as to ensure sustainable use is maintained even as the exploration and exploitation exercise continues. The role and mandate of NOCK in the exploration and exploitation process should be defined in a statute rather than the current situation where NOCK is a company under the companies Act. The statutory provisions will harmonize the mandate and functions of NOCK with those of the lead agency and other governmental agencies.

The Armed Forces Act should also be amended so as to give the Kenya Navy specific coast guard mandate in the interim pending the establishment of a full-fledged coast guard unit. The coast guard unit under the Navy should also be empowered through an amendment to the Armed Forces Act to have control over marine parks and to carry out enforcement of marine resources governance legislations and regulations. The Police Act should equally be amended to give the coast guard prosecutorial powers with regard to offences committed within Kenya's maritime zones. This will increase efficiency as the current situation where the Kenya navy arrests offenders and then hands them over to the Kenya Police has led to escape of such offenders as the Police have no skills in the prosecution of maritime offences.

The provisions for the establishment of KMFRI should be removed from the Science and Technology Act and instead be placed under a specific Act of Parliament of establishing the body. KMFRI should be the lead research agency within Kenya's maritime zones and should be empowered to even undertake oceanographic studies.

The Merchant Shipping Act should also be extensively reviewed so as to synchronize it with the provisions of IMO, SOLAS, SUA and the ISPS code. It should also provide for training of seafarers to the standards approved by STWC'95 so as to ensure Kenya's inclusion in the 'White List'. A law on cabotage should either be enacted or sufficient provisions to safeguard the welfare of Kenyan seafarers included in the Merchant Shipping Act.

The law on Admiralty jurisdiction should be well spelt out in a statute so as to avoid the current awkward situation where the Kenyan courts are bound by laws and rules of procedure enacted for the English courts. This would herald a new dispensation in the resolution of maritime disputes in Kenya in addition to the assertion of Kenya's sovereignty.

6.3.3 Reforms in the Institutional Framework:

As it was earlier mentioned in chapter five, it would not be prudent to set up new institutions to govern marine resources since the costs involved would make such an exercise impractical. Instead, the agencies that are in existence should be harmonized and

the culture of corporate governance cultivated and enhanced in these organizations. This can be done by introducing performance contracts within the agencies especially where such agencies are government corporations. Targets should be set for the agencies and their performance evaluated on a regular basis against the backdrop of these targets. Future funding should be pegged on past performance such that those agencies whose performance falls below the set standards are earmarked for reforms. Corporate governance should be emphasized and practiced within the institutions involved in the governance of marine resources.

There should be established a lead agency to oversee the activities of these agencies so as to avoid duplicity and overlap. KMA's mandate should be extended so as to constitute it as the lead agency in the implementation of the ICZM plan for governance of marine resources in Kenya. The role of KMA should then be to coordinate the operations of the other bodies involved in the governance of the marine resources in addition to its current regulatory role. NEMA should continue to handle matters touching on marine pollution while KPA's regulatory role should be scrapped and instead KPA should remain strictly a service provider. The situation where the service provider is also a regulator provides ample incentives for corruption and compromise of standards.

KMFRI should be converted into the lead research agency within Kenya's maritime zones and its research mandate should be extended to include oceanographic studies. KMFRI has the physical facilities to accommodate this role and with adequate funding can carry out such a mandate effectively. In line with this broad mandate, the study

proposes that the agency's name should be changed to Kenya Marine Research Institute (KMRI) and all other research bodies involved in marine research should work closely and in consultation with this lead agency. Donor funding towards marine research should be channeled through KMRI which should also be the liaison agency to cooperate with regional institutions in marine research. A levy should be imposed on hotels and other tourist establishments operating within Kenya's maritime zones so as to provide funding for KMRI. Such a levy has proved to work well in the hotel industry through the Catering Training and Tourism Development Levy established under the Hotels and Restaurant Act (Cap 494 Laws of Kenya).

As it was stated in chapter five, the costs of establishing of a full fledged coast guard are enormous and could be a major challenge to any developing coastal state wishes to set up a mechanism to enforce marine resources governance regulations, therefore, the coast guard role of the Navy in Kenya should be formalized by amending the Armed Forces Act to create a coast guard unit within the Navy and make provisions for specific coast guard mandate. The equipment for the coast guard operation should be a donation from the Navy since most of the Navy equipment is idle. Since the regular police force lack the expertise on marine governance and maritime law, the coast guard should have powers to arrest and prosecute persons suspected to have violated any of the maritime regulations in Kenya. This transformation of the coast guard into a non-military organization could have far-reaching positive implications as even donors who would be reluctant to fund military operations would readily offer technical, equipment, services, cooperation and other much needed assistance.

The coast guard services should include impounding contraband, hot pursuit and enforcement of fishing regulation. In the long term, the coast guard could also be responsible for enforcement of customs and fiscal regulations and the MPAs working closely with KMA. The coast guard staff should be on secondment from the Navy who then should be specially trained. Posts should be created within the coast guard to enable those who opt to join the coast guard to be delinked from the mainstream Navy and also to rise to the same cadre they would have risen to had they stuck with the Navy. Eventually, the coast guard should be detached from the Navy and become a full-fledged force with minimal cost implications.

Kenya should establish a self-funding maritime education board responsible for the establishment, development and promotion of marine and maritime education. Bandari College should be upgraded and turned into a regional maritime institution with an international character offering middle level courses for various cadre in the maritime industry. This can only be achieved through a total repeal of the current Merchant Shipping Act to bring it in line with the STCW' 95 requirements and hence gain inclusion in the white list.

Primary and secondary schools as well as the local universities should be encouraged to teach specialized maritime subjects.

6.4 Conclusion

This study has revealed that in deed Kenya's maritime zones is a forgotten province. A lot of attention has been given to the land-based resources much to the neglect of the

marine resources. Even where they exist, laws on governance of marine resources in Kenya have not conformed to the international standards and are characterized by duplicity and overlap with seldom any cogent enforcement mechanisms. Consequently, the regulations have been flouted with impunity whereas the duplicity of agencies with authority over the governance of the marine resources coupled with the lack of a coordination framework has had a counterproductive effect. Kenyan seafarers and coastal communities who depend on marine resources as a source of livelihood have not been able to reap maximum benefits from the resources in Kenya's maritime zones.

There is urgent need to shift focus from the utilitarian mode of governance of Kenya's marine resources to a more sustainable LOSC compliant approach. Such a process should include a review of the policy, legal and institutional frameworks responsible for the governance of maritime zones in Kenya. Such a move would ensure that Kenya's maritime zones are no longer a forgotten province but are Kenya's ninth province.

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APPENDIX I

STRUCTURED INTERVIEW QUESTIONS

The following research questions were used in interviews with senior managers and decision-makers in the various institutions that are directly involved in the governance of marine resources in Kenya.

1. KENYA MARINE FISHERIES RESEARCH INSTITUTE (KMFRI)

1. What is the mandate and objectives of KMFRI?
2. How does KMFRI seek to achieve the objectives stated in 1 above?
3. What problems/hiccups (technical, financial, political or otherwise) is KMFRI facing in seeking to realize its objective?
4. From your own research and observation, is it true to assert that the exploitation of the resources of the sea is generally a forgotten province?
5. What is the current status of Kenya's marine fisheries?
6. What is KMFRI doing to establish species composition, distribution, behaviour and migration of marine life within Kenya's maritime zones?
7. What inadequacies does Kenya face in exploiting her marine living resources?
8. What is KMFRI doing about the reef area degradation reported along the more densely populated southern coast brought about by over-exploitation?

9. Are there vessels from Distant Water Fishing Nations (DWFNs) exploiting Kenya's marine fisheries? If so, what is the nationality of such vessels?
10. Are there incidents of pirate and illegal fishing within Kenya's Exclusive Economic Zone (EEZ)?
11. If such incidents have occurred, what has been done to prevent repeated occurrence? Have such measures been successful?
12. How have the rising cases of piracy and hijackings along the Kenyan and Somali coastlines affected exploitation of marine living resources?
13. Has Kenya entered into any fishing access agreements with Distant Fishing Nations? If not, why and would she be willing to enter into such agreements?
14. How does KMFRI relate with other agencies with authority over Kenya's maritime zones such as the Kenya Ports Authority (KPA), Kenya Maritime Authority (KMA), the National Environment Management Authority (NEMA), the Kenya Navy and the Kenya Police in managing Kenya's ocean areas?
15. What measures do you recommend to be put in place to ensure optimal utilization and sound protection of the marine fisheries?
16. If well-managed, do marine fisheries hold the key to alleviating poverty along Kenya's coastal shores and generally improving the standards of living of Kenyans?
17. What other comments can you make?

2. KENYA MARITIME AUTHORITY (KMA)

1. Is it true to assert that the exploitation of the resources of the sea within Kenya's maritime zones is generally a forgotten province?
2. Kindly give a brief overview of the current legal, policy and institutional structure responsible for the management of Kenya's marine resources?
3. What is your personal assessment of this structure? Is it effective?
4. How does KMA discharge its mandate of co-ordination of the implementation of policies relating to maritime affairs and promotion of the integration of such policies into the national development plans?
5. Has KMA undertaken any research, investigation and surveys in the maritime sector necessary for the discharge of its mandate? If so, what are the findings?
6. Has KMA been efficient and effective in the discharge of Kenya's flag State and port State responsibilities having regard to international maritime conventions, treaties, agreements and other international instruments? If not, what are the reasons for its failure?
7. What national oil spill contingency plan for coastal waters has KMA put in place to prevent pollution of marine environment by oil spills and how effective has it been?
8. Does KMA maintain and administer a ship register?
9. How does KMA deal with matters pertaining to maritime search and rescue?

10. What has KMA done to improve maritime security?
11. What factors would you attribute to the rising cases of piracy and hijackings along the Kenyan and Somali coastlines?
12. Has KMA been successful in co-ordinating the recruitment and training of Kenya seafarers and monitoring and evaluating training programmes to ensure conformity with standards laid down in international maritime conventions?
13. How does KMA relate with other research and enforcement authorities within Kenya's maritime zones such as Kenya Ports Authority (KPA), the Kenya Marine Fisheries Research Institute (KMFRI), the National Environment Management Authority (NEMA), the Kenya Navy and the Kenya Police in managing Kenya's ocean areas?
14. Is there proper coordination in the operations of these institutions?
15. What problems/hiccups (technical, financial, political or otherwise) is KMA facing in its efforts to ensure a sound and balanced maritime regime encompassing the interests of all relevant stakeholders?
16. Has KMA identified a country Kenya from which Kenya can learn the best practice in the control of maritime zones and utilization of marine resources?
17. Why have you chosen that country (for example, is such country comparable to Kenya in terms of economic, technical and management capacities)?
18. What legal, policy and institutional reform measures would you recommend as appropriate to the maritime sector generally?

19. If well-managed, does the sea and its resources hold the key to Kenya's economic prosperity?

20. What other comments can you make?

**3. NATIONAL ENVIRONMENT MANAGEMENT
AUTHORITY (NEMA)**

1. Is it true to assert that the governance of marine environment within Kenya's maritime zones is generally a forgotten province?
2. Kindly give a brief overview of the current legal, policy and institutional structure responsible for the governance and protection of marine environment within Kenya's maritime zones?
3. What is your personal assessment of this structure? Is it effective?
4. Are there areas that the Minister in charge of environment has declared to be protected coastal zones under the Environmental Management and Co-ordination Act (EMCA)? List them.
5. Has NEMA prepared a survey of the coastal zone and an integrated national coastal zone management plan in accordance with EMCA?
6. In preparation of the coastal management plan, were stakeholders consulted and their interests taken into account?
7. What is NEMA doing to prevent pollution of marine environment from land based sources and other extra-marine activities?
8. What is NEMA's policy on vessel-based pollution such as oil spills?
9. In the on going exploration of oil off Kenya's shores, has NEMA ensured that adequate Environment Impact Assessments (EIA) have been carried out and that

steps are taken to mitigate the negative impact that the exploration is likely to have on marine environment and the living and non-living resources therein?

10. How does NEMA relate with other research and enforcement authorities within Kenya's maritime zones such as Kenya Ports Authority (KPA), Kenya Maritime Authority (KMA), the Kenya Marine Fisheries Research Institute (KMFRI), the Kenya Navy and the Kenya Police in managing Kenya's ocean areas?
11. What problems/hiccups (technical, financial, political or otherwise) is the NEMA facing in its efforts to ensure protection of marine environment and sustainable exploitation of marine resources within Kenya's maritime zones?
12. What international conventions, agreements and commitments has the country entered into relating to protection of marine environment?
13. Have these conventions, agreements and commitments found application and relevance in the local context?
14. What other comments can you make?

4. COASTAL DEVELOPMENT AUTHORITY (CDA)

1. What is the mandate and objectives of CDA?
2. How does CDA seek to achieve the objectives stated in 1 above?
3. What problems/hiccups (technical, financial, political or otherwise) is CDA facing in seeking to realize its objective?
4. From your own research and observation, is it true to assert that the management and governance of marine resources is generally a forgotten province?
5. Has CDA formulated policy guidelines for the sustainable exploitation of marine resources within Kenya's maritime zones?
6. What is your personal assessment of these policy guidelines? Are they effective?
7. In developing the policy guidelines mentioned above, were stakeholders consulted and their interests taken into account?
8. How does CDA undertake monitoring and surveillance to ensure that the policy guidelines mentioned above are adhered to?
9. What is CDA doing about the reef area degradation reported along the more densely populated southern coast brought about by over-exploitation?
10. Does CDA have a system for collection, collation and correlation of data related to the sustainable use and exploitation of marine resources?
11. Does CDA conduct assessment, audit and evaluation of Kenya's resources on and off her coast? If yes, state when they commenced, for what purpose they were

undertaken and what were/are their expected results. Expound briefly on the structure and participants in these exercises

12. What international conventions, agreements and commitments has the country entered into relating to sustainable exploitation of marine resources and how has it operationalized its obligations (For example, through National Action Plans, Participation in Regional/International initiatives, Declarations of Action etc.)
13. How does CDA relate with other bodies with authority over Kenya's maritime zones such as Kenya Ports Authority (KPA), Kenya Maritime Authority (KMA), the National Environment Management Authority (NEMA), the Kenya Navy, Kenya Wildlife Service (KWS) and the Kenya Marine Fisheries Research Institute (KMFRI)?
14. What measures do you recommend to be put in place to ensure optimal utilization of Kenya's marine resources?
15. What other comments can you make?

3. KENYA WILDLIFE SERVICE (KWS)

1. What is the mandate and objectives of KWS with regard to conservation of wild marine fauna and flora?
2. How does KWS seek to achieve the objectives stated in 1 above?
3. What problems/hiccups (technical, financial, political or otherwise) is KWS facing in seeking to realize its objective?
4. From your own research and observation, is it true to assert that the management and governance of marine wildlife is generally a forgotten province?
5. What is KWS doing to ensure that wild marine fauna and flora continue to flourish in their natural habitat?
6. Are there Marine Protected Areas (e.g. Marine Parks, Marine Reserves etc.) within Kenya's maritime zones? If so, list them.
7. What criterion was used in establishing the MPAs mentioned above?
8. Has KWS established buffer zones around the MPAs? If yes, what has been the effect?
9. Does KWS have a policy framework for conservation of wild fauna and flora in the MPAs listed above?
10. What is your personal assessment of this policy? Is it effective?
11. In developing the policy mentioned above, were stakeholders consulted and their interests taken into account?

12. Are there endangered species within Kenya's maritime zones? List them.
13. What is KWS doing to conserve these species?
14. What international conventions, agreements and commitments has the country entered into relating to conservation of the marine fauna and flora and how has it operationalized its obligations (For example, through National Action Plans, Participation in Regional/International initiatives, Declarations of Action etc.)
15. Does KWS conduct assessment, audit and evaluation of Kenya's wild marine fauna and flora on and off her coast? If yes, state when they commenced, for what purpose they were undertaken and what were/are their expected results. Expound briefly on the structure and participants in these exercises.
16. Are there other government agencies with mandate to oversee the conservation of marine fauna and flora? If so, list them.
17. How do you harmonize the work of your organization with the work of those government agencies?
18. How does KWS relate with other bodies with authority over Kenya's maritime zones such as Kenya Ports Authority (KPA), Kenya Maritime Authority (KMA), the National Environment Management Authority (NEMA), the Kenya Navy, Coastal Development Authority (CDA) and the Kenya Marine Fisheries Research Institute (KMFRI)?
19. What measures do you recommend to be put in place to ensure conservation of Kenya's wild marine fauna and flora?
20. What other comments can you make?

6 MINISTRY OF TRANSPORT (MOT)

1. Is it true to assert that the exploitation of the resources of the sea within Kenya's maritime zones is generally a forgotten province?
2. What are the current legal, policy and institutional structures responsible for the management of Kenya's maritime sector?
3. What is your assessment of these structures? Are they effective?
4. What specific steps has MOT taken to formulate a suitable and viable national maritime policy, legal and institutional framework for the management of Kenya's maritime transport sector?
5. What are the challenges facing MOT in the formulation of policy, legal and institutional framework for the administration and regulation of Kenya's maritime transport?
6. What is MOT doing to overcome these challenges?
7. How is MOT involved in matters pertaining to maritime search and rescue?
8. How is MOT involved in maritime security?
9. What factors would you attribute to the rising cases of piracy and hijackings along the Kenyan and Somali coastlines?
10. What steps has MOT taken to domesticate the conventions relating to recruitment and training of seafarers?

11. Has KMA been successful in co-ordinating the training of Kenya seafarers and monitoring and evaluating training programmes to ensure conformity with standards laid down in international maritime conventions?
12. How does MOT relate with other research and enforcement authorities within Kenya's maritime zones such as the Kenya Marine Fisheries Research Institute (KMFRI), the National Environment Management Authority (NEMA), the Kenya Navy and the Kenya Police in managing Kenya's ocean areas?
13. Is there proper coordination in the operations of these institutions?
14. Has MOT identified a country from which Kenya can learn the best practice in the control of maritime zones and utilization of marine resources?
15. Why have you chosen that country (for example, is such country comparable to Kenya in terms of economic, technical and management capacities)?
16. What legal, policy and institutional reform measures would you recommend as appropriate to the maritime transport sector?
17. If well-managed, what benefits would maritime transport accrue to Kenya economic prosperity?
18. What other comments can you make?

7. NATIONAL OIL CORPORATION OF KENYA (NOCK)

1. A visit to NOCK homepage at www.nockkenya.co.ke reveals that NOCK is a limited liability company incorporated under the Companies Act in 1981 with 100% government of Kenya ownership.
2. Why was it necessary to incorporate a company that is fully owned by the government instead of forming a State Corporation under the State Corporations Act or a specific Act of Parliament?
3. What is the mandate and objectives of NOCK with regard to exploration and exploitation of non-living resources (oil, petroleum and natural gases etc) within Kenya's maritime zones?
4. How does NOCK seek to achieve the mandate and objectives stated in 2 above?
5. What problems/hiccups (technical, financial, political or otherwise) is NOCK facing in seeking to realize its objectives
6. From your own research and/or observation, is it true to assert that the exploration and exploitation of non-living resources within Kenya's maritime zones is generally a forgotten province?
7. Who are the major stakeholders in the exploration and exploitation of non-living resources within Kenya's maritime zones?
8. Does NOCK conduct research and exploration missions to establish the presence and prevalence of non-living resources within Kenya's maritime zones?

9. Why is it few, if any, local companies are involved in the process of exploration of non-living marine resources within Kenya's maritime zones?
10. From the data posted on NOCK's website, only 3 out 30 wells drilled so far in the exploration of oil, petroleum and natural gases in Kenya are offshore. What are the reasons that have led to little attention being given to the maritime zones in this on going exploration process?
11. Does Kenya have a policy framework for the exploration and exploitation of her non-living marine resources and for ensuring that the negative environmental impacts brought about by this exploration and exploitation are minimized and/or mitigated?
12. If yes, what is the policy and is it effective?
13. Is the current legal framework governing non-living resources exploration and exploitation within Kenya's maritime zones sufficient?
14. Which institutions are involved in the non-living resources exploration and exploitation within Kenya's maritime zones?
15. Is the institutional framework adequate? If not, what proposals for reform would you suggest?
16. Does NOCK have a system for collection, collation and correlation of data related to the sustainable exploration and exploitation of oil, petroleum and natural gas resources within Kenya's maritime zones?
17. What international conventions, agreements and commitments has the country entered into relating to sustainable exploration and exploitation of non-living

marine resources and how has it operationalized its obligations (For example, through National Action Plans, Participation in Regional/International initiatives, Declarations of Action etc.)

18. In carrying out its mandate, how does NOCK relate with other bodies with authority over Kenya's maritime zones such as Kenya Ports Authority (KPA), Kenya Maritime Authority (KMA), the National Environment Management Authority (NEMA), the Kenya Navy, Coastal Development Authority (CDA), Kenya Wildlife Service (KWS) and the Kenya Marine Fisheries Research Institute (KMFRI)?
19. What measures do you recommend to be put in place to ensure optimal utilization of Kenya's non-living marine resources?
20. What other comments can you make?

**8. TASK FORCE ON THE DELINEATION OF THE
CONTINENTAL SHELF**

1. Is it true to assert that Kenya's maritime zones are generally a forgotten province?
2. Are Kenya's maritime zones delimited? If NO why has it taken the country so long to delimit its maritime jurisdiction? If yes, how effective has this delimitation been in ensuring sound governance of the maritime zones?
3. Kindly give a brief overview of the current legal, policy and institutional structure responsible for the delimitation of Kenya's maritime zones?
4. Have these legal, policy and institutional frameworks been successful in ensuring the effective delineation of Kenya's maritime zones?
5. What international conventions, agreements and commitments has the country entered into relating to delimitation of maritime zones and how has it operationalized its obligations (For example, through National Action Plans, Participation in Regional/International initiatives, Declarations of Action etc.)
6. What problems/hiccups (technical, financial, political or otherwise) has the country faced in its efforts to delimit its maritime zones?
7. What are some of the problems associated with the lack of clearly defined maritime boundaries that Kenya has experienced in the history of the management of the nation's maritime zones?
8. What benefits does the country stand to enjoy if the maritime zones are effectively delineated?

9. Is there any country known to you which offers Kenya the best practice in ensuring adequate delimitation of maritime zones?
10. Why have you chosen that country (for example, is such country comparable to Kenya in terms of economic, technical and management capacities)?
11. What legal, policy and institutional reform measures would you recommend as appropriate to delineation of Kenya's maritime zones?
12. What other comments can you make?

APPENDIX II

DRAFT MODEL OF A PERFORMANCE CONTRACT

This Performance Contract (hereinafter referred to as “the Contract”) is entered into between the Government of the Republic of Kenya (hereinafter referred to as “GoK”) through its Ministry of of Post Office Box Nairobi (together with its assignees and successors) of the one part, and the Board of Directors of [corporation] (hereinafter referred to as “the Board”), a State Corporation having its registered office at (together with its assignees and successors) of Post Office Box..... of the other part.

WHEREAS

The GoK is committed to clearly defining the working relationship between itself and state corporations;

The parties recognize the need for adequate and reasonable managerial and operational autonomy to facilitate achievement by the Board and management of [corporation] of the agreed and freely negotiated performance targets set out in this Contract;

The parties are desirous of enhancing transparency in the management of public resources and accountability for results;

The Board has indicated its capacity and competence to perform the duties and undertake the functions specified under this Contract;

NOW THEREFORE, the parties hereto agree as follows:

PART I

(a) Vision of the Corporation

- Ideal state of the organization

(b) Mission of the Corporation

- Reason for existence
- Core activities
- Focus of action

(c) Objectives of the Corporation

- Board approved;
- Specific, easily understood, attainable, measurable;
- Quantitative, qualitative, commercial, non-commercial, static, dynamic;
- Avoid repetitions, contradictions and overlaps;
- Only outcome (not process), objectives to be included;
- Include all critical objectives;

PART II

Commitments and Responsibilities of the Corporation (Board/Management)

- Setting performance criteria;
- Assigning weights to criteria;
- Negotiating/signing performance contract;
- Ensuring achievement of performance targets;
- Preparing employees in the Organization for the desired changes in working styles, attitudes and work ethics;

PART III

Commitments and Obligations of the Government

- Delegation of powers and autonomies;
- Assistance;
- Enabling environment

PART IV

Frequency of Monitoring and Information Flow

- Modality of information flow;
- Frequency of monitoring

PART V

Duration of the Performance Contract

The PC will normally run for a period of 12 months from 1st July 2005 to 30th of every year. For those organizations whose financial year corresponds with the calendar year, the PC will run from 1st January to 31st December of every year.

Signed

State

Corporation:

Chairman.....Date.....

Director.....Date.....

Government: Permanent Secretary.....Date.....

Counter-signed:

Ministry of Environment and Natural Resources.....Date.....

APPENDIX III

KENYA MARITIME ZONES BOUNDARIES

Territorial Baseline under the Territorial Waters Act (Repealed)

The area of the territorial waters of the Republic of Kenya extends on the coastline adjacent to the High Seas to a line twelve International Nautical Miles seawards from the straight baselines, low water lines or low tide elevations, hereinafter described as follows:

Commencing on the straight line joining Diua Damasciaca Island and Kiungamwina Island at the point at which this line is intersected perpendicularly by the Median straight line drawn from Boundary Pillar 29 (being the terminal pillar of the Kenya-Somali land boundary),

thence continuing south westerly by a straight baseline to Kiungamwina Island;

thence south westerly by a straight baseline for about 7 km. to an unnamed island;

thence south westerly by a straight baseline for about 25 km. to Little Head;

thence south westerly by a straight baseline for about 11 km. to Boteler Island;

thence south westerly by a straight baseline for about 45 km. to Ras Takwa;

thence south westerly by a straight baseline for about 18 km. to Kinyika Island;

thence south westerly by a straight baseline for about 9 km. to Tenewi Ya Juu Island;

thence south westerly by a straight baseline for about 26 km. to Ziwaiu Island;

thence south westerly by a straight baseline across Ungwana Bay for about 56 km. to the northernmost point of Ras Ngomeni;

Territorial Baseline under the Maritime Zones Act (Cap 371 Laws of Kenya)

Commencing on the straight line joining Diua Damasciaca Island and Kiungamwina Island at the point at which this line is intersected perpendicularly by the Median straight line drawn from Boundary Pillar 29 (being the terminal pillar of the Kenya Somalia land boundary),

thence continuing south westerly by a straight base line to Kiungamwina Island;

thence south westerly by a straight base line for about 7 km.to an unnamed island;

thence south westerly by a straight base line for about 25 km.to Little Head;

thence south westerly by a straight base line for about 11 km. to Boteler Island;

thence south westerly by a straight base line for about 45 km. to Ras Takwa;

thence south westerly by a straight base line for about 18 km. to Kinyika Island;

thence south westerly by a straight base line for about 9 km. to Tenewi Ya Juu Island;

thence south westerly by a straight base line for about 26 km. to Ziwaiu Island;

thence south westerly by a straight base line across Ungwana Bay for about 56 km. to the northernmost point of Ras Ngomeni;

thence continuing generally along the low water line to Ras Wasini (provided that the following bays are internal waters and the inner boundary of the territorial sea shall follow the closing lines across their entrances -

Sabaki River, Mida Creek, Kilifi Creek, Takaungu Creek, Mtwapa Creek, Mombasa and Kilindini Harbours, Mwachema River, Maftaha (Gazi) Bay, Funzi Bay);

thence southerly across the Wasini Channel to Ras Kisinga Mkoni;

thence by the low water line to Mpunguti Ya Chini Island;

thence southerly by a straight base line for about 3 km. to Mpunguti Ya Juu Island;

thence westerly by a straight base line for about 5 km. to Kisite Island;

thence westerly by a straight base line for about 18 km. to the terminal of the Kenya/Tanzania land boundary at Ras Jimbo.

APPENDIX V

THE MARITIME ZONES BILL 2008

An act of Parliament to provide for the delimitation of the territorial waters, contiguous zones, exclusive economic zone and the continental shelf of Kenya.

Part I

Preliminary

1. This Act may be cited as the Maritime Zones Act 2008.
2. In this Act, unless the context otherwise requires “exclusive economic Zone” means the exclusive economic zone of Kenya established and delimited by section 10;

“installation” includes any moored vessel, communication cable, oil pipelines, military surveillance installation and any structure whether permanent or temporary within the maritime zone, which is being or intended to be used for or in connection with the exploration and exploitation and conservation and

management of the natural resources, and particularly means any of the following situated within internal waters, territorial waters or the exclusive economic zone or on or above the continental shelf:

- (a) Any installation, including a pipeline, which is used for the transfer of any substance to or from —
 - (i) a ship
 - (ii) a research, exploration or production platform; or
 - (iii) the coast of Kenya.
- (b) Any exploration or production platform used in prospecting for or the mining of any substance.
- (c) Any exploration or production vessel used in prospecting for or the mining of any substance.
- (d) A telecommunications line as defined in section of Kenya Posts and Telecommunication Corporation Act.
- (e) Any vessel or appliance used for the exploration or exploitation of the seabed.
- (f) Any area situated within a distance of 500 metres measured from any point on the exterior side of an installation referred to in paragraph (a) or (b) other than a pipeline.
- (g) Any area situated under or above an installation referred to in paragraph (a) or (b);

“maritime zones”, means the contiguous zones, the continental shelf, the

exclusive economic zone together with the territorial waters and the air space above the exclusive economic zone;

“resources” means the living and non-living resources of the seabed and subsoil thereof, and of the waters superjacent to the seabed; as well as resources for the production of energy from tides, winds and current;

“Minister” means the Minister for the time being responsible for matters relating to Maritime Administration;

“nautical mile” means the international nautical mile of 1852 metres;

“sea” means the water of the sea, as well as the bed of the sea and the subsoil thereof;

“baseline” means the baseline as determined in accordance with the straight baseline system;

“continental shelf” means the continental shelf of Kenya established and delimited by section 11;

“limit” in relation to the territorial waters, the continental shelf and the exclusive economic zone of Kenya, means the limit of such waters, shelf, or exclusive

economic zone with reference to the coast of Kenya or islands constituting the territory of Kenya;

“submarines” includes underwater vehicles however propelled;

“territorial waters” means the territorial waters of Kenya established and delimited by section 3;

“artificial island” means any man-made extension of the seabed or a feature, whether or not the extension breaks the surface of the superjacent waters;

“ship” includes any description of vessel, boat or craft designed, used or capable of being used solely or partly for marine navigation without regard to method or lack of propulsion.

Part II

Maritime Zones of Kenya

Territorial Sea and contiguous zone

3. The territorial sea of Kenya consist of a belt of sea that has as its inner limit the baselines described in section 4 and as its outer limit;
 - (a) subject to paragraph (b), the line every point of which is at a distance of 12

nautical miles from the nearest point of the baselines; or

- (b) in respect of the portions of the territorial sea of Kenya for which geographical coordinates of points have been prescribed pursuant to section 38, lines determined from the geographical coordinates of points so prescribed.

- 4. (1) Subject to subsections (2) and (3), the baseline is the low-water line along the coast or on a low-tide elevation that is situated wholly or partly at a distance not exceeding the breadth of the territorial sea of Kenya from the mainland or an island.

- (2) In respect of any area for which geographical coordinates of points have been prescribed pursuant to section 38 and subject to any exceptions in the regulations for -

- (a) the use of the low-water line along the coast between given points, and
- (b) the use of the low-water lines of low-tide elevations that are situated wholly or partly at a distance not exceeding the breadth of the sea of Kenya from the mainland or an island,

the baselines are straight lines interpreted as geodesics joining the

consecutive geographical coordinates of points so

(3) In respect of any area not referred to in subsection (2), the baselines are the outer limits of any area, other than the territorial sea of Kenya, over which Kenya has a historic or other title of sovereignty.

(4) For the purposes of this section, a low-tide elevation is a naturally formed area of land that is surrounded by and above water or low tide but submerged at high tide.

5. (1) The internal waters of Kenya shall consist of:

(a) all waters landward of the baselines of the territorial sea of Kenya

(b) all harbours.

(2) The right of innocent passage shall not exist in the internal waters.

6. (1) For greater certainty, the internal waters of Kenya and the territorial sea of Kenya form part of Kenya.

(2) The right of innocent passage shall exist in the territorial waters.

7. The contiguous zone of Kenya consists of an area of the sea that has as its inner limit the outer limit of the territorial sea of Kenya and as its outer limit the line every point of which is at a distance of 24 nautical miles from the nearest point of

the baselines of the territorial sea of Kenya but does not include an area of the sea that forms part of the territorial sea of another state or in which another state has sovereign rights.

8. A person who is responsible for the enforcement of a customs, fiscal, immigration or sanitary law and who has reasonable grounds to believe that a person in the contiguous zone of Kenya would, if that person were to enter Kenya commit an offence under that law may, subject to Kenya's international obligations, prevent the entry of that person into Kenya or the commission of the offence.

9. (1) Where there are reasonable grounds to believe that a person has committed an offence in Kenya in respect of a customs, fiscal, immigration or sanitary law, every power of arrest, entry, search or seizure or other power that could be exercised in Kenya in respect Kenya.

(2) A power of arrest referred to in subsection (1) shall not be exercised in the contiguous zone of Kenya on board any ship registered outside Kenya without the consent of the Attorney General of Kenya.

Exclusive Economic Zone

10. (1) The exclusive economic zone of Kenya consists of an area of the sea beyond and adjacent to the territorial sea of Kenya that has as its inner limit the outer limit

of the territorial sea of Kenya and as its outer limit.

(a) subject to paragraph (b), the line every point of which is at a distance of 200 nautical miles from the nearest point of the baselines of the territorial sea of Kenya; or

(b) in respect of a portion of the exclusive economic zone of Kenya for which geographical coordinates of points have been prescribed, lines determined from the geographical coordinates of points so prescribed.

(2) For greater certainty, paragraph (1)(a) applies regardless of whether regulations are made prescribing geographical coordinates of points from which the outer limit of the exclusive economic zone of Kenya may be determined.

Continental Shelf

11. (1) The continental shelf of Kenya is the seabed and subsoil of the submarine area, including those of the exclusive economic zone of Kenya that extend beyond the territorial sea of Kenya throughout the natural prolongation of the land territory of Kenya:

(a) subject to paragraph (b) and (c), to the outer edge of the continental margin, determined in the manner under international law that results in

the maximum extent of the continental margin being the submerged prolongation of the land mass of Kenya consisting of the seabed and subsoil of the shelf, the slope and the rise, but not including the deep ocean floor with its oceanic ridges or its subsoil;

(b) to a distance of 200 nautical miles from the baselines of the territorial sea of Kenya where the outer edge of the continental margin does not extend up to that distance; or

(c) in respect of a portion of the continental shelf of Kenya for which geographical coordinates of points have been prescribed to lines determined from the geographical coordinates of points so prescribed.

(2) For greater certainty, paragraph (1) (a) and (b) apply regardless of whether regulations are made prescribing geographical coordinates of points from which the outer edge of the continental margin or other outer limit of the continental shelf of Kenya may be determined.

13. Kenya has sovereign rights over the continental shelf of Kenya for the purpose of exploring it and exploiting the mineral and other non-living natural resources of the seabed and subsoil of the continental shelf of Kenya, together with living organisms belonging to sedentary species, that is to say, organisms that, at the harvestable stage, either are immobile on or under the seabed of the continental shelf of Kenya or are unable to move except in constant physical contact with the seabed or the subsoil of the continental shelf of Kenya.

Part III

Exclusive Economic zone

13. (1) There is established, contiguous to the territorial waters, a marine zone to be known as the Exclusive Economic Zone having as its inner limit the boundary line of the seaward limit of the territorial waters and as its outer limit a boundary line which, subject to subsection (3), at every point is a distance of 200 miles from the nearest point of the baselines of the territorial waters or such other distance from the nearest point of those baselines as the Minister by order, prescribes.

(2) An order made under subsection (1) shall be duly published by the Minister.

(3) Notwithstanding subsection (1), where the median line as defined by subsection (4) between Kenya and any adjacent or opposite State is less than 200 miles from the baselines of the territorial waters, the outer boundary limit of the Zone shall be that fixed by agreement between Kenya and that other state, but where there is no such agreement, the outer boundary limit shall be the median line.

(4) The median line is a line every point of which is equidistant from the nearest points of the baselines of the territorial waters, on the one hand, and the corresponding baselines of the territorial waters of any adjacent or opposite state as

recognized by the Minister, on the other hand.

(5) An agreement entered into pursuant to subsection (3) shall be duly published by the Minister.

14. (1) The minister shall cause the boundary lines of the Zone to be marked on a scaled map or chart.

(2) The minister shall make provision for the safe custody of the map or chart referred to in subsection (1), and shall, by notice, specify the place where any person may inspect that map or chart or purchase a certified copy thereof.

15. There is vested in the Government of Kenya:

(a) all rights in, and jurisdiction over, the Zone in respect of

(i) the exploration, exploitation, conservation, protection or management of the natural living and non — living resources of the sea-bed, subsoil and superjacent waters;

(ii) the construction, maintenance or use of structures or devices relating to the exploration or exploitation of the resources of the Zone, the regulation and safety of shipping, or any other economic purpose;

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

(iv) the authorization, regulation or control of scientific research;

(v) the preservation and protection of the marine environment and the prevention and control of marine pollution;

(vi) all other activities relating to the economic exploitation and exploration of the Zone; and

(b) all other rights in, and jurisdiction over, the Zone recognized by international law.

16. (1) Subject to this Act, no person shall within the zone, except under or in accordance with an agreement with the Government of Kenya or a permit granted by the Minister-

(a) explore or exploit any resources thereof;

(b) carry out any search or excavation;

(c) conduct any research;

(d) drill in or construct, maintain or operate any structure or device; or

(e) carry out any economic activity

(2) This section does not apply to fishing by a citizen of Kenya in or from a Kenyan vessel.

(3) Any person who contravenes this section is guilty of an offence and liable-

(a) on conviction on indictment, to a fine of Kshs.5,000,000 or imprisonment for a term of 5 years or both; or

(b) on summary conviction, to a fine of Kshs.2,000,000 or imprisonment for a term of 2 years or both and,

(c) in addition, the court may order the forfeiture of any vessel, structure, equipment, device or thing in connection with which the offence was committed.

17. Subject to the provisions of this Act and of any other written law made in accordance with the relevant rules of international law, all States and their

nationals shall enjoy, in the exclusive economic zone, the high seas freedoms of navigation and overflight and of the laying of submarine cables and pipelines, and all other internationally lawful uses of the sea related to those freedoms, compatible with the rules of international law.

18. (1) The Minister may, by order, with such exceptions and modifications as may be specified in the order, extend the application of any enactment to the Zone or any part thereof, and an enactment to extend shall have effect in relation to the Zone as if it had been enacted by this Act.

(2) An order made under this section shall be duly published by the Minister.

19. (1) The jurisdiction and power of the Kenyan courts extend to the Zone for the purpose of giving effect to the provisions of this Act and any other enactment to the Zone under section 19 as if the Zone were a part of the territory of Kenya.

(2) Where an offence is, by virtue of this Act or any Enactment extended to the Zone under section 19, punishable on summary conviction or indictment, it may be enquired into or determined, as the case may be, by a magistrate and that magistrate shall exercise, in respect of the offence, all the powers, privileges, rights and jurisdiction conferred on him by the Magistrate's Courts Act.

(3) The quasi-criminal and the civil jurisdiction Conferred on a magistrate by the

Magistrate's Courts Act is, in relation to the Zone, exercisable by any magistrate.

(4) The jurisdiction and power conferred on the courts under this Act do not affect any jurisdiction or powers conferred on, or exercisable by, any other courts under any other law.

20. (1) In any proceedings in a court in relation to the averment that an offence was committed or that an act was done within the limit of the Zone shall, until the contrary is proved, be deemed to be prima facie evidence that the locus in quo was within the Zone.

(2) An incident shall, for the purposes of any law conferring jurisdiction on a court in Kenya, be deemed to have occurred in Kenya if —

(a) that incident occurs in, on, under, above or in relation to any vessel, structure or device or any waters within 500 metres of that structure or device, in the Zone; or

(b) that incident, if having occurred in Kenya, would be an offence or give rise to quasi-criminal proceedings or a civil cause of action.

21. Where no other provision is for the time being made in any other written law for

any such purpose, the Minister may make regulations, in accordance with the rules of international law, for all or any of the following purposes:

- (a) regulating the conduct of scientific research within the exclusive economic zone;
- (b) regulating the exploration and exploitation of the exclusive economic zone for the production of energy from the waters, currents and winds, and for other economic purposes;
- (c) regulating the construction, operation and use of artificial islands, installations and structures within the exclusive economic zone, including, but not confined to, the establishment of safety zones around islands, installations and structures;
- (d) prescribing measures for the protection and preservation of the marine environment of the exclusive economic zone; and
- (e) providing for such other matters as are necessary or expedient to give effect to Kenya's rights and obligations in relation to the exclusive economic zone or are necessary to give full effect to the provisions of this Act, other than matters in respect of which regulations may be made under the provisions of section 38.

22. Subject to section 32, a court may order that property seized under subsection (3) of section 31 be returned to the person from whom it was taken or to a person named by that person where -

- (a) the court dismisses a charge brought against that person under this Act or the regulations, and it is of the opinion that the property can be returned consistently with the interests of justice; or
- (c) no charge has been brought against any person within a reasonable time after a seizure has been effected under that subsection.

Miscellaneous Provisions

23. (1) In any legal or other proceedings, a certificate issued by or under the authority of Minister of Foreign Affairs containing a statement that any geographic location specified in the certificate was, at any time material to the proceedings,

- (a) in the internal waters of Kenya;
- (b) in the territorial sea of Kenya;
- (c) in the contiguous zones of Kenya;
- (d) in the exclusive economic zone of Kenya or
- (e) in or above the continental shelf of Kenya

is conclusive proof of the truth of the statement without proof of the signature or official character of the person appearing to have issued the certificate.

(2) A certificate referred to in subsection (1) is admissible in evidence in

proceedings referred to in that subsection, but its production cannot be compelled.

24. The minister may give directions respecting the disposal or release of any vessel, structure, equipment, device or thing that is ordered by a court to be forfeited under this Act or the regulations.

25. (1)The Minister may make regulations generally for carrying into effect the provisions of this Act, and in particular respecting —

(a)any activity relating to the exploration, exploitation and protection of the resources of the Zone;

(b) any activity relating to the economic exploration or exploitation of the Zone;

(c) the safety and protection of structures or devices in the Zone;

(d) the authorization, control and regulation of scientific research in the Zone;

(e) the customs and other fiscal matters relating to the Zone;

(f) the duties, powers, functions and conditions of service of fisheries

officers; and

(g) the fees to be paid under this Act.

(h) The delimitation of the maritime zones and in particular prescribing the geographical coordinates of points for each Maritime Zone.

