5 Africa's engagement with part XI of the United Nations Convention on the Law of the Sea: A policy perspective

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1 Introduction

The United Nations Convention on the Law of the Sea of 1982 (Convention'or UNCLOS) is an international treaty that addresses all the various aspects of the maritime areas as well as their activities and consequences; it advanced on the four Geneva Conventions of 1958.[1] The Convention has become the legal framework for marine and maritime activities internationally. UNCLOS comprises 320 articles, arranged into 17 parts and supplemented by 9 annexes. Part XI together with annexes III and IV sets out the regime for the Area in UNCLOS. The Area is defined as the seabed and ocean floor and subsoil thereof beyond the limits of national jurisdiction.[2] Other aspects of the Convention that fall within the purview of the Authority's scope of work are Parts XII and XIII. Part XII sets out the broad principles for the protection and preservation of the marine environment and the prevention of marine pollution from land and sea sources. Part XIII focuses on marine scientific research, the manner in which it should be carried out and the dissemination of the results.[3]

This chapter focuses on the international law regime governing the Area. The legal and regulatory regime within which the chapter is discussed are the aforementioned parts of the Convention, the Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea (1994 Agreement) and the mining code, which comprise the comprehensive set of rules, regulations and procedures issued by the

* The views of this author in this article are not intended to represent any official position or express any opinion whatsoever on the part of the Secretariat of the International Seabed Authority.

1 These conventions of 1958 were the Convention on the Territorial Sea and Contiguous Zone; the Convention on the High Seas; the Convention on the Continental Shelf; the Convention on Fishing and Conservation of the Resources of the High Seas. There was also an optional Protocol of Signature concerning the Compulsory Settlement of Disputes.

2 See art 1(1) of UNCLOS.

3 See RR Churchill 'The 1982 United Nations Convention on the Law of the Sea' in DR Rothwell et al *The Oxford handbook of the law of the sea* (2015) 28-29.

Authority to regulate prospecting, exploration and exploitation of marine minerals in the Area.[4] To date, the Authority has issued three Regulations, namely, (i) Regulations on Prospecting and Exploration for Polymetallic Nodules (adopted on 13 July 2000 and amended 25 July 2013); (ii) Regulations on Prospecting and Exploration for Polymetallic Sulphides in the Area (adopted on 7 May 2010); and (iii) Regulations on Prospecting and Exploration for Cobalt-Rich Crusts (adopted on 27 July 2012). There is a draft exploitation regulation (ISBA/ 25/C/WP.1) currently being negotiated in the Council of the Authority. The initial projection for its adoption was July 2020. However, this was not actualised owing to the COVID-19 global pandemic.

The focus of this chapter is on how countries on the continent have engaged with the regime established for the Authority specifically. It does not address the entire law of the sea regime, as this is too broad a scope that may not be exhaustively discussed within the context of this chapter. The chapter is divided into three main parts. Part 2 adopts a historic approach by examining the role and participation of the African group before the establishment of UNCLOS, with a particular focus on the role played in the enactment of Part XI of the Convention. Part 3 focuses on events after the entry into force of UNCLOS, and the current composition and extent of engagement, while part 4 serves as a conclusion to address possible future prospects for further engagement by African states in the work of the Authority.

2 African states' participation pre-UNCLOS: Historical perspectives

The United Nations (UN) initiative to establish Part XI of the Convention commenced with the General Assembly adopting Resolution 2172(XXI) in 1966. The Resolution requested that the UN, in cooperation with its agencies and interested member states, undertake a comprehensive survey of activities in marine science and technology, including mineral resources to formulate proposals with regard to the exploitation and development of marine resources.[5] Paragraph 1 endorsed the Economic and Social Council Resolution 1112(XL) of 7 March 1966. The Resolution requested the Secretary-General to make a survey of the state of knowledge of the resources of the sea beyond the continental shelf, excluding fish, and the

4 See arts 133(a) and (b) of the Convention that defines the 'resources' of the Area to mean all solid, liquid or gaseous mineral resources *in situ* in the Area at or beneath the seabed including polymetallic nodules. Resources when recovered from the Area are thereafter referred to as mineral.

5 NS Rembe *Africa and the international law of the sea* (1980) 38-40.

techniques for exploiting those resources. While these interests grew at the international level, countries, particularly developed countries capable of carrying out exploitation, had commenced measures to undertake further studies of the deep seabed and the possibility of exploiting the mineral resources therein. President Johnson of the United States, at the time, made the following remark at the commissioning of the ocean research ship, *Oceanographer*, in 1966:[6]

> Under no circumstances, we believe, must we ever allow the prospects of rich harvests and mineral wealth [of the oceans] to create a new form of colonial competition among the maritime nations. We must be careful to avoid a race to grab and to hold the lands under the high seas. We must ensure that the deep seas and the ocean bottoms are the legacy of all human beings.

In 1967 there was another clarion call in a meeting of approximately 2 000 lawyers and judges from over 100 countries under the auspices of the World Peace Through Law. The meeting adopted a resolution recommending that the General Assembly issue a proclamation declaring that the non-fishery resources of the high seas, outside the territorial waters of any state, and the bed of the sea beyond the continental shelf, appertain to the jurisdiction and control of the UN.[7]

On the international scene in the UN, it was the remarkable speech delivered by the ambassador of Malta, Arvid Pardo, in November 1967 that further roused the consideration of the resources of the seabed. Pardo at the time was the permanent pepresentative of Malta to the UN. He inscribed on the agenda of the twenty-second session of the UN General Assembly the item: 'Examination of the question of the reservation exclusively for peaceful purposes, of the sea-bed and the ocean floor, and the subsoil thereof, underlying the high seas beyond the limits of present national jurisdiction and the use of their resources in the interest of mankind'.[8]

The speech, among other things, highlighted the broad prospect of untold wealth in the deep seabed, 'vast untapped wealth' with a focus mainly on manganese nodules at the time. His speech in some ways epitomised the common heritage of mankind principle, which became

6 HB Robertson 'The 1982 United Nations Convention on the Law of the Sea: An historical perspective on prospects for US accession' (2008) 84 *International Law Studies* 112.

7 Rembe (n 5) paraphrased citing A/C. 1/PV. 1515, 67.

8 See the speech of Ambassador Pardo in UN Doc A/C1/PV.1515 and 1516 of 1 November 1967.

enshrined in UNCLOS and the 1994 Agreement. African states played a significant role in the development of the legal regime for the Area, rallying behind Arvid Pardo's call to recognise the seabed beyond the limits of national jurisdiction and its resources as the common heritage of mankind.[9]

The four Geneva Conventions on the law of the sea that preceded UNCLOS did not tackle issues relating to the seabed beyond national jurisdiction. Therefore, it was necessary to establish a convention that would, among others, create a regime for the regulation of the resources on the seabed in the areas beyond the national jurisdiction of all states. In 1969, by Resolution 2749(XXV), the General Assembly adopted a moratorium against any individual state's claim or activity in the seabed Area.[10] This was shortly followed by the Declaration of Principles Governing the Seabed and the Ocean Floor, and the Subsoil Thereof, beyond the limits of national jurisdiction in 1970. UNCLOS declared the deep seabed and its resources 'the common heritage of mankind' and this eventually became embodied in article 136 of the Convention. Article 140 was also the outcome of one of the compromises reached during the negotiations, especially for African states.

The first meetings towards the development of UNCLOS did not enjoy much participation from African states. This may have been owing largely to the fact that a number of the states were colonised at the time or were just emerging from colonialisation/self-determination. With respect to African states' participation, at the first UN Conference in 1960 (UNCLOS I) only six out of 86 states participated.[11] At the Second United Nations Conference on the Law of the Sea (UNCLOS II) 10 out of

9 Africans supported the common heritage of humankind because its wider application meant justice, equality, development and an equitable distribution of resources, fitting with the major development of the new international order which was prevalent in the 1970s. This view was expressed by the chairperson of the Group of 77 when he stated that 'Resolution 2749(XXV) remained valid … and in the absence of an international treaty … all states and all natural or juridical persons were required to refrain from exploiting the area', with the result that 'all activities undertaken outside the international regime to be established unlawful (UNCLOS III '19th first committee meeting' 21 (UN Doc. A/CONF.62/C.1/SR.19 (1975) Official Records II 53).

10 Resolution 2749 (XXV) had 108 votes in favour, none against and 14 abstentions. The General Assembly passed the resolution 'that, pending the establishment of the aforementioned international regime: (a) states and persons, physical or juridical, are bound to refrain from all activities of exploitation of the resources of the area of the sea-bed and ocean floor, and the subsoil thereof, beyond the limits of national jurisdiction; (b) no claim to any part of that area or its resources shall be recognised'.

11 United Nations Conference on the Law of the Sea 1958 (UN Doc. A/CONF.13/38) xiii-xxiv (namely, Ghana, Liberia, Libya, Morocco, South Africa and Tunisia).

88 states participated.[12] However, during UNCLOS III (1973-1982) several African nations had attained independence and more African states actively participated in negotiations. Notably, Bamela Engo (Cameroon), acted as Chairperson of the First Committee, tasked with issues related to the deep seabed beyond national jurisdiction. He also acted as Chairperson of Negotiating Group 3 on the organs and decision-making powers of the International Seabed Authority. Francis Njenga (Kenya) acted as Chairperson of Negotiating Group 1, which dealt with the system of exploration and exploitation and resource policy.

The General Assembly (through Resolution 2340 (XXII) of 18 December1967) established the seabed *ad hoc* committee to study the peaceful uses of the seabed and the ocean floor. Ten African states sponsored the draft resolution, namely, Ghana, Kenya, Libya, Madagascar, Nigeria, Senegal, Somalia, Sudan, Tunisia and Egypt. Moreover, seven African states were members of the committee, all of which were coastal states, namely, Kenya, Liberia, Libya, Senegal, Somalia, Egypt and Tanzania. At the following session, the General Assembly reconstituted the *ad hoc* Committee into a standing seabed committee under the title the Committee on the Peaceful Uses of the Seabed and the Ocean Floor Beyond Limits of National Jurisdiction (Seabed Committee).

The Seabed Committee was enlarged from the original 35 members of the *ad hoc* committee to 42 members. Africa was represented by the addition of Cameroon, Madagascar, Mauritania, Nigeria, Sierra Leone and Sudan to the original seven members of the *ad hoc* committee. The Seabed Committee was further enlarged to 91 members,[13] including 26 African states. This metamorphosed into the preparatory Committee for the Law of the Sea, established by Resolution I of UNCLOS III[14] (Prepcom). The Prepcom met twice a year between 1983 and 1994. Its most prominent work at the time was implementing and amending the provision of Resolution II of the UNCLOS III concerning pioneer investors, all of which changed substantively with the entry into force

12 Second United Nations Conference on the Law of the Sea 1960 Summary Records of Plenary Meetings and of the Committee of the Whole, UN DOC. A/CONG.19/8, xiii-xxiv. (Countries that participated were Cameroon, Ethiopia, Ghana, Guinea, Liberia, Libya, Morocco, South Africa and Sudan).

13 See Resolutions 2750(XXV), 17 December 1970, para 5; and 2881 (XXVI), 21 December 1971, para 3.

14 Resolution I on the Establishment of the Preparatory Commission for the International Sea-Bed Authority and for the International Tribunal for the Law for the Sea, adopted by UNCLOS III on 30 April 1982, in *Law of the Sea* (United Nations, 1983, Sales E. 83.V.5), at p. 175; reproduced in vol 3 as Doc 14.1.

of the 1994 Agreement.[15] At the first session of the Prepcom,[16] Joseph Sinde Warioba of Tanzania was elected as Chairperson. Another African, (Judge) Jose Lui Jesus of Cabo Verde, was elected to preside over the Prepcom[17] from 1987 to 1994. Its principal task was to prepare the draft rules, regulations and procedures necessary to enable the Authority to commence its functions and deal with other preliminary matters of an institutional nature. At its first meeting, 162 members participated, 32 out of which were African states.[18]

The Organisation for African Unity (OAU) also participated in the conference and subsequently in the Prepcom. The OAU put forward a rather united front for the advancement of the interests of African states, especially taking into consideration the peculiarity of African countries in that many of these countries lacked the requisite technology to mine the resources in the Area. It was imperative to ensure that the system established would be both favourable to them in the long run, hence they advocated the internationalisation and equitable distribution of the benefits derived from the exploitation of the resources of the seabed.[19] Unfortunately, despite its active engagement in the early days of the establishment of the Authority and the regime for the Area, the OAU's participation in the work of the Authority faded in the years following. This may have been attributable to the internal change over from OAU to the African Union (AU) in 2002.

15 M Lodge 'International seabed authority' in W Rüdiger (ed) *Max Planck encyclopaedia of public international law* B.5.

16 The first session of the Prepcom held in Jamaica from 15 March to 8 April 1983, and 15 August to 9 September 1983.

17 Jose Lui Jesus of Cabo Verde currently is a judge at the International Tribunal on the Law of the Sea (ITLOS) and has been a member of the tribunal since 1 October 1999; re-elected as from 1 October 2008 and 1 October 2017; president of the tribunal 2008-2011; president of the Seabed Disputes Chamber 2014-2017; member of the Special Chamber formed to deal with the dispute concerning delimitation of the maritime boundary between Mauritius and Maldives in the Indian Ocean (Mauritius/Maldives).

18 A full list of the Countries in attendance may be found at https://www.un.org/depts/los/convention_agreements/texts/final_act_eng.pdf (accessed 14 August 2020). See the OAU declaration on the issues of the Law of the Sea doc A/AC.138/89 and A/CONF. 62/33.

19 The OAU Council of Ministers Declaration of the 37th ordinary session on the UN Conference on the Law of the Sea (OAU Doc. CM/ST.20 (XXXVII) of 15 June 1981) para 6 – noting the 'concern of the African producers of minerals whose economies are likely to be adversely affected by uncontrolled exploitation of such minerals from the sea-bed [that the matter] be thoroughly examined and satisfactorily resolved'. See also E Luard *The control of the sea-bed: A new international issue* (1974) 294, where this approach, it was suggested, would create international socialism.

For African countries participating in the discussions at the time, there was the concern that seabed mining would adversely affect the mainstay of their economies that was based on raw materials equally derivable from the seabed, particularly cobalt and manganese. Therefore, it became paramount and imperative to them that the developing countries were willing to negotiate a system whereby the resources from the seabed would be accessible to all. Whenever these minerals were to be extracted, the proceeds thereof would be shared equitably among all nations, including developing states whose economies were likely to suffer serious adverse effects on their export earnings or economies. The projection was that seabed mining would result in a fall in the price of a mineral or metal or a reduction in the volume of exports of that mineral or metal.[20]

3 African engagement with Part XI of UNCLOS through the International Seabed Authority

The lengthy negotiations leading up to the adoption of the Convention in 1982 were complex, with some developing and developed states only agreeing to be signatories to the Convention after the implementation agreements had been adopted. Overall, the Convention managed to bridge some of the gaps between developing and developed countries through compromises.[21] Part XI established the International Seabed Authority as the organisation embodied with the responsibility to regulate activities in the Area and, in some ways, safeguard the common heritage of mankind. Therefore, no state may carry out activities in the Area without being issued a contract to do so by the Authority.

In the last 26 years of its existence, the work of the Authority has been centred around three main mineral resources, namely, polymetallic nodules, polymetallic sulphides and cobalt-rich ferromanganese crusts. These mineral resources contain, in varying quantities, a wide range of precious metals such as cobalt, copper, zinc, manganese and nickel. Over the last years, the activities in the Area have mostly centred around prospecting

20 This is now covered in art 151(10) of the Convention and Annex sec 6 para 7 of the 1994 Agreement. Sec 7 para 1(a) establishes an economic assistance fund by the Authority from payments received from contractors, the Enterprise and voluntary contributions. Based on the portion of funds of the Authority, excluding administrative expenditure. The size of the fund will be determined by the Council from the time to time acting upon the recommendations of the Finance Committee.

21 TTB Koh & S Jayakumar 'The negotiating process of the third United Nations conference on the law of the sea' in MH Nordquist (ed) *United Nations Convention on the Law of the Sea 1982: A commentary* (1985) 54.

and exploration in the Area, butexploitation is yet to commence.[22] As of 2022, the Authority has issued 31 contracts for exploration.[23] In line with the regulations, these contracts are granted for 15-year periods following approval by the council of the Authority upon recommendation by the Legal and Technical Commission.

At the time of writing this chapter, no contractor has been sponsored by an African country. This is possibly attributable to several factors including the fact that deep seabed mining is a very expensive venture and some African countries fear that they are unable to competitively gain traction or compete fairly. However, this situation is envisaged and well anticipated by the Convention and the 1994 Agreement. It recognises that member states from developing countries that are unable to financially engage but are willing to do so can exploit through 'the Enterprise'.[24] In the Convention, the Enterprise is established as an independent organ of the Authority, although it is yet to be fully operationalised in line with the requirements and the terms stipulated for its operationalisation in the Convention and the 1994 Agreement.[25]

Hypothetically, the Enterprise is the pathway through which developing states may benefit from seabed mining through joint ventures in the reserved areas.[26]

To sponsor a contract, a member state would have to show effective control over the contractor and, among others, issue a certificate of

22 The Convention recognises in art 1 that the activities in the Area means all activities of exploration for and exploitation of the resources of the Area. Prospecting is discussed under Annex III art 2.

23 These contracts are sponsored by 21 different countries, to see the breakdown of the mineral resources and contracts issued by the Authority. Information is available at https://www.isa.org.jm/exploration-contracts (accessed 14 August 2020).

24 See art 8 of Annex III of UNCLOS 82 and sec 1 para 10 of the Annex to 1994 Agreement.

25 Under the 1994 Agreement, the secretariat is to perform the functions of the Enterprise listed in in Annex secs 2(1)(a)-(h) until it begins to operate independently of the Secretariat. The 1994 Agreement further provides that the Enterprise shall conduct its initial deep seabed mining operations through joint ventures, and that upon certain eventualities, 'the Council shall take up the issue of the functioning of the Enterprise independently of the Secretariat of the Authority see (functioning' (Annex sec 2(2) 1994 Agreement).

26 For more information on the Enterprise, see a recently-concluded study by the Authority 'A study related to issues on the operationalisation of the Enterprise. Legal, technical and financial implication for the International Seabed Authority and for states parties to the United Nations Convention on the Law of the Sea' ISA Technical Report 1/2019 prepared by Edwin Egede, Mati Pal and Eden Charles, https://isa.org.jm/files/files/documents/enterprise_study.pdf (accessed 14 August 2020).

sponsorship evidencing same which is presented to the Authority.[27] Developing countries face challenges in deep sea exploitation due to the capital-intensive nature of this venture. Bearing in mind also that the technology and equipment needed to engage in this process is still evolving, government entities, state enterprises and private companies that are contractors in the Area would need to have robust engineering and mining industries and budgets to undertake capital-intensive research expeditions and cruises. This is key to having a competitive advantage, which may at this time be lacking for several African countries. Nevertheless, it is worth noting that there are a few developing states that currently are sponsoring states, the majority of which are in the Asia-Pacific region.[28] Interestingly, in 2020 Blue Minerals Jamaica Ltd, a company sponsored by the government of Jamaica (and host country of the Authority) applied for a contract for polymetallic nodules which was approved by the Council, making Jamaica the first Caribbean sponsoring state.

3.1 Participation in the organs of the International Seabed Authority

This part will examine African membership in the various organs and sub-organs of the Authority. The organs of the Authority are the Assembly, the Council, the Legal and Technical Commission, the Finance Committee, the Secretariat and the Enterprise.[29] The Assembly comprises all member states of the Convention. At the time of writing this chapter, there are 168 members of the Authority, 27 of which are member states of the European Union (EU). Out of this number, 47 are from Africa.[30] Though

27 For more information on effective control, see Responsibilities and Obligations of States with respect to Activities in the Area, Advisory Opinion, Seabed Disputes Chamber of the International Tribunal for the Law of the Sea, Case 17, 1 February 2011, 50 ILM 458.

28 These are China, Singapore, Tonga, Nauru, Cook Islands, Kiribati, India and Brazil. For a full list of contractors for the Authority, see https://isa.org.jm/exploration-contracts (accessed 14 August 2020).

29 The organs of the Authority are spelt out in the Convention; see art 58. There are hereby established, as the principal organs of the Authority, an Assembly, a Council and a Secretariat. There is hereby established the Enterprise, the organ through which the Authority shall carry out the functions referred to in art 170 para 1. Such subsidiary organs as may be found necessary may be established in accordance with this part. 4. Each principal organ of the Authority and the Enterprise shall be responsible for exercising those powers and functions which are conferred upon it. In exercising such powers and functions each organ shall avoid taking any action which may derogate from or impede the exercise of specific powers and functions conferred upon another organ.

30 A full list of the members of the Authority is available at https://www.isa.org.jm/member-states; regional groupings can also be found at https://www.isa.org.jm/regional-groups (accessed 14 August 2020).

several African member states have ratified the Convention, the majority have never attended the meetings of the Authority since its establishment and others participate infrequently.

3.1.1 Council membership

The Council is the executive organ of the Authority and is established under article 162 of the Convention. It has powers to establish specific policies on any matters within its competence under the Convention as well as the general policies of the Authority. The Council also proposes to the Assembly a list of candidates for the election of the Secretary-General and the Director-General/governing board of the Enterprise. In accordance with paragraph 15, section 3 of the Annex to the 1994 Agreement, the Council is to be comprised of 36 members. In the current composition of the Council for 2022, 10 slots have been allocated to the African group, which currently is comprised of South Africa, Uganda, Lesotho, Algeria, Cameroon, Mauritius, Ghana, Nigeria, Sierra Leone and Morocco. The election of the members is done through a complex formula of groupings into groups A-E which is based on rules of eligibility. The criteria of eligibility for each group is different and based on a range of factors. Group A comprises member states that make up the total world consumption or imports of the commodities produced from the categories of minerals derivable from the Area. Group B comprise the largest investments in preparation for and in conduct of activities in the Area. Group C is for states that are major net exporters of the categories of minerals to be derived from the Area. Group D reflects potential producers that represent special interests for landlocked or geographically disadvantaged states, and Group E is reserved for states that qualify based on the principle of equitable geographical distribution of the seats.[31]

African presidents in the Council have come from Senegal (2004), Egypt (2009), Cameroon (2014) and South Africa (2019). In terms of membership, every election year an eligibility list is prepared by the secretariat pursuant to paragraph 9 section 3 of the Annex to the 1994 Agreement, to indicate which countries meet the criteria for the year. In 2020 Zambia has shown promise within the group of major consumers and importers of more than 2 per cent in value terms of total world consumption of the commodities from cobalt and copper, and South Africa for manganese and nickel. The Democratic Republic of the Congo (DRC) has featured in the list of major producers and net exporter for cobalt and copper. Gabon and Ghana have also been identified as major

31 For full details on the groupings, see paras 15(a)-(d), sec 3 of the Annex to the 1994 Agreement.

producers and net exporters for manganese. Morocco has been identified as one of the developing states that are major importers of cobalt. A number of African states have been identified as potential producers of the categories of mineral derivable from the Area.[32]

3.1.2 Legal and Technical Commission

The Legal and Technical Commission (LTC) is a subsidiary organ of the Council comprising independent experts, nominated by member states with appropriate qualifications relevant to the exploration, exploitation and processing of mineral resources, oceanography, protection of marine environment, or economic or legal matters relating to ocean mining and related fields of expertise. Article 163 of the Convention also establishes the Economic Planning Commission (EPC). The EPC is to review the trends of and factors affecting the supply, demand and prices of minerals that may be derived from the Area, bearing in mind the interests of both importing and exporting countries, and in particular of the developing states. Members of the EPC shall have appropriate qualifications in mining, management of mineral resource activities, international trade or international economies.[33] However, the EPC is yet to be in operation, so its activities are currently undertaken by the LTC, until such a time as is deemed fit by the Council to operationalise the EPC. This currently is on the agenda of the Council for discussion at its meetings in 2022.[34]

The first five-year term of the LTC was elected in 1997. Although the stipulated number in the Convention for both Commissions is 15, the Convention gives the discretion to increase the size of either Commission having en due regard to economy and efficiency.[35] Membership of the LTC started at 22 and has gradually increased over the years. The current composition of the LTC is 30 members, though at the Part II meeting of the Council, it decided to further enlarge the size of the Commission for the 2023-2027 membership.[36] The Chairperson and a Vice-Chairperson are elected from among members. Five of the 30 current members of the Legal and Technical Commission (2017-2021) are from Africa, namely,

32 See ISBA/26/A/CRP.2 for the indicative list of states for 2020, https://www.isa.org.jm/files/documents/isba_26_a_crp.2.pdf (accessed 14 August 2020)..

33 See art 164 of UNCLOS.

34 See document ISBA/27/C/25, Operationalisation of the Economic Planning Commission, 6 May 2022.

35 See art 163(3) of UNCLOS.

36 See ISA document ISBA/27/C/41, Decision of the Council of the International Seabed Authority relating to the election of members of the Legal and Technical Commission, 28 July 2022.

Theophile Mbarga (Cameroon); Michael Gikuhi (Kenya); Thembile Joyini (South Africa); Ahmed Farouk (Egypt); and Joshua Tuhumwire (Uganda). In 2000 and 2001 Namibia chaired the LTC session, in 2005 Senegal chaired, South Africa in 2003 and 2004, Egypt in 2007 and Mozambique in 2010. The graph below shows the overall membership for African states in the Commission from 1997 to 2020.

3.1.3 Finance Committee

The Finance Committee was created under the 1994 Agreement to oversee the financing and financial management of ISA. The Committee consists of 15 members elected by the Assembly for a period of five years, taking into account equitable geographical distribution among regional groups and representation of special interests. As of 2022, two of the 15 members of the current composition of the Committee are from Africa, namely, Medard Ainomuhisha (Uganda) and Abderahmane Zino Izourar (Algeria). The Committee plays a central role in the administration of the Authority's financial and budgetary arrangements. Members are expected to have qualifications relevant to financial matters as they are involved in making recommendations on financial rules, regulations, and procedures of the organs of the Authority, its programme of work as well as the assessed contributions of its member states. In 2017-2020 Algeria served as Vice-Chair of the Committee. Below is a graph indicating participation from Africa since its creation.

3.1.4 Secretariat

The Secretariat is located in Kingston, Jamaica at the seat of the Authority and is headed by a Secretary-General.[37] It currently has a staff strength of approximately 47 which reflects nationalities with an equitable geographical spread among the member states of the Authority. As at the time of writing this chapter, there are two staff members from Africa (Nigeria and the Republic of Sudan). Interestingly, the second Secretary-General of the Authority was from Ghana, Mr Nii Allotey Odunton.[38] A significant number of achievements and milestones were reached in the Authority during his tenure. He served two tenures, from 2009 to 2016. In 2020 the Authority's museum was named in his honour.[39] The Secretariat provides support to the Secretary-General and other principal organs and

37 Art 156(4) of UNCLOS, which establishes the seat of the Authority as Jamaica.

38 Nii Oduton passed away 13 February 2022.

39 Press release of 27 November 2020 of the Authority, https://www.isa.org.jm/news/isa-deep-sea-exploration-museum-named-honour-mr-nii-allotey-odunton (accessed 16 December 2020).

their subsidiary organs in undertaking the functions under the Convention and the 1994 Agreement and the mining code. It accomplishes this through its four organisational units.[40]

4 Projection for the coming years, challenges and prospects for Africa

The current priority for the Authority is the development of the regulations for exploitation of mineral resources in the Area. Since its inception, no contractor has engaged in exploitation. Contractors have only carried out prospecting and exploration, that is, the stage where the mineral resources are assessed for availability, quantity, size, coverage, and s forth. Exploitation, which is the next and most lucrative phase, involves the harvesting and production of the minerals from the deep seabed into precious metals. The benefits of these minerals to mankind are inexhaustible and have the potential to boost international trade in metals. Discussions on the development of the draft exploitation regulations commenced in 2014. Since then there have been several rounds of consultations and negotiations.

During these negotiations, the African group and individual African states have made submissions to the draft text and adopted a rather coordinated approach. Key issues of particular interest to the African group have been (i) the operationalisation of the Enterprise; (ii) the financial model for the payment mechanism for deep sea mining; (iii) the potential impact of mineral production from the Area on the economies of developing land-based producers; and (iv) the protection and preservation of the marine environment.[41]

At the first part of the twenty-sixth session meetings of the Council in February 2020, three informal working groups were established to advance discussions on specific parts of the draft regulations for exploitation. Janet Olisa (Nigeria) was appointed facilitator of the informal working group that deals with inspection, compliance and enforcement.

In recent times,the African group has adopted an active and rather coordinated approach in its engagement in the Authority. However, the

40 The organisational units of the Authority are the office of legal affairs; the executive office of the Secretary-General; the office for administrative services; and the office of environmental management and mineral resources.

41 See the Authority's stakeholder consultation process on the draft Exploitation Regulations from 2015 for comments from the African group and from other individual African Countries, https://www.isa.org.jm/mining-code/ongoing-development-regulations-exploitation-mineral-resources-area (accessed 18 December 2020).

region still witnesses very low participation from member states, and in many cases non-payment of annual assessed contributions for long periods. This has led to the suspension of voting rights of many African member states, several of which still fail to attend meetings of the Authority at all, despite having ratified the Convention.

The author shares the view that some of the perceived reasons for this lack of engagement can be attributed to, among others, the following issues:

(a) the remoteness of the secretariat in Jamaica, as well as the high cost of travel from Africa to the Caribbean to attend meetings, which would require transiting through one or more countries. Currently there are no direct flights to Jamaica from any African country. Therefore, any person travelling to Jamaica would be mandated to transit through Europe or the Americas. In some cases, participants are unable to obtain or denied transit visas.
(b) a lack of understanding and/or appreciation of the regime of the Area, its importance, and potential benefits. The concept of mining in the Area remains rather aspirational and somewhat far-fetched to several African states, which has led to high levels of apathy.

Irrespective of these challenges, the Authority is working assiduously to ensure that all developing states, with a particular attention to small island developing states and African states, engage in deep seabed exploration and exploitation. The latter can be seen in the launching of the Africa Deep Seabed Resources (ADSR) project carried out in partnership with the AU, with support from the Norwegian Agency for Development Cooperation.

Furthermore, in February 2020 the Authority convened an international workshop dedicated to needs and resource assessment. This was specifically focused on undertaking an assessment of capacity-building needs of developing states to improve effectiveness and impact of the Authority's capacity-building programmes, namely, the contractor training programmes, the Endowment Fund for Marine Scientific Research and internships.[42] Through the ADSR project, the Authority has managed to undertake workshops and trainings in Africa (South Africa,

42 This is in line with Strategic Direction 5 of the Authority's Strategic plan for 2019-2023. See the ISBA/25/A/15 for the Authority's strategic plans 2019-2023; further information on the need assessment workshop can also be found at https://www.isa.org.jm/event/international-workshop-capacity-development-resources-needs-assessment (accessed 14 December 2020).

Uganda, Nigeria, Morocco, Senegal and Côte d'Ivoire) as well as sponsor secondment opportunities within the Secretariat for experts from Africa.[43]

Over the years, several nationals from African states have benefitted from the capacity-building programmes of the Authority. As of 2022, 91 out of 253 placements for contractor training programmes have been granted to Africans, while 55 out of 158 have benefited from the Endowment Fund on Marine Scientific Research.[44]

Another step that the Authority has taken, especially in view of the COVID-19 pandemic, is to move its workshops and programmes to a remote format, in which case the issues relating to budgetary limitations on travelling can no longer be the reason for non-participation in the Authority's work. Prior to the COVID-19 pandemic, the meetings of the Council and Assembly within the last two years have been streamed live on the website of the Authority to garner a wider range of participation.

4.1 Future prospects

One may rightfully argue that the regime of the Area is one of the most balanced international regimes established. It provides ample opportunities for developing states to benefit by creating a level playing field. This part highlights specific provisions in UNCLOS that ensure that developing states benefit from special incentives and initiatives. Bearing in mind that a large percentage of African states fall into the categorisation of developing states, the following opportunities would readily be available and accessible to nearly all African member states and their nationals:

4.1.1 Training programmes

Article 144(2) of the Convention, section 5 paragraph 1(c) of the Annex to the 1994 Agreement and the current version of the draft exploitation regulations state that a contractor shall draw up practical programmes for the training of personnel of the Authority and developing states, including in all activities in the Area that are covered by the contract.

43 For more information on the ADSR project, see https://www.isa.org.jm/training/adsr-experts accessed 20 August 2020 (accessed 14 December 2020).

44 Full details on the training programmes and the beneficiaries can be found at https://isa.org.jm/training accessed 20 August 2020 (accessed 14 December 2020).

4.1.2 Reserved areas

The reservation of sites is provided for in Annex III, articles 8, 9 and 11[45] of the Convention and in Annex Section 1(10) of the 1994 Agreement. It was first introduced in the Revised Single Negotiating Text in 1967.[46] In summary, the system requires that an applicant for a contract with the Authority reserves an equal half of its proposed contract Area for the Authority, for exploitation through the Enterprise or in association with developing states. The system is also called site-banking and has been elaborated in the Regulations on Prospecting and Exploration for all three minerals.[47]

4.1.3 Joint arrangements and incentives with the Enterprise

Under article 11 of Annex III article 5, contractors entering joint arrangements (including joint ventures or production sharing) with the Enterprise and with developing states or their nationals may receive financial incentives. The purpose and aim of this is the encouragement of transfer of technology through training personnel of the Authority and of developing states.

4.1.4 The promotion of marine science and technology

This is enshrined in Part XII (Marine Scientific Research) and Part XIV (development and transfer of Marine Science and Technology) of the

45 Art 8 of UNCLOS states: 'Each application, other than those submitted by the Enterprise or by any other entities for reserved areas, shall cover a total area, which need not be a single continuous area, sufficiently large and of sufficient estimated commercial value to allow two mining operations. The applicant shall indicate the coordinates dividing the area into two parts of equal estimated commercial value to allow two mining operations. The applicant shall indicate the coordinates dividing the area into two parts of equal estimated commercial value and submit all the data obtained by him with respect to both parts [to the Authority] without prejudice to the powers of the Authority pursuant to Article 17 of this annex [powers to make rules and regulations], the data to be submitted concerning polymetallic nodules shall relate to mapping, sampling, the abundance of nodules and their metal content. Within 45 days of receiving such data, the Authority shall designate which part is to be reserved solely for the conduct of activities by the Authority through the Enterprise or in association with developing states. This designation may be deferred for a further period of 45 days if the Authority requests an independent expert to assess whether the data required by this article has been submitted. The area designated shall become a reserved area as soon as the plan of work for the non-reserved is approved and the contract is signed.'

46 ED Brown *Sea-bed energy and mineral resources and the law of the sea: The area beyond the limits of national jurisdiction (*1986).

47 See Regulations 15, 16, 17 & 18 of the three regulations on prospecting and exploration in the Area.

Convention. These provisions aim to enhance the capacity of member states by training scientists from developing countries and assisting developing states in the evaluation of research results.[48]This is an area where the African continent possesses the lowest share of capability and where there is much growth potential. There are a wide range of collaborations at the international and regional levels equally involving the Authority within and outside the UN system. One such collaborative initiative can be seen in the recent adoption of an Action Plan for Marine Scientific Research in support of the UN Decade of Ocean Science for Sustainable Development.[49] Furthermore, in 2019 the Authority launched a deep data website pursuant to its mandate under article 143(3)(b),[50] to promote marine scientific research by making publicly available all deep seabed activities related data and, in particular, data collected by the contractors on their exploration activities and other relevant environmental and resource-related data for the Area.[51]

4.1.5 Land-based producer developing countries

Section 7 of the Annex to the 1994 Agreement and article 152(10) of the Convention ensure that when commercial mining cmmences, land-based producer developing states are not disadvantaged by seabed mining. To this end, an economic assistance fund is to be established by the Authority based on a portion of the funds received from contractors,

48 For more on this topic, see AHA Soons *Marine scientific research and the law of the sea* (1998); UNAOLOS *The law of the sea: Marine scientific research: A guide to the implementation of the relevant provisions of the UN Convention on the Law of the Sea* (1991); see also the Authority's work in the development of the Marine scientific research through its Action Plan in support of the United Nations Decade of Ocean Science for Sustainable Development.

49 The MSR Action Plan identifies six strategic research priorities: advancing scientific knowledge and understanding of deep-sea ecosystems, including biodiversity and ecosystems functions in the Area; standardising and innovating methodologies for deep-sea biodiversity assessment, including taxonomic identification and description in the Area; facilitating technology development for activities in the Area, including ocean observation and monitoring; enhancing scientific knowledge and understanding of potential impacts of activities in the Area; promoting dissemination, exchange and sharing of scientific data and deep-sea research outputs and increasing deep-sea literacy; strengthening deep-sea scientific capacity of ISA members, in particular developing states.

50 Art 143(3)(b) of UNCLOS states that the ISA is to ensure that programmes are developed through the Authority or other international organisations as appropriate for the benefit of developing states and technologically less developed states with a view to (i) strengthening their research capabilities; (ii) training their personnel and the personnel of the Authority in the techniques and applications of research; (iii) fostering the employment of their qualified personnel in research in the Area.

51 ISA Deep Data, https://data.isa.org.jm/isa/map/accessed 15 December 2020 (accessed 14 December 2020).

but taking into account administrative fees. The policy of the Authority on economic assistance is to be based on the four principles identified in the 1994 Agreement.[52] A determination on the size and the time for the establishment of the fund is currently being addressed by the Legal and Technical Commission, with a view to identifying potential impacts of exploitation on land-based mining producers of developing states. The current focus of the Commission is on the impact for polymetallic nodules.[53]

4.1.6 Equitable distribution under article 82 of the Convention

Although a rather complex and somewhat aspirational formulation, article 82 of the Convention mandates that where a coastal state undertakes exploitation of non-living resources of the continental shelf beyond 200 nautical miles, it shall make payments at a specified percentage to the Authority. The Authority, in turn, shall distribute the proceeds equitably to state parties to the Convention, taking into account the interests and needs of developing states, particularly the least developed and land-locked states. Several African states fall within this categorisation and, as such, could potentially benefit from the actualisation of this mandate.[54]

52 See Annex, sec 7 para 1 of the 1994 Agreement, which states as follows '1. The policy of the Authority of assisting developing countries which suffer serious adverse effects on their export earnings or economies resulting from a reduction in the price of an affected mineral or in the volume of exports of that mineral, to the extent that such reduction is caused by activities in the Area, shall be based on the following principles: (a) The Authority shall establish an economic assistance fund from a portion of the funds of the Authority which exceeds those necessary to cover the administrative expenses of the Authority. The amount set aside for this purpose shall be determined by the Council from time to time, upon the recommendation of the Finance Committee. Only funds from payments received from contractors, including the Enterprise, and voluntary contributions shall be used for the establishment of the economic assistance fund; (b) Developing land-based producer States whose economies have been determined to be seriously affected by the production of minerals from the deep seabed shall be assisted from the economic assistance fund of the Authority; (c) The Authority shall provide assistance from the fund to affected developing land-based producer states, where appropriate, in cooperation with existing global or regional development institutions which have the infrastructure and expertise to carry out such assistance programs; (d) The extent and period of such assistance shall be determined on a case-by-case basis. In doing so, due consideration shall be given to the nature and magnitude of the problems encountered by affected developing land-based producer states.'

53 ED Brown *Sea-bed energy and minerals: The international legal regime* (200) 90.

54 Art 82 of the Convention states that payments and contributions with respect to the exploitation of the continental shelf beyond 200 nautical miles '1. The coastal state shall make payments or contributions in kind in respect of the exploitation of the non-living resources of the continental shelf beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured. 2. The payments and contributions shall be made annually with respect to all production at a site after the first five years of production at that site. For the sixth year, the rate of payment or contribution shall

5 Conclusion

In this chapter we looked at Africa's engagement over the years, as well as identified key challenges of African states. Areas of prospects and future opportunities were also discussed. The author is of the view that the continent stands to gain enormous benefits from intensifying its engagement with the International Seabed Authority and the Convention in general. It would also be a promising step if at least one African state becomes a sponsoring state for a contract in the Area. This would have the effect of signalling to the others the actualisation of this possibility.

The need for increased interest, engagement and knowledge intensification in the work of the Authority has to be systemic and ingrown, emanating from political will at the governmental level of respective states. This should be evidenced by the domestication of the provisions of the Convention in national law, as well as enacting national legislation on deep seabed mining. Other steps could include assigning permanent or semi-permanent desk officers and focal point offices that could engage on a regular and frequent basis. Doing so would build capacity of the team and ensure that capacity-building opportunities from the Authority are targeted to the right persons and departments. Furthermore, the attendance and participation at workshops are encouraged, especially now with the development and proliferation of remote trainings and workshops, which would bridge the challenge of budgetary implications on travel. Furthermore, initiatives such as the ADSR project are specifically targeted to Africa; hence, there is no excuse for a lack of engagement. African member states are also requested to actively engage by paying up their assessed contributions to the Authority. Several states have had their voting rights suspended due to outstanding balances spanning over years. To get the best benefit from the privileges and advantages envisaged by UNCLOS, this would need to change.

The prospect of commercial mining is becoming a reality each day, bringing us closer to the vision the founding fathers of the Convention had

be 1 per cent of the value or volume of production at the site. The rate shall increase by 1 per cent for each subsequent year until the twelfth year and shall remain at7 per cent thereafter. Production does not include resources used in connection with exploitation. 3. A developing state which is a net importer of a mineral resource produced from its continental shelf is exempt from making such payments or contributions in respect of that mineral resource. 4. The payments or contributions shall be made through the Authority, which shall distribute them to states parties to this Convention, on the basis of equitable sharing criteria, taking into account the interests and needs of developing states, particularly the least developed and the land-locked among them.'

during negotiations. This is the best time for African states to completely engage in the work and vision of the Authority and harness the potentials and benefits that rests within part XI of the Convention and the 1994 Agreement.