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Selected recent institutional and rule-making developments in the law of the sea (2015-2016)

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The United Nations Convention on the Law of the Sea¹ (LOSC or the Convention) is quite simply, the greatest treaty-making achievement of the United Nations (UN) era. This appraisal of the recent developments of 2015-16 in this legal regime that governs the oceans – waters, floor and subsoil thereof – which cover ‘over 70 percent of the surface of our planet’², focuses on its oft-ignored aspect, that is, its institutional framework.

LOSC Meeting of State Parties (SPLOS)

Parties to the Convention meet annually as mandated by the Convention³ during which reports of the International Tribunal on the Law of the Sea (ITLOS), the International Seabed Authority (ISA), and the Commission on the Limits of the Continental Shelf (CLCS) are presented. The Meeting of State Parties (SPLOS) elects members to ITLOS and CLCS and deals with the budgetary matters of these institutions. The UN Secretary General also presents a report, in accordance with LOSC Article 319, on issues of a general nature, relevant to state parties, that have arisen with respect to LOSC.

In 2016, SPLOS has been convened twice: on 15 January 2016 as a resumed session of the 25th Meeting (SPLOS25); and from 20 to 24 June 2016 as the 26th Meeting (SPLOS26).

¹ 10 December 1982, 1833 UNTS 31633.

² ‘How much water is in the ocean?’ <http://oceanservice.noaa.gov/facts/oceanwater.html> on 10 August 2016.

³ Article 319 (2,e), LOSC.

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SPLOS resumed its 25th Meeting to fill vacancies occasioned by resignations in ITLOS and CLCS.⁴ Antonio Cachapuz de Medeiros (Brazil) was elected to serve the remainder⁵ of Vicente Marotta Rangel's term on the bench of ITLOS, which ends on 30 September 2017.⁶ However, the election to fill the CLCS vacancy occasioned by the resignation of Nenad Leder (Croatia) did not take place at SPLOS25. This was postponed to the 26th Meeting (SPLOS26) due to a lack of nominations by the allotted group (Group of Eastern European States). State parties also took note that the next (41st) session of the CLCS would be held after SPLOS26, hence such postponement would not be detrimental to the Commission's work.⁷ Leder, who resigned on 22 September 2015, had himself only been elected at SPLOS25 to serve until 15 June 2017⁸ after the resignation of George Jaoshvili.⁹

International Seabed Authority

The International Seabed Authority (ISA or Authority) is the international body¹⁰ charged with administering¹¹ the resources of the seabed and subsoil beyond the limits of national jurisdiction (the Area¹²) and regulating the mining of its resources.¹³ It also administers the sharing of the economic benefits thereof among all states, including landlocked and geographically disadvantaged states, with particular consideration for the needs and interests of developing states and peoples.¹⁴ It also ensures the sharing the benefits of marine scientific research¹⁵ and protection of the marine environment.¹⁶

⁴ Report of the twenty-fifth Meeting of States Parties resumed to elect one member of the International Tribunal for the Law of the Sea and one member of the Commission on the Limits of the Continental Shelf (SPLOS25b Report), 28 January 2016, SPLOS/293, para. 1.

⁵ SPLOS25b Report, para. 12.

⁶ ITLOS Press Release 'Resignation of Judge Vicente Marotta Rangel', ITLOS/Press 230, 18 May 2015.

⁷ SPLOS25b Report, para. 14-16; also, UN Press Release, SEA/2028, 15 January 2016.

⁸ UN Press Release, SEA/2018, 15 June 2015.

⁹ 'Commission on the Limits of the Continental Shelf (CLCS) – Members of the Commission' http://www.un.org/depts/los/clcs_new/commission_members.htm#Members on 12 July 2016.

¹⁰ Established under Article 156, LOSC.

¹¹ Article 157, LOSC; Section 1(1), *Annex, Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982* (hereinafter, *Part XI Implementation Agreement*), 28 July 1994, 1836 UNTS 3.

¹² Article 1(1), LOSC; Preamble 2, *Part XI Implementation Agreement*.

¹³ Section 1(5)(a-f), 1(15), 1(16), Annex, *Part XI Implementation Agreement*.

¹⁴ Articles 140, 148, LOSC; Section 1(5)(d), Annex, *Part XI Implementation Agreement*.

¹⁵ Articles 143-4, LOSC; Section 1(5)(h-j), Annex, *Part XI Implementation Agreement*.

¹⁶ Article 145, LOSC; Section 1(5)(g, k), Annex, *Part XI Implementation Agreement*.

The ISA's organs are: the Assembly, the Council, the Secretariat¹⁷, the Legal and Technical Commission,¹⁸ and the Finance Committee.¹⁹ The Enterprise is a *sui generis* entity within the ISA.²⁰ The ISA holds annual sessions, the 22nd of which was held between 11-22 July 2016 (ISA22).

The ISA also runs an Endowment Fund that supports the participation of qualified scientists and technical personnel from developing countries in marine scientific research²¹ and the Voluntary Trust Fund to help ISA members from developing countries participate fully in the meetings of the Legal and Technical Commission and the Finance Committee.²² It is funded by members of the Authority and others. Among its scientific activities,

the [ISA] Secretariat carries out detailed resource assessments of the areas reserved for the Authority; maintains a specialised Database (POLYDAT) of data and information on the resources of the international seabed area and monitors the current status of scientific knowledge of the deep sea marine environment as part of its ongoing development and formulation of the Central Data Repository.²³

¹⁷ Article 158(1), LOSC; Section 1(4), Annex, *Part XI Implementation Agreement*.

¹⁸ A subsidiary organ of the ISA Council (Article 163 (1)(b), also 158 (3), LOSC; Section 1 (4), Annex, *Part XI Implementation Agreement*). 'The Commission is entrusted with various functions relating to activities in the deep seabed area including the review of applications for plans of work, supervision of exploration or mining activities, assessment of the environmental impact of such activities and provide advice to the [ISA] Assembly and Council on all matters relating to exploration and exploitation of non-living marine resources (such as polymetallic [manganese] nodules, polymetallic sulphides and cobalt crusts)'. <https://www.isa.org/jm/authority/legal-and-technical-commission> on 10 July 2016; also Article 165, LOSC. LOSC also mandates the establishment of the Economic Planning Commission (Article 163 (1)(a), LOSC), whose need will arise upon commencement of Area resource exploitation as provided for in Section 1(3 & 4), Annex, *Part XI Implementation Agreement*.

¹⁹ Established under Section 9(1), Annex, *Part XI Implementation Agreement*.

²⁰ Articles 158(2), 170, LOSC, Section 2(1-3), Annex, *Part XI Implementation Agreement*. For a comprehensive treatment, see International Seabed Authority, *Legislative history of the 'Enterprise' under the United Nations Convention on the Law of the Sea and the Agreement Relating to the Implementation of Part XI of the Convention*, Kingston, 2002.

²¹ ISA, 'Scientific activities and promotion' <https://www.isa.org/jm/scientific-activities> on 8 July 2016; ISA, 'International Seabed Authority 22nd Session (Background Press Release)', 4 July 2016, <https://www.isa.org/jm/news/international-seabed-authority-22nd-session-background-press-release> on 6 July 2016.

²² ISA, 'International Seabed Authority 22nd Session (Background Press Release)'.

²³ ISA, 'Scientific activities and promotion'.

*Licensing of Area activities*²⁴

While the ISA is yet to approve any exploitation activities, it has licensed exploratory activities, the earliest of which were granted in 2001 for a period of 15 years to six contractors.²⁵ These contractors applied for extension of these exploration licences for a further five years.²⁶ All extensions were approved at ISA22 by the ISA Council.²⁷

Between July 2015 and August 2016 three exploration contracts were concluded. These are contracts for the exploration for cobalt-rich ferromanganese crusts, signed with a Brazilian company, Companhia de Pesquisa de Recursos Minerais S.A, on 9 November 2015; and two for the exploration for polymetallic nodules signed with the UK Seabed Resources Ltd on 29 March 2016,²⁸ and Cook Islands Investment Corporation signed on 15 July 2016.²⁹ Two other contracts are expected to be signed in 2016: one with the Government of India for the exploration for polymetallic sulphides; and another with China Minmetals Corporation.³⁰ In addition, the ISA Council approved the plan of work for ex-

²⁴ Article 1.1(3), LOSC defines this as ‘all activities of exploration for, and exploitation of, the resources of the Area’. ITLOS provides an extensive discussion on the meaning of ‘exploration for and exploitation of’, including distinguishing ‘activities in the Area’ from any mineral transportation – which is the province of the high seas freedoms regime – and processing thereafter. See *Responsibilities and obligations of States with respect to activities in the Area*, Advisory Opinion, 1 February 2011, ITLOS Reports 2011, p. 10, para 82-98.

²⁵ InterOceanmetal Joint Organisation, sponsored by Bulgaria, Cuba, Czech Republic, Poland, the Russian Federation and Slovakia (29 March 2001-28 March 2016); Yuzhmorgeologiya, sponsored by the Russian Federation (29 March 2001-28 March 2016); Government of the Republic of Korea (27 April 2001-26 April 2016); China Ocean Mineral Resources Research and Development Association, sponsored by China (22 May 2001-21 May 2016); Institut français de recherche pour l’exploitation de la mer, sponsored by France (20 June 2001-19 June 2016); Deep Ocean Resources Development Co. Ltd, sponsored by Japan (20 June 2001-19 June 2016). Contractor information from www.wisa.org/jm/deep-seabed-minerals-contractors/overview on 26 April 2015.

²⁶ As provided in Section 1(9), Annex, Part XI Implementation Agreement. See ISA, ‘International Seabed Authority 22nd Session (Background Press Release)’.

²⁷ InterOceanmetal Joint Organisation, with effect from 29 March 2016 (ISBA/22/C/21); Yuzhmorgeologiya, with effect from 29 March 2016 (ISBA/22/C/22); Government of the Republic of Korea, with effect from 27 April 2016 (ISBA/22/C/23); China Ocean Mineral Resources Research and Development Association, with effect from 22 May 2016 (ISBA/22/C/24); Institut français de recherche pour l’exploitation de la mer, with effect from 20 June 2016 (ISBA/22/C/26); Deep Ocean Resources Development Co. Ltd, with effect from 20 June 2016 (ISBA/22/C/25). All dated 18 July 2016.

²⁸ ‘International Seabed Authority 22nd Session (Background Press Release)’, citing ISA Secretary General’s Report (ISBA/22/C/5).

²⁹ ‘Cook Islands Investment Corporation Signs Exploration Contract with the International Seabed Authority’.

³⁰ ‘International Seabed Authority 22nd Session (Background Press Release)’, citing ISA Secretary General’s Report (ISBA/22/C/5).

ploration for cobalt-rich ferromanganese crusts submitted by the Government of the Republic of Korea on 10 May 2016.³¹ As at 10 August 2016, twenty-five contracts for exploration had entered into force (sixteen for polymetallic nodules, five for polymetallic sulphides and four for cobalt-rich ferromanganese crusts).³²

Regulation of Area activities

As part of its regulatory mandate, the ISA issues binding regulations³³ for Area mining. These are regulations for *exploration* for polymetallic nodules³⁴; polymetallic sulphides³⁵; and cobalt-rich ferromanganese crusts.³⁶ These regulations, together with accompanying recommendations and procedures, form the Area Mining Code.³⁷

For the first time, draft regulations for the *exploitation* of Area resources are being developed by the Legal and Technical Commission (LTC). In March 2015, the LTC issued a Draft Framework for the Regulation of Exploitation Activities and a Discussion Paper on the Financial Terms of Exploitation Contracts, followed by a Draft Framework and Action Plan in July 2015. At ISA21, the ISA Council noted with approval the developments, including a submission by the Netherlands on addressing serious harm to the marine environment, and urged member states and all stakeholders to submit their views to the Authority. In 2016, four key discussion papers on various aspects of the proposed exploitation code were published by the ISA Secretariat. Finally, in July 2016, days before the opening of ISA22, the LTC published the first draft exploitation code, inviting

³¹ ISBA/22/C/20, 18 July 2016.

³² 'International Seabed Authority 22nd Session (Background Press Release)', citing ISA Secretary General's Report (ISBA/22/C/5); 'Cook Islands Investment Corporation Signs Exploration Contract with the International Seabed Authority' 16 July 2016, <https://www.isa.org.jm/news/cook-islands-investment-corporation-signs-exploration-contract-international-seabed-authority> on 10 August 2016.

³³ Articles 203, 215, LOSC; Section 1 (5)(f, g, k), 1(15), Annex, Part XI Implementation Agreement. Convention Article 189 precludes the exercise of judicial review by the ITLOS Seabed Disputes Chamber over ISA rules, regulations and procedures.

³⁴ Adopted on 13 July 2000, and later updated and adopted 25 July 2013.

³⁵ Adopted 7 May 2010 and amended in 2013 and 2014.

³⁶ Adopted 27 July 2012 and amended in 2013. Based on these Regulations, the ISA 'Legal and Technical Commission has issued recommendations for the Guidance of contractors covering, among others, content, format and structure of their annual reports; exploration expenditure reporting; and assessment of environmental impacts resulting from their operations in the Area [as well as] a guide for contractors and sponsoring states on training programmes under plans of work for exploration'. 'International Seabed Authority 22nd Session (Background Press Release)'.

³⁷ ISA, 'The Mining Code' <https://www.isa.org.jm/mining-code> on 29 July 2016.

stakeholder comment before 2 November 2016.³⁸ At ISA22, the ISA Council urged the LTC to continue this work as a matter of priority.³⁹

The significance of these exploitation regulations cannot be gainsaid. For some years now, environmentalists have warned that Area (deep sea) mining may be irreparably harmful for the environment and have called on the ISA to apply the precautionary principle⁴⁰ and prioritise its marine protection mandate over the demands of resources hungry companies and their sponsoring states. They argue that '[t]here is insufficient scientific data about the impacts of deep sea mining, no regulatory frameworks in place to govern mining operations and the capacity to enforce such frameworks does not yet exist.'⁴¹

These proposed regulations will be ISA's first attempt to provide an exploitation framework, upon which assessments of the environmental friendliness and, therefore, legality of exploitation *methods* can be made.

And while the anticipated Area exploitation is hotly contested, even the current exploration licences have been called into question. '...So many exploration licences have been issued without any understanding of the environmental impacts of exploration, let alone exploitation.'⁴² In May 2015, a coalition of NGOs submitted a report to the ISA on *Developing a regulatory framework for mineral exploitation in the Area*.⁴³ The exploitation code will give an indication of civil society influence in Area law-making,⁴⁴ particularly considering

³⁸ ISA, 'Ongoing development of regulations on exploitation of mineral resources in the Area' <https://www.isa.org.jm/legal-instruments/ongoing-development-regulations-exploitation-mineral-resources-area> on 10 August 2016.

³⁹ ISBA/22/C/28, 19 July 2016.

⁴⁰ For a discussion on the application of the precautionary principle in the Area mining regime, see ITLOS, *Obligations of states*, para 125-35. While a fuller treatment of whether the precautionary principle obligates the ISA to apply some form of moratorium on Area exploration or exploitation is beyond our present scope, it is worthy of brief note that the ISA may be precluded from applying such moratorium by Section 1(15)(c), Annex, *Part XI Implementation Agreement*. It would therefore be more helpful that any advocacy in this regard, rather or in addition, be directed at SPLOS.

⁴¹ 'No deep sea mining without civil society consent! Worldwide pressure on the International Seabed Authority for a moratorium on deep sea mining' *Deep Sea Mining Campaign*, 20 July 2015, <http://www.deepseaminingoutofourdepth.org/media-release-worldwide-pressure-on-the-isa-for-a-moratorium-on-deep-sea-mining/>. See also, Avaaz, 'Save our oceans from deep sea mining' https://secure.avaaz.org/en/deep_sea_mining_2/?pv=63&rc=fb on 6 July 2016.

⁴² 'No deep sea mining without civil society consent!'

⁴³ Deep Sea Mining Campaign, Earthworks, MiningWatch Canada, Oasis Earth and the Mineral Policy Institute, *Developing a regulatory framework for mineral exploitation in the area: Submission to the International Seabed Authority on the report to ISA members and stakeholders, 15 May 2015*, http://www.deepseamining-outofourdepth.org/wp-content/uploads/150515_ISA_Submission.pdf on 6 July 2016.

⁴⁴ Article 169, LOSC provides for 'consultation and cooperation' with IGOs and ECOSOC recognised NGOs. In addition, the ISA conducts 'Stakeholder Surveys to solicit relevant information for the development of a regulatory framework for the exploitation of minerals in the Area from members

that the Area is ‘the common heritage of humanity’⁴⁵ in which states, even when acting together, will continue to be hard pressed to retain unfettered decision-making authority.

In the interrelated questions of licensing and regulating Area mining and environmental protection, two municipal developments are worthy of brief note. In 2014, Papua New Guinea (PNG) concluded an agreement with Nautilus Minerals to conduct deep-sea exploitation on the ocean floor within its national jurisdiction, approximately 30 kilometers off the coast of New Ireland.⁴⁶ The PNG Government holds a 15% stake in the mine, and exploitation is expected to begin in 2018.

In August 2016, a petition was launched to urge the PNG government to reconsider the project.⁴⁷ Opinions are unsurprisingly mixed. Greenpeace, for instance, argues that ‘[t]he deep ocean is not yet mapped or explored and so the potential loss of fauna and biospheres from mining is not yet understood’ while the ISA welcomed the development as ‘a very exciting opportunity . . . , which is a world first and should give us some valuable insights into technical feasibility and environmental impact.’⁴⁸

In addition, the US Government, through the municipal regulator, the National Oceanic and Atmospheric Administration (NOAA), has been sued by an NGO, the Center for Biological Diversity, for issuing and renewing licences for large-scale deep-sea mining in the Clarion-Clipperton Zone (CCZ),⁴⁹ which is the

of the Authority and current and future stakeholders.’ ISA, ‘Scientific activities and promotion’, <https://www.isa.org.jm/scientific-activities> on 8 July 2016. See <https://www.isa.org.jm/observers> for a list of observer NGOs before the ISA. Also, ‘On 9 July [2015], the Center for Ocean Solutions released a paper in *Science* journal outlining research carried out over eight years into seabed mining. It is intended to inform upcoming discussions by the ISA that will set the groundwork for future deep sea environmental protection and mining regulations.’ Vella H, ‘Balancing economics and the environment: deep sea mining in the Clarion-Clipperton zone’ *Mining-technology.com* 3 November 2015 <http://www.mining-technology.com/features/featurebalancing-economics-the-environment-deep-sea-mining-the-clarion-clipperton-zone-4647457/> on 6 July 2016.

⁴⁵ UNGA Resolution 2749 (XXV) of 17 December 1970; Preamble 6, Articles 136 (also 137), 150(i), LOSC; Preamble 2, Part XI Implementation Agreement.

⁴⁶ ‘Deep sea mining in the PNG’ <http://www.solwaramining.org/> on 10 August 2016; also, Shukman D, ‘Agreement reached on deep sea mining’ *BBC News* 24 April 2014.

⁴⁷ Avaaz, ‘Papua New Guinea: Stop the deep sea mine’ https://secure.avaaz.org/en/png_nautilus_bgms/?pv=96&rc=fb on 15 August 2016.

⁴⁸ Shukman, ‘Agreement reached on deep sea mining’ *BBC*, citing Richard Page of Greenpeace and Michael Lodge, then Deputy Secretary General and Legal Counsel of the ISA.

⁴⁹ Center for Biological Diversity, ‘Landmark lawsuit challenges US approval of deep-sea mineral mining: New ocean gold rush could hurt marine life before impacts are known’ Press Release 13 May 2015 http://www.biologicaldiversity.org/news/press_releases/2015/deep-sea-mining-05-13-2015.html on 8 July 2016; See also, Vella, ‘Balancing economics and the environment’; ‘No deep sea min-

deep sea between Hawaii and Mexico.⁵⁰ While the US participated in the LOSC negotiations during the Third United Nations Conference on the Law of the Sea (UNCLOS III) until 1980, it has not ratified the ‘constitution for the oceans’.⁵¹ The US lays claim to the parts of the CCZ and to a right to mine there, regardless of its non-accession⁵² under its Deep Seabed Hard Mineral Resource Act of 1980. This present lawsuit therefore concerns US municipal law.

While not legally impinging on the Area regime, these municipal developments can be expected to influence Area exploitation in some way. They come just as the five-year countdown to exploitation by the six initial contractors discussed above begins⁵³, and during development of the Area’s exploitation code, which is, arguably, legally bound to higher standards of environmental protection and balance between business and the protection of humanity’s common heritage, as indicated above by the ITLOS advisory opinion.

Elections of ISA office holders

Elections for key ISA office holders were also held in ISA22. These include: Secretary-General of the Authority for the period 2017-2021; half of the 36-member Council; the Legal and Technical Commission; and the 15-member Finance Committee, whose terms of office expire on 31 December 2016.⁵⁴ Michael Lodge (UK) was elected the new ISA Secretary General, succeeding Nii

ing without civil society consent!.

⁵⁰ Vella, ‘Balancing economics and the environment’. The ISA defines it as ‘An area in the Eastern Pacific Ocean approximately 20oN, 120oW to 5oN, 160oW bounded by the Clarion Fracture Zone to the north and the Clipperton Fracture Zone to the south. All of the potential polymetallic nodule exploration contracts that have been granted in the Pacific are in this region. Also called the Clarion-Clipperton Zone. Abbreviated to CCFZ or CCZ.’ ISA, ‘Clarion-Clipperton Fracture Zone’ <https://www.isa.org/jm/clarion-clipperton-fracture-zone> on 6 July 2016.

⁵¹ Koh T, ‘A constitution for the oceans: Remarks by Tommy TB Koh of Singapore, President of the Third United Nations Conference on the Law of the Sea’. See Amb. Koh’s remarks urging the US to ‘reconsider its position’ on precisely this question, in this speech, delivered at the final session of UNCLOS III.

⁵² Vella, ‘Balancing economics and the environment’, See also, Groves S, ‘The US can mine the deep seabed without joining the UN Convention on the Law of the Sea’ *The Heritage Foundation* <http://www.heritage.org/research/reports/2012/12/the-us-can-mine-the-deep-seabed-without-joining-the-un-convention-on-the-law-of-the-sea> on 6 July 2016. The US has concluded bilateral non-contest agreements with every nation that has been licensed by the ISA to conduct exploratory activities in the CCZ. See Groves, ‘The US can mine...’.

⁵³ ‘Commercialization of marine minerals in deep seabed well within reach...’ <https://www.isa.org/jm/news/commercialization-marine-minerals-deep-seabed-well-within-reach-international-seabed-authority> 16 August 2016.

⁵⁴ ‘International Seabed Authority 22nd Session (Background Press Release).’

Allotey Odunton (Ghana), who had served since 2009.⁵⁵

The ISA Council's election of LTC members for the 2017-2021 term was rather contested, leading to a lengthy debate and a 'rare night meeting,' as delegations were divided over whether to have a 25, 30 or 36 member LTC. 30 nominations had been received within the stipulated time. Agreement was reached to elect 30 experts, 'on an exceptional and temporary basis, and without prejudice to future elections'. The ISA Council further requested a report from the Secretary General on the ideal size and composition of the LTC, with due regard to the outcomes of the Article 154 review. Five Africans were elected to the LTC, with the expert from Cameroon being reelected, and a new expert from Egypt, and new slots for South Africa, Kenya, and Uganda.⁵⁶ The LTC had 24 members for the 2012-2016 term.⁵⁷ Although serving in their personal capacities,⁵⁸ is noteworthy that an expert from landlocked Uganda was elected.

Article 154 periodic review

Of particular interest among matters for consideration at ISA22 was LOSC Article 154 periodic review of the regime governing the Area. Although Article 154⁵⁹ mandates a regular five-year review, it is only at the ISA21 in July 2015 that the Review Committee was first established.⁶⁰ The Review Committee's mandate involves

⁵⁵ 'Assembly elects Michael Lodge of the United Kingdom as next secretary-general of Seabed Authority...' 21 July 2016, <https://www.isa.org.jm/news/assembly-elects-michael-lodge-united-kingdom-next-secretary-general-seabed-authority-hears> on 10 August 2016.

⁵⁶ '2016 Seabed Session concludes after extended council debate over LTC membership; Assembly Approves \$17.1M Budget for 2017-2018' 25 July 2016 <https://www.isa.org.jm/news/2016-seabed-session-concludes-after-extended-council-debate-over-ltc-membership-assembly> on 13 August 2016; also, 'Decision of the Council ... relating to the election of members of the [LTC]' ISBA/22/C/29, 26 July 2016.

⁵⁷ 'Legal and Technical Commission' <https://www.isa.org.jm/authority/legal-and-technical-commission> on 13 August 2016.

⁵⁸ In its comments discussed below, the Article 154 Review Committee explicitly raised concern that members of the LTC and the Finance Committee 'should refrain from acting as delegates from their respective country in the [Authority organ] in respect of matters that are within the competence of that [Commission/Committee].'*Periodic Review of the [ISA] Pursuant to LOSC Article 154, Interim Report, Comments by the Review Committee, ISBA/22/A/CRP.3(2)*, 25 May 2016, para 18, 19.

⁵⁹ Article 154, Part XI, LOSC: 'Every five years from the entry into force of this Convention, the Assembly shall undertake a general and systematic review of the manner in which the international regime of the Area established in this Convention has operated in practice. In the light of this review the Assembly may take, or recommend that other organs take measures, in accordance with the provisions and procedures of this part and the annexes relating thereto which will lead to the improvement of the operation of the regime.'

⁶⁰ 'ISA commences first periodic review' 29 January 2016, <https://www.isa.org.jm/news/isa-commences-first-periodic-review> on 6 July 2016.

a review of the level of representation and attendance of members of the Authority at its regular annual sessions; an analysis of the performance of the Assembly as the supreme organ of the Authority; an analysis of the performance of the Council as the executive organ of the Authority; and a review of the structure of the secretariat and of the performance of its functions including its performance of the functions of the Enterprise pursuant to paragraph 5 of section 1 of the annex to the 1994 Agreement. The review would also require a review of the performance, level of representation and attendance of members of the subsidiary organs of the Authority, together with an analysis of the current and projected workload and the identification of measures that may lead to an improvement of their operations.⁶¹

Chaired by former ITLOS judge Helmut Tuerk, its conclusions and recommendations, seventeen years overdue, will be much awaited. Worthy of concern for Africa and the developing world is the assessment of 'Third World states' participation in the workings of the ISA. It ought be recalled that among the remarkable achievements of LOSC is the extent to which it provides for the concerns of the Third World in matters such as a fairer judicial settlement organ,⁶² preferential treatment in relation to marine environment pollution control,⁶³ a definitive exclusive economic zone (EEZ) to protect their fisheries jurisdiction,⁶⁴ as well as the rights of landlocked states.⁶⁵ Relevant for the review beyond state participation in ISA decision-making is the role of the Enterprise, and capacity and technology transfer to developing states.⁶⁶ The effective participation of de-

⁶¹ 'ISA commences first periodic review'.

⁶² An issue driven by African states, given their then disenchantment with the ICJ over the *South West Africa cases* and which led to the creation of ITLOS. See Oxman BH, 'The rule of law and the United Nations Convention on the Law of the Sea', 7 *The European Journal of International Law* (1996), 369; Pellet A, 'Judicial Settlement of International Disputes' *The Max Planck Encyclopedia of Public International Law*, Vol. VI, last updated April 2011, para. 69.

⁶³ Article 203, LOSC.

⁶⁴ As conceived by Kenyan Francis Njenga and Tanzanian Joseph Warioba in 1971. See Akintoba TO, *African states and contemporary international law: A case study of the 1982 Law of the Sea Convention and the exclusive economic zone*, The Hague, Martinus Nijhoff, 1996, 2-3; Njenga FX, *International law and world order problems*, Moi University Press, Eldoret, 2001, 107-161.

⁶⁵ Tuerk himself points out the role of the combined efforts of European landlocked and Third World states during UNCLOS III in securing greater rights for landlocked states in LOSC in comparison with the defunct Geneva law of the sea regime. See Tuerk H, 'Landlocked states and the law of the sea', *UN Audiovisual Library of International Law*, on 20 February 2014.

⁶⁶ Area mining technology transfer to developing states was among the thorniest issues that held up LOSC ratification by major maritime powers. To this end, Section 5, Annex, *Part XI Implementation Agreement* pegged the acquisition of such technology 'on fair and reasonable commercial terms and conditions [on the open market], consistent with the effective protection of intellectual property rights'. See also, on economic assistance to mineral export dependent developing states affected by price reductions from Area mining, Section 7, Annex, *Part XI Implementation Agreement*. However, capacity building for personnel from Third World states is already operational. ISA contractors 'have a legal obligation to provide and fund training opportunities for trainees from developing states and [ISA] personnel. The legal basis for the requirement stems from the provisions of the

veloping countries in ISA proceedings will also foreshadow how the mechanism for sharing Area exploitation benefits is effected, which will be the mandate of the ISA's Economic Planning Commission.⁶⁷

An Interim Report of the First Periodic Review of the International Regime of the Area Pursuant to Article 154 of the Convention,⁶⁸ prepared by a consultancy firm, was considered at ISA22 by the ISA Assembly, along with the comments of the Review Committee, the ISA's LTC, Finance Committee and Secretariat.⁶⁹ States, observers and stakeholders were urged to send in their comments before 15 October 2016, with a revised interim draft expected by 15 January 2017 and a draft final report by 15 April 2017⁷⁰ in anticipation of the 23rd ISA Assembly in July 2017.

The comments of the Review Committee provide useful insight. The Review Committee first laments the poor response to the review questionnaire and requests for interviews, indicating that this casts doubt on the reliability of such sparse views for gauging support for a specific finding.⁷¹

The Review Committee's comments dedicate significant concern on the need to further develop Area mining regulation and environmental protection. It affirms the need for the ISA to study the adequacy of the municipal legislations of states sponsoring entities with Area exploration contracts, in accordance with the ITLOS opinion.⁷² The ISA maintains a limited raw database of national legislation, but a qualitative assessment of adequacy, as discussed above, remains lacking.⁷³ The Review Committee also calls for an inspectorate to be urgently

Convention and the 1994 Agreement and is set out in the standard terms of contracts. The purpose of the obligation is to ensure that personnel from developing states are provided with appropriate operational expertise to enable them to participate in deep seabed mining.' See <https://www.isa.org.jm/contractor/training-activities> for further information and how to apply. Also, ITLOS, *Obligations of states*, para 157.

⁶⁷ See note 18 above.

⁶⁸ Hereinafter 2016 Interim Review Report.

⁶⁹ Decision of the Assembly regarding the interim report of the first periodic review of the international regime of the Area pursuant to article 154 of [LOSC], ISBA/22/A/11, 21 July 2016.

⁷⁰ ISBA/22/A/11.

⁷¹ ISBA/22/A/CRP.3(2), para 2.

⁷² ISBA/22/A/CRP.3(2), para 5; also ITLOS, *Obligations of states*.

⁷³ 'As at 30 May 2016, the following States and areas had provided information on, or texts of, relevant national legislation: Belgium, China, Cook Islands, Cuba, Czech Republic, Fiji, France, Germany, Guyana, India, Japan, Mexico, Nauru, Netherlands, New Zealand, Nigeria, Niue, Oman, Republic of Korea, Singapore, Tonga, United Kingdom of Great Britain and Northern Ireland, United States of America and Zambia; and a submission had also been received from the Pacific Community Secretariat on behalf of the Pacific islands region. [See] (www.isa.org.jm/national-legislation-database).⁷ Laws, regulations and administrative measures adopted by sponsoring States and other members of the International Seabed Authority with respect to the activities in the Area: Report of the Secretary-

established to enforce Area activity standards in light of the fast-approaching commercialisation of Area exploitation⁷⁴ and a clear plan on how the Authority will ensure environmental protection.⁷⁵

The Review Committee suggests that the confidentiality provisions of data supplied to ISA and lack of transparency in the work of the LTC may not fit in with the Authority's role as trustee of humankind's common heritage.⁷⁶

The Review Committee notes that the definition of 'developing state' remains unclear, but curiously recommends that the UN be consulted.⁷⁷ It would seem, given the particular attention granted developing countries in LOSC as discussed above, that such a question may be worthy of a request for an ITLOS advisory opinion. Such view is supported by the fact that the Review Committee itself expresses concern for the need to establish the Economic Planning Commission 'well ahead of the advent of commercial seabed mining', as well as begin operationalisation of the Enterprise.⁷⁸

As if to foreshadow its contested election, as discussed above, the Review Committee had also suggested that the LTC, as well as the Secretariat, should have increased levels of expertise in order to 'to incorporate applicable standards for the protection and preservation of the marine environment'.⁷⁹

Finally, the Review Committee highlights problems relating to the participation of observers in ISA debates and the 'very little substantial contribution' of the Assembly, which promotes low participation interest by member states and results in lack of quorum for Assembly meetings. It dismisses the suggestion of the consultants – who drafted the 2016 Interim Review Report – that the Assembly meet biennially as a violation of LOSC Article 159(2). Instead, the Review Committee recommends that rather the Assembly and Council meetings being held concurrently as is the present case, the Assembly should consider meeting immediately after the Council's annual meeting, thus splitting the two-week annual session to one week each for Council and later the Assembly.⁸⁰ This

General, ISBA/22/C/8, 13 June 2016.

⁷⁴ ISBA/22/A/CRP.3(2), para 6-7, 21.

⁷⁵ ISBA/22/A/CRP.3(2), para 20.

⁷⁶ ISBA/22/A/CRP.3(2), para 8, 18.

⁷⁷ ISBA/22/A/CRP.3(2), para 9.

⁷⁸ ISBA/22/A/CRP.3(2), para 10, 21. See also, Issues relating to the operation of the Enterprise, in particular the legal, technical and financial implications for the Authority and for States parties: Note by the Secretariat, ISBA/22/LTC/9, 18 April 2016.

⁷⁹ ISBA/22/A/CRP.3(2), para 11, also para 17, 18.

⁸⁰ ISBA/22/A/CRP.3(2), para 12-15.

suggestion, in any case, is customary for most other membership IGOs. It also urges the Council to meet twice a year since the Area regime is fast developing.⁸¹

Commission on the Limits of the Continental Shelf

While the determination of continental shelf limits beyond 200 nautical miles is vested in the coastal state, the Commission on the Limits of the Continental Shelf (CLCS)⁸² is mandated to receive submissions of such delineations and make recommendations which will form the basis of the final determination to be made by the coastal state.⁸³ This means that the completion of this process by coastal states will provide the definitive borders of the Area. This highly technical undertaking⁸⁴ is of particular importance to the future of the economic development of African coastal states, given the vast resources available on the continental shelf.

LOSC had set a deadline of 2004 (ten-year limit from entry into force)⁸⁵ for coastal states to formally claim their rightful share of the continental shelf. However, given the technical and financial challenges faced by the least developed coastal states, SPLOS concluded an understanding in 2001 to consider the ten-year period as starting from 13 May 1999, effectively postponing the deadline to 2009.⁸⁶ Later in 2008, state parties at SPLOS agreed to understand the 2009 deadline to have been met by their submission to the UN Secretary General of 'preliminary information indicative of the limits of the outer limits of the continental shelf beyond 200 nautical miles'.⁸⁷ State parties further agreed that such preliminary information be submitted, without prejudice to the final submission, and that the preliminary submission would not be considered by the CLCS,⁸⁸ thus only serving to allow such struggling states to meet the LOSC deadline. These understandings have thus prolonged the life of the CLCS.

⁸¹ ISBA/22/A/CRP.3(2), para 16.

⁸² Established under LOSC, Annex II.

⁸³ Article 76, LOSC.

⁸⁴ More a matter of the natural sciences than of law, akin with the verification regime of the Comprehensive Nuclear Test Ban Treaty.

⁸⁵ Article 4, Annex II, LOSC.

⁸⁶ SPLOS/72, para (a).

⁸⁷ SPLOS/183, para. 1(a).

⁸⁸ SPLOS/183, para. 1(c, b). See also UN Doc A/RES/63/111 on Oceans and the Law of the Sea, 5 December 2008.

The CLCS continues to labour under an overwhelming workload, lack of adequate funding, lack of full membership and poor participation by members as well as dwindling resources of the trust fund created to facilitate participation in the CLCS meetings.⁸⁹ CLCS members also struggle with less-than-favourable terms of service and working conditions, including inadequate office space.⁹⁰

Currently it takes at least six years, from date of receipt of submissions, for the CLCS to establish a sub-commission to consider them. As at 31 August 2015, 49 out of the 81 submissions to the CLCS were not under active consideration.⁹¹ By 18 April 2016, this had reduced to 45.⁹² In response to these concerns, SPLOS' Open Ended Working Group on the conditions of service of the members of the CLCS presented its report to SPLOS26.

Selected recent rule making development

Entry into force of the PSMA

On 5 June 2016 the Food and Agriculture Organisation (FAO) announced⁹³ the entry into force of the Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (PSMA). Adopted as an Article XIV instrument under the FAO Constitution,⁹⁴ the PSMA is the first ever binding treaty on illegal fishing and is now binding on: Australia, Barbados, Chile, Costa Rica, Cuba, Dominica, the European Union (as a member organisation), Gabon, Guinea, Guyana, Iceland, Mauritius, Mozambique, Myanmar, New Zealand, Norway, Oman, Palau, Republic of Korea, Saint Kitts and Nevis, Seychelles, Somalia, South Africa, Sri Lanka, Sudan, Thailand, Tonga, the United States of America, Uruguay, and Vanuatu.⁹⁵

⁸⁹ Statement by Kenya to SPLOS26, 23 June 2016.

⁹⁰ UN Press Release, SEA/2018, 15 June 2015; UN Press Release, SEA/2028, 15 January 2016; Letter of the Chair of the [CLCS] addressed to the President of [SPLOS26], 18 April 2016, SPLOS/298, para. 8-23, offers further insight into these problems.

⁹¹ Report of the UN Secretary General on oceans and the law of the sea, 1 September 2015, A/70/74/Add.1, para.12-13.

⁹² Letter of the Chair of the [CLCS] addressed to the President of [SPLOS26], para. 9.

⁹³ 'UN agency announces world's first illegal fishing treaty now in force' *UN News Centre* 5 June 2016 <http://www.un.org/apps/news/story.asp?NewsID=54140> on 6 July 2016.

⁹⁴ 'UN agency announces world's first illegal fishing treaty now in force'.

⁹⁵ 'UN agency announces world's first illegal fishing treaty now in force'.

The PSMA requires state parties to tighten control over their ports to detect illegal unreported and unregulated fishing (IUU), interdict offloading and the sale of illegally caught fish and, even more importantly, share information globally on offending vessels. Measures include restriction of landing sites to specific sites to facilitate inspection, regulating port entry and requiring detailed information from such vessels.⁹⁶ Practices related to illegal fishing include operating without proper authorisation, using outlawed types of gear, catching protected species and disregarding catch quotas, of which the latter two are also regulated under the LOSC regime.

With this Treaty, and given ITLOS' decisions in *MV Saiga II (Saint Vincent and the Grenadines v. Guinea)*⁹⁷ and *MV Virginia (Panama/Guinea Bissau)*⁹⁸, the legal regime on coastal state powers to regulate illegal fishing becomes even clearer. Yet, only eight of Africa's coastal states have ratified the PSMA. Unsurprisingly, Guinea, which first bore the brunt of clarifying the legal limits of coastal state powers to regulate illegal fishing, is among the state parties. African current disregard of this Treaty is all the more unfortunate as Goal 14.4 of the Sustainable Development Goals⁹⁹ specifically calls for the effective regulation, by 2020, of 'harvesting and end[ing] overfishing, illegal, unreported and unregulated fishing and destructive fishing practices.'¹⁰⁰ This is in addition to the Addis Ababa Action Agenda's assertions on enhanced capacity for monitoring, control and surveillance of fishing vessels so as to effectively prevent, deter and eliminate illegal, unreported and unregulated fishing,¹⁰¹ prohibiting subsidies that contribute to overfishing¹⁰² and the centrality of sustainable fisheries in ending hunger and malnutrition.¹⁰³

⁹⁶ 'UN agency announces world's first illegal fishing treaty now in force'.

⁹⁷ (Merits), 1 July 1999, ITLOS Reports 1999, p.4.

⁹⁸ Judgement, 14 April 2014, ITLOS Reports 2014, p.4.

⁹⁹ UNGA Resolution A/Res/70/1, 21 October 2015.

¹⁰⁰ Goal 14.4, SDGs. See also, Goal 14.6 on prohibiting subsidies that facilitate IUU, as well as Goal 14.7 on increasing the economic benefits to Small Island Developing States (SIDS) and Least Developed Countries (LDCs) through *inter alia*, sustainable management of fisheries.

¹⁰¹ Addis Ababa Action Agenda of the Third International Conference on Financing for Development (Addis Ababa Action Agenda), Annex, UNGA Resolution A/Res/69/313, para. 92.

¹⁰² Addis Ababa Action Agenda Annex, para. 83.

¹⁰³ Addis Ababa Action Agenda Annex, para. 13.