



## MODULE EIA, LESSON 2

### THE AREA: THE INTERNATIONAL SEABED AUTHORITY – ROLES, FUNCTIONS AND STRUCTURE LECTURE NOTES

#### LECTURE NOTES

I am going to say a few words about the International Seabed Authority, its role, structure and functioning. I am sure you will know it's:

- An autonomous international organization
- Based in Kingston Jamaica
- It's the organization through its State Parties to the 1982 United Nations Convention on the Law of the sea (UNCLOS) shall, in accordance with Part XI and the 1994 Implementation Agreement, organization, and control activities in the Area, particularly with a view to administering the mineral resources of the Area.

I want to emphasize at the outset, that amongst other things, the Authority's mission statement makes clear the importance attached to the effective protection of the marine environment. My own connection with Authority goes back a long way, to its establishment in early years. I have much to do with the negotiations of Part XI and have since kept in touch with the Authority's activities from a distance. This is made easier by the Secretary General's annual reports and the Authority's excellent website.

I am going to speak about the Authority as an International Organization. On the surface it looks much like other international organizations, but diving deep into it we can see that it has some very special features, not least is its extensive powers in relation to a large part of the globe's surface and some innovative decision-making provisions.

#### **International Law**

The Authority is firmly based within the international law relating to international organizations, which is a relatively new branch of international law. Even now for example, it's far from clear to what extent international organizations are bound by general international law. There are mostly parties to very few treaties, the Authority to virtually none and it's an open question how far they are bound by rules of customary international law, such as those relating to human rights or the environment, though they may certainly be guided by such rules. In its advisory opinion concerning the agreement between the World Health Organization and Egypt, the International Court said that international organizations are subjects of international law and as such are bound by any international obligations incumbent upon them, under general rules under international law. Under constitutions or under international agreements to which they are parties.

This passes any obligations incumbent upon them, is somewhat equivocal. Like most international organizations, the Authority has a constituent instrument, a foundational document set out in an international treaty.

## **Constituent Instruments**

The Authority's constituent instrument is to be found in Part XI and related provisions of the 1982 Law of the Sea convention as implemented by the Part XI implementation Agreement adopted by the General Assembly of the United Nations in 1994. The Convention entered in force on 16 November 1994, the Agreement became provisionally applicable on that day and the Authority came into being.

Institutionally the Authority is autonomous for example, it's not a part of the United Nations but its firmly anchored within the international community. It is one of three distinct. International institutions established by the Law of the Sea Convention, the others being, the International Tribunal for the Law of the Seas in Hamburg and the Commission on the Limits of the Continent Shelf, which is serviced by the UN secretariat and meets in New York.

The Authority has a relationship agreement with the United Nations. Each year the Secretary General addresses the plenary of the UN General Assembly during its annual debate on the Law of the Sea and he also addresses the annual meeting of State Parties to the Law of the Sea convention, also in New York.

## **ISA constituent instrument: consolidated versions of Part XI of UNCLOS and the 1994 Agreement**

Anyone dealing with the Authority needs at least some understanding of its constituent instrument, and for this they need to look at a consolidated version of Part XI and the 1994 Agreement. It is important to understand the relationship between Part XI, as originally drafted, and the 1994 Agreement. As is provided by the General Assembly resolution, adopting the Agreement and in the Agreement, the provisions of the Agreement in Part XI are to be interpreted and applied together as a single instrument. In the event of any inconsistency, the provisions of the Agreement prevail.

There are still some twenty or so members of the Authority that are not yet parties to the Agreement. It's important to keep encouraging to exceed, but in any event of necessity, they participate in the work of the Authority, under arrangements based on the Agreement. Like the United Nations and other international organizations, the Authority, but not its individual Organs has international legal personality, that is to say, it may have international rights and responsibilities, and it may bare international responsibility. It may also operate under domestic law, it enjoys legal status, privileges and immunities, set out in Part XI in a protocol and in a Headquarters Agreement.

## **Legal status, privileges and immunities**

The Authority's powers and functions are those expressly conferred by the Law of the Sea Convention. In addition, it has such incidental powers consistent with the Convention, as are implicit in and necessary for the exercise of those powers and functions. This reference to implied powers of the Authority, adopts a language of the International Court of Justice in the reparations for injuries case. An important statutory provision for the work of the Authority is that in order to minimize cost to State Parties, all Organs and subsidiary bodies to be established under the convention, shall be cost effective. A related provision states that the functioning of all Organs and subsidiary bodies of the Authority shall be based on an evolutionary approach.

## **Mandates of ISA under UNCLOS and the 1994 Agreement**

This is not the occasion to describe in detail what the Authority has done to date, others are going to do that in other lessons. I shall just recall the broad mandates assigned to the Authority, include:

1. Ensuring that activities in the area are carried out for the benefit of mankind as a whole;
2. Ensuring effective protection for the marine environment and of human life;

3. Promoting and encouraging the conduct of marine scientific research in the area;
4. And the effective participation of developing states in activities in the area.

Also included are:

1. the importance of fostering healthy development of the world economy and balance growth of international trade;
2. ensuring the development of the resources of the Area;
3. the orderly safe rationale management of the area;
4. the enhancement of opportunities for all state parties and;
5. the development of the common heritage of the benefit of mankind as a whole

As you can see, this is potentially a very broad mandate.

The system of exploration, exploitation of mineral resources of the Area, is often referred to as the parallel system. This was devised early in the UN conference on the Law of the Sea as compromise between those who wanted all activities in the Area to be conducted by the Authority and those who considered they should be conducted only by States and entities sponsored by them.

Under the parallel system both the Authority through its circled Enterprise and States now sponsored by them, they conduct mining activities. On a practical level the 1994 Implementation Agreement encourages joint ventures between the Enterprise and other operators. An important task of the Authority itself, is to adopt rules, regulations and procedures for deep seabed mining, this is known as mining code. The Authority has three principal Organs:

1. An Assembly;
2. A council;
3. And a Secretariat headed by the Secretary General who is elected for a renewable four-year term

Other important statutory Organs are the Legal and Technical Commission, which is an Organ of the Council and the Finance Committee. And in addition, as I said there is an Enterprise originally envisaged as Organ which would itself carry out mining activities. The Enterprise's position was much altered by the 1994 Agreement. From a legal point of view it's important to note the frequent references throughout Part XI to things being done in accordance with the provisions of Part XI These expressly limit the exercise of the Authority's powers and functions to the particular terms and conditions set forth in the Convention. And in addition it is expressly stated that each principle 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 other Organs. So you can see the Convention was drafted to be very carefully balanced and to impose quite strict limitations on what the various Organs of the Authority do.

Turning quickly to the assembly, it's the plenary Organ of the Authority. As with all Organs, the general is the decision making shall be by consensus. Its only if all efforts to reach decision have been exhausted that the Authority may adopt decisions on questions of substance by a two-third majority. And in fact, voting has been exceedingly rare expect from indicative votes concerning the election of the Secretary General. That's the only example of voting.

The thirty-six-member Council together with the Legal and Technical Commission is really the central body of the Authority. It's unique among organs of international organization, both in its and its decisions making. The aim is to make sure there is wide spread of its decisions, across all interest groups and the majorities cannot override minorities and that at the same time, key decisions will not be blocked; so, you can see it was a very delicate matter negotiating the provisions concerning the Council. The members of the Council are elected by the Assembly, for staggered four-year term according to a very complicated formula, whose implementation requires a good deal of negotiation, and which leaves the Assembly very little discretion when electing a Council. Very briefly the Council comprises five groups:

1. Large consumers or importers of the Minerals found in the deep seabed;
2. Large investors in deep seabed mining;
3. Land based producers of these minerals and;
4. Developing States representing special interests and then;
5. half the Council eighteen members elected to ensure equitable geographical distribution in the Councils of whole.

Each group is represented by the members nominated by the group and voting by the Council is by Chambers and very complex, but the bottom line is that if a majority of any Chamber for example the consumers or the investor votes against a substantive decision, the decision is not adopted. But as for the Assembly, the general rule is that the decision making should be by consensus and despite all the complexities, perhaps because of them, decisions are indeed taken by consensus in practice. The Legal and Technical Commission is a subsidiary Organ of the Council, in practice composed of, technical experts, not so much lawyers. It mostly relies on the Secretariat for legal input, its elected by the Council and plays a key role in relation to the adoption of the Authority's rules, regulations and procedures and in recommending the approval for contracts for seabed mining. Others are going to describe its work in detail.

The Finance Committee and as you know financing is crucial to any international organization, was placed on a statute basis by the 1994 Agreement. It's composed of fifteen persons who sit in their personal capacity, until the Authority is self-financing, the Committee must include members from the five largest contributors to the Authority's ministry budget.

Decision of the Finance Committee are taken by consensus, and decisions of the Assembly and the Council on a range of matters of financial implications must take into account recommendation of the Finance Committee. So, you can see there is very strict control of the budgetary arrangements for the Authority. There is going to be separate lesson in this course about the Enterprise, so I shall refer only to and very briefly to its institutional position. The Enterprise is an organ of the Authority but it enjoys a large measure of autonomy, in the conduct of its operations. It has its own statute in Annex 4 of the Convention. Nothing in the convention makes the Authority or a member of the Authority liable for the acts of the Enterprise. Within the international legal personality of the Authority, the Enterprise has such legal capability as is provide for in its statute, it has distinct privileges and immunities. The separation of the Enterprise from the Authority is quite deliberate and it will be essential going forward to adhere strictly to the statutory provisions in this regard.

Mining activities in the deep seabed take place under a plan of work for exploration or exploitation, which usually takes the form of contract. The approval for a plan of work involves a painstaking process with analysis of technical including environmental aspects and a minimum of political interference. The need for adequate provision to protect the environment is one of the most important matters considered. Decision making is governed by a complex set of provisions. The essence of which is that if the Legal and Technical Commission recommends a plan of work, the council will approve it unless the council takes a positive decision to disapprove it by two-thirds majority including a majority member of the members in each of the

Council's Chambers. Again, very strict control over the workings of the Council.

The preparation and adoption of the Authority's budget, of course is central in defining the provisions concerning financial arrangements. As I have shown, care was taken to ensure that the largest contributors could not be overruled and the role of the Finance Committee in this regard is crucial. The largest contributors nominate members to the Committee, the Committee has to act by consensus and the Council and Assembly must adopt the budget on the basis of the Committee's recommendation. But in fact, thanks to good cooperation and trust between successive Secretaries General and the member of the Finance Committee, budgets have always been agreed; between them they have been kept quite low and adequate in keeping with the cost effective principle that I mentioned.

Part XI includes provision settlement of disputes and advisory opinions given by the International Tribunal for the Law of the Seas. The Seabed Dispute Chambers of the International Tribunal has jurisdiction in relation to a number disputes concerning activities in the Area as well as giving advisory opinions and it gave its first advisory at the request of Council of the Authority in 2011. That was an opinion that gave important and very useful explanations of Part XI. It is important to note that the Tribunal and the Seabed Dispute Chambers, is not an Organ of the Authority but its part of the system by which the Authority's Organs operate.

In conclusion, let me say that I believe the International Seabed Authority is operating well. Over twenty years ago I suggested that three objectives for the members of the Authority would be :

1. To ensure that nothing was done to that would unnecessarily hamper commercial deep sea mining, if and when that became a real prospect while taking into account other interest, in particular the need for adequate environmental protection and the need to avoid unfair competition;
2. second to ensure that Part XI and the 1994 Agreement was strictly adhered to, in particular that the Authority did not exceed its powers and functions and that procedural safeguards, especially the relationship between the Council and the Assembly and then then the budgetary Finance Committee were maintained and;
3. thirdly to ensure the Authority remains cost effective.

I believe that these objectives have indeed guided the work of the Authority and the successive Secretaries general in particular the terms of the constituent instrument have been strictly adhered to, though by general agreement, flexibility has been permitted where dictated by common sense. And provided these objectives continue to be respected, as I believe they will be, the future of the International Seabed Authority, looks bright.