

Africa's combined exclusive maritime zone concept

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The establishment of the Combined Exclusive Maritime Zone for Africa (CEMZA) is a strategic objective of Africa's Integrated Maritime Strategy. The intention is to create a common maritime space to facilitate geostrategic, economic, political, social and security benefits and minimise transnational threats. This report unpacks the nature and implications of the concept. Although the challenges of implementation are enormous and the prognosis appears bleak, the report identifies some examples from which best practices can be drawn.

Key findings

- ▶ The concept of a ‘maritime space without barriers’ envisages a geographical region in which states exercise joint or concurrent powers.
- ▶ Once it is acknowledged that issue-specific multilateral area designations co-exist with the UNCLOS framework it is evident that holistic cooperative governance could aid in implementing ‘common African maritime affairs policies’.
- ▶ Proponents of the CEMZA concept can find precedents, analogies or best practices in existing structures for exercising cooperative governance within a common geographical zone and resolving territorial and boundary disputes.
- ▶ There is no indication in the CEMZA provisions that states should cede their sovereign rights. However, there is also no precise description of the limits or definition of the rights and obligations of states in relation to the CEMZA. It is also unclear whether the ‘collective efforts’ described in the provisions are restricted to member states.
- ▶ When prescribing common enforcement jurisdiction mechanisms over the CEMZA the rights and obligations of member states in the exclusive economic zone should be closely analysed.
- ▶ The application of the law of *dédoulement fonctionnel* is recommended for the governance structure of the CEMZA.

Recommendations

- ▶ The Strategic Special Task Force (S2TF) must delimit the CEMZA precisely and indicate whether it is a combination of member states’ Exclusive Economic Zones (EEZs) or combines other zones falling within the African Maritime Domain (AMD).
- ▶ The S2TF should also clarify whether ‘inland resources’ are all such resources of member states or only those shared by member states.
- ▶ The Solemn Declaration should contain an explicit provision stating that the sovereign rights of member states should not be affected.
- ▶ The declaration should set out the extent of jurisdiction enjoyed by member states over the CEMZA and provide a scale of participation in joint enforcement operations.
- ▶ If the CEMZA is to overlap with a member state’s internal waters and territorial sea, preferential rights to exercise jurisdiction should vest in that state.
- ▶ National legislation relating to the maritime zones of member states must be surveyed by the S2TF in order to clarify their obligations and entitlements.
- ▶ The declaration should set out the role of international partners, organisations, institutions and programmes, if any, in managing the CEMZA.
- ▶ Territorial and boundary disputes, including matters in which arbitration is pending, must be surveyed and the potential impact on delimitation identified.
- ▶ The AU Commission should weigh up the logistics and benefits of formulating a binding instrument setting out the content of the Solemn Declaration.

Background

A 'new frontier of African renaissance' is the way the African Union (AU) describes the Blue Economy¹ and its platform, the African Maritime Domain (AMD). The all-encompassing definition of this domain is that it comprises

all areas and resources of, on, under, relating to, adjacent to, or bordering on an African sea, ocean, or African lakes, intra-coastal and inland navigable waterways, including all African maritime-related activities, infrastructure, cargo, vessels, and other means of conveyance. It also includes the air above the African seas, oceans, lakes, intra-coastal and inland navigable waterways and to the oceans' electromagnetic spectrum as well.²

This vast domain is surrounded by water bodies and ocean systems – the Mediterranean Sea in the north, the

Red Sea in the north-east, the Indian Ocean on the south-east and the Atlantic in the west.³

Only 16 of the 55 countries in Africa are landlocked states with no direct access to the ocean. The other 39 account for a total coastline of 26 000 nautical miles and 13 million km² of exclusive economic zones.⁴

The global instrument that sets out the legal framework for this domain is the United Nations Convention on the Law of the Sea (UNCLOS).⁵

The contribution of newly-independent African states to the Third United Nations Conference on the Law of the Sea (UNCLOS III), 1973–1982 is well documented.⁶ It constituted an opportunity to break away from their colonial past and confront doctrines such as the freedoms of the sea, which contributed to colonisation and the exploitation of resources to their detriment.⁷

Figure 1: Africa's coastal and landlocked states



Source: Adewumi 2020⁸

In 1974 the Organisation of African Unity issued a declaration on the law of the sea which presented a harmonised African position on the salient issues in UNCLOS III.⁹ In particular, the declaration contained a description of the concept of the exclusive economic zone (EEZ).¹⁰

African leadership in the doctrinal formulation, refinement and brokering of the EEZ was particularly noteworthy and African coastal states achieved their goal of securing exclusive rights to the living and non-living resources within the zonal limits.¹¹

However, in the more than three decades since the adoption of UNCLOS its transformative impact has been questioned. Vrancken comments that 'UNCLOS fails to go beyond formal equality on land and to fully acknowledge the range and depth of substantive inequalities that continue to scar the international community.'¹²

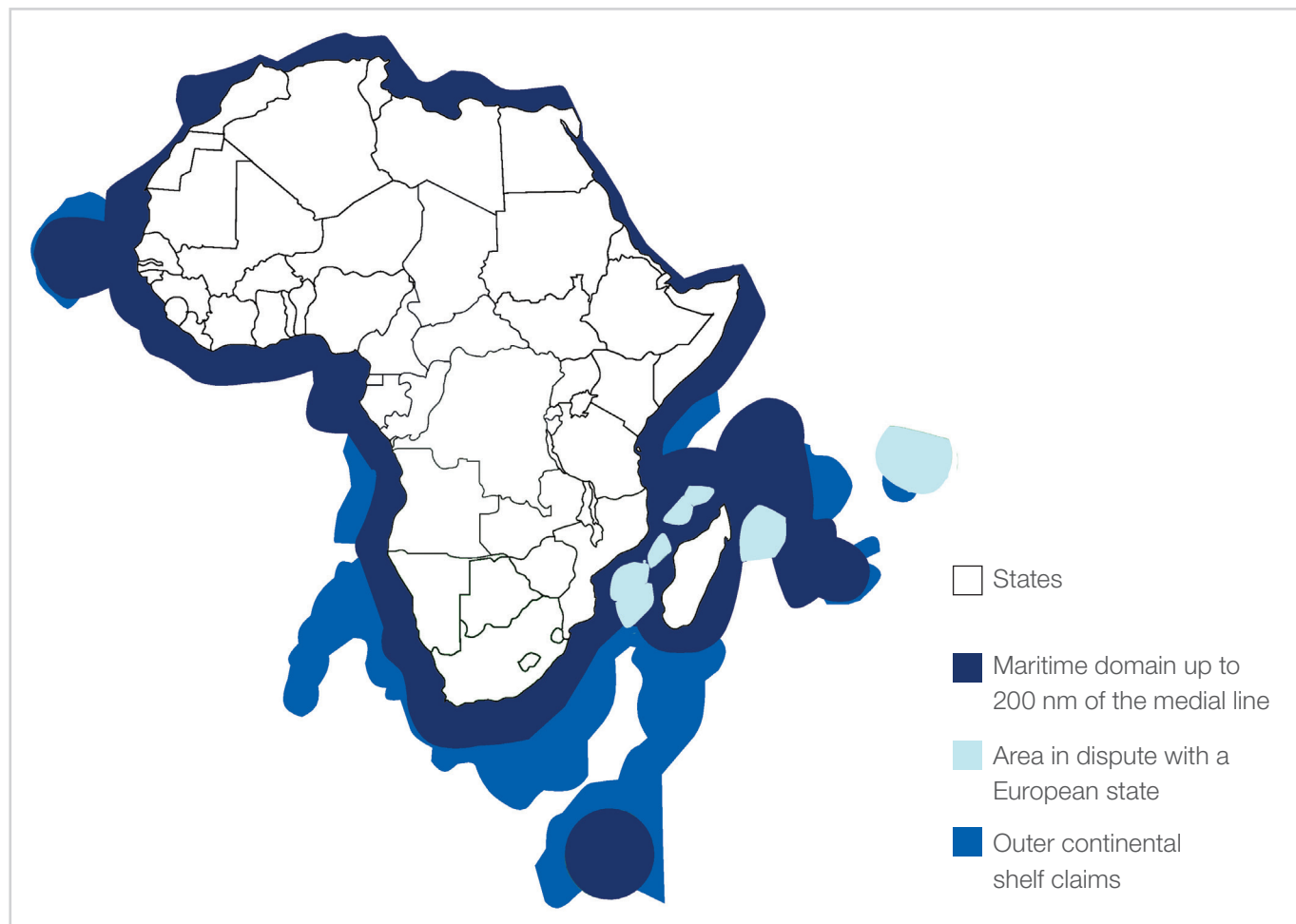
Furthermore, in a world that looks increasingly to the oceans as a reservoir of resources there is an underlying insecurity about growing human activity there.

This insecurity arises from increased transnational organised crime; illegal, unreported and unregulated fishing; environmental crimes and marine environmental degradation; disappearing biodiversity and the effects of climate change.

The AU recognises that sustainable protection and exploitation of the African maritime domain offers a vast potential for wealth creation. At the same time, there are common challenges and insecurities that must be addressed by a strategy that can be implemented effectively.

This requires innovative thinking, envisioning norms and considering the feasibility of implementing such a strategy. The AU continues to set norms that will

Figure 2: Africa's maritime domain



Source: Vrancken and Tsamenyi, 2017¹³

buttress the continental agreements and policy regulating the African maritime domain.

In 2009 the AU Assembly, concerned about maritime security, including piracy, illegal fishing and the dumping of toxic waste, called on the AU Commission to develop 'a comprehensive and coherent strategy to combat these scourges'.¹⁴

In the more than three decades since the adoption of UNCLOS its transformative impact has been questioned

The result was the adoption of the 2050 Africa's Integrated Maritime Strategy (AIMS),¹⁵ consisting of 'overarching, concerted and coherent long-term multi-layered plans of actions that will achieve the objective of the AU to enhance the maritime viability for a prosperous Africa'.¹⁶ One of the strategic objectives of the AIMS is the establishment of a Combined Exclusive Maritime Zone of Africa (CEMZA).

The leadership of the AU's predecessor in the formulation of a *sui generis* EEZ that confronted existing principles of the law of the sea and paved the way for securing exclusive rights to the resources in the African maritime domain can serve as an inspiration to bring African states together to realise the objective of the CEMZA.

This report unpacks the CEMZA concept, considers its compatibility with UNCLOS and highlights challenges to its implementation.

AIMS and CEMZA provisions

The AIMS is far more comprehensive than the mandate given in 2009, 'to foster increased wealth creation from Africa's oceans and seas by developing a sustainable thriving blue economy in a secure and environmentally sustainable manner'.¹⁷ It has been described as a 'bold manifesto of Africa's intent to harness the oceans for the advancement of its people'.¹⁸

Two paragraphs in the AIMS are devoted to the CEMZA concept. Paragraph 29 provides brief procedural guidelines and highlights the desired outcomes:

Africa is to establish, as appropriate and when permissible, a Combined Exclusive Maritime Zone of Africa (CEMZA). This will require the

establishment of a dedicated Strategic Special Task Force (S2TF) to prepare the technical file which will underpin the Solemn Declaration of the CEMZA. The technical file will include charts presenting the CEMZA limits. CEMZA is expected to grant Africa enormous cross-cutting geo-strategic, economic, political, social and security benefits, as it will engender collective efforts and reduce the risks of all transnational threats, environmental mismanagement, smuggling and arms trafficking.

Paragraph 30 further describes the concept and desired outcomes:

The CEMZA, being a common African maritime space without barriers, is a concept which aims at 'Boosting intra-African Trade', eliminating or simplifying administrative procedures in intra-AU maritime transport, the aim being to make it more attractive, more efficient and more competitive, and do more to protect the environment. The CEMZA will contribute to the integration of the internal market for intra-AU maritime transport and services. The AU shall further set out guiding principles for the development of a common information sharing environment for the CEMZA. This should allow for the convergence of existing and future monitoring and tracking systems used for maritime safety and security, protection of the marine environment, fisheries control, trade and economic interests, border control and other law enforcement and defence activities.

Annex B to AIMS contains a definition of the CEMZA:¹⁹

Without prejudice to maritime zones as established by the UNCLOS for individual nations, the [CEMZA] defines a common maritime zone of all AU Member States. It is to be a stable, secure and clean maritime zone in the view of developing and implementing common African maritime affairs policies for the management of African oceans, seas and inland waterways resources as well as for its multifaceted strategic benefits. The CEMZA will grant Africa enormous crosscutting geostrategic, economic, political, social and security benefits, as well as minimize the risks of all transnational threats including organized crime and terrorism in Africa.

This definition clarifies the concept in broad terms in relation to the established UNCLOS regime and

alludes to its application to African oceans, seas and inland waterways.

Annex C to the AIMS provides a plan of action for putting it into operation. As a short-term goal (envisaged between 2013 and 2018), the AU was to take the lead in conducting research into the establishment of a CEMZA and submit a CEMZA research report during 2018.²⁰ Furthermore, as provided in paragraph 29, a technical file that sets out the limits of CEMZA must be prepared by the S2TF. To date, the research report has not been released and the Special Task Force is yet to be put in place.²¹

As a result the CEMZA is yet to be established and remains a concept on paper only. It has not been referred to in a key subsequent instrument, African Charter on Maritime Security and Safety and Development in Africa (Lomé Charter), adopted in 2016.²² The charter, however, uses the phrase 'maritime domain'.²³

The above provisions constitute the full suite of primary sources on the CEMZA. Because has yet to be put into operation it is not surprising that there is dearth of scholarly commentary on it.

The African maritime domain is presently not a unitary zone but is fragmented into almost 40 national maritime domains

Potgieter and Walker note that '...it is not all clear what this [CEMZA] means for the various participants and stakeholders.'²⁴ Vrancken observes that '[i]t is not entirely clear what the Zone, which is defined as "a common African maritime space without barriers" would entail from a legal perspective.'²⁵

The implications of CEMZA are also a source of concern, for example, Benkenstein observed that 'African governments will undoubtedly be concerned about the full implications of CEMZA in relation to national sovereignty, particularly with regard to resource utilization'.²⁶ Egede suggests that 'if the idea of the CEMZA is to transcend the sovereignty/sovereign rights given to each coastal State over their marine space by the provisions of [UNCLOS] ... this would obviously require rather complex negotiations amongst AU member States'.²⁷

The fact that the AIMS is not a binding legal instrument will be pertinent to any analysis of the CEMZA provisions. Given the broad strokes by which the concept is painted in the AIMS, together with the provisions for its functions (i.e. the establishment of the S2TF and the release of a technical file), a contextual and purposive analysis must complement a textual interpretation of the CEMZA provisions.

The case for the CEMZA

Before the CEMZA provisions highlighted above are analysed in relation to the existing UNCLOS regime the concept of a 'maritime space without barriers' and a maritime zone is considered in general. This concept envisages a broad common geographical region²⁸ where states belonging to the region exercise specified joint or concurrent powers for the purposes of cooperation.

Certain rudimentary concepts must be revisited here. The concept of a 'region' itself has been described as malleable.²⁹ VanderZwaag notes that '[r]egions are human constructs subject to considerable overlaps and blurrings because of the many ways they can be defined'.³⁰

The concept of a 'maritime zone' could refer to (i) zones generated by a sea-coastline and (ii) zones in freshwater lakes, fully enclosed salt-water lakes or seas not connected to another sea or ocean.³¹ Molenaar submits that the latter category consists of waters that are generally accepted not to be subject to the international law of the sea.³² References to a maritime zone would generally relate to the former category and, by implication, would exclude inland waterways and riverine systems. The definition of the African maritime domain, however, appears to encompass both categories.

The concept of a maritime zone also embodies two further categories:

- coastal state maritime zones³³
- areas beyond national jurisdiction, namely the high seas and the area³⁴

In terms of this categorisation the African maritime domain is presently not a unitary zone but is fragmented into almost 40 national maritime domains.³⁵ The consequence of this fragmentation is significant. Molenaar points out that '[r]estricting maritime zones ... to these two categories excludes the wide range

of essentially issue-specific multilateral area designations, whether by international bodies or not, that are in existence today.³⁶ There are regions in the African maritime domain that are delineated for different purposes, functions or parameters and these regions can otherwise overlap.³⁷ They would fall into the following broad categories:

- *Management functions*, which could include, for example:
 - Fisheries: where there could be considerable overlaps in many regions because of multiple arrangements/agreements put in place over time to address priority fisheries management issues.³⁸ The drafters of UNCLOS were aware that ecosystems and fisheries resources often straddle maritime boundaries and provision has been made there for states to agree on measures for conservation and coordination.³⁹
 - Shipping: possible future emissions control areas established to minimise airborne emissions from ships.
 - Migratory species and conservation: whale sanctuaries established by the International Whaling Commission; regional wildlife and nature conservation agreements that overlap with regional seas programmes and transboundary marine protected areas.
- *Oceanographic and ecological parameters*, which would include:
 - Large marine ecosystems (LME) consisting of the Agulhas current LME, Somali coastal current LME, Arabian sea LME, Red Sea LME, Mediterranean Sea LME, Canary current LME, Guinea current LME and the Benguela Current LME. The African LMEs, which are some of the most productive in the world, are shared by 33 coastal states and 600 million people.⁴⁰
 - Ecological regions covering relatively large areas of ocean containing diverse flora, fauna and ecosystems that are geographically distinct from others.
- *Political and economic expediency* would entail:
 - Trade facilitation and simplifying administrative requirements for intra-African transport.
 - Safety and security of navigation, including long-range identification and tracking zones, search and rescue regions and designation of places of refuge.

Once it is acknowledged that issue-specific multilateral area designations co-exist with the UNCLOS framework it is easy to see how holistic cooperative governance could aid in implementing the ‘common African maritime affairs policies’ described in the AIMS.

A variety of commentators have supported this view. According to Rao, ‘African states have long been conscious of such a regional imperative to commonly protect their coastal resources and good order, which are gravely threatened by a multitude of factors.’⁴¹

It is recognised that national management of the fragmented maritime domain is inadequate. For example, Molenaar remarks that ‘[s]tate practice demonstrates that compliance with rules concerning the conservation of

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these resources cannot be effectively ensured by self-regulation on the basis of the reciprocity'.⁴²

Vrancken adds that '[t]he inability of individual African States, to varying degrees, to maintain law and order at sea opened the door to the possibility of some level of continental federalization of the AMD in the form of the CEMZA'.⁴³ In these circumstances the CEMZA could facilitate much needed pooling of resources and capacity in an environment with fewer obstacles created by the extant jurisdictional framework.

The question arises whether the CEMZA concept is consistent with the existing international law of the sea

VanderZwaag cautions against a 'silo approach' to governance, giving the example of regional fisheries management organisations that have 'concentrated on their own mandates with little or no attention being paid to potential areas of common concern, such as the impacts of pollutants and coastal habitat degradations on fish stocks and the need to establish marine protected areas'.⁴⁴

This silo approach or myopia could feature in states' management of their own maritime zones, which Vrancken argues creates 'serious obstacles when combatting transnational threats and avoiding large-scale mismanagement'.⁴⁵

Cooperative measures are, however, a feature of the existing UNCLOS regime and there are articles setting out different ways of dealing with, *inter alia*, conservation and management of living resources of the high seas,⁴⁶ enclosed or semi-enclosed areas,⁴⁷ landlocked states,⁴⁸ marine scientific research,⁴⁹ transfer of technology and scientific knowledge relating to activities in the Area,⁵⁰ consultation and cooperation with international and non-governmental organisations,⁵¹ protection and preservation of the marine environment,⁵² avoidance of unnecessary physical inspection of vessels at sea,⁵³ responsibility and liability for damage to the environment,⁵⁴ marine scientific research,⁵⁵ development and transfer of marine technology⁵⁶ and archaeological and historical objects found at sea.⁵⁷

A precursor to the CEMZA concept was contained in a proposal by Libya to the AU Assembly in 2009 that

an 'African Agency for the Protection of Territorial and Economic Waters of African Countries' be established.⁵⁸ The Libyan government contended that

in order to protect the economic waters of Africa and to put an end to the unjust and illegal exploitation of this wealth, there is need for Africa to put in place an effective instrument to regulate their exploitation for the benefit of the coastal populations and the entire African peoples.⁵⁹

Although this agency was never established, the proposal gained acceptance at the AU.⁶⁰

Based on the above, proponents of the CEMZA concept can find precedents or analogies within existing structures for exercising cooperative governance within a common geographical realm for the mutual benefit of all stakeholders.

Compatibility with the UNCLOS framework

The way in which the CEMZA provisions in the AIMS were formulated make it difficult to define its legal content precisely. However, as shown above, this does not mean that it is an entirely vague abstraction. The question arises whether the CEMZA concept is consistent with the existing international law of the sea. An instrument establishing a zone should contain:

- a precise geographical delimitation of the zone
- the definition of the obligations of zonal and non-zonal states *vis-à-vis* the zone
- procedures for implementation, observation and verification and enforcement mechanisms⁶¹

For ease of reference, the germane principles contained in UNCLOS provisions are set out first. In the fragmented African maritime domain, coastal states exercise:

- *sovereignty* over their internal waters⁶² and territorial sea⁶³
- *jurisdiction* over the contiguous zone, and sovereign rights over the EEZ⁶⁴ and continental shelf

In the former category every coastal state enjoys *full sovereignty* over its internal waters⁶⁵ and can exercise complete *legislative and enforcement jurisdiction* in the territorial sea over all matters and all people in an exclusive manner unless international law provides otherwise.⁶⁶ The main restriction on the coastal state's

sovereignty is the right of innocent passage of foreign vessels through the territorial sea.⁶⁷

In the latter category, in the contiguous zone, the coastal state is vested only with *enforcement jurisdiction* of its customs, fiscal, immigration or sanitary law and regulations within its territory, internal waters and territorial sea.⁶⁸ The legal regimes governing the EEZ and the continental shelf were essentially a result of the aspiration of coastal states to control offshore natural resources.⁶⁹

In terms of the EEZ the coastal state has acquired two types of powers. The first is *sovereign rights* for the purpose of exploring and exploiting natural resources.⁷⁰ This means that other states cannot explore and exploit these resources without the consent of the littoral state.

The coastal state also has sovereign rights to explore and exploit the natural resources over the continental shelf.⁷¹ The second power is *jurisdiction* over specific activities in the EEZ, such as the establishment and use of artificial islands, installations and structures, marine scientific research and the protection and preservation of the marine environment.⁷²

The use of the word 'combined' suggests that the CEMZA will merge existing zones into one common zone

In respect of other matters, other states may enjoy in the EEZ of the coastal state some of the freedoms of the seas and general provisions of the high seas regime.⁷³ In particular, other states enjoy the freedoms of navigation, overflight and laying submarine cables and pipelines in the EEZ.⁷⁴ These freedoms are not a wholesale import of the freedoms enjoyed on the high seas⁷⁵ and may be qualified by coastal state jurisdiction in the EEZ.⁷⁶

If the CEMZA provisions are read in isolation the question arises whether the 'common maritime space without borders' means that the fragmented maritime zones under the extant UNCLOS regime would be replaced by a common zone with new limits delineated and exclusive sovereign rights to resources would instead be pooled for the communal benefit of all Africans.

An analysis of the general tenor of the CEMZA provisions reveals that there appears to be no indication that

states should cede their exclusive sovereign rights. Furthermore, the definition of the CEMZA in annex B of the AIMS indicates that its establishment is '[w]ithout prejudice to maritime zones as established by the UNCLOS for individual nations'.

The definitive answer can be found in paragraph 13 of the AIMS, which provides that '[n]othing in this document shall be construed or applied contrary to the sovereignty of any of the AU Member States in accordance with the principles of international law'. Paragraph 27 also provides that the AIMS shall be interpreted and implemented in conjunction with all relevant AU, national and international regulatory frameworks.

Therefore, the geographical extent of the CEMZA and the rights of obligations of the parties must be considered in light of the unambiguous provision that the CEMZA must not be applied in ways that conflict with the existing legal framework.

Geographical extent

From the above it appears that the CEMZA is an issue-specific combined zone, co-existing with the maritime zones under UNCLOS. The question arises whether its limits would overlap with the outer limits of the EEZ and possibly the continental shelf.

As seen in paragraph 29 of AIMS there is no precise description of the limits of the CEMZA. The use of the word 'combined' suggests that the CEMZA will merge existing zones into one common zone.

The reference to 'exclusive' suggests that the existing zones that would be combined are the EEZs of AU member states. In a symposium at the AU the union's legal counsel, Ambassador Namira Negm, referred to a '[c]ommon Fisheries Policy for the conservation, management and exploitation of fish stocks in accordance with the ecosystems and precautionary approach for the *whole Exclusive Economic Zone for Africa*' (my emphasis).⁷⁷

The continental shelf is also a resource-oriented zone and Vrancken notes that there should be no reason why it should not also be included in the CEMZA.⁷⁸ A strong indication that it is contemplated that the CEMZA will be a combined EEZ can be found by comparing a similar provision in the Economic Community of West African States (ECOWAS) Integrated Maritime Strategy (EIMS).

One of the strategic objectives is to ‘develop and promote efficient and responsible maritime resource management’ in its maritime domain (EMD).⁷⁹ Paragraph 27(i) provides that ‘ECOWAS has to develop a policy for the management of the EMD (*i.e. combined ECOWAS Member States EEZs*)’ (my emphasis).⁸⁰

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However, the definition of the AMD not only envisages the seaward EEZ it refers to areas in the hinterland such as ‘African lakes, intra-coastal and inland navigable waterways’.⁸¹ The CEMZA definition also refers to ‘inland waterways resources’.⁸² Inland water resources could also benefit from the objectives of creating a ‘stable, secure and clean zone ...’ For example, 30 million people live around Lake Chad, a shallow water body in the Sahel region where four countries – Nigeria, Chad, Niger and Cameroon – share borders.⁸³ The region has been called one of the most unstable in the world.⁸⁴

Rights and obligations of states

There is also no precise definition of the rights and obligations of states in relation to the CEMZA. As pointed out above, member states enjoy sovereignty over their respective internal waters and territorial sea, certain jurisdiction over the contiguous zone and sovereign rights over the EEZ and continental shelf.

According to a media report, former AU Commission chairperson, Dr Nkosazana Dlamini-Zuma referred to the CEMZA as ‘the collective exercise of sovereignty’ and also used the phrase ‘pooling of sovereignty’.⁸⁵ This could imply the pooling of sovereign rights in the EEZ or the continental shelf or the ceding of sovereign prerogatives of member states in internal waters and the territorial sea, which would go beyond the provisions of paragraph 13 of the AIMS.

If the pooling of sovereignty and sovereign rights of member states are excluded from the CEMZA concept, what remains is the exercise of jurisdiction. The CEMZA provisions referred to above use the phrases ‘collective efforts ...’, ‘protect the environment ...’, ‘common information sharing ...’, ‘monitoring and tracking ...’, ‘management of African oceans ...’ which point to the exercise of common or joint enforcement jurisdiction to manage risk and resources within the AMD.

The case for cooperative governance and joint or common enforcement jurisdiction has been made above. The contemplated Solemn Declaration of the CEMZA must therefore provide a scale for the extent of joint or common enforcement jurisdiction by member states in zones established by the UNCLOS regime.

The definition of

the AMD

also includes African lakes, intra-coastal and inland navigable waterways

Legal and political challenges

The S2TF must be cognisant of the following legal and political challenges in preparing the technical file underpinning the CEMZA:

Legal challenges

Gavouneli has commented that the *sui generis* nature of the EEZ meant that even the International Tribunal on the Law of the Sea (ITLOS) was at a loss to identify the exact powers of states in the EEZ.⁸⁶ In the *M/V Saiga*, the ITLOS decided a matter regarding offshore bunkering on the particular circumstances of the case without addressing the broader question of the rights of coastal states and of other states with regard to bunkering in the EEZ.⁸⁷ This example illustrates that when prescribing common enforcement jurisdiction mechanisms over the CEMZA the S2TF should analyse closely the obligations of member states.

Chircop *et al.* comment that despite the longstanding African regional support for UNCLOS a significant number of states have not legislatively appropriated the full maritime zone benefits provided to littoral states by UNCLOS.⁸⁸

Using information provided by the United Nations Division for Ocean Affairs and the Law of the Sea, it appears that less than half of Africa's coastal states have fully utilised UNCLOS to maximise permissible maritime zones.⁸⁹

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Although the maximum breadth of the territorial sea prescribed in UNCLOS is 12 nautical miles, Togo claims a 30 nautical mile territorial sea.⁹⁰

Several coastal states have not claimed a contiguous zone,⁹¹ while others may have declared or delimited the EEZ boundary with a neighbouring state but have not necessarily legislated their EEZs.⁹²

Where states have legislated their EEZs the practice has been to conform to the text of Part V of UNCLOS. However, there have been different approaches. For example, in Kenyan legislation there does not appear

to be a distinction between sovereign rights and jurisdictions in the EEZ.⁹³

South African legislation has equated sovereign rights over natural resources in the EEZ with those rights enjoyed over natural resources in the territorial sea. Section 7(2) of the Maritime Zones Act⁹⁴ provides that the republic shall have 'the same *rights* and *powers* as it has in respect of its territorial waters' (my emphasis). However, it has not set out the jurisdiction it enjoys in the same legislative provisions.⁹⁵ The implications of this omission are critical if the same member states are expected to exercise effective management of the CEMZA.

Member states, therefore, must legislate the full maritime zone benefits available under UNCLOS and define the extent of their sovereign rights, obligations and jurisdictions through such legislation. Once they have done so and the CEMZA has begun to operate individual member states will be able clarify the applicable rules vis-à-vis other member states and their own national authorities and courts will have the appropriate guidance on the extent of jurisdiction that may be exercised over the CEMZA.

Political challenges

The CEMZA provisions envisage the drawing up of charts depicting its limits or boundaries. The drafters of the charts must be cognisant of any territorial and boundary disputes in the AMD. 'Boundaries' are lines defining a territory, marking the limits of territorial sovereignty, sovereign rights⁹⁶ and jurisdiction, whereas 'territories', generally speaking, are those areas over which such rights are exercised.⁹⁷

Territorial disputes involve, in general, one state claiming to dislodge another from an area of its sovereignty on the ground of better legal title.⁹⁸ Boundary disputes, on the other hand, usually relate to ambiguities in the instruments creating the boundaries or to problems with fixing the borderline in the field or on hydrographic charts.⁹⁹

The creation of the CEMZA boundaries will involve the application of two existing processes. The first is *delimitation* – the determination of the boundary line by treaty or otherwise and its expression in verbal terms.¹⁰⁰ Delimitation is a political process established by diplomats.¹⁰¹

The second is *demarcation*, a physical demonstration of the delimitation in the field by means of boundary posts or hydrographic charts. Demarcation is a technical operation.¹⁰² In this regard, the S2TF is expected to work closely with the African Union Border Programme.¹⁰³

The EIMS provides that 'clear delineation of maritime borders and associated claims, and common agreement thereto, is essential for harmonious coexistence and the management thereof.'¹⁰⁴ VanderZwaag comments that 'while transboundary cooperation can occur even where ocean boundaries and areas remain contested, regional cooperation may be "chilled" by territorial and maritime boundary disputes.'¹⁰⁵

'Most African countries lack the maritime capacity to patrol their maritime domain'

The delimitation of the maritime boundaries between Kenya and Somalia, for example, is the subject of a pending dispute before the International Court of Justice.¹⁰⁶ There are also territorial disputes in the Indian Ocean, particularly Mauritius's claim over the Chagos Archipelago.

The governance structure of the CEMZA would have to be set out. Tanaka identifies three models relating to the protection of community interests.¹⁰⁷ This concept of protecting community interests is reflected in the objectives of the CEMZA. The three models are:

- Protection through an international organisation (in this instance, the AU)
- Protection through the individual application of the law of *dédoublement fonctionnel*, where each state would assume the role of an advocate of the international community (in this case, through individual AU member states)
- Protection through an institutional application of the law of *dédoublement fonctionnel*, where the action of relevant states is more institutionalised and falls half way between the first and second models (in this case, individual member states acting under the auspices of the AU, e.g. coordination and information sharing through AU institutional structures such as the Continental Early Warning System)

The doctrine of *dédoublement fonctionnel* or 'role splitting', developed by Georges Scelle, provides that

national members of the executive as well as state officials fulfil a 'dual' role: they act as state organs whenever they operate within the national legal system; they act qua international agents when they operate within the international legal system.¹⁰⁸

Tanaka suggests that the third model would appear to furnish realistic mechanisms for the protection of community interests.¹⁰⁹ He cautions, however, that community interests and national interests may be mixed and the application of the law of *dédoublement fonctionnel* 'may entail the risk of pursuing interests of a particular state or a group of states under the guise of action in the protection of community interests.'¹¹⁰

The CEMZA provisions refer to 'collective efforts'¹¹¹ and it has not been made clear whether those collective efforts are restricted to participation by member states. Brits and Nel comment that the involvement of international support and partnerships has brought relief because 'most African countries lack the maritime capacity to patrol their maritime domain and have little to none to spare in developing a broader regional maritime capacity'.¹¹² EIMS, for example, aims to promote and deepen collaborative efforts among member states and with international partners, organisations, institutions and programmes.¹¹³

Implementation: into the doldrums?

The sheer scale of putting the CEMZA into operation is evident: intensive planning and technical skill is required to draw up the technical file that seeks to underpin the Solemn Declaration. Given existing territorial and boundary disputes there would need to be transboundary negotiations and intersectoral planning, from environmental to economic sectors and intragovernmental coordination, processes would have to be set out.

The challenge lies in building further momentum to settle these variables and ensure that stakeholders continue to share in the vision and contribute to its implementation.¹¹⁴ The CEMZA is being proposed to member states that would be wary of its implications for their sovereign rights and without the benefit of the S2TF to spearhead and drive the technical underpinning. It thus remains a concept on paper six years after the adoption of the AIMS.

Gottschalk bemoans the fact that ‘nominal targets to such supra-national endeavors, like a mirage, keep inevitably retreating ever-further into the future: 2032, 2050 and 2063’.¹¹⁵

If what is being proposed in the maritime space is compared to the implementation of an air space regime, the Yamoussoukro Decision in 1999 provided that all African states should offer open skies to each other’s airlines.¹¹⁶ Two decades later, the decision has not been implemented.¹¹⁷

There is a significant gap between the number of treaties developed by the AU and the number actually implemented by the parties

Gottschalk comments that the 2018 treaty for a Single Air Transport Market¹¹⁸ ‘is basically an unimplemented re-iteration of the unimplemented 1999 declaration’.¹¹⁹ This example supports the contention by Brits and Nel that the AU has not moved much beyond the stage of norm setting and there is a significant gap between the number of treaties developed by the AU and the number actually implemented by the parties.¹²⁰

A further point that may have an impact on effective implementation is the consideration of whether to move from soft-law cooperative arrangements such as the AIMS to cooperation based on a binding agreement. However, the process of AU member-state ratification of binding agreements has been slow.¹²¹

VanderZwaag lists potential drawbacks such as the lack of assurance that all states will readily accept the newly negotiated obligations and the lengthy and costly preparatory and negotiation processes involved.¹²² He points out the advantages of switching to hard law, such as:

- ‘encouraging greater political and bureaucratic commitments;
- ‘establishing firmer institutional and financial foundations;
- ‘transcending the vagaries of changing governmental principles and standards;
- ‘raising the public profile of regional challenges and cooperation needs; and
- ‘providing for dispute resolution.’¹²³

Salutary examples

While the challenges pointed out above, particularly territorial and boundary disputes, may appear to be formidable, the *Policy Handbook for Africa’s Blue Economy*¹²⁴ provides several success stories from which lessons can be learnt, and best practices followed. For example:

- The successful delimitation of maritime boundaries of Yemen and Eritrea, where both states agreed to resolve their territorial claims legally and submitted the case to the Permanent Court of Arbitration in 1998–1999.¹²⁵



THE PROCESS OF
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- Senegal and Guinea-Bissau put aside their differences in 1993 on the legal outcome of a delimitation dispute and favoured joint development of resources.¹²⁶ Some ECOWAS states (Benin, Ghana, Nigeria and Togo) have declared their willingness to pursue negotiations over their joint maritime boundaries.¹²⁷
- In 2012 Mauritius and Seychelles entered into an agreement that provides for the joint exercise of sovereign rights to explore the continental shelf and exploit its natural resources. The approach has enabled the two states to leverage their respective resources for economic growth, job creation and international trade.¹²⁸
- The Regional Fusion and Law Enforcement Centre for Safety and Security at Sea was established in 2012 as a joint initiative by the governments of the United Kingdom and Seychelles. It provides a model for cooperation.¹²⁹
- The Zone of Peace and Cooperation of the South Atlantic, established in 1986, is an example of a regional framework for cooperation aimed at strengthening national institutions, capacity building and joint research for the effective use and management of marine resources.¹³⁰

The handbook points out that ‘when fully realized ... partnerships can produce a quantum leap forward in the economic development of individual States and the expansion of progress, peace and prosperity across the continent.’¹³¹

Conclusion

This report opened with a discussion of Africa’s contribution to UNCLOS III, which Rembe viewed as enabling states to ‘show their creativity in devising a new regime that reflected their interests as well as in bringing forward before the international community their socio-economic problems’.¹³² African states participated in UNCLOS III with virtually no experience in matters pertaining to the law of the sea, yet, as Chircop observes, this lack of experience was no impediment to the extent, scope or quality of their participation and contributions.¹³³

The AU, in developing AIMS, has demonstrated creativity and innovation in the form of the CEMZA concept

Like its predecessor, the AU, in developing AIMS, has demonstrated creativity and innovation in the form of the CEMZA concept, a ‘living document – meant to evolve and be improved upon’.¹³⁴ In a world in which international law has been conservative about its traditional institutions, which Tanaka observes have not been challenged by new developments in the protection of community interests, the AU has brought innovation.¹³⁵ The CEMZA concept is, therefore, a brave move towards protecting community interests and managing resources across the AMD.

Notes

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- 3 PV Rao, Managing Africa's maritime domain: Issues and challenges, *Journal of the Indian Ocean Region* 10(1), 2014, 113.
- 4 2050 Africa's Integrated Maritime Strategy, par I(1).
- 5 United Nations Convention on the Law of the Sea, Montego Bay, 10 December 1982, UN Doc. A/CONF.62/122.
- 6 See generally, N S Rembe, *Africa and the International Law of the Sea: A study of the contribution of the African states to the third United Nations Conference on the Law of the Sea*. Alphen aan den Rijn: Sijthoff and Noordhoff, 1980.
- 7 A Chircop, D Dzidzornu, J Guerreiro and C Grilo, The Maritime Zones of East African States in the law of the sea: Benefits gained, opportunities missed, *African Journal of International and Comparative Law* 16, 2008, 125; see generally, M Tsamenyi and K-D Ali, African States and the Law of the Sea Convention: Have the benefits been realized?, *Ocean Yearbook* 26(1), 2012, 113–160.
- 8 I J Adewumi, African Integrated Maritime Strategy 2050: Challenges for Implementation, in SO Idowu (ed), *Encyclopaedia of Sustainable Management*, 2020, 8.
- 9 Declaration of the Organisation of African Unity on the Issue of the Law of the Sea, UN Doc. A/CONF.62/33, 1974.
- 10 *Ibid*, section C, pars 6–10.
- 11 See article 56(1)(a) of UNCLOS.
- 12 International Seabed Authority, *Africa's Deep Seabed Resources Project: Second Workshop Report*, May 2019, 24.
- 13 P H G Vrancken and M Tsamenyi (eds), *The Law of the Sea: The African Union and its Member States*, Cape Town: Juta, 2017.
- 14 AU Doc. Assembly/AU/Dec. 294 (XV) (2010), par 27.
- 15 See, AU Doc. Assembly/AU/Dec. 496 (XXII) (2014), par 6. Full text of AIMS: https://cggrps.com/wp-content/uploads/2050-AIM-Strategy_EN.pdf.
- 16 *Ibid*, par 17.
- 17 AIMS, par 18.
- 18 V Nmehielle and T Pasipanodya, African Union, in Vrancken and Tsamenyi (eds), *The Law of the Sea*, 52.
- 19 https://au.int/sites/default/files/documents/30928-doc-annex_b_definitions_eng.doc.
- 20 https://au.int/sites/default/files/documents/30929-doc-annex_c_poa_eng.pdf, 5.
- 21 Adewumi, African Integrated Maritime Strategy, 8.
- 22 https://au.int/sites/default/files/treaties/37286-treaty-african_charter_on_maritime_security.pdf.
- 23 See article 30. See also article 2(1) of the Code of Conduct Concerning the Repression of Piracy, Armed Robbery against Ships, and Illicit Maritime Activity in West and Central Africa, 23 June 2013 (Yaoundé Code of Conduct), which refers to organised crime in the 'maritime domain', www.imo.org/en/OurWork/Security/WestAfrica/Documents/code_of_conduct%20signed%20from%20ECOWAS%20site.pdf.
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- 25 P Vrancken, The African Perspective on Global Ocean Governance, in D Attard, D Ong and D Kritsiotis (eds), *The IMLI Treatise on Global Ocean Governance* 1. Oxford: Oxford University Press, 2018, 223.
- 26 A Benkenstein, Aligning Africa's Maritime Ambitions with Broader Indian Ocean Regionalism, *SAIIA Policy Insights*, 25 September 2015, 4.
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- 30 *Ibid*.
- 31 E Molenaar, New maritime zones and the law of the sea, in H Ringbom, *Jurisdiction Over Ships: Post UNCLOS developments in the law of the sea*, Leiden: Koninklijke Brill NV, 2015, 251.
- 32 *Ibid*; see also article 122 of UNCLOS.
- 33 The EEZ vests certain rights and jurisdiction in the coastal state (Part V of UNCLOS), however, in terms of article 58(2) of UNCLOS, articles 88–115 (Part VII of UNCLOS) and other pertinent rules of international law apply to the EEZ in so far as they are not incompatible with Part V.
- 34 *Ibid*; see also article 58(2) of UNCLOS.
- 35 P Vrancken, The 2050 Africa's Integrated Maritime Strategy: The Combined Exclusive Maritime Zone of Africa as an instrument of sustainable development of the African large marine ecosystems, *Environmental Development*, 2020, 1.
- 36 Molenaar New maritime zones, 251.

- 37 VanderZwaag, Overview of Regional Cooperation, 198.
- 38 Ibid, 204; see generally Vrancken and Tsamenyi (eds), *The Law of the Sea*, 84–102, 123–127, 167–184.
- 39 See article 63 of UNCLOS; see also Vrancken, The 2050 Africa's Integrated Maritime Strategy, 2.
- 40 B Satia, An overview of the large marine ecosystem programs at work in Africa today, *Environmental Development* 17, 2016, 11.
- 41 Rao, Managing Africa's maritime domain, 115.
- 42 E Molenaar, New maritime zones, 338. According to this principle, 'compliance with rules of law results from the interest a state perceives in the reciprocal action of another state or states' (Molenaar, 334).
- 43 Vrancken, The African Perspective on Global Ocean Governance, 231.
- 44 VanderZwaag, Overview of Regional Cooperation, 201.
- 45 Vrancken, The 2050 Africa's Integrated Maritime Strategy, 11.
- 46 Articles 117–120.
- 47 Article 123.
- 48 Articles 129–130.
- 49 Article 133(3).
- 50 Article 144(2).
- 51 Article 169.
- 52 Articles 197–201.
- 53 Article 226(2).
- 54 Article 235(3).
- 55 Articles 242–244.
- 56 Articles 266(1), 268–278.
- 57 Article 303(1).
- 58 AU Doc. EX.CL520 (XV) Rev. 2 (June 2009), par. 1; see also AU Doc. Assembly/AU/15 (XIII) Add.4, par. II.
- 59 AU Doc. Assembly/AU/15 (XIII) Add.4 at par. II. Some of salient points in the proposal were: (1) Protect Territorial and Economic Waters of African Countries by preventing aggression and unjust exploitation of their wealth in accordance with the principle of sovereignty over their economic zones and preserve their wealth as provided for in the law of the sea; (2) Coordinate efforts by African countries to preserve water and fishery resources in their respective territories and regulate their exploitation by others in accordance with agreed standards; (3) Endeavour to establish an early warning system to warn member states against any violation of their territorial and economic waters and exploitation of their wealth; (4) Enact and implement policies for the African Union in the area of joint administration of African marine resources; (5) Provide assistance to member states in the area of training personnel working in the institutions concerned with the management and protection of coastal zones, exploitation of territorial waters and economic resources as well as preparation of studies and researches on the development of their capabilities in those areas; (6) Provide assistance to member states under circumstances that might warrant technical and field support to respond to any violation of their territorial economic waters.
- 60 See, AU Doc. Assembly/AU/Dec. 259(XIII) (July 2009), par 3.
- 61 See generally, S Subedi, Land and Maritime Zones of Peace in International Law, unpublished PhD thesis, University of Oxford, 1993, 45.
- 62 Article 8.
- 63 Article 2. Article 3 sets the limits of the breadth of the territorial sea at 12 nautical miles measured from the baselines.
- 64 In terms of article 55 the EEZ does not overlap with the territorial sea.
- 65 Y Tanaka, *The International Law of the Sea*, Cambridge: Cambridge University Press, 2015, 78. The right of ships in distress to enter a foreign port is an established rule of customary international law.
- 66 Ibid, 85.
- 67 Articles 17–19.
- 68 Article 33.
- 69 Tanaka, *The International Law of the Sea*, 123.
- 70 Article 56(1)(a).
- 71 Article 77.
- 72 Article 56(1)(b).
- 73 Article 58 (1)–(2).
- 74 Article 58(1).
- 75 Article 87(1).
- 76 Article 58(3).
- 77 https://au.int/sites/default/files/newsevents/workingdocuments/33832-wd-african_union_3-1.pdf, par. 4(vi).
- 78 Vrancken, The 2050 Africa's Integrated Maritime Strategy, 5.
- 79 ECOWAS Integrated Maritime Strategy, www.ecowas.int/wpcontent/uploads/2019/05/EIMS-English-final.pdf.
- 80 Ibid.
- 81 Annex B of the AIMS.
- 82 Ibid.
- 83 *The Conversation*, Africa Edition, 3 October 2020.
- 84 Ibid.
- 85 *Business Day*, 28 October 2013, cited in K Gottschalk, Persistent problems in African integration and peace-keeping, *Journal of African Union Studies* 7(3), 2018, 70.

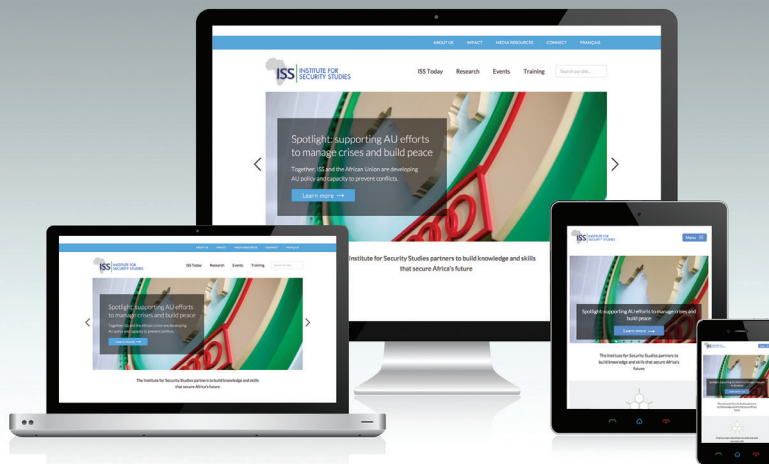
- 86 M Gavouneli, *Functional Jurisdiction and the Law of the Sea*, Leiden/Boston: Martinus Nijhoff, 2007, 67.
- 87 The *M/V 'Saiga'* (No. 2) case (Saint Vincent and the Grenadines v Guinea) (1999) 38 *International Legal Materials*, www.itlos.org/cases/list-of-cases/case-no-2/, par. 137–138. A similar issue arose in 2014 with the *M/V Virginia G* case (Panama v Guinea-Bissau).
- 88 A Chircop *et al*, The maritime zones of East African states, 149.
- 89 United Nations: Division for Ocean Affairs and the Law of the Sea (DOALOS), *Summary of National Claims*, 2011, www.un.org/Depts/los/LEGISLATIONANDTREATIES/claims.htm. See also, Chircop *et al*, 128. These states are Angola, Cape Verde, Djibouti, Gabon, Ghana, Madagascar, Mauritania, Mozambique, Namibia, Senegal, Seychelles, Sierra Leone and South Africa.
- 90 *Ibid.*
- 91 *Ibid.* These states are Benin, Cameroon, Comoros, Côte d'Ivoire, Equatorial Guinea, Eritrea, Guinea, Guinea-Bissau, Kenya, Libya, Nigeria, São Tomé and Príncipe, Somalia, Togo and Tanzania.
- 92 *Ibid.* The Gambia claims a 200 nautical mile fisheries zone. See generally, Vrancken and Tsamenyi, *The Law of the Sea*, 362.
- 93 Section 5 of the Maritime Zones Act, 1989 provides: 'Kenya shall, within the exclusive economic zone, exercise sovereign rights with respect to the exploration and exploitation and conservation and management of the natural resources of the zone and without prejudice to the generality of the foregoing, the exercise of the sovereign rights shall be in respect of - (a) exploration and exploitation of the zone for the production of energy from tides, water currents and winds; (b) regulation, control and preservation of the marine environment; (c) establishment and use of artificial islands and offshore terminals, installations, structures and other devices; and (d) authorization and control of scientific research.' See also Chircop *et al*, The maritime zones of east African states, 140; Vrancken and Tsamenyi, *The Law of the Sea*, 442–444.
- 94 Maritime Zones Act, 1994 (15 of 1994).
- 95 *Ibid.*
- 96 In the case of the EEZ and the continental shelf.
- 97 The EEZ and the continental shelf, however, would not fall within this definition. See M Shaw, *Title to Territory in Africa: International Legal Issues*, New York: Oxford University Press, 1986, 224.
- 98 *Ibid.*, 225.
- 99 *Ibid.*
- 100 *Ibid.*, 228.
- 101 *Ibid.* It is envisaged, however, that the CEMZA boundaries would be along the outer limits of the maritime zones under UNCLOS and not to all parts of the AMD.
- 102 *Ibid.*
- 103 See generally, www.peaceau.org/en/page/85-au-border-programme-aubp.
- 104 EIMS, par 26.
- 105 VanderZwaag, Overview of Regional Cooperation, 209.
- 106 International Court of Justice, Maritime Delimitation in the Indian Ocean (Somalia v Kenya), Press Release, 22 May 2020, www.icj-cij.org/files/case-related/161/161-20200522-PRE-01-00-EN.pdf.
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- 108 A Cassese, Remarks on Scelle's Theory of 'Role Splitting' (*dédoublement fonctionnel*) in International Law, *European Journal of International Law* 1, 1990, 212. See also 227, where Cassese comments that 'the new trends emerging in the international community have led (or are leading) to an enhancement of the "dual" role played by state agents under the doctrine of *dédoublement fonctionnel*.'
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- 110 *Ibid.*
- 111 AIMS, par 29.
- 112 P Brits and M Nel, African maritime security and the Lomé Charter: Reality or dream?, *African Security Review* 27(3–4), 2018, 232.
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- 114 T Walker, Implementing Africa's maritime security challenges, *Wilton Park* 1407, 2015, 2.
- 115 Gottschalk, Persistent problems in African integration and peace-keeping, 71.
- 116 See generally, World Bank, Open Skies for Africa – Implementing the Yamoussoukro Decision, 2010, www.worldbank.org/en/topic/transport/publication/open-skies-for-africa.
- 117 Gottschalk, Persistent problems in African integration and peace-keeping, 70.
- 118 See generally, <https://au.int/en/saatm>.
- 119 Gottschalk, Persistent problems in African integration and peace-keeping, 70.
- 120 Brits and Nel, African maritime security and the Lomé Charter, 235.
- 121 For example, the Lomé Charter, adopted in 2016, has only been ratified by two states so far.
- 122 VanderZwaag, Overview of Regional Cooperation, 208.
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- 124 United Nations Economic Commission for Africa (UNECA), *Africa's Blue Economy: A policy handbook*, 2016,

www.uneca.org/sites/default/files/PublicationFiles/blueeco-policy-handbook_en.pdf, *Africa's Blue Economy*.

- 125** Ibid., 27.
- 126** Ibid., 29.
- 127** C Lathrop, Continental Shelf delimitation beyond 200 nautical miles: Approaches taken by coastal states before the Commission on the Limits of the Continental Shelf, in D A Colson and R W Smith (eds), *International Maritime Boundaries*, 2011, 4139–4160, www.sovereigngeographic.com/wp-content/uploads/2016/06/IMB-VI-4139-4160-con-shelf.pdf.
- 128** UNECA), *Africa's Blue Economy*, 29.
- 129** Ibid., 30.
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