



Legal and Technical Commission

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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

I. Introduction

1. This paper has been prepared in response to the request by the Council of the International Seabed Authority that the Secretary-General of the Authority carry out a study of the issues relating to the operation of the Enterprise, in particular on the legal, technical and financial implications for the Authority and for States parties to the United Nations Convention on the Law of the Sea, taking into account the provisions of the Convention, the 1994 Agreement relating to the Implementation of Part XI of the Convention and the regulations on prospecting and exploration for cobalt-rich ferromanganese crusts and polymetallic sulphides and nodules in the Area.

II. Background

2. In October 2012, the Secretary-General received a proposal from Nautilus Minerals Inc., a company incorporated in Canada, to enter into negotiations to form a joint venture with the Enterprise for the purpose of developing eight of the reserved area blocks in the Clarion-Clipperton Zone. Under the proposed agreement, Nautilus Minerals Inc. would start working with the Enterprise in 2013 to develop a proposal for a joint venture operation over a period of three years. A full proposal for a joint venture operation would be presented to the Council in 2015. The terms of the proposal by Nautilus Minerals Inc. were set out in a draft heads of agreement, annexed to the report by the Interim Director General of the Enterprise ([ISBA/19/C/4](#)).



3. At its 189th, 190th and 191st meetings, on 19 and 22 July 2013, the Council considered the report of the Interim Director General of the Enterprise on the proposal by Nautilus Minerals Inc. and concluded, inter alia:

(a) That it was premature for the Enterprise to function independently;

(b) That the proposal for a joint venture between Nautilus Minerals Inc. and the Enterprise should no longer be an impediment to the consideration by the Legal and Technical Commission and the Council of applications for reserved areas by developing countries and other qualified applicants.

4. The Council then requested the Secretary-General, referring where appropriate to the Legal and Technical Commission and the Finance Committee, to carry out a study of the issues relating to the operation of the Enterprise, in particular on the legal, technical and financial implications for the Authority and for States parties, taking into account the provisions of the Convention, the 1994 Agreement and the Regulations (ISBA/19/C/18, para. 16).

III. The Enterprise

5. Established by article 170 and annex IV of the Convention, the Enterprise is the organ of the Authority which is to carry out activities in the Area directly, as well as the transporting, processing and marketing of minerals recovered from the Area. While the Enterprise is to act in accordance with the general policies of the Assembly and the directives of the Council, it is autonomous in the conduct of its operations, which are to be directed by a Governing Board composed of 15 members elected by the Assembly. The Enterprise will also have a Director General, elected by the Assembly on the recommendation of the Council and the nomination of the Governing Board. The Director General will also be the Enterprise's Chief Executive Officer and legal representative.

6. The Enterprise is the fruit of compromise between two previously held, entirely different perceptions about the system of exploration and exploitation of the resources in the Area.¹ First proposed by the Latin American countries in 1971, through the Group of 77 and China, the Enterprise later became the brain child of developing countries that regarded the mineral resources of the seabed as the common heritage of mankind and considered that the best way to implement that concept was through direct and exclusive exploitation by an international enterprise. Industrialized countries, on the other hand, wanted a simple licensing system under which any State, person or company wishing to exploit the seabed resources might apply for a license, upon payment of a fee. Seabed mining would be conducted on a competitive first-come, first-served basis. In the end, the compromise was the parallel system which left the Area open to access by States, State enterprises, natural and juridical persons sponsored by States, and the Enterprise.

7. The provisions of the Convention relating to the Enterprise were radically affected by section 2 of the annex to the 1994 Agreement, according to which the functions of the Enterprise are to be performed by the secretariat of the Authority until such time as it begins to operate independently of the secretariat. The

¹ Roy S. Lee, "The Enterprise: operational aspects and implications", *Columbia Journal of World Business*, vol. XV, No. 4 (1980), p. 62.

Agreement establishes a number of conditions that must be satisfied before the Enterprise may operate as an independent entity. Furthermore, it provides that the Enterprise is to conduct its initial deep seabed mining operations through joint ventures. Article 170, paragraph 4, and annex IV of the Convention are to be interpreted and applied in accordance with section 2 of the annex to the 1994 Agreement, which provides that, upon the approval of a plan of work for exploitation by an entity other than the Enterprise, or upon receipt by the Council of an application for a joint venture operation with the Enterprise, the Council is to take up the issue of the functioning of the Enterprise independently of the secretariat of the Authority.

IV. Study of issues relating to the operation of the Enterprise

8. Section 2 of the annex to the 1994 Agreement provides that, until it begins to operate independently, the functions of the Enterprise are to be performed by the secretariat. These functions are limited to certain specific and defined matters as follows:

(a) Monitoring and review of trends and developments relating to deep seabed mining activities, including regular analysis of world metal market conditions and metal prices, trends and prospects;

(b) Assessment of the results of the conduct of marine scientific research with respect to activities in the Area, with particular emphasis on research related to the environmental impact of activities in the Area;

(c) Assessment of available data relating to prospecting and exploration, including the criteria for such activities;

(d) Assessment of technological developments relevant to activities in the Area, in particular technology relating to the protection and preservation of the marine environment;

(e) Evaluation of information and data relating to areas reserved for the Authority;

(f) Assessment of approaches to joint venture operations;

(g) Collection of information on the availability of trained manpower;

(h) Study of managerial policy options for the administration of the Enterprise at different stages of its operations.

9. The functions listed in paragraphs (a) to (e) above are mainly confined to monitoring, assessment and evaluation of data and information. Functions (f) to (h) are relevant to the operation of the Enterprise and are identical in nature and similar in content to the subject of the study presently requested by the Council. In keeping with the evolutionary approach called for in the 1994 Agreement and owing to uncertainty in the timing of when the Enterprise might be brought into existence, no substantive work other than considering and analysing the proposal by Nautilus Minerals Inc. in 2013 has ever been undertaken by the secretariat in relation to the functions listed above.

10. In light of its increased workload, time constraints and the availability of resources, the secretariat has been unable to conduct the study requested by the

Council. After a review of the available literature on the subject, however, the secretariat proposes, subject to the availability of resources, to carry out a study in time for the twenty-first session of the Authority in 2015. For this purpose, the secretariat has prepared draft terms of reference, which are set out in the annex to the present document.

V. Recommendations

11. The Commission is invited to:
 - (a) Take note of the status of the study requested by the Council;
 - (b) Consider and provide further inputs, where appropriate, to the draft terms of reference for the study; and
 - (c) Keep this item on the agenda of the twenty-first session of the Authority.

Annex

Draft terms of reference

These terms of reference are to guide and assist the conduct of the study on the issues relating to the operations of the Enterprise pursuant to the request of the Council recorded in the statement of the President of the Council of the International Seabed Authority on the work of the Council during the nineteenth session of the Authority (ISBA/19/C/18, para. 16).

I. Legal implications

In terms of the Enterprise's relationship with the Authority:

(a) Identify gaps, if any, in the current regulatory and procedural regime and suggest ways, including the formulation of appropriate regulatory and procedural measures, to ensure proper and independent operations of the Enterprise;

(b) Identify gaps, if any, in existing general policies of the Assembly that are relevant to the operation of the Enterprise and suggest measures for addressing such gaps;

In relation to the autonomous functioning of the Enterprise:

(c) Define the extent of control to be exercised by the Council and identify the appropriate nature of its directives in order to safeguard the Enterprise's autonomy as an independent commercial entity;

In terms of procedures:

(d) Suggest and elaborate on the criteria, qualifications and standards for nomination of the Director General and election of the members of the governing board;

(e) Identify and formulate criteria for the rules of procedure of the governing board of the Enterprise and the code of conduct of its members;

In respect to legal principles:

(f) Analyse and assess options and approaches available to joint ventures operations;

(g) Clarify the concept of "sound commercial principles";

(h) Suggest the possible form and content of the directive to be issued by the Council for the independent functioning of the Enterprise;

II. Financial implications

(i) Identify the financing options available to the Enterprise for the conduct of its activities, including for the acquisition of technology, in light of section 2 of the annex to the 1994 Agreement;

(j) Suggest the selection criteria for and qualifications and skills of the staff of the Enterprise, and an estimate of costs and other expenses for its central management and administration;

III. Technological implications

(k) Identify and suggest approaches that are available to the Enterprise to acquire appropriate technology for its activities;

(l) Collect information on the availability of trained and competent technical personnel capable of evaluating technology.
