



## Council

Distr.: General  
12 June 2019

Original: English

---

### Twenty-fifth session

Council session, part II

Kingston, 15–19 July 2019

Agenda item 14

### Report on matters relating to the Enterprise

## **Issues relating to the operation of the Enterprise, in particular the legal, technical and financial implications for the International Seabed Authority and for States parties to the United Nations Convention on the Law of the Sea**

### **Report of the Special Representative of the Secretary-General of the International Seabed Authority for the Enterprise**

#### **I. Introduction**

1. The present report contains an executive summary of the study of issues relating to the operation of the Enterprise, in particular the legal, technical and financial implications for the International Seabed Authority and for States parties to the United Nations Convention on the Law of the Sea.
2. The executive summary has been prepared by the Special Representative of the Secretary-General of the International Seabed Authority for the Enterprise to inform discussions within the organs of the Authority.
3. The study has been conducted in response to the request made by the Council to the Secretary-General during its nineteenth session, in July 2013, to carry out, referring where appropriate to the Legal and Technical Commission and the Finance Committee, a study of the issues relating to the operationalization 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 relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982 and the regulations for exploration ([ISBA/19/C/18](#), para. 16).
4. At the twentieth session, in July 2014, the Commission considered draft terms of reference for the study ([ISBA/20/LTC/12](#), annex) and made preliminary observations. In recognition of the complexity of the issues involved and the relative priority to be given to them, it was suggested that the secretariat follow an incremental approach in carrying out the various components of the study.



5. During the first part of the twenty-fourth session, in March 2018, the Commission, recalling the request by the Assembly that the Commission continue to address the question of the operationalization of the Enterprise as an important matter in the light of developments with respect to deep-sea mining (ISBA/23/A/13, sect. G, para. 2), considered issues relating to the operation of the Enterprise and endorsed the draft terms of reference for a study on those issues (ISBA/24/C/9, para. 19).

6. The study was outsourced to external consultants. The draft for the full study was received in December 2018, along with an executive summary, both of which were sent out for peer review. During the first part of the 2019 session, in March 2019, members of the Commission were invited to formulate comments on the draft study and its executive summary. The comments thus received were forwarded to the consultants.

7. The final version of the study will be issued as a technical study of the Authority. An advance unedited version will be posted on the website before the second part of the Council session, in July.

8. During the second part of its session, in July, the Commission, taking into account the content of the technical study, will work on its recommendations regarding the operation of the Enterprise (ISBA/25/C/19, para. 25).

## **II. Executive summary**

### **A. Background information on the Enterprise**

9. The Enterprise, a unique entity, is exceptional in the sense that, under the relevant treaties, it is an organ of an international organization, the International Seabed Authority,<sup>1</sup> yet it has also been conceived to engage in commercial deep seabed mining activities in the Area.<sup>2</sup> Although the Enterprise is to act in accordance with the general policies of the Assembly and the directives of the Council, it is to enjoy autonomy in the conduct of its operations.

10. As an organ of the Authority, the Enterprise, once operationalized, is to carry out mining activities in the Area directly, as well as the transporting, processing and marketing of minerals recovered from the Area in accordance with the relevant provisions of the United Nations Convention on the Law of the Sea, as modified by the 1994 Agreement.

11. The Enterprise is also to play the crucial role of facilitating the participation of developing States in deep seabed mining in the Area, as it is able to carry out such mining activities in the reserved areas in association with developing States.

### **B. The Enterprise and the interim status under the 1994 Agreement**

12. As part of the cost-effective and evolutionary approach to be followed pending the full operationalization of the Enterprise, the Enterprise was downgraded in the 1994 Agreement from being an autonomous organ of the Authority to becoming a part of the secretariat of the Authority, with an interim director general to be appointed by the Secretary-General from among the staff of the Authority.

---

<sup>1</sup> The Enterprise is, however, not a principal organ; see art. 158, para. 2, and art. 170, para. 1, of the United Nations Convention on the Law of the Sea.

<sup>2</sup> See, for example, art. 153, para. 2 (a), annex III, art. 3, and annex IV to the Convention, and annex, sect. 2, para. 2, to the Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea.

13. In the final report relating to the periodic review of the international Authority pursuant to article 154 of the Convention (ISBA/23/A/3, annex), the Review Committee noted that no interim director general had been appointed since 2012 and recommended that the Legal and Technical Commission be requested to continue to address the issue of the operationalization of the Enterprise as an important matter in the light of developments with respect to deep-sea mining, adding, however, that the appointment of an interim director general of the Enterprise would not be advisable at that point in time (ibid., chap. II, recommendation 12).

14. It is imperative, as provided for in the 1994 Agreement, that an interim director general be appointed as soon as possible. First, in the provisions of the 1994 Agreement on the appointment of an interim director general by the Secretary-General of the Authority, the word “shall” is used, which makes it mandatory that such appointment be made from among the staff of the Authority to oversee the functions of the Enterprise. Second, the requirement contained in the 1994 Agreement that the Secretary-General appoint the interim director general from among the existing staff of the Authority would meet the cost-effectiveness threshold of the Agreement.

15. In its final report, the Review Committee also mentioned that, because of the low staffing level in the secretariat at the time, there was the potential for conflicts of interest between the responsibilities of an interim director general and senior staff of the secretariat. In an earlier report, the Secretary-General had explored that issue in some detail and put forward two alternative options. The first was to increase the size and capacity of the secretariat in order to establish an independent unit under the leadership of an appointed interim director general. The second was to authorize the interim director general to appoint from outside the secretariat an eminent person with appropriate experience and qualifications as a special representative who would report to the Council periodically and, in addition, to retain appropriately qualified technical and legal consultants to act and to conduct negotiations on behalf of the Enterprise (ISBA/19/C/6, paras. 16 and 17).

### **C. The Enterprise and independent functioning under the 1994 Agreement**

16. Under section 2 of the annex to the 1994 Agreement, the independent functioning of the Enterprise may be triggered by one of two events, namely, receipt by the Council of an application for a joint-venture operation with the Enterprise or approval of a plan of work for exploitation for an entity other than the Enterprise.

17. In 2012, Nautilus Minerals Inc., a company incorporated in Canada, presented a proposal to the Secretary-General 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 Fracture Zone. However, at the time, the Council took the view that it was premature for the Enterprise to function independently.

18. Recently, the Secretary-General received an expression of interest from the Secretary of State for the Ministry of the Environment of Poland to enter into negotiations to form a joint venture with the Enterprise. However, at the time of writing the study, Poland was yet to provide a detailed proposal to the Authority.

19. Under the 1994 Agreement, there are several conditions that would need to be satisfied for the Enterprise to operate as an independent entity. First, one of the trigger events mentioned above must occur. Second, upon the occurrence of either of these trigger events, the Council is under a legal obligation to take up the issue of the independent functioning of the Enterprise. Third, the Council has to consider whether

joint-venture operations with the Enterprise accord with “sound commercial principles”. Fourth, if the Council is satisfied that joint-venture operations with the Enterprise accord with sound commercial principles, it has the obligation to issue a directive for such independent functioning.

#### **D. Funding the Enterprise**

20. Under the 1994 Agreement, States parties are exempt from funding a mine site of the Enterprise and it is clearly stated that States parties are under no obligation to finance any of the operations at any mine site of the Enterprise or under its joint-venture arrangements. However, nothing in the Agreement precludes the States parties from voluntarily choosing to do so, if they so wish.

21. It is important to note that the Enterprise, as an organ of the Authority, within the framework of the international legal personality of the Authority, has such legal capacity as conferred upon it by its statute, as set out in annex IV to the Convention. Under annex IV, the Enterprise has the capacity, among others, to borrow funds and to provide such collateral or other security as it may determine.

#### **E. Transfer of technology and the Enterprise**

22. The 1994 Agreement makes the transfer of technology to the Enterprise no longer mandatory. However, the Agreement provides that the Enterprise and developing States seeking deep seabed mining technology are to seek to obtain such technology on fair and reasonable commercial terms and conditions on the open market, or through joint-venture arrangements.

#### **F. Operationalization of the Enterprise and draft exploitation code**

23. Under the 1994 Agreement, the obligations applicable to contractors apply to the Enterprise and the Enterprise is required to apply for a plan of work for mining like any other contractor. Therefore, the Enterprise, as other contractors that have had an opportunity to participate in the development of the exploitation code, is a crucial stakeholder, and its input is necessary for the development of this important regulatory instrument.

#### **G. Operationalizing the Enterprise: functional needs**

24. Following the requirements of cost-effectiveness and of an evolutionary approach, and progressing step by step within the that approach, four basic steps have been considered, with a focus on functional needs, in line with the Agreement, as follows:

- Step 1: current arrangement, reinforced
- Step 2: appointment of an interim director general through the creation of an additional position in the secretariat by the Secretary-General and assumption of the functions previously carried out by the Special Representative
- Step 3: period subsequent to the issuance of the directive by the Council for the independent functioning of the Enterprise
- Step 4: period immediately subsequent to the appointment of the director general.

### **1. Step 1: current arrangement, reinforced**

25. The functional needs are:

(a) Conducting negotiations on joint ventures on behalf of the Enterprise, appointing a special representative and the necessary technical and legal advisers to support that representative;

(b) Completing the study on the operation of the Enterprise, including actionable recommendations;

(c) Performing as fully as possible the functions of the Enterprise assigned to the secretariat.

### **2. Step 2: appointment of an interim director general through the creation of an additional position in the secretariat by the Secretary-General and assumption of the functions previously carried out by the Special Representative**

26. The functional needs are:

(a) Conducting negotiations on joint ventures, including with regard to mobilizing administrative costs for operationalizing the Enterprise;

(b) Providing input to the legislative development process, in particular for the draft exploitation code;

(c) Performing fully the functions assigned to the secretariat.

### **3. Step 3: period subsequent to the issuance of the directive by the Council for the independent functioning of the Enterprise**

27. Functional needs will include:

(a) Providing assistance in the formation of the Governing Board, as requested; and servicing the Governing Board;

(b) Forming and managing a joint-venture negotiation team and conducting negotiations with qualified entities for joint ventures;

(c) Providing input to the legislative development process;

(d) Preparing for an operational Enterprise, both as a mining entity and an international organization, including project management and the mobilization of start-up funding and of technical capability for training, and drafting rules, regulations and procedures for administrative, financial and personnel matters.

### **4. Step 4: period immediately subsequent to the appointment of a director general**

28. Step 4 is when the Enterprise becomes operational and a director general of the Enterprise is appointed. The director general is to be elected by the Assembly for a fixed term not exceeding five years, upon the nomination of the Governing Board and the recommendation of the Council. The director general may be re-elected for further terms. The director general will have the staff necessary for the exercise of the Enterprise's functions. For the paramount purpose of minimizing costs, a minimal core group of staff with the managerial and technical expertise necessary for the exercise of the immediate functions is considered.

## **H. Funding sources for operationalizing the Enterprise**

29. First and foremost, the functions of the Enterprise entrusted to the secretariat of the Authority need to be performed to the fullest extent possible and as expeditiously

as practicable. Doing so will reduce the costs of operationalizing the Enterprise, because performance of those functions lessens the functional needs of the Enterprise that are to be met for its operationalization. The secretariat, under the guidance of member States and with the cooperation of the Special Representative or the interim director general, as applicable, can: (a) prepare a work programme required for the full performance of the functions; (b) realize maximum savings by exercising the utmost economy and utilize such savings for executing the work programme; (c) review its current work programme to streamline, reorganize and prioritize work; and (d) as a last resort, request additional appropriations.

30. Other sources may be promising. First, the possibility of devising the financial payment system under the mining code in such a manner as to garner funds from contractors that could be utilized for operationalizing the Enterprise should be explored. Second, vigorous efforts should be initiated immediately to mobilize voluntary contributions from States parties for the purpose of operationalizing the Enterprise. Third, joint ventures with the Enterprise may include favourable terms so as to cover the administrative costs of the Enterprise for becoming operational.

## **I. Answers to specific questions under the terms of reference**

### **1. Analyse and assess options and approaches available to joint-venture operations**

31. The Enterprise has the legal capacity, inter alia, to enter into contracts, joint arrangements and other arrangements. Under the 1994 Agreement, the Enterprise is to carry out its initial deep seabed mining operation through joint ventures, including either incorporated (equity) or unincorporated (contractual) joint ventures.

### **2. Clarify the concept of “sound commercial principles”**

32. The concept of “sound commercial principles”, though utilized in the Convention, the 1994 Agreement and the revised draft regulations on exploitation, is not explicitly defined in any of those legal instruments. In seeking to clarify the concept, it would therefore be helpful to resort to the treaty interpretation rules as set forth in the Vienna Convention on the Law of Treaties of 1969 and to bear in mind the following parameters based on the provisions of part XI of the Convention and of the Agreement:

- The common heritage principle, as the fundamental overarching principle governing the regime of the Area
- The autonomy of the Enterprise to make effective commercial decisions without political influence
- Cost-effectiveness in relation to the operations of the Enterprise, which should be in a position to generate enough revenue to finance its running cost and run its operations efficiently without the need to be subsidized by member States
- An evolutionary approach in its operationalization (for example, an evolutionary approach to staffing, accommodation and its initial operation)
- Commercial viability, as it has been identified that commercial viability would entail a number of considerations, such as what management structure to adopt, whether the management is sound, whether funds are available, whether it has access to the resources that it intends to develop, whether it has or can obtain the necessary technology, whether it will have access to a market for the resources and what the prospects for that market are

**3. Suggest the possible form and content of the directive to be issued by the Council for the independent functioning of the Enterprise**

33. The 1994 Agreement provides that the independent functioning of the Enterprise shall be effected by way of a directive issued by the Council, acting alone and without any direct involvement from the other principal organs of the Authority, in particular the Assembly, and assuring the autonomy of the Enterprise.

**4. 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**

34. Under the Convention, the Enterprise, although required to act under the directives and control of the Council, is meant to enjoy autonomy in its operations. A directive should therefore allow the Council to set policy targets for the Enterprise in line with the Convention and the 1994 Agreement.

**5. Identify gaps, if any, in the current regulatory and procedural regime and suggest ways to ensure the proper and independent operations of the Enterprise, including by formulating appropriate regulatory and procedural measures**

35. The 1994 Agreement provides that an interim director general should be appointed from among the staff of the Authority prior to the Enterprise's independent functioning to oversee the functions set out in the Agreement. When the Enterprise begins to function independently, a substantive director general is to be elected. The substantive director general is to be the legal representative and chief executive of the Enterprise directly responsible to the Board for the conduct of operations of the Enterprise and may participate, without the right to vote, in meetings of the Assembly and the Council whenever those organs deal with matters concerning the Enterprise. Although the current rules of procedure of the Assembly and the Council provide for the inclusion in their provisional agendas of reports by the Enterprise, there are no specific provisions for the interim director general and, subsequently, the substantive director general to participate in the meetings of those organs.

**6. Suggest and elaborate on the criteria, qualifications and standards for the nomination of a director general and the election of the members of the Governing Board**

36. The 1994 Agreement merely provides that the interim director general should be appointed from among the staff of the Authority. It does not specify any qualifications required for that position. It is suggested that the Secretary-General seek to appoint a member of the Authority's staff with relevant qualifications, for example in the legal, accounting, financial or technical field. In addition, as regards the permanent director general, the Convention merely states that the Assembly shall, upon the recommendation of the Council and the nomination of the Governing Board, elect the director general of the Enterprise, but without specifying particular qualifications for that position either.

37. Furthermore, the Convention provides that due regard is to be paid to the principle of equitable geographical representation in electing the members of the Governing Board of the Enterprise. It also states that, in electing members to the Board, regard should be paid to the need to nominate candidates of the highest standard of competence, with qualifications in relevant fields.

**7. Identify and formulate criteria for the rules of procedure of the Governing Board of the Enterprise and the code of conduct of its members**

38. The Enterprise is to develop rules of procedure for the Governing Board covering areas such as meetings, decision-making and voting, the election of a chair, the participation of the director general in meetings, the appointment of a secretary to the Governing Board and committees of the Board dealing with matters such as investment assessment, governance, operations, audits and ethics.

### **III. Final remarks and recommendations**

39. In the light of the foregoing and taking into consideration the request of the Council mentioned in paragraph 3 above, the Council is invited to:

(a) Take note of the present report of the Special Representative;

(b) Also take note of the final study and consider any recommendations that the Commission may make during the second part of its session, in July, in relation to the operation of the Enterprise;

(c) Recommend that the Assembly request that the Secretary-General create an additional position of interim director general and that the person whom he appoints to that position carry out the duties identified in the 1994 Agreement and assume the functions previously carried out by the Special Representative (see [ISBA/23/A/13](#), sect. C, para. 3), bearing in mind decision [ISBA/25/C/16](#) adopted by the Council on 1 March 2019, in which the Council, inter alia, undertook to consider recommendations made at the present session, taking account of the ISA technical study on the operationalization of the Enterprise, on the appointment of an interim director general, and also bearing in mind the current limited number of staff employed, whose existing duties would make it extremely difficult, if not impossible, to assume the work associated with the position of interim director general and who, although physically located within the secretariat, would need to be sufficiently autonomous in relation to the secretariat to ensure the arm's length approach and independence required of the interim director general, as provided for in the Agreement. Such action should also take into consideration the calls for the operationalization of the Enterprise contained in a note dated 6 July 2018 from the African Group addressed to the secretariat, which received cross-regional support, and the previous calls by the Council for the Secretary-General to appoint an interim director general in keeping with the requirements of the Agreement, as no appointment has been made since the retirement of the previous interim director general, in 2012.