



الجمهورية الجزائرية الديمقراطية الشعبية
PEOPLE'S DEMOCRATIC REPUBLIC OF ALGERIA

Permanent Mission of Algeria
to the International Seabed Authority

البعثة الجزائرية الدائمة
لدى السلطة الدولية لبحار
العمق

MPANY/N° 04 /MR/18

The Permanent Mission of the People's Democratic Republic of Algeria to the International Seabed Authority presents its compliments to the Secretariat of the International Seabed Authority and, in its capacity as coordinator of the African Group, has the honor to request the submission of the paper, attached, to the Council for its consideration during the 24th session of the International Seabed Authority, in connection with the discussions under the Council's provisional agenda item 11 relating to the "Draft regulations for exploitation of mineral resources in the Area".

The Permanent Mission kindly requests that this note and its attachment be made available to the Member States of International Seabed Authority in advance of next meeting of the Council.

The Permanent Mission of the People's Democratic Republic of Algeria to the International Seabed Authority avails itself of this opportunity to renew the assurances of its highest consideration to the Secretariat of the International Seabed Authority.

New York, 6th July 2018



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Seabed Authority
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Request for consideration by the Council of the African Group's proposal for the operationalization of the "Enterprise"

6th July 2018

(1) /Executive Summary

1. The African Group, representing 47 member States of the International Seabed Authority (the ISA), recognises the Enterprise as an essential component of the regime for seabed mineral activities in the Area envisioned by the UN Convention on the Law of the Sea (the Convention).
2. The African Group is concerned at the lack of progress made to date towards the commencement of the Enterprise as an independently functioning organ of the ISA, able directly to carry out activities in the Area.
3. The African Group finds that the convergence of four separate factors, elaborated below, make it timely for the Enterprise to be launched into a formal existence independent of the ISA's Secretariat, and requests the Council now to take action to operationalise the Enterprise.

(2) Status of the Enterprise

4. Article 170 and Annex IV of the Convention established the Enterprise as the organ of the ISA which, subject to the directives and control of the Council, is to carry out activities in the Area. The Enterprise is to be autonomous in the conduct of its operations, which are to be directed by a Governing Board composed of fifteen members acting in an independent, personal capacity, elected by the Assembly. The Enterprise will also have a Director-General as its Chief Executive Officer and legal representative.
5. The 1994 Agreement, adopting an 'evolutionary approach'¹, provided for delayed commencement of the Enterprise stipulating that, in the immediate term:
 - a. the functions of the Enterprise are to be performed by the Secretariat of the ISA until such time as it begins to operate independently;
 - b. the Secretary-General will appoint an Interim Director-General from the staff of the ISA, to oversee specified functions listed in section 2(1) of the Annex to the 1994 Agreement;
 - c. the Enterprise shall conduct its initial deep seabed mining operations through joint ventures;
 - d. the Council must '*take up the issue of*' the functioning of the Enterprise independently of the Secretariat of the ISA in the event of:
 - i. the approval of a plan of work for exploitation for an entity other than the Enterprise, or
 - ii. upon receipt by the Council of an application for a joint-venture operation with the Enterprise; and
 - e. if joint venture operations with the Enterprise accord with sound commercial principles, the Council shall issue a directive providing for the Enterprise's independent functioning.
6. To date, the functions of the Enterprise have sat within the Secretariat. A first request for consideration of a joint venture arrangement received in October 2012 (which notably did not involve a sponsoring State, and covered eight reserved areas) was received in October 2012. Upon consideration, the Council concluded that it was 'premature' for the Enterprise to function independently at that time².

(3) Importance of the Enterprise

¹ Section 1(3) of the Annex to the 1994 Agreement

² ISBA/20/LTC/12: <https://www.isa.org.im/document/isba20ltc12>

7. The 1971 paper from the Group of Latin American and Caribbean Countries that first introduced the idea of the Enterprise described their reasoning thus: *"In keeping with the principle of common heritage, [we] envisage the establishment of a system in which mankind, in the capacity of owner, would participate directly in the administration and management of the Area and the exploitation of its resources."*³
8. It was to avoid an exclusive group of States or private individuals benefiting above others – and particularly developing States and land-locked States – that the common heritage of mankind principle was set, and that the Enterprise was included in the Convention.
9. The African Group notes today that:
 - a. none of the 29 ISA contracts currently held are sponsored by an African country, or by a land-locked country; and very few are held by developing countries⁴;
 - b. a very low royalty of 2-4% royalty, combined with no profit share, has been proposed as the system of payment to the ISA by contractors;
 - c. the latest draft Exploitation Regulations provide that (non-developing State) contractors could even be financially incentivised to mine the resources of the Area⁵;
 - d. little ISA time has been spent on considering how to maximise participation by developing States and/or the financial and other benefits of activities in the Area to be derived by developing countries, and how to see these shared equitably;
 - e. little ISA time has been spent on assessing the adverse impacts of future exploitation in the Area on developing country economies;
10. Given these points, the African Group is concerned that principles and mechanisms designed to render the Area a level playing field, and which are the cornerstone of the Convention, are at risk of being eroded. The African Group does not wish to see an exploitation regime that facilitates the loss of common heritage resources in return for minimal or no benefit to the populations of African countries, and other developing States.
11. The African Group also notes that the Enterprise is the only mechanism by which the vast majority of developing States can participate in activities in the Area.
12. Meaningful steps toward the launch of the Enterprise taken now, would go some way to safeguard the 'common heritage' and 'benefit to humankind' principles espoused by Part XI of the Convention.

³ Submitted by Chile, Colombia, Ecuador, El Salvador, Guatemala, Guyana, Jamaica, Mexico, Panama, Peru, Trinidad and Tobago, Uruguay, Venezuela, and originally issued as A/AC.138/49, Official Records of the General Assembly, Twenty-sixth Session, Supplement No. 21 (A/8421), pp.93-101.

⁴ The interim report of the Article 154 Review (ISBA/22/A/CRP.3.1: <https://www.isa.org.im/document/isba22acrp-3-1>) noted that: *"It is questionable whether the Authority has enhanced opportunities for all States Parties. It has approved exploration contract applications from some developing States, and it could do more. Some ambiguities were identified by respondents, particularly the term 'developing State' (not defined by the Convention) - some countries that rank highly on the Human Development Index and/or Gross Domestic Product rankings still hold this status. This has potential to influence access to sites reserved only for developing States. Several respondents questioned whether the reserved area system is effective in promoting opportunities [...] Many developing States also find it difficult to participate in the activities of the Authority due to financial and other constraints, and hence encounter problems when developing their own applications. The Enterprise, which was intended to partner with developing States, has not yet been developed by the Authority and some of the reserved areas that were destined to be developed by the Enterprise have now been approved for individual States to explore."*

⁵ The African Group does not support this proposal; effectively paying a private sector company or State to mine the resources of the Area is not in keeping with Part XI of the Convention.

(4) Current Factors Prompting the Commencement of the Enterprise

A. Proposal from the Government of Poland

13. The African Group notes the new proposal currently before the Council contained in ISBA/24/C/12⁶. This proposal, made by the Government of Poland, is “to enter into negotiations to form a joint venture with the Enterprise.” (Further details of the ‘expression of interest’ made by the Government of Poland to the Secretary-General have not been shared with the Council.)
14. The African Group broadly welcomes the proposal, and any moves towards the realisation of the Enterprise, as envisioned in UNCLOS as the key mechanism by which developing countries can directly participate in and maximise benefits from activities in the Area.
15. The African Group notes that the Secretary-General’s report on the Polish proposal states: “The submission of a full proposal for a joint-venture operation to the Council for its consideration in 2019 is envisaged. As required under the Agreement, any such proposal would have to be based on sound commercial principles. **Should a proposal be approved in 2019, the Council may then decide to issue a directive for the independent functioning of the Enterprise, in accordance with section 2, paragraph 2, of the annex to the Agreement.**” [emphasis added]
16. With respect, the African Group considers that such a directive need not wait, and indeed that some independent functioning of the Enterprise should be required before any such proposal can be properly considered and approved or dis-approved by the Authority. The appropriate body to negotiate provisional terms of a potential joint venture arrangement is the Enterprise itself, through its Director-General and Governing Board.
17. In support of this premise, the African Group notes:
 - a. The conflicts of interest that arise so long as the Secretariat continues to act as the Enterprise, as articulated by the Secretary-General in 2013 (paragraphs 13-14 of ISBA/19/C/6)⁷ and reiterated in the ‘Final report on the periodic review of the International Seabed Authority pursuant to article 154 of the United Nations Convention on the Law of the Sea’ (ISBA/23/A/3)⁸.
 - b. The functions assigned to the Secretariat to perform in the interim period before the Enterprise begins to operate independently of the Secretariat. These functions are exhaustively listed in section 2(1) of the Annex to the 1994 Agreement. While this includes ‘Assessment of approaches to joint-venture operations’ generally, it does not include entering into negotiations for a specific joint-venture arrangement.
 - c. That there is currently no Interim Director-General of the Enterprise appointed within the Secretariat. It is unclear how, if at all, the Enterprise is currently being represented by the Secretariat.
 - d. The functions of the Enterprise that are assigned to the Secretariat to perform until the Enterprise begins to operate (by section 2(1) of the Annex to the 1994 Agreement), are not currently being carried out effectively by the Secretariat⁹. Indeed, its workload and capacity constraints have rendered the Secretariat unable year after year even to prepare a study about the Enterprise¹⁰.

⁶ <https://www.isa.org.jm/document/isba24c12>

⁷ <https://www.isa.org.jm/documents/isba19c6>

⁸ <https://www.isa.org.jm/document/isba23a3>

⁹ “Little has been achieved in terms of the Secretariat’s performance of the function of the Enterprise [...and] to date no progress has been made to operationalize the Enterprise.” ISBA/22/A/CRP.3: <https://www.isa.org.jm/document/isba22acrp-3-1> (Interim Report of the Article 154 review).

¹⁰ ISBA/20/LTC/12: <https://www.isa.org.jm/document/isba20ltc12>

B. Draft Exploitation Regulations

18. The African Group is concerned to ensure that the ISA's Exploitation Regulations are drafted in such a way as to take account of the Enterprise, and indeed to encourage applications for exploitation undertaken by the Enterprise (initially by way of joint venture, and in the future as a sole contractor).
19. The Enterprise, as a future ISA contractor operating on behalf of all States and humankind, is a crucial stakeholder in the development of the Mining Code. Unless and until the Enterprise exists as an independent entity, it is not possible for the Enterprise to provide inputs into the consultation process about the drafting of the Regulations.
20. The African Group further notes aspects of the draft Regulations that would appear to require the existence of a functioning Enterprise in order to have meaning, such as:
 - a. the fundamental principle at Regulation 2(2)(c) "*Activities in the Area shall be carried out with a view to ensuring [...] transfer of technology to the Enterprise*"
 - b. Regulation 20 on joint arrangements, e.g. "*The Council shall enable the Enterprise to engage in seabed mining effectively at the same time as the entities referred to in article 153, paragraph 2(b), of the Convention.*"
21. The African Group recalls that contractors have urged the ISA to move forward efficiently with the development of the Exploitation Regulations, indicating an interest to apply for exploitation contracts within the next 2-3 years. Strategic Direction 2.1 in the latest draft Strategic Plan appears to envisage the Exploitation Code and financial regime for the Area being fully completed by 2023¹¹.
22. The African Group believes that the Enterprise should be 'ready to go', when the first exploitation application is under consideration, in order to allow meaningful discussion of joint venture operations. This is particularly relevant for the eleven contracts that have been awarded on the basis of a future joint venture arrangement with the Enterprise (see section D, below).
23. The African Group is concerned that opportunities to involve the Enterprise in activities in the Area have already been lost¹² and wishes to see no further delays.

C. Payment Regime for the Area

24. The ISA is currently considering the design of the system of payments for exploitation of minerals in the Area. To inform this process, three workshops have been held¹³, and the Secretariat of the ISA has commissioned the Massachusetts Institute of Technology to run an

¹¹ ISBA/24/A/4: <https://www.isa.org.jm/document/isba24a4>

¹² Six reserved areas have already been awarded to State-sponsored contractors (as sole operators), in the absence of the Enterprise. Furthermore, a submission from a contractor to the Article 154 review process offered the following view "*With respect to the Enterprise, if a contractor wishes to carry out a joint venture with the Enterprise, then this should be agreed upon at the time of applying for an exploration license. It would not be fair to a Contractor who has invested money during the exploration phase to then be told that they need to partner with the Enterprise. That is a decision that needs to be made by the Enterprise at the time of the exploration contract being granted.*" (<https://www.isa.org.jm/files/documents/EN/Art154/Art154.pdf>) If followed, this approach would mean that the Enterprise is effectively already closed out of eighteen potential exploitation projects, due to the delays in its functioning. This is a matter that requires further discussion at the ISA, before the Exploitation Regulations can be finalised.

¹³ Workshop on the Deep Seabed Mining Payment Regime Workshop (San Diego, 17-18 May 2016); Deep Seabed Mining Payment Regime Workshop 2 (London 1-2 December 2016), and Deep Seabed Mining Payment Regime Workshop 3 (Singapore 19-21 April 2017) <https://www.isa.org.jm/legal-instruments/ongoing-development-regulations-exploitation-mineral-resources-area>

economic model¹⁴. The African Group understands that the principal participants at those workshops were contractors, and that the economic model is based upon inputs provided by private sector exploration contractors.

25. A future mining operation by the Enterprise has not thus far been modelled. Inputs from the Enterprise have not been obtained (this not being possible, unless and until the Enterprise exists).
26. The African Group believes that bringing the Enterprise into existence would bring an important stakeholder voice into this process. The Enterprise, if operational, could provide inputs to enable economic modelling of different types of contractor arrangements. This would assist the ISA better to predict the types of financial benefits that may be derived from activities in the Area, and inform the development of a payment regime for the Area, and contract terms for exploitation, that are designed to maximise benefits to humankind.

D. Future Equity Interest Option Taken by Exploration Contractors

27. Applicants for plans of work for exploration for polymetallic sulphides and cobalt-rich ferromanganese crusts are required to choose between either providing a reserved area, or offering an equity interest in a future joint venture arrangement with the Enterprise (see regulations 16 and 19 of the applicable regulations - ISBA/16/A/12/Rev.1 and ISBA/18/A/11, respectively)¹⁵.
28. The option to offer an equity interest in a future joint venture arrangement with the Enterprise has been taken up by eleven contractors¹⁶, entering into contracts for exploration of polymetallic sulphides or ferromanganese cobalt-rich crusts between 2011 and 2018.
29. It has been highlighted previously in ISA proceedings¹⁷ that the terms and conditions upon which such equity participation may be obtained will need to be further elaborated. No substantive efforts appear to have been made in this regard to date, and the draft Exploitation Regulations do not contain any suggested provisions to cover this.
30. The African Group is of the view that the Enterprise itself is best-placed to provide suggested input in this regard, and will be the best-placed organ within the ISA to undertake the negotiation and analysis of proposed arrangements, within parameters set by the Council (and the Regulations), in accordance with sound commercial principles.

(5) Way Forward

31. The African Group notes that the Secretariat has not been able to respond efficiently to requests, since 2013, to furnish the Council with studies on matters relating to the Enterprise¹⁸.
32. The African Group believes that the operation of the Enterprise is crucial to realising the core principles of UNCLOS Part XI and specifically the common heritage of mankind principle. The

¹⁴ https://www.isa.org.jm/sites/default/files/files/documents/economicspm_n_0.pdf

¹⁵ <https://www.isa.org.jm/documents/isba16a12-rev-1> and <https://www.isa.org.jm/documents/isba18a11>

¹⁶ **Polymetallic sulphides:** COMRA in 2011, the Russian Federation in 2012, IFREMER in 2014, the Republic of Korea in 2014, the Federal Republic of Germany in 2015, India in 2016 and the Republic of Poland in 2018.
Cobalt-rich ferromanganese crusts: COMRA in 2014, JOGMEC in 2014, Companhia De Pesquisa de Recursos Minerais in 2015 and the Republic of Korea in 2018

¹⁷ For example, in the July 2014 Summary report of the Chair of the LTC (ISBA/20/C/20: <https://www.isa.org.jm/document/isba20c20>), and again in 2016 (ISBA/22/LTC/9: <https://www.isa.org.jm/document/isba22l9>).

¹⁸ "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" ISBA/20/LTC/12: <https://www.isa.org.jm/document/isba20l12>

African Group wishes to see this cornerstone of the regime of the Area hindered by inaction no longer.

33. The African Group notes that, while the 1994 Agreement established that (i) two potential trigger events require the Council to take up the issue, and (ii) *“the Secretariat of the Authority shall perform the functions of the Enterprise until it begins to operate independently of the Secretariat”* the Council is not prevented from either ‘taking up the issue’ or indeed, issuing a directive for the independent functioning of the Enterprise at its discretion at any time.
34. The African Group, for the reasons outlined above, believes that the right time is now; and therefore requests the Council to consider the issue of a directive for the independent functioning of the Enterprise at this time, in order to:
 - a) consider and respond to the proposal made by the Government of Poland,
 - b) provide stakeholder input to the development of the Exploitation Regulations,
 - c) work with the Secretariat on economic modelling to ascertain the potential financial benefits of exploitation carried out by the Enterprise, as compared to other types of contractors, in order to inform the development of the ISA’s payment regime, and
 - d) work on a further elaboration of the proposed conditions under which joint ventures in future exploitation contracts may operate, with the Enterprise’s equity participation.
35. In the interim, the African Group:
 - a. does not consider that the Exploitation Regulations or the payment regime of the ISA can be finalised without independent inputs from the Enterprise;
 - b. does not consider the draft Strategic Plan’s stated intention merely to *“identify possible approaches to the future establishment of the Enterprise”*¹⁹, a sufficiently ambitious five-year vision; and
 - c. [suggests, in accordance with the evolutionary approach espoused by the 1994 Agreement, that the Council in the immediate term should re-consider the Secretary-General’s proposal from 2013 *“to authorize the Interim Director-General to appoint from outside the secretariat a special representative and such other technical and legal advisers as may be necessary (for example, consultants and legal firms), who will be independent of the secretariat of the Authority, and of [contractors], for the purposes of conducting negotiations on behalf of the Enterprise [...] The special representative should be an eminent person with appropriate experience and qualifications. He or she would report directly to the Council through the Interim Director-General of the Enterprise, and not to the Secretary-General.”* (ISBA/19/C/6, paragraph 17). The African Group would add that this arrangement should be considered a temporary bridge until the commencement of an independently functioning Enterprise, which should occur within the 5-year strategic plan period.]

¹⁹ ISBA/24/A/4 <https://www.isa.org.jm/document/isba24a4>