

Workshop for the Promotion of Sustainable Development of Africa's Deep Seabed Resources in Support for Africa's Blue Economy
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**INDEPENDENT OPERATION OF THE ENTERPRISE :
PERSPECTIVES AND CHALLENGES**

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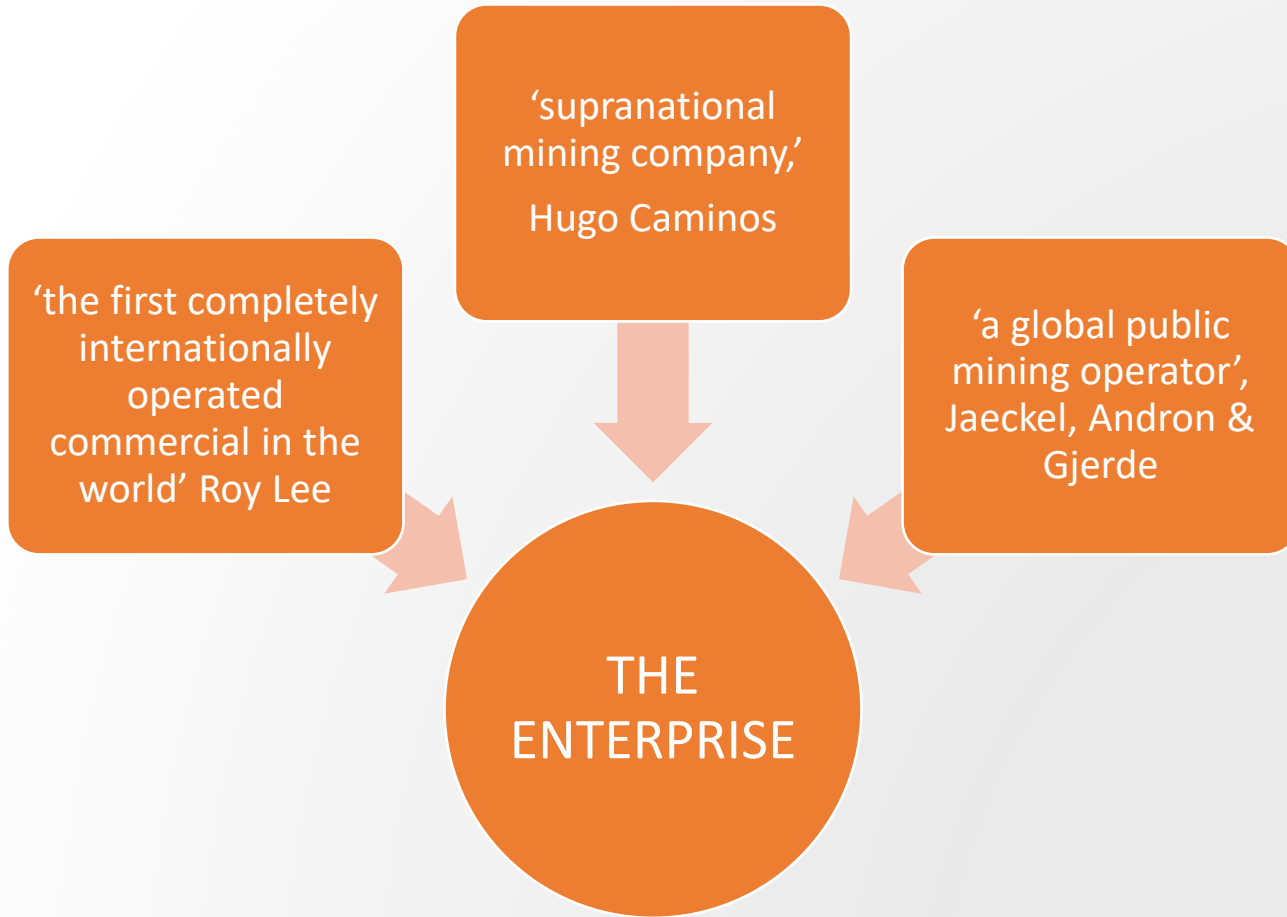
Outline

- Introduction
- What Exactly is the Enterprise?
- Enterprise – UNCLOS 82 and 1994 Agreement provisions
- Enterprise – interim status
- Enterprise – independent functioning
 - ❑ Trigger events
 - ❑ Sound commercial principles – what does this mean
 - ❑ Some issues
- Conclusions

Introduction

- Background
- African Group's proposal for the operationalization of the "Enterprise", 6th July 2018
 - ❑ "...the Enterprise is the only mechanism by which the vast majority of developing States can participate in activities in the Area." African Group(2018)
 - ❑ "... 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" African Group(2018)
 - ❑ "one of the crucial building blocks for effective implementation of the Common Heritage of Humankind" Egede

What exactly is the Enterprise?



Enterprise – Treaty Provisions(I)

- Art.170 of UNCLOS 82

1. The Enterprise ***shall be the organ of the Authority which shall carry out activities in the Area directly, pursuant to article 153, paragraph 2(a), as well as the transporting, processing and marketing of minerals recovered from the Area.***

2. The Enterprise shall, within the framework of the international legal personality of the Authority, have such legal capacity as is provided for in the Statute set forth in Annex IV. The Enterprise shall act in accordance with this Convention and the rules, regulations and procedures of the Authority, as well as the general policies established by the Assembly, and shall be subject to the directives and control of the Council.

3. The Enterprise shall have its principal place of business at the seat of the Authority.

4. The Enterprise shall, in accordance with article 173, paragraph 2, and Annex IV, article 11, be provided with such funds as it may require to carry out its functions, and shall receive technology as provided in article 144 and other relevant provisions of this Convention.

- Annex IV, UNCLOS 82 – Statute of the Enterprise

Enterprise – Treaty Provisions(II)

Interim Status

- See Section 2 of Annex of 1994 Agreement
- 1. The Secretariat of the Authority shall perform the functions of the Enterprise **until it begins to operate independently of the Secretariat**. The Secretary-General of the Authority shall appoint from within the staff of the Authority an interim Director-General to oversee the performance of these functions by the Secretariat. These functions shall be [specified functions listed in section 2(1)...];

Independent Functioning

- 2. The Enterprise shall conduct its initial deep seabed mining operations through joint ventures. **Upon the approval of a plan of work for exploitation for 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 shall take up the issue of the functioning of the Enterprise independently of the Secretariat of the Authority. If joint-venture operations with the Enterprise **accord with sound commercial principles**, the Council shall issue a directive pursuant to article 170, paragraph 2, of the Convention providing for such independent functioning.

Interim Status of Enterprise

- Some issues arising
 - Appointment of interim D-G and qualifications;
 - Staff required to support interim D-G;
 - Special Representative –
 - Use of Consultants;
 - Interim D-G's role vis-à-vis Enterprise's independent functioning

Enterprise –
Independent
Functioning

Some Issues

- Trigger events
- Joint Ventures
- Sound
Commercial
Principles
- Enterprise as an
independent
entity: some key
issues

Trigger Events

Pre-exploitation Trigger

- ⑩ Receipt by the Council of an application for a joint-venture operation with the Enterprise
- ⑩ 2012 Nautilus Minerals Inc. joint venture proposal
- ⑩ 2018 Government of Poland joint venture proposal
- ⑩ appointment of Special Representative. ISBA/25/C/16;
- ⑩ Letter of 3 January 2019 from Special representative report of January 2009

Post-exploitation Trigger

- ⑩ Upon the approval of a plan of work for exploitation for another entity.

Trigger events
(II)

- What are these?
- Types of Joint ventures?
- Joint ventures for all or some of the activities the Enterprise can undertake?

Sound
Commercial
Principles –
what does
this mean?

Not explicitly defined in any of these legal instruments

Vienna Convention on Law of Treaties
1969 – Treaty interpretation Rules

Interpreting 'sound commercial principles in the light of certain parameters, based on the provisions of Part XI of the Convention and 1994 Agreement.

Sound Commercial Principles – what does this mean? (II)

- **What are the parameters?**
 - ❑ **Common Heritage principle** - as the fundamental overarching principle governing the regime;
 - ❑ **Autonomy** of the Enterprise to make effective commercial decisions without political influence;
 - ❑ **Cost-effectiveness** in relation to the operations of the Enterprise (it should be a position to generate enough revenue to finance its running cost and to run its operations efficiently without a need to be subsidized by the State Members);
 - ❑ **Evolutionary approach** in its operationalization (for instance, an evolutionary approach to staffing, accommodation and its initial operation);
 - ❑ **Commercial viability.** It has been identified that commercial viability would entail a number of considerations, such as: What is the management structure? Is the management sound? Are funds available? Does it have access to the resources that it intends to develop? Has it or can it obtain the necessary technology? Will it have access to a market for the resources and what are the prospects of that market?

Enterprise as an independent entity: some issues(I)



Efficient running of Enterprise v.
Politicisation



Reconciling how the Enterprise could
be an autonomous body and yet act
under the directive of the Council?



Governance issues



Immunity issues



Liability issues

Enterprise as
an
independent
entity: some
issues(II)

Funding of the Enterprise

Minimization of Costs to States
Parties

Transfer of Technology

Operationalization of the
Enterprise and Exploitation Code

Conclusions

- ❑ Some questions to consider
 - What can be done during the interim status of the Enterprise to ensure that the interim DG is effective?
 - What can be done to ensure the independent functioning of the Enterprise?
 - What can be done to ensure the independent Enterprise is commercially viable?
- ❑ Full operationalization of the Enterprise would give effect to the implementation of the CHM!

Thank You

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