

Effective Control

ISA Council 28th Session Part II

Informal Working Group on Institutional Matters

Co-Facilitators, Ambassador Georgina Guillén-Grillo (Costa Rica) and Mr. Salvador Vega Telias (Chile)

17 July 2023

What is ‘Effective Control’?

- Article 153(2) UNCLOS provides:

*“Activities in the Area shall be carried out [...]: (a) by the Enterprise, and (b) in association with the Authority by States Parties, or state enterprises or **natural or juridical persons which possess the nationality of States Parties or are effectively controlled by them or their nationals, when sponsored by such States, or any group of the foregoing [...]**”*

- Advisory Opinion on the Responsibilities and Obligations of States Sponsoring Persons and Entities With Respect To Activities in the Area, Case No. 17, delivered by the Seabed Disputes Chamber of ITLOS on 1 February 2011 provides:

“75. The purpose of requiring the sponsorship of applicants for contracts for the exploration and exploitation of the resources of the Area is to achieve the result that the obligations set out in the Convention, a treaty under international law which binds only States Parties thereto, are complied with by entities that are subjects of domestic legal systems.”

““77. [...] All contractors and applicants for contracts must secure and maintain the sponsorship of the State or States of which they are nationals. If another State or its nationals exercises effective control, the sponsorship of that State is also necessary. [...]”

- So ‘effective control’ is: relationship that must exist between a Sponsoring State and an entity, in order for that entity to be eligible to carry out activities in the Area.
- A non-State entity is not bound by UNCLOS or ISA rules. ‘State sponsorship’ ensures there is always a State (subject to international law) accountable to the international community for any contractor’s conduct.
- Article 153(2) does not explain what is required specifically for the relationship to qualify as ‘effective control’.
- But does tell us that it is different from owning the State’s nationality.

‘Effective control’ and ‘Responsibility to Ensure’?

- Article 139 UNCLOS: States Parties have “**responsibility to ensure** that activities in the Area, [...] effectively controlled by them or their nationals, shall be carried out in conformity with [Part XI UNCLOS]”.
- This ‘responsibility to ensure’ was the subject of the ITLOS Advisory Opinion of 2011.
- ‘Effective control’ and ‘responsibility to ensure’ are related but different obligations.
 - ‘*Effective control*’ is the relationship that must exist between the State and Contractor, throughout the contract. This seems to be a question of fact, rather than a State duty.
 - ‘*Responsibility to ensure*’ is an ongoing duty that the State must meet, to exercise regulatory control over the contractor. This duty may be met by robust national laws and administrative measures, properly implemented.
- ‘Effective control’ is important in legal framework, because national law and domestic administrative matters cannot be enforced if the contractor does not have presence in the national jurisdiction.

ISA approach to 'Effective Control' to date

- UNCLOS Travaux Préparatoires for UNCLOS: requirements for 'Effective Control' to be set forth in rules, regulations and procedures of the ISA. No such ISA rules yet exist.
- Exploration Regulations require an applicant only to disclose principal place where domiciled and does business / the place of registration of the applicant. (This is known as '**regulatory control**'.)
- Before 2011, all ISA contract applicants were States, State institutions, or State owned companies. 2011-2021 saw applications from private sector companies, sponsored by a State.
- In 2011 Council asked for advice, and the Secretariat provided an opinion in 2014 that "[t]he emerging trend is towards a test of effective control that emphasizes 'regulatory control' over ownership and investment criteria." [ISBA/20/LTC/10]. This drew on examples relating to flagging vessels and civil aviation.
- The Council noted the matter remained unsettled.

‘Regulatory control’ vs ‘Economic Control’?

- **ISA Legal Liability Working Group** questioned reliance on ‘regulatory control’ as test for ‘effective control’, querying whether an ‘economic control’ test would be more appropriate. [Rojas and Phillips, 2019]
- Authors found examples in international law to suggest the trend was more in favour of emphasis on ‘**economic control**’ i.e. ‘lifting the corporate veil’ and looking at where financial ownership and management control were located (e.g. parent company).
- Relevant precedents include: diplomatic protection, and 1988 Convention on Regulation of Antarctic Mineral Resource Activities (CRAMRA).
- The paper also considered examples of vessel flagging and aviation, but came to a different analysis from the Secretariat’s, finding that these regimes pointed to in favour of an ‘economic control’ approach at the ISA, not mere ‘regulatory control’.
- The paper noted that leaving to each individual sponsoring State the determination of what constitutes effective control could lead to legal variability, encourage ‘forum shopping’, and undermine the coherence of the international framework.

How else does 'Effective Control' relate in the ISA regime?

Contractor that is subsidiary of parent company located in a different country, may give rise to questions relating to, e.g.:

- *Monopolisation.*
- *State who receives benefits vs State who holds liability.*
- *'Reserved Areas'.*
- *Joint State Sponsorship.*
- *Technology Transfer.*
- *Liability.*

The risk of “sponsoring States of convenience”

2011 Advisory Opinion cautions against the spread of sponsoring States ‘of convenience

159. Equality of treatment between developing and developed sponsoring States is consistent with the need to prevent commercial enterprises based in developed States from setting up companies in developing States, acquiring their nationality and obtaining their sponsorship in the hope of being subjected to less burdensome regulations and controls. The spread of sponsoring States “of convenience” would jeopardize uniform application of the highest standards of protection of the marine environment, the safe development of activities in the Area and protection of the common heritage of mankind.

Conclusion

- Different interpretations, with potentially significant implications.
- Increasingly important that Council takes a proactive and informed decision about how to apply 'effective control' as we move towards exploitation.
- While noting that any decision that is deemed a change to approach by the ISA, would require consideration of the impacts on existing contracts.
- Exploitation Regulations present an opportunity to provide the missing rules.
 - *Regulation 6: Certificate of Sponsorship*
 - *Regulation 6 and Annex I: Form of applications to accompany a Plan of Work*
 - *Regulation 13: Assessment of Applicants*
 - *Regulation 21: Termination of Sponsorship*
 - *Regulation 24: Change of Control*
 - *Schedule of defined terms*
- Co-facilitators would like to propose inter-sessional working on this specific topic through a webinar.