

Part III of the 28th Session of the International Seabed Authority
Informal Working Group on Institutional Matters
Webinar on “Effective control”
September 1st 2023 7 am to 10 am Jamaican Time

CONCEPT NOTE

Since the beginning of the discussions on the Draft Regulations, several delegations noted the need to discuss the issue of effective control within the framework of the informal working group on institutional matters. ‘Effective control’ is shorthand for the relationship between a sponsoring State and a non-State ISA contractor, which is required (but not expressly defined) by UNCLOS.

According to UNCLOS, ISA contracts can be held either by States or by non-State entities. UNCLOS stipulates that any non-state contractor must be ‘effectively controlled’ by a sponsoring State or by nationals of the sponsoring State. This is both a pre-condition to contract award, and a continuing requirement throughout contract term.

The reason for the “effective control” requirement is that a non-State entity is not bound by UNCLOS or ISA rules. The ISA ‘State sponsorship’ system ensures there is always a State (which is subject to those international rules) accountable to the rest of the international community for any ISA contractor’s conduct. The individual State can hold its sponsored contractor to the relevant rules, by way of national law. For that mechanism to work in practice, there needs to be a real link between the State and the contractor: a relationship of ‘effective control’.

UNCLOS does not however expressly define ‘effective control’ or say much more about how it should work. According to the travaux préparatoires for UNCLOS, there were some concerns expressed about the effective control provisions, which were resolved by a compromise that requirements for ‘effective control’ were to be set forth in rules, regulations and procedures of the ISA [“Report of the coordinators of the working group of 21 to the First Committee during the ninth session of the conference”]. But to date, none of the ISA’s rules have provided a clear definition of effective control.

For drafting a robust legal framework for seabed mining, defining effective control is of essence.

The definition of Effective Control is relevant to (and could be clarified in), for example,

- Regulation 6: Certificate of Sponsorship
- Regulation 6 and Annex I: Form of applications to accompany a Plan of Work
- Regulation 13: Assessment of Applicants
- Schedule of defined terms

Some relevant legal considerations :

- Article 153(2) of the Convention 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 [...]**”*

- *The ITLOS 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 additional insight and helps set the context*
- So ‘effective control’ is: the 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.
- This is relevant because a non-State entity is not bound by UNCLOS or ISA rules. So the ‘State sponsorship’ system ensures there is always a State (subject to those international rules) accountable to the rest of 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’. It does tell that it is different from owning the State’s nationality.
- The Seabed Disputes Chamber of ITLOS cautioned against the potential spread of ‘sponsoring States of convenience’.

Paragraph 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 the protection of the common heritage of mankind”.

How does ‘Effective Control’ relate to a Sponsoring State’s duties to ensure compliance?

- A sponsoring State has a duty under Article 139 of the Convention States Parties of “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 this legal framework, because a national law and domestic administrative matters cannot be effectively enforced if the contractor does not have meaningful presence in the national jurisdiction.
- Both ‘effective control’ [the relationship] and ‘responsibility to ensure’ [the duty] are required for the Sponsoring State arrangement to work.

How else is ‘Effective Control’ relevant to the ISA legal framework?

- As well as being relevant to a State’s ability to exercise its ‘responsibility to ensure’, ‘effective control’ may also have repercussions for other aspects of the ISA’s regime, particularly on issues relating to equity. E.g.

- **Monopolisation.** *If there were a parent company that controls multiple contractors, but that is not regulated by the Sponsoring State, that company may be able to use its position to monopolise or to unfairly affect competitive conditions in the market.*
- **Benefits to sponsoring State.** *It has become emerged during the OEWG on the payment regime that contractors may not be paying tax in their developing country sponsoring State, but instead paying tax via a parent company in a developed country.. This means that the State who benefits, is different from the State who holds responsibility and liability.*
- **Joint State sponsorship.** *UNCLOS envisages that a contractor may have multiple sponsoring States. Is this possible if the 'regulatory control' test is applied? A contractor presumably can't be registered in more than one jurisdiction. (Noting that the ISA's one existing joint sponsorship contract, is an international organisation so may not encounter this issue).*
- **Technology transfer.** *Article 5(3)(c) of annex III, relating to the facilitation of technology transfer, takes into account the "closeness" and the "degree of control or influence" in determining if all reasonable measures were taken to acquire a right of use the technology owner.*
- **Liability.** *Should the sponsoring State liability extend not only to the State in which the company is registered, but also the State(s) in which a parent company controlling that contractor as its subsidiary is domiciled?*

The Exploitation Regulations present a timely opportunity to provide the missing rules envisaged by the UNCLOS drafters, and to provide legal certainty in this area to all ISA stakeholders. This webinar will allow to kick-start the discussion, in order to work together towards the definition of Effective Control needed for the correct future application of the Rules, Regulations and Procedures.