

EFFECTIVE CONTROL: IMPLICATIONS FOR SPONSORING STATES AND THEIR OBLIGATIONS TO REGULATE THE CONTRACTOR

**WEBINAR ON EFFECTIVE CONTROL HELD BY THE INFORMAL WORKING GROUP ON
INSTITUTIONAL MATTERS, 1 SEPT 2023**

Dr. Tara Davenport

Co-Head, Oceans Law and Policy Programme

Centre for International Law

National University of Singapore

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 [...]**”*

- **SDC Advisory Opinion 2011:**

- “All contractors and applicants for contracts must secure and maintain the sponsorship of the State or States of which they are national. If another State or its nationals exercise effective control, the sponsoring of that State is also necessary” [para. 77]
- “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**. This result is obtained through the provisions of the Authority’s Regulations that apply to such entities and through the implementation by the sponsoring States of their obligations under the Convention and related instruments” [para. 75]
- Sponsoring States contribute to “the realization of the common interest of all States in the proper application of the principle of the common heritage of mankind which requires faithful compliance with the obligations set out in Part XI” [para. 76]

EFFECTIVE CONTROL

- 2011 SDC Advisory Opinion indicates that where nationality and effective control involve two different states, sponsorship is required from both
- 2016 ISA Secretariat Report notes the following development from 2011 onwards:
 - "the existence of close associations or collaborations between developing States and their sponsored entities with the business interests of entities registered in, or owned by nationals of, developed States"
- In practice, "effective control" has been interpreted as "regulatory control" in that in the applications for exploration licenses, no potential contractor has been asked to present a sponsorship certificate issued by the State of the nationality of the company that is a parent company of the subsidiary that is incorporated in the sponsoring State

SPONSORING STATE OBLIGATIONS

SDC Advisory Opinion 2011

- Sponsoring States have 2 kinds of obligations under UNCLOS and related instruments:
 - 1) Direct obligations with which Sponsoring States must comply independently of their obligation to ensure a certain conduct on the part of sponsored contractors.
 - The obligation to assist the ISA in its function of exercising control over activities in the Area as is necessary for the purpose of securing compliance by Contractors as set out in Article 153 (4) of UNCLOS
 - The obligation to apply the precautionary approach as reflected in Principle 15 of the Rio Declaration
 - The obligation to apply best environmental practices as set out in the ISA Regulations
 - The obligation to adopt measures to ensure the provision of guarantees in the event of an emergency order by the ISA for protection of the marine environment
 - The obligation to provide recourse for compensation
 - The sponsoring State is under a due diligence obligation to ensure compliance by the sponsored contractor with its obligation to carry out an Environmental Impact Assessment under the Annex to the 1994 Agreement

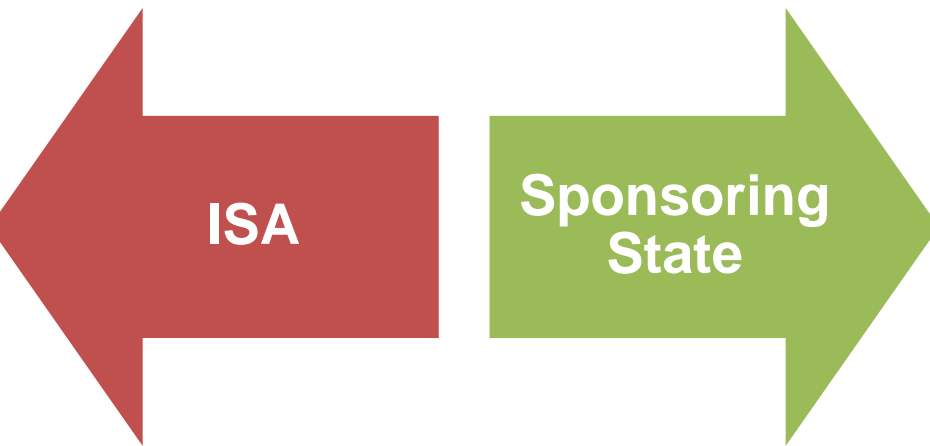
SPONSORING STATE OBLIGATIONS

SDC Advisory Opinion 2011

2) Due Diligence Obligation

- The obligation to exercise *due diligence* to ensure compliance by sponsored Contractors with the terms of the contract and obligations set out in UNCLOS and related instruments.
- Not an obligation to achieve the result that the sponsored Contractor complies with its obligations but rather an obligation to ‘deploy adequate means, to exercise best possible efforts, to do the utmost, to obtain this result’
- Sponsoring states can fulfill their due diligence obligations by taking necessary and appropriate measures within its legal system to ensure that a Contractor complies with its obligations
- These necessary and appropriate consist of “laws and regulations and administrative measures which are, within the framework of its legal system, reasonably appropriate for securing compliance by persons under its jurisdiction”
- The sponsoring state’s obligation is ongoing in that it requires not only the adoption of appropriate rules and measures but also a **certain level of vigilance in their enforcement and the exercise of administrative control applicable to public and private operators**, such as the monitoring of activities undertaken by such operators

MONITORING & ENFORCEMENT VIS-À-VIS CONTRACTORS



Shared Responsibilities in
Ensuring Compliance by
Contractor

- Monitoring and enforcement of Contractor's obligations is a key component of ensuring compliance by Contractor
- The ISA is an intergovernmental organization and its ability to monitor and enforce Contractor's obligations may be limited as compared to the sponsoring state
- Sponsoring state may be better placed to monitor and enforce some of Contractor's obligations due to the presence of business offices and other assets in the jurisdiction of the sponsoring State
- Home States of parent corporations are not obliged to adopt necessary and appropriate measures within their national legal systems

MONITORING AND ENFORCEMENT VIS-À-VIS CONTRACTORS

Inspections at Contractors' Offices and Vessels / Installations

Non-Compliance Mechanisms

Suspension and Termination of Contract / Sponsorship

Initiation of Dispute Settlement Proceedings

MONITORING AND ENFORCEMENT VIS-À-VIS CONTRACTORS

- Inspections
 - UNCLOS and Draft Exploitation Regulations oblige Contractors to allow the ISA to send its Inspectors to Contractors' offices wherever situated, and vessels and installations, whether onshore or offshore and that the sponsoring State shall assist the Council, the Secretary-General and Inspectors in discharging their functions
 - Contractor must also provide access to monitoring equipment, books, documents, papers, etc
 - Sponsoring state only has authority over premises situated in its national jurisdiction

MONITORING AND ENFORCEMENT VIS-À-VIS CONTRACTORS

- Non-compliance mechanisms under UNCLOS and Draft Exploitation Regulations
 - Written warnings
 - Compliance notices
 - Monetary Penalties
- If monetary penalties are not satisfied, sponsoring States in principle have the right to bring domestic proceedings under their national laws
- More complex if assets are in a different jurisdiction

MONITORING AND ENFORCEMENT VIS-À-VIS CONTRACTORS

- Initiation of dispute settlement proceedings either under national law or under Section 5 of Part XI of UNCLOS, including claims for liability
 - Challenges in enforcement of decisions of the Seabed Disputes Chamber/arbitral tribunal and decisions of national courts when the parent entity is another jurisdiction

SOME CONCLUDING THOUGHTS

- The problem of regulation of transnational corporations is not a new phenomenon in international law
 - Limited liability of corporations has facilitated the conduct of business through group structures in order to reduce risk and increase financial returns, consequently incentivizing the establishment of subsidiaries
 - Subsidiaries (unlike branches) are separate legal entities, distinct from the parent companies that own them even though parent companies often own most of the shares in their subsidiaries
 - General challenges in holding private actors liable under international law
- Both advantages and disadvantages in current emphasis on “effective control” as “regulatory control”
- Notion that the State of incorporation of a company is also the State that exercises effective control over that company is increasingly being challenged with the multitude of legally incorporated entities in different jurisdictions with no connection to the territory – a challenge that the ISA will have to continue to deal with in the exploitation phase

THE END
QUESTIONS?
lawtmd@nus.edu.sg