



Effective Control and Deep Seabed Mining: Toward a Definition

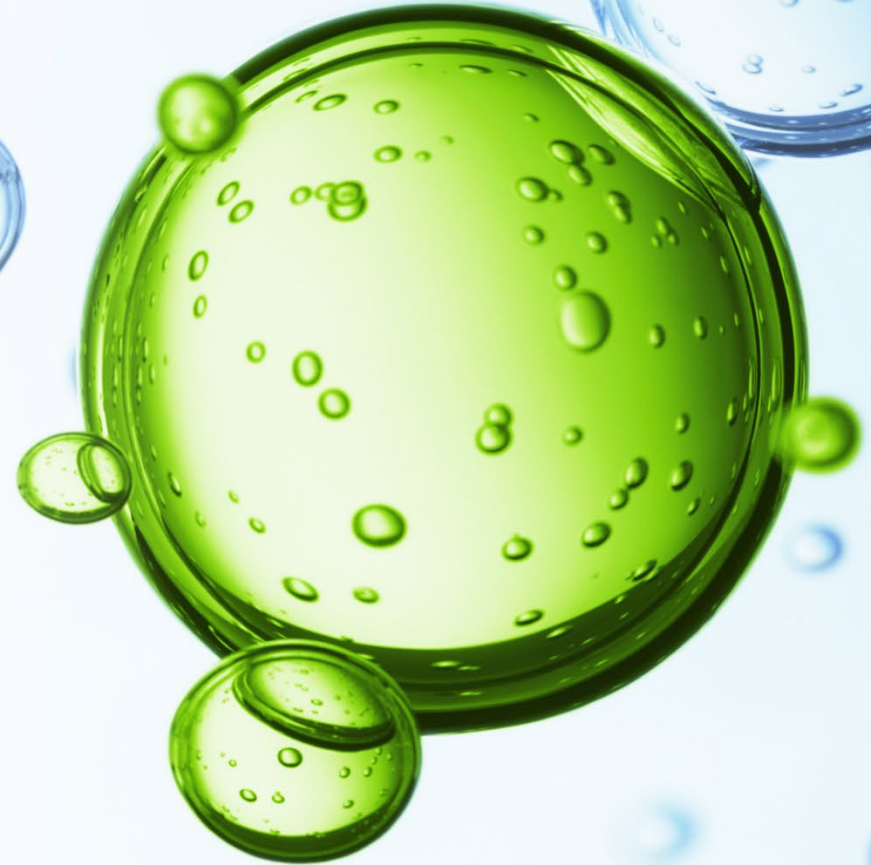
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Overview

Effective Control and Deep Seabed Mining: Toward a Definition

- Unpacking Effective Control
- Interpreting the Concept of Effective Control
 - United Nations Convention on the Law of the Sea (LOSC)
 - Other Documents: Exploration Regulations and previous discussions
- Effective Control in Other International Legal Contexts
 - Diplomatic Protection
 - Maritime Vessels and Civil Aviation
- Clarifying Effective Control



Effective Control in the Liability Context

A Regulatory and/or Economic Concept

- Development of a liability regime for deep seabed mining should be responsive to the practical realities of organizational practices and structures to ensure injured parties have legal recourse to seek compensation for environmental damages.
- Under the Law of the Sea Convention (LOSC), effective control — by a state itself or by its nationals — is one of the two possible links between a sponsoring state and a contractor, the other being nationality (Art 139 & 153).
 - ✓ **Art 139(1):** States parties hold **responsibility for ensuring** activities carried out by entities that “possess the nationality of States Parties or are effectively controlled by them or their nationals” are in **compliance with the convention**.
 - ✓ **Art 153(2):** May be carried out by: the Enterprise, “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...”



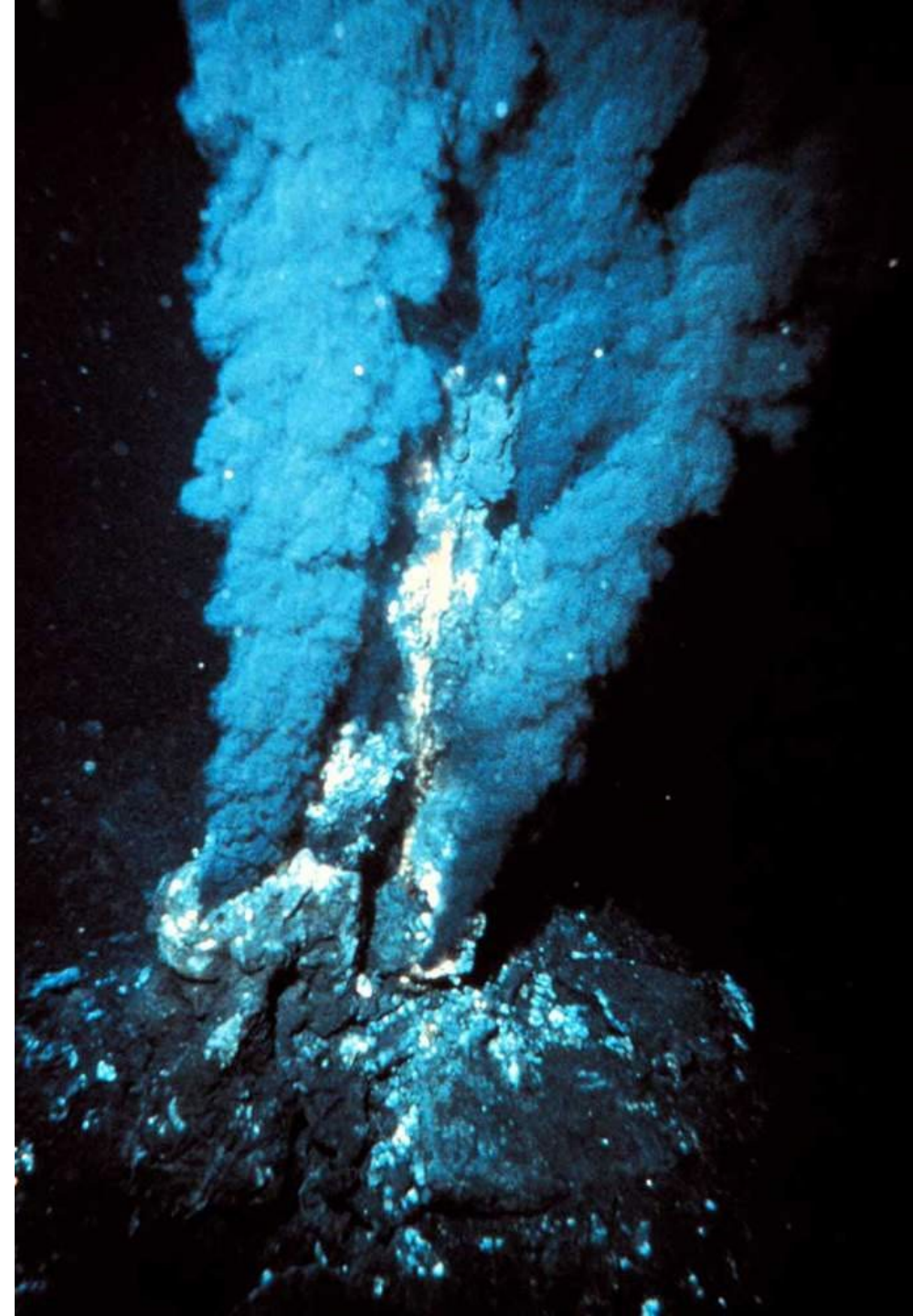
Effective Control and Deep Seabed Mining: Toward a Definition

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Potential for Divergent Interpretations

Implications

- **Annex III, Art 4(3):**
 - ✓ Eligibility: must either be a national of the sponsoring state or effectively controlled by it/or its nationals. **In the event that the state of effective control differs from the state of nationality**, it requires that both states should issue certificates of sponsorship. Multiple nationalities: such as groups = all States involved.
- **Regulatory control**: limited scope for joint sponsorship given regulatory authority over nationals.
- **Economic control**: through, for example corporate ownership structures, has a much higher scope for joint sponsorship.
 - ✓ Art 139 could likewise be interpreted so that sponsoring state liability could extend to the entity's state of nationality as well as that of the parent company exercising effective control over the subsidiary.



Informing Interpretation

Vienna Convention on the Law of Treaties

- **Art 31-32: Interpreted in good faith, based on the “ordinary meaning,”** in the context of the object and purpose of the instrument
- **South China Sea Dispute:** The Tribunal stressed the **prominence of environmental protection under the Convention. Interpretation is informed by obligations within the Convention, other instruments, and the general corpus of international law.**
- **Obligations: Sponsoring states assume due diligence obligations** which have been the object of a detailed analysis by the Seabed Disputes Chamber (SDC) of the International Tribunal of the Law of the Sea (ITLOS) in its 2011 Advisory Opinion. **Lack of proper fulfillment of those obligations will function as a source of liability**

Corporate Practices

Example of corporate structure

- ✓ Subsidiary registered in a developing or emerging economy with significant foreign ownership.
- ✓ Potential for highly complex corporate structure.

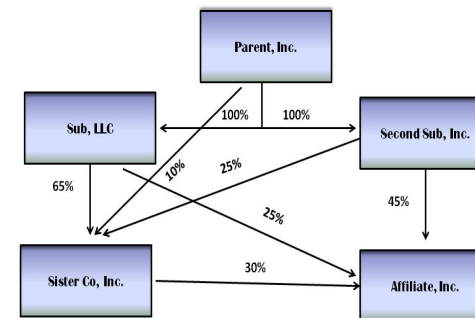


Figure A: Example of corporate structure

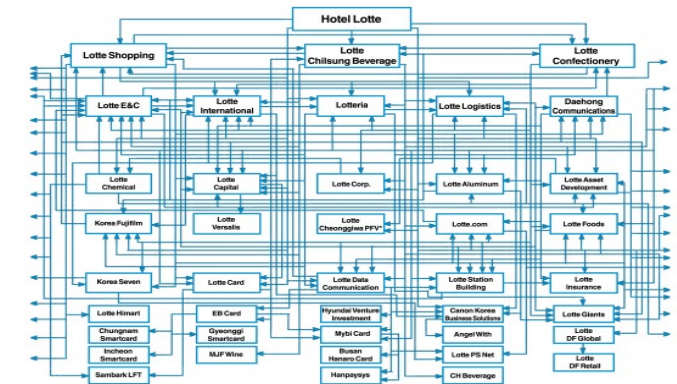
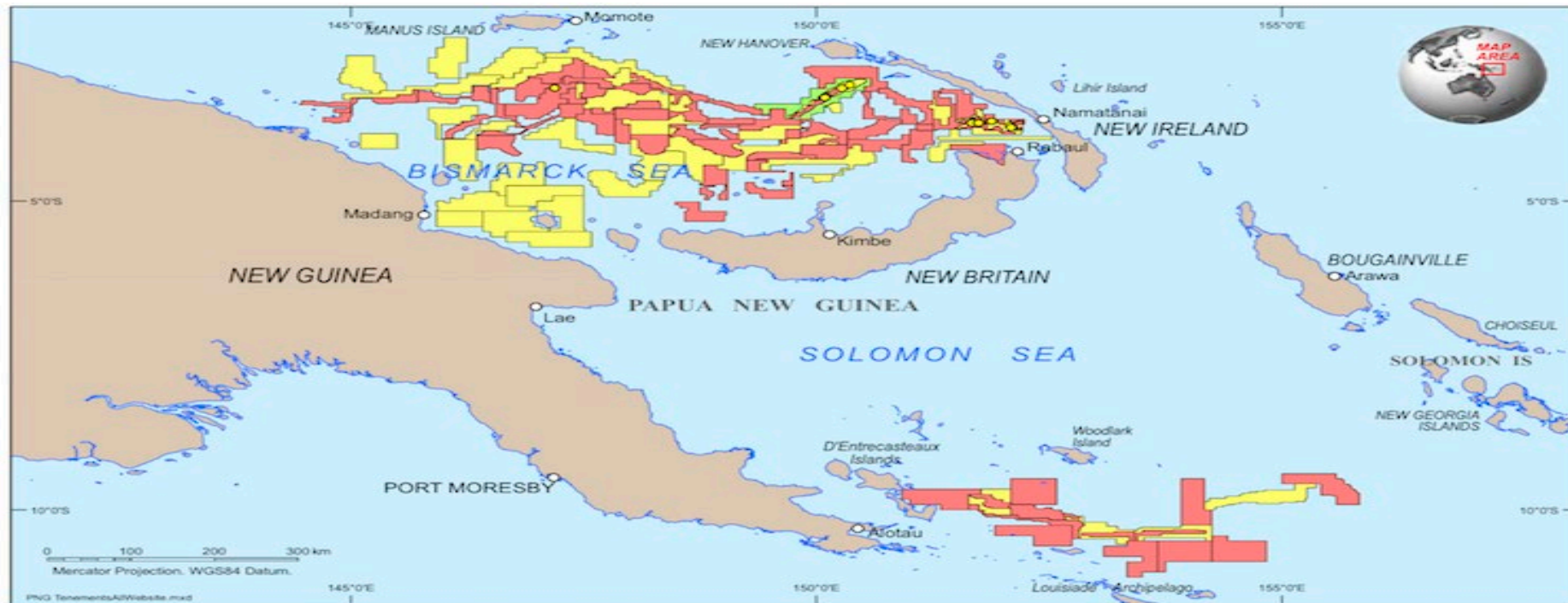


Figure B: Example of corporate structure

Twofold Connection of “Effective Control”

Multiple Nationalities / Factors Related to Monopolization

- All contractors are to maintain the sponsorship of “the State or States of which they are nationals” and where another state or its nationals exercises effective control, their sponsorship as well. (SDC para 77).
- Annex III, Art 6 – prevention of abuse of dominant position
 - ✓ May be approved except where submitted by a state party that already holds plans for exploration and exploitation which, if combined, would exceed 30% of a 400,000 km² circular area.
 - ✓ Consortiums are to be considered on a *pro rata* basis.



Additional References (1/2)

Other factors for consideration

■ Annex III, Art 9(4) – “reserved areas”

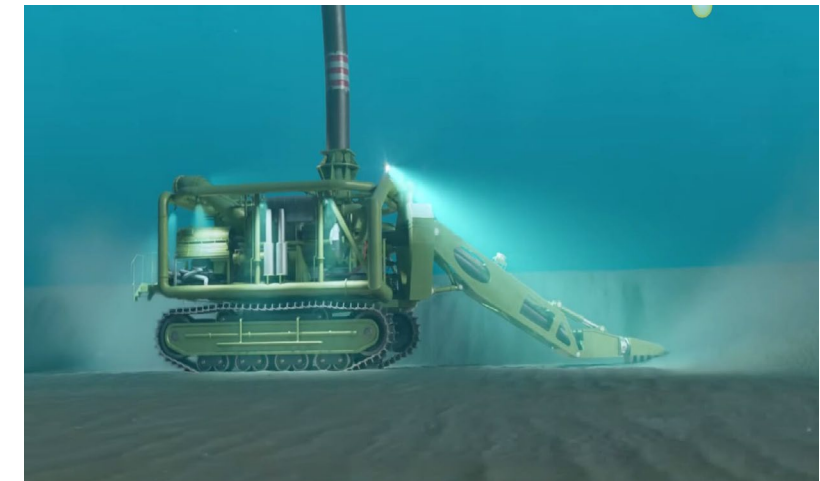
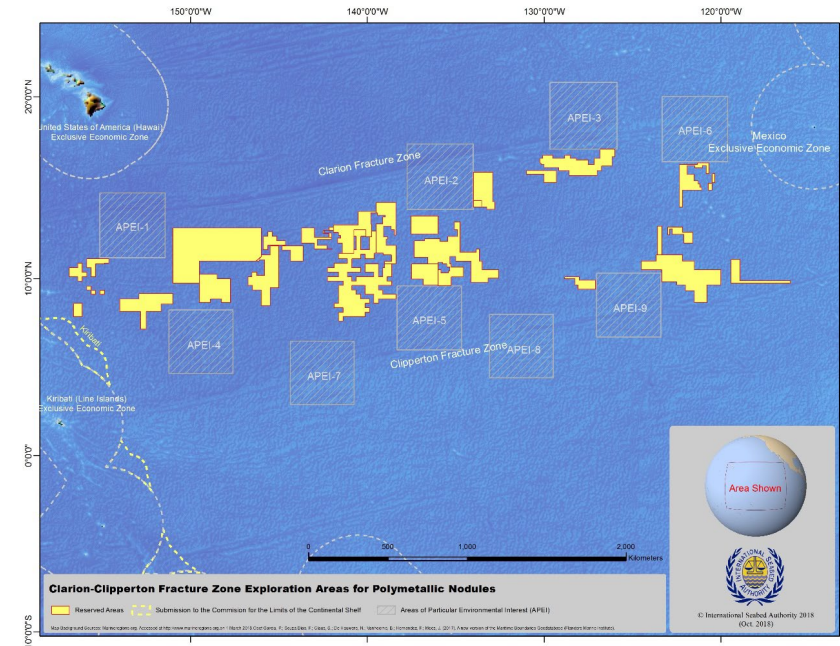
- ✓ **Developing states parties**, or entities sponsored and effectively controlled by developing states parties, may notify the ISA of an intention to **submit a plan of work relating to a “reserved area.”**
- ✓ It is through this process that the **equity** and awareness of the **special position of developing countries** are achieved (SDC para 163).

■ Annex III, Art 5(3)(c) - technology transfer

- ✓ Takes into account the **“closeness” of the relationship between the contractor and the technology owner** and the **“degree of control or influence”** in making a determination if all reasonable measures were taken to acquire a right of use.
- ✓ Cases where the contractor effectively controls the owner of the technology, and yet fails to secure a usage right, are to be considered in future applications for approval

■ Final Act of the Third Conference on the Law of the Sea

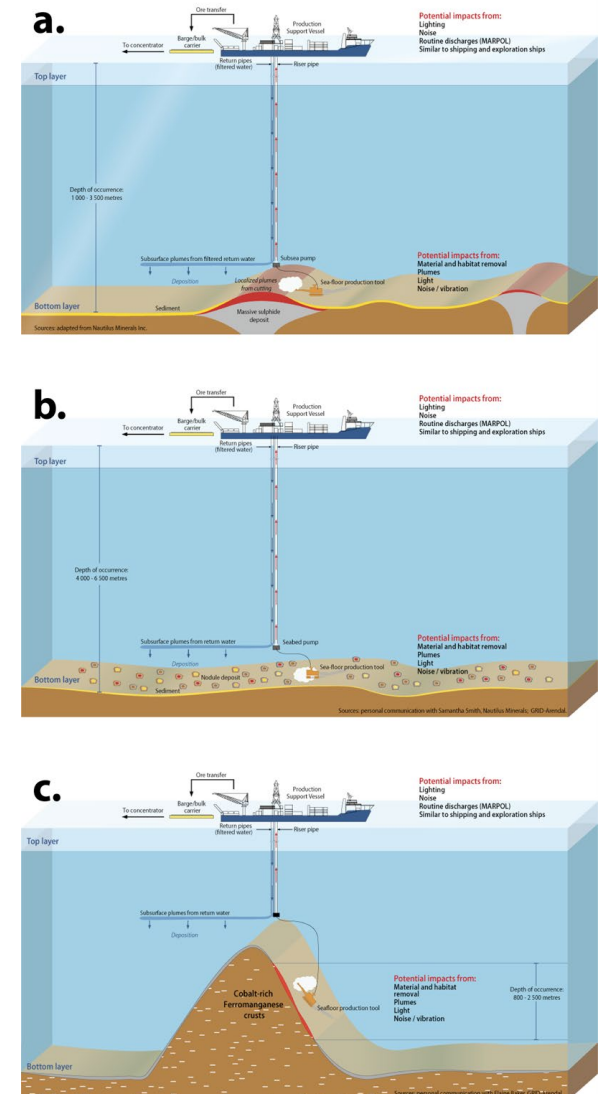
- ✓ Definition of “pioneer investor,” specifically an entity that **“possesses the nationality of or is effectively controlled by”** a listed state party or its nationals.
- ✓ Envisions multiple nationalities, groups collaborating, and change to nationality.



Additional References (2/2)

Exploration Regulations

- **Reg 10.3** provides the required elements for exploration applications by a state enterprise or private entity, including: **sufficient information to determine state or states of nationality** of the applicant, **or those nationals who effectively control the applicant**; and the **principal place where the entity is domiciled** and does business and, where applicable, the place of registration of the applicant.
- **Reg 10.4, Reg 11** Where an applicant with one nationality is effectively controlled by another state or its nationals, **all states involved must provide certification.**
- **Progress under the ISA Secretariat Information Note (2014)** “[t]he emerging trend is towards a test of effective control that emphasizes ‘regulatory control’ over ownership and investment criteria.”
- Even where the entity was a complete subsidiary, place of incorporation was sufficient, provided the separation between the organizations was maintained.
- **LTC** noted the **decision to sponsor an entity was a domestic process**, and stressed the importance of the **certificate of registration, place of business and domicile**, and the certificate(s) of sponsorship were central. **Yet, effective Control remains unsettled.**



Effective Control in Other International Legal Contexts

Diplomatic protection

- The International Court of Justice (ICJ) in their seminal decision *Barcelona Traction* considered **diplomatic protection noting two criteria** — jurisdiction of incorporation and its registered office.
- Stressed state practice differed with some only providing diplomatic protection to entities that have their **headquarters or management control (*siège social*)** in the jurisdiction, or where a substantial portion of ownership held by nationals created **the nexus of a genuine connection**.
- Similarly endorsed and applied by ICSID in *Tokios Tokelés*.
- **International Law Commission (ILC) Draft Articles on Diplomatic Protection** notes nationality as the jurisdiction of incorporation but emphasizes that where management/ financial control are located elsewhere, it is that second jurisdiction that is regarded as the state of nationality (Art 9).



Practices in the Maritime Sector

Vessel Flagging

- **Art 91:** provides that each **state is to establish conditions for the granting of nationality**, the registration of ships domestically and the **right to fly the flag** of that jurisdiction **based on a genuine link**.
- **A ship that sails under the flag of a state is subject to its exclusive jurisdiction** and may not switch during the voyage or at a port of call but can do so in the case of an actual transfer of ownership.
- **Art 94:** The flag state must **“effectively exercise its jurisdiction and control in administrative, technical/social matters over ships flying its flag”**
- **Control in the context of a flag state’s exclusive governance jurisdiction is a legal obligation derived from the process of flagging a vessel.**
- **Note: Control in LOSC Part XI is a fact that must be ascertained vs. obligations to be fulfilled by the flag state jurisdiction. These are different.**



Practices in the Civil Aviation

Nationality in Air Transport

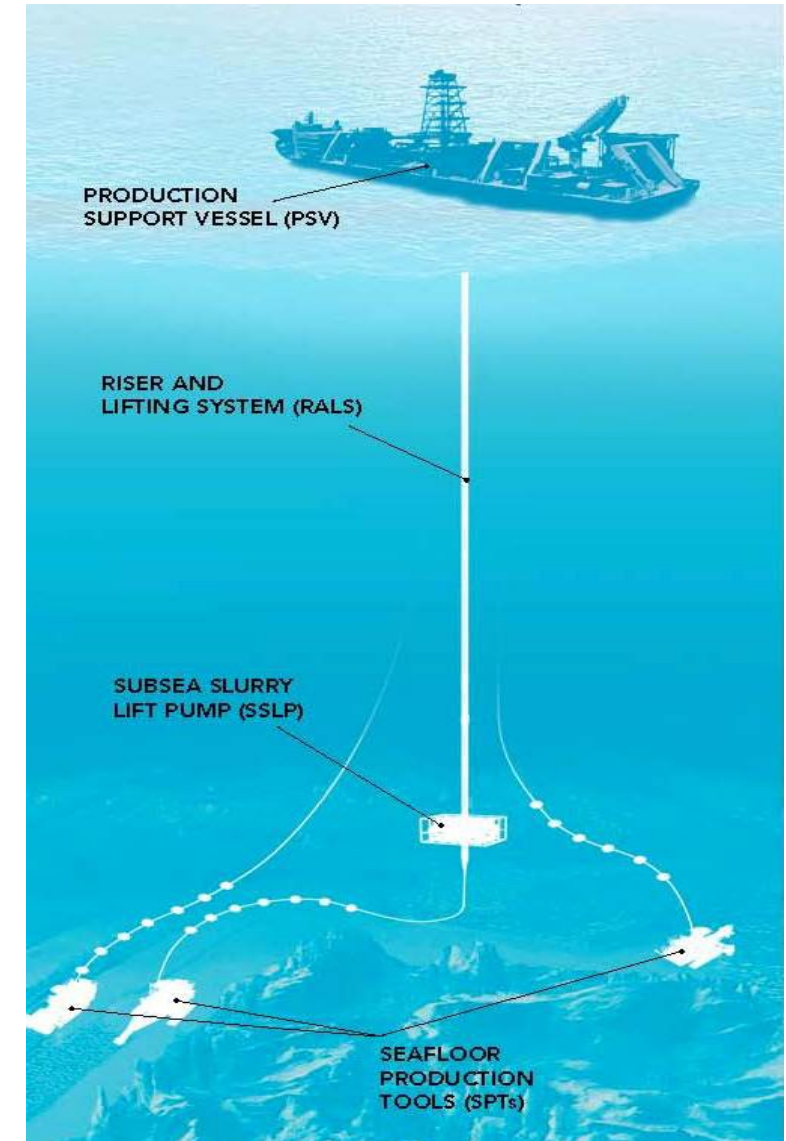
- Under the *Policy and Guidance Material on the Economic Regulation of International Air Transport (2008)*, contracting states may withhold or revoke a permit of an air transport entity of any state **where they are not satisfied that both “substantial ownership and effective control” rest with nationals of the sponsoring jurisdiction** or in cases of a breach of legal obligation.
- This approach remains in the most recent iteration of the Regulations (2017).
- The concepts of **effective control** and **substantial ownership** are utilized under the International Civil Aviation Organization (ICAO) as **distinct yet linked**, moving beyond “regulatory control” only.



Clarifying Effective Control

Lack of a Definition

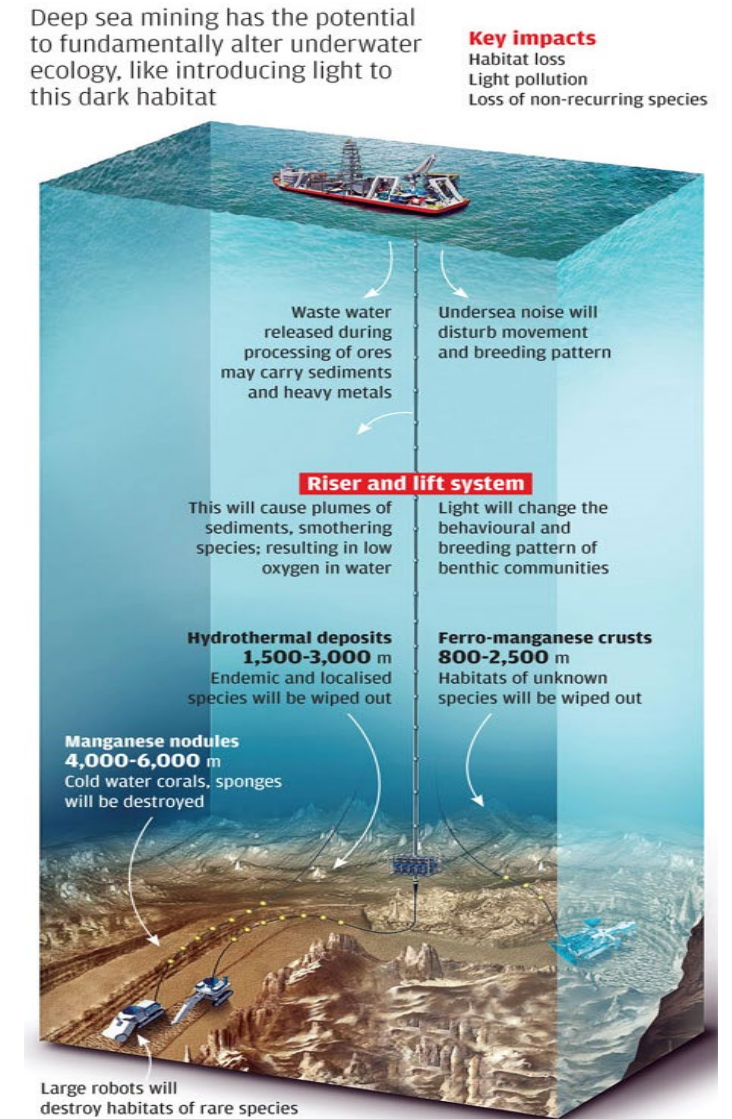
- **There is no explicit definition of effective control under LOSC.** Used to describe the myriad of relationships between a state, legal entities, persons or a group thereof, implicating multiple possible jurisdictions, as a component of the application process.
- **A definition must be derived from the context of usage and, arguably, informed by the other legal sources in which the term, or variations of it, occurs.**
 - ✓ Effective control **may mean either an economic concept** (control or influence over the entity) or a **regulatory one** (jurisdiction of incorporation).
 - ✓ **Note:** Identifying two approaches does not mean that there may not be options that borrow elements from each approach and, indeed, this may be the optimal interpretation to serve the overarching purposes of Part XI.
- **Economic control approach (Int'l jurisprudence / domestic approaches) includes a number of factors:** (i) ownership of a majority of shares; (ii) ownership of a majority of capital/assets; (iii) holding a majority of the applicant's voting rights; (iv) holding the right to elect a majority of the Board; (v) having an influence sufficient to determine its decisions; (vi) or any combination or variation of the above
- **Regulatory control approach**, effective control is determined by “the act of incorporation, or the conferring of nationality.”



Potential Approaches to Effective Control and their Implications

Summary

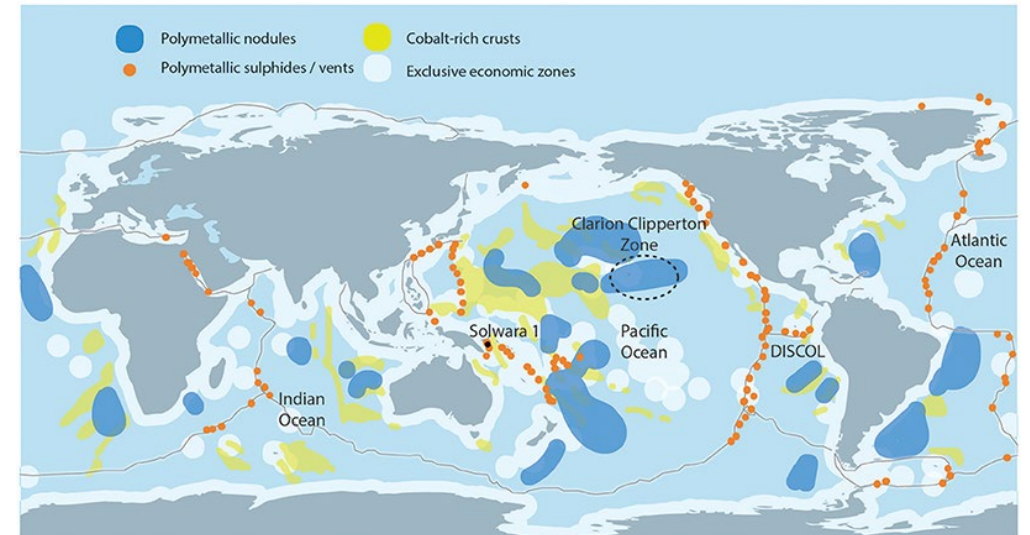
- Both the International Seabed Authority (ISA) Secretariat and the Legal and Technical Commission (LTC) agree that the definition of effective control could be clarified but were inclined to leave this to forthcoming rules, regulations and procedures.
- Leaving to each state the determination of what constitutes **effective control could lead to legal variability** and undermine the coherence of the international framework.
- The regulatory control model** coincides with the **current application procedures**, and as noted by the Secretariat, in its opinion is the **crucial or dominant factor**.
 - ✓ Easiest to operationalize, certainly renew the confidence of contractors.
- However there are instances of effective control in the LOSC and the general corpus of applicable international law that treat “nationality” & “effective control” as different.
- A purely regulatory interpretation seemingly ignores treaty language and disregards the economic reality of new models of business (wholly owned subsidiary of an experienced mining company in a developed jurisdiction operating in a developing or emerging economy).
- A narrow interpretation could lead to **monopolistic practices, negative consequences for equity goals of LOSC, and forum shopping**. In addition only that jurisdiction can be liable for non-compliance with the obligations of sponsoring states which may be a concern where profits are repatriated to the parent company in a different jurisdiction.



Potential Approaches to Effective Control and their Implications

Adding the Economic Control Approach

- The above discussion shows that an interpretation of effective control that is limited only to regulatory control would miss key objectives of the LOSC.
- Obligations under the LOSC and the general corpus of applicable international law suggest *prima facie* application of a model of effective control that includes regulatory control but is responsive to the economic reality of controlling influences and potential corporate structures.
 - ✓ Could assist in operationalizing protections against monopolistic activities and equitable development of reserved areas (Annex III art 6 and 9).
- The sponsoring state(s) and the ISA would need to review the information provided and determine where effective control lies. Straightforward in cases of wholly owned subsidiaries but may be more difficult in cases of complex business arrangements.



Concluding Thoughts

- The discussion examines two possible approaches to effective control, not to suggest the ISA should adopt one to the exclusion of the other, but rather to demonstrate the strengths and limitations of each and suggest there may be negotiated solutions that include elements of both approaches that would better address the objectives of Part XI of the LOSC and of its member states.
- By shedding light on the international law relevant to interpreting the concept of “effective control,” it is hoped this analysis will support efforts made in the ISA to negotiate a solution, as well as to bring the matter to the attention of stakeholders by underlining the potential consequences.
- In reaching an outcome, **Parties should consider current practice** in light of the interpretation of the term “effective control” in accordance with the ordinary meaning of the words grounded in the **object and purpose of the Convention** and taking into account **international practice** and the **interpretation given to the term by international courts and tribunals**.





Thank You!



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