

## **The Pew Charitable Trusts Intervention on Effective Control**

Thank you Madam Facilitator,

We note that UNCLOS requires two different elements of State sponsorship. One is effective control, and the second is responsibility to ensure compliance of a sponsored contractor with UNCLOS, the ISA's RRP's and the contract. The 'responsibility to ensure' requirement was the topic of the ITLOS Advisory Opinion, which focused on national laws and measures. The effective control criterion is not the same. It is about the legal relationship between a State and a contractor that must exist before a contract is obtained and continue throughout.

To date, for the purposes of exploration contracts, the ISA has accepted evidence of ISA contractor incorporation or company registration in the sponsoring State, as demonstrating necessary 'effective control'. We consider that the application of this approach for the exploitation regime would not be appropriate. The reason is that the national laws and measures taken by a sponsoring State may meet the requisite due diligence criteria outlined by ITLOS but may still be entirely ineffective if a contractor has little or no personnel, assets, management, ownership, premises, or other presence in the sponsoring State. A corporate registration number cannot be held to account in a national court. A regulatory approach could see decisions about ISA contractor operations taken in one country, while another country with little opportunity to influence those decisions, bears liability for them.

It is a matter for ISA partly because UNCLOS requires the ISA to set the relevant criteria in Article 4 of Annex III, and partly because the ISA has a responsibility to humankind to ensure activities in the Area are controlled within the legal rules set by UNCLOS and RRP's. If the ISA can see a loophole in the regime, it must address it.

ISA is also responsible to oversee the reserved areas scheme, for the benefit of developing States and the Enterprise. The regulatory control approach can enable access to reserved areas by companies whose beneficial owners are not nationals of developing States (or even take away reserved areas from the Enterprise). As already noticed by others, the same issues can arise with monopolization.

Pew believes that an economic approach which does look at the location of company ownership, operations and management would be in the best interest of this body and all of humankind and help to ensure effective regulation of contractors that cannot be evaded by corporate lawyers coming up with clever evasion schemes, and parent companies hiding behind the corporate veil. This is of great importance to us, as compliance mechanism are essential to ensure the effective protection of the marine environment

We understand some of the concerns that have been raised today by taking up this more comprehensive approach, in particular the legitimate expectation of contractors, and the impact on developing States and their right to participation in seabed mining.

With regards to fairness to existing contractors, it is important to remember that this is not a rule change, but new rules for Exploitation, and every applicant would have an equal opportunity to evolve their structure to meet the new rules before applying. In addition, all contractors who have engaged in activities in the Area have done so with the knowledge that the applicable legal regime is incomplete and subject to change and therefore the argument for legitimate expectation is tenuous in law as best. As noted by Ireland, the creation of a new corporate structure for mining, as opposed to exploration, is

common in the terrestrial mining sector. However, we appreciate it is a sensitive issue, and trust that the Council can find a mutually agreeable way forward that sets acceptable rules for protecting the environment and humankind, without unduly disadvantaging the - maybe four? - States who may be affected by this question.

With regards to facilitating effective participation in activities in the Area for developing States, we are pleased to listen to developing countries' own experiences this regards. However, we would emphasize the importance that such participation according to UNCLOS, must be 'effective' which to us means bringing meaningful benefit. It seems to us that an economic control approach would ensure that any private entities engaged in activities in the Area under developing State sponsorship would need to evidence assets, premises, personnel in the sponsoring State. To us this seems likely to result in more benefit for the developing State, to balance the liability that they are undertaking. An economic control approach may also facilitate co-sponsorship between developing and developed States, which could promote technology and knowledge transfer, as well as regulatory burden-sharing.

To end, we wanted to note that Pew will release a paper on this issue in the coming days. The paper written by our Code Project team of international experts, provides an examination of the ISA's current practice with regard to exploration, an analysis of regulatory control vs an economic control, including comparable precedents in different spheres of international law, and the legal and practical implications of each approach. We are happy to share this paper with any interested delegations.

Thank you.