

Discussion paper

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Effective control

ABSTRACT

This paper is concerned with the proper interpretation of the term “effective control” as used in several provisions of UNCLOS relating to deep sea mining. Having set out those provisions, it then considers other provisions in UNCLOS which use similar terminology and how they have been interpreted. Other areas of international law in which similar wording is used are looked at, as well as some analogous provisions in national law. The respective situations of the sponsoring State, the ISA and third States under UNCLOS are reviewed, and finally, an attempt is made to draw some conclusions about the legal position.

Background

The purpose of this discussion paper is to undertake a study to summarize the parameters established under international law as well as work already undertaken within the context of the Council and the Legal and Technical Commission over the years on effective control to provide an updated document containing a thorough review and analysis of the subject.

1. This discussion paper considers the proper interpretation of the term “effective control” as used in the relevant provisions of the United Nations Convention on the Law of the Sea (UNCLOS).¹
2. The Legal and Technical Commission (LTC) of the International Seabed Authority (ISA) first formally considered this issue in 2014 based on a paper from the ISA Secretariat,² and the LTC made a number of observations.³ The following year, the ISA Secretariat prepared a further paper summarizing the position adopted by the LTC at its 2014 meetings.⁴ Further analysis was requested by the LTC, particularly in light of the so-called “new ways of doing business” it had identified during its assessment of applications for approval of plans of work for exploration.⁵ In 2016, the Secretariat issued a further note on issues related to the sponsorship of contracts for exploration in the Area, monopolization, effective control and related matters.⁶ That note outlined certain “new models of business arrangements” highlighted by the LTC, or 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.
3. Since then, the LTC has not formally taken up the question. However, it has recently been raised in the context of the negotiation of the Regulations on the exploitation of mineral resources in the Area (Exploitation regulations). It seems right that the question should now be reconsidered.

Introduction: relevant texts

4. This paper will focus on UNCLOS, Article 153(2)(b) on system of exploration and exploitation, which reads:

Activities in the Area shall be carried out as prescribed in paragraph 3:

(a) by the Enterprise, and

(b) in association with the [ISA] 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 which meets the requirements provided in this Part and in Annex III.

¹ United Nations, *Treaty Series*, vol. 1833, no. 31363.

² ISA. 2014. Analysis of regulation 11.2 of the Regulations on Prospecting and Exploration for Polymetallic Nodules and Polymetallic Sulphides in the Area, Note by the Secretariat (ISBA/20/LTC/10).

³ ISA. 2014. Summary report of the Chair of the Legal and Technical Commission on the work of the Commission during the twentieth session of the International Seabed Authority (ISBA/20/C/20).

⁴ ISA. 2015. Issues related to the sponsorship by States of contracts for exploration in the Area and related matters, Note by the Secretariat (ISBA/21/LTC/12).

⁵ ISA. 2015. Report of the Chair of the Legal and Technical Commission on the work of the Commission during the twenty-first session of the International Seabed Authority (ISBA/21/C/16).

⁶ ISA. 2016. Issues related to the sponsorship of contracts for exploration in the Area, monopolization, effective control and related matters, Note by the Secretariat (ISBA/22/LTC/13).

5. Another provision important for the issue under examination is UNCLOS, Article 139, on compliance and liability, the first sentence reading:

States Parties shall have the responsibility to ensure that activities in the Area, whether carried out 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, shall be carried out in conformity with this Part.

6. UNCLOS, Annex III, Article 4(3) also refers to “effective control,” stipulating that:

Each applicant shall be sponsored by the State Party of which it is a national unless the applicant has more than one nationality, as in the case of a partnership or consortium of entities from several States, in which event all States Parties involved shall sponsor the application, or unless the applicant is effectively controlled by another State Party or its nationals, in which event both States Parties shall sponsor the application. The criteria and procedures for implementation of the sponsorship requirements shall be set forth in the rules, regulations and procedures of [ISA].

7. The three sets of Exploration regulations adopted by ISA Council contain Regulation 11, paragraphs 1 and 2 each, providing as follows:

1. Each application by a State enterprise or one of the entities referred to in regulation 9 (b) shall be accompanied by a certificate of sponsorship issued by the State of which it is a national or by which or by whose nationals it is effectively controlled. If the applicant has more than one nationality, as in the case of a partnership or consortium of entities from more than one State, each State involved shall issue a certificate of sponsorship.

2. Where the applicant has the nationality of one State but is effectively controlled by another State or its nationals, each State involved shall issue a certificate of sponsorship.

8. To summarize briefly the effect of these provisions, UNCLOS, Article 153(2)(b), sets out the conditions under which, inter alia, juridical persons may carry out activities in the Area. UNCLOS, Article 139, confirms that States have a responsibility to ensure compliance with Part XI by those whom they sponsor. UNCLOS, Annex III, Article 4(3), uses the term in relation to a particular situation, i.e. where an applicant is “effectively controlled” by nationals of a State other than the one sponsoring it. Finally, Exploration Regulation 11, paragraphs 1 and 2, stipulate the contents of one of the documents that must accompany a certificate of sponsorship.
9. It is to be noted that each of these provisions uses the term “effectively controlled,” without definition or further elaboration. But generally, commentators, when considering the term, identify two models, an economic control model and a regulatory control model. The former would look to the State where the ultimate economic controller of a corporation is based, whereas the latter would consider which State is corporation’ regulator.

10. The travaux préparatoires are described in the Virginia Commentary to UNCLOS.⁷ The current UNCLOS, Article 153, was elaborated in the First Committee of the Conference, and was contentious, since different groups of States had differing views as to the roles to be played by ISA and the States Parties in the exploitation of the Area. The phrase “persons natural or juridical which possess the nationality of such States [i.e. States Parties to UNCLOS] or are effectively controlled by them or their nationals” seems first to have been used in the Informal Single Negotiating Text in 1975.⁸ It appears, with slight drafting variations, in all the subsequent texts. However, the records do not indicate that the negotiators elaborated upon what they intended to mean by the phrase. The only reference to it seems to be in the report of the coordinators of the working group of 21 to the First Committee at the ninth session held in August 1980,⁹ where concerns were expressed about the burden that ensuring “effective control” would impose upon developing countries in cases covered in what is now UNCLOS, Annex III, Article 4(3). In conclusion, the travaux préparatoires do not assist in interpreting the phrase.
11. For completeness, there has been no suggestion that the equivalent phrase in the other authentic texts has any different meaning from that in the English language text.

Other pertinent provisions in UNCLOS

12. UNCLOS, Article 94(1), provides another significant provision that refers to the duty of States to “effectively [exercise] control,” requiring that “[e]very State shall effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag.” The International Tribunal for the Law of Sea (ITLOS) has considered this provision, particularly in the case of *Virginia G*,¹⁰ stating that the provision requires that the flag State should “ensure that [the ship] operates in accordance with generally accepted international regulations, procedures and practices.”¹¹ ITLOS went on to refer to the requirements imposed by Panamanian law upon shipowners relating to the provision of documentation required to fulfill Panama’s international obligations, including under the International Convention for the Safety of Life At Sea 1974, as well as those relating to annual safety inspections to meet the international standards set out in the International Convention for the Prevention of Pollution from Ships 1973/78.¹² As a result, ITLOS “note[d] that, on the basis of information available to it, there [was] no reason to question that Panama exercised effective jurisdiction and control over the M/V Virginia G at the time of the incident.”¹³ Accordingly, ITLOS held that there was a genuine link between the vessel and Panama.¹⁴

⁷ S. N. Nandan, M. W. Lodge and S. Rosenne (eds). 2002. United Nations Convention on the Law of the Sea 1982 – A Commentary, Vol. VI. The Hague: Martinus Nijhoff.

⁸ R. Platzöder (ed). 1985. Third United Nations Conference on the Law of the Sea, Vol. VII. Dobbs Ferry, New York: Oceana Publications Inc, p. 110 at p. 120.

⁹ United Nations. 1980. Third United Nations Conference on the Law of the Sea. Report of the co-ordinators of the working group of 21 to the First Committee (A/CONF.62/C.1/L.28 and Add.1).

¹⁰ ITLOS. 2014. M/V “Virginia G” (Panama/Guinea-Bissau), Judgment, ITLOS Reports 2014, p. 4.

¹¹ Ibid, para 113.

¹² Ibid, paras 115-6.

¹³ Ibid, para 114.

¹⁴ Ibid, para 117.

13. This would suggest that, provided that the flag State has in place a legal framework for securing that shipowners meet the appropriate requirements in administrative, technical and social matters, then the flag State will have fulfilled its obligations under Article 94(1), particularly to exercise “effective control” as required by that Article. It should be noted that ITLOS did not regard as relevant where the ultimate economic control over the vessel lay (i.e. in Spain) but concentrated solely upon the regulatory control exercised by Panama. Indeed, ITLOS did not even address the objection by Guinea-Bissau that Panama was a “flag of convenience” and that to establish a genuine link between Panama and the vessel, the former must be able to “exercise appropriate jurisdiction and control also over the owners of the ship,”¹⁵ who were Spanish. Given that one would expect that UNCLOS, Articles 94, 139 and 153 would be interpreted consistently, the interpretation given to Article 94 by ITLOS should give a strong indication of how Articles 139 and 153 should be interpreted.
14. It should also be noted that United Nations Conference on Trade and Development elaborated a Convention on Conditions for Registration of Ships, which sought to define the conditions under which a genuine link will exist between a flag State and a vessel.¹⁶ However, some 37 years later, the Convention on Conditions for Registration of Ships has not entered into force. It now seems unlikely that it will, as there are only 15 States Parties, well short of the requirements for entry into force, and the last ratification was over ten years ago.¹⁷ Therefore, it does not seem to be of assistance here.¹⁸

Pertinent provisions in other international instruments

15. First, it must be noted that both Articles 139 and 153 use the word “or,” making it clear that either nationality or effective control is an acceptable connecting factor. In a number of other areas of international law, the nationality of a juridical person, i.e. normally the law under which it is created, will be regarded as sufficient without more, without regard to questions of control. Thus, in the UNIDROIT Principles of Civil Procedure, “a substantial connection between the forum state and the party or the transaction or occurrence in dispute” is required before the courts of the forum state should take jurisdiction. However, a substantial connection is considered present where a defendant is a juridical person incorporated in the forum state.¹⁹
16. Likewise, in considering the rules about the exercise of diplomatic protection over juridical persons in international law, the International Court of Justice (ICJ) has held that the state of incorporation of the juridical person and of the location of its registered office (which will in

¹⁵ Ibid, paras 102-3; a point commented upon by Judges Ndiaye (paragraph 100) and Jesus (paragraph 34) in their Dissenting Opinions.

¹⁶ United Nations Conference on Trade and Development. 1986. The United Nations Convention on Conditions for Registration of Ships (TD/RS/CONF/23).

¹⁷ I.e. 40 States, the combined tonnage of which amounts to at least 25 per cent of the world tonnage (see United Nations Convention on Conditions for Registration of Ships, Article 19(1)).

¹⁸ Note that the relevance of the United Nations Convention on Conditions for Registration of Ships in the *Virginia G* case was urged by Guinea-Bissau (Counter-Memorial, paragraphs 34-7). Although ITLOS referred to the argument, it did not address it substantively (Judgment, para 103).

¹⁹ UNIDROIT. 2004. Principles of Transnational Civil Procedure, Principle 2.

nearly all cases be the same) may exercise diplomatic protection in respect of it.²⁰ In its report on diplomatic protection, the International Law Commission accepted the correctness of this rule but suggested an exception to it where “the corporation is controlled by nationals of another State or States and has no substantial business activities in the State of incorporation, and the seat of management and the financial control of the corporation are both located in another State, that State shall be regarded as the State of nationality.”²¹ However, the International Law Commission does not describe any State practice that might support this exception nor does it offer any definition or elucidation of the word “control” in this context. Accordingly, this does not seem to assist in interpreting the provisions of UNCLOS. In any event, it should be noted that the United Nations General Assembly has not endorsed the draft articles adopted by the International Law Commission. They are due to be considered again by the Sixth Committee (Legal) in 2025.

17. Air services agreements present another field of international law in which “effective control” has played a significant role. A standard provision in such agreements is that for an airline designated by one of the parties to be eligible to provide services under the agreement, it must be “substantially owned and effectively controlled” by that party and/or its nationals. This provision goes back to the seminal bilateral agreement, the United States-United Kingdom agreement of 1946, commonly known as Bermuda I. Although the formula has been criticized on the grounds that it restricts inward investment into airlines, it is still incorporated into many air services agreements without further definition.²² One exception to this was in Legal Notice No. 2 of 1999 of the Common Market for Eastern and Southern Africa (COMESA), Article 1, which defines “substantial ownership and effective control” to mean “to be controlled by COMESA States, a national of a COMESA States or a combination of COMESA States and/or their nationals through a simple majority share-holding and through both the Board and executive management,” thus emphasizing the importance of both the shareholdings in and the management of the airline.²³
18. Despite the prevalence of these provisions in air services agreements, there is no decision by an international tribunal providing an exposition that might be useful in interpreting similar provisions in UNCLOS. No consistent and uniform State practice might be considered, either. Indeed, the International Civil Aviation Organization stated, “States take varying views in their domestic legislation or practice as to what might constitute ‘effective control.’”²⁴ Therefore, one cannot conclude that the air services agreement precedent is helpful.
19. The jurisprudence on UNCLOS, Article 94, will be the most relevant in considering the phrase “effective control” in Article 153, as one would expect that the same or similar terms in

²⁰ International Court of Justice. 1970. Reports of judgments, advisory opinions and orders. Case concerning the Barcelona traction, light and power company, limited (new application : 1962) (Belgium v. Spain) second phase judgment of 5 February 1970, p. 3, para 70. This has been accepted as correct in International Court of Justice. 2007. Reports of judgments, advisory opinions and orders. Case concerning Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo) preliminary objections, judgment of 24 May 2007, p. 582, para 87.

²¹ United Nations. 2006. Report of the International Law Commission at its fifty-eighth session, p. 36, Article 9.

²² For example, the Agreement between China and ASEAN of 2010, and that between the United States and the United Kingdom of 2020.

²³ COMESA. 1999. Legal Notice No. 2 of 1999: Council regulations. COMESA regulations for the implementation of the liberalised air transport industry.

²⁴ ICAO. 2008. Policy and Guidance Material on the Economic Regulation of International Air Transport, 3rd Edition (Doc 9587). Montreal: ICAO, p. 128.

UNCLOS would be interpreted consistently. The other rules of international law considered above have developed in their specific circumstances to deal with particular problems. However, they do not seem to assist in elucidating the meaning of the words “effectively controlled” in UNCLOS.

National law analogies

20. It is important to emphasize that juridical persons are created by and under national legal systems. As ICJ stated in the *Barcelona Traction* case, “international law has had to recognize the corporate entity as an institution created by States in a domain essentially within their domestic jurisdiction. This, in turn, requires that whenever legal issues arise concerning the rights of States with regard to the treatment of companies and shareholders, as to which rights international law has not established its own rules, it has to refer to the relevant rules of municipal law.”²⁵
21. Furthermore, there are many models of corporate structure employed in the business world. In a recent case heard before the UK Supreme Court, Lord Briggs, speaking of the relationship between a parent and its subsidiary, pointed out that: “There is no limit to the models of management and control which may be put in place within a multinational group of companies. At one end, the parent may be no more than a passive investor in separate businesses carried out by its various direct and indirect subsidiaries. At the other extreme, the parent may carry out a thoroughgoing vertical reorganisation of the group’s businesses so that they are, in management terms, carried on as if they were a single commercial undertaking, with boundaries of legal personality and ownership within the group becoming irrelevant, until the onset of insolvency.”²⁶ It is not the function of ISA to inhibit commercial entities from adopting the structure they consider suitable, provided, of course, that the terms of UNCLOS are respected.
22. In principle, in the common law, control over a company is regarded as inhering in whoever holds 50 per cent or more of the shares. However, given the complexity and variety of the legal arrangements that can be put in place, the word “effective” has been used to ensure that the practical, not just the theoretical, position should be considered. In a case concerning the confiscation of property, a Supreme Court of Western Australia judge provided a clear explanation, stating that the phrase “effective control [...] means de facto control. The expression contemplates control that is practically effective, in the sense that the person concerned has, in fact, the capacity to control the possession, use, or disposition of the property.”²⁷
23. In the UK law on confiscation of property, “effective control” is defined as involving “direct or indirect control.”²⁸ References are made to “direct or indirect” control in other legal

²⁵ International Court of Justice. 1970. Reports of judgments, advisory opinions and orders. Case concerning the Barcelona traction, light and power company, limited (new application : 1962) (Belgium v. Spain) second phase judgment of 5 February 1970, p. 3, para 38.

²⁶ UK Supreme Court. JUDGMENT [2019] UKSC 20 on appeal from: [2017] EWCA Civ 1528. Vedanta Resources PLC and another (Appellants) v Lungowe and others (Respondents), para 51.

²⁷ Supreme Court of Queensland. Rowland J in *Connell v. Lavender* (1991) 7 WAR 9, at 22.

²⁸ UK. Proceeds of Crime Act 2002, section 362H(3).

provisions, such as United Nations Security Council Resolutions imposing asset freezes.²⁹ References have also been employed in national legal texts, such as in the definition of “subsidiary” in the US State of Delaware, Corporations Code, Section 220, or the ability to exercise “directly or indirectly” a sufficient number of votes to exercise control over the corporation, as in the Commercial Code of France, Article L233-3,³⁰ and a similar provision in German law.³¹ Likewise, the European Union Regulation on licensing of air carriers defines “effective control” as involving “the possibility of directly or indirectly exercising a decisive influence on an undertaking.”³²

24. Of course, agreements, particularly between the shareholders, may be relevant to effective control. Thus, in the European Union Regulation on licensing of air carriers, there is a reference to “rights or contracts which confer a decisive influence on the composition, voting or decisions of the bodies of an undertaking or otherwise confer a decisive influence on the running of the business of the undertaking” as being relevant to where control lies.³³ In the Companies Law of China adopted in 2006, a person may control a corporation even if s/he is not a shareholder.³⁴ It is assumed the intent here is to cover nominees and trustees.

25. Other aspects of the relationship with the corporation may also be regarded as relevant. Thus, in the UK laws, “control” is defined for certain tax purposes as covering cases where a person does, is able to, or is entitled to exercise “direct or indirect control over [the company’s] affairs.” However, one factor in establishing whether this test is met is whether a person is or would be entitled to the majority of the company’s income or assets.³⁵ In the EU Regulation on licensing of air carriers mentioned “the right to use all or part of the assets of an undertaking” is a relevant consideration in deciding upon effective control.³⁶

²⁹ For example, United Nations Security Council Resolution 2196 (2015) concerning the Central African Republic, para 7, and United Nations Security Council Resolution 2270 (2016) concerning PDR Korea, para 32 (see also para 22 (ownership of vessels)).

³⁰ The French Republic. 2015. Code de commerce. Available in the French language on: https://www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000031564650 (last accessed on 15 May 2023).

³¹ German Stock Corporation Act (Aktiengesetz), English translation by Norton Rose Fulbright as at 10 May 2016, section 17 “Controlled and Controlling Enterprise (1) Legally separate enterprises over which another enterprise (controlling enterprise) is able to exert, directly or indirectly, a controlling influence, shall constitute controlled enterprises. (2) A majority owned enterprise shall be presumed to be controlled by the enterprise with a majority shareholding in it.”

³² Regulation (EC) No. 1008/2008 of the European Parliament and of the Council of 24 September 2008 on common rules for the operation of air services in the Community, Article 2(9), the full text of which defines “effective control” as meaning “a relationship constituted by rights, contracts or any other means which, either separately or jointly and having regard to the considerations of fact or law involved, confer the possibility of directly or indirectly exercising a decisive influence on an undertaking, in particular by: (a) the right to use all or part of the assets of an undertaking; (b) rights or contracts which confer a decisive influence on the composition, voting or decisions of the bodies of an undertaking or otherwise confer a decisive influence on the running of the business of the undertaking.”

³³ Regulation (EC) No. 1008/2008 of the European Parliament and of the Council of 24 September 2008 on common rules for the operation of air services in the Community, Article 2(9).

³⁴ Companies Law of the People’s Republic of China, Order of the President of the People’s Republic of China, No. 42 (2006), Section 217(3): “An actual controller means a person who is able practically to govern the behaviour of a company through investment relations, agreements or other arrangements, although the person is not a shareholder of the company.”

³⁵ UK. Corporation Tax Act 2010, s. 450. See also Taxation (International and Other Provisions) Act 2010, sections 371RA-371RF.

³⁶ Regulation (EC) No 1008/2008 of the European Parliament and of the Council of 24 September 2008 on common rules for the operation of air services in the Community, Article 2(9).

26. Another important point to note is that in large corporations with numerous shareholders, a shareholding of less than 50 per cent may, in practice, confer control. As the Organisation for Economic Cooperation and Development has stated: “‘effective control’ may be exercised when the investor(s) holds a large block of voting stock even when it is less than 50 per cent but the remaining shares are widely held by many smaller investors.”³⁷ The French Commercial Code has an interesting provision, which seems partly designed to address this point, reading: “Toute personne ... est présumée exercer ce contrôle lorsqu’elle dispose directement ou indirectement, d’une fraction des droits de vote supérieure à 40 % et qu’aucun autre associé ou actionnaire ne détient directement ou indirectement une fraction supérieure à la sienne”³⁸ (Any person [...] is deemed to exercise such control when it directly or indirectly holds a fraction of the voting rights above 40% and no other partner or shareholder directly or indirectly holds a fraction larger than its own.).³⁹ But more generally, the point made by the Organisation for Economic Cooperation and Development underscores the need to address practical realities rather than just the formal legal position.
27. Another area where the question of control over an entity has been regarded as important concerns whether the degree of control over a subsidiary by its parent is such that the parent can be held liable in tort for the activities of the subsidiary, particularly where the parent is a large corporation based in a developed country and the subsidiary is based in a developing country. In a recent case, the UK Supreme Court held that a parent company could be liable in such circumstances, depending on the degree of control that the parent had over the subsidiary.⁴⁰
28. This short survey of some national legal provisions related to the issue of “effective control” demonstrates the complexity of the issue and the difficulty of drawing any general conclusions. The number of factors that might be relevant to the question of control is extensive. While national legal systems will vary enormously, it is clear that legislators and courts are aware that, in many cases, the formal legal position may diverge from the position in practice and that it is important to capture both. It seems reasonable to assume that the negotiators who included the term “effective control” in UNCLOS had the same considerations in mind.

Role of sponsoring State

29. It is important to note that it is a prerequisite to a national or juridical person carrying out activities in the Area for the purposes of UNCLOS, Article 153, that a State Party should have decided to sponsor that national or juridical person. The ITLOS, Seabed Disputes Chamber, stated this clearly: “[UNCLOS] ... requires a specific act emanating from the will of the State

³⁷ Organization for Economic Cooperation and Development. 1993. Glossary of Industrial Organisation Economics and Competition Law. Paris Publishing, p. 31.

³⁸ The French Republic. 2015. Code de commerce. Available in the French language on: https://www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000031564650 (last accessed on 15 May 2023).

³⁹ WIPO. Commercial Code of the France, translation into English, available at: <https://wipolex-res.wipo.int/edocs/lexdocs/laws/en/fr/fr199en.pdf>.

⁴⁰ UK Supreme Court. JUDGMENT [2019] UKSC 20 on appeal from: [2017] EWCA Civ 1528. Vedanta Resources PLC and another (Appellants) v Lungowe and others (Respondents). See also the judgment of the Supreme Court of Canada in *Nevsun Resources Ltd. v. Araya*, 2020 SCC 5.

or States of nationality and of effective control. Such act consists in the decision to sponsor.”⁴¹ The State Party will then be aware of the need to comply with the provisions of UNCLOS, as well as the ISA Regulations. In the first instance, it will be for the sponsoring State to satisfy itself that the provisions of UNCLOS are complied with, particularly that the entities it is sponsoring are “natural or juridical persons which possess [its] nationality or are effectively controlled by [it, i.e. the sponsoring State] or [its] nationals” to comply with Article 153(2)(b). Regarding nationality, only the State concerned can say whether a particular person or entity is one of its nationals, nationality being a matter reserved to the State concerned.⁴² In the same way, whether an entity is “effectively controlled” by a particular person will depend upon the national law of the entity. Of course, this may not be the same as that of the sponsoring State. Nevertheless, it is clear that the sponsoring State must satisfy itself that the requirements of Exploration Regulation 11 are met.

30. Nevertheless, it is submitted that the sponsoring State has a continuing obligation to ensure that the sponsored entity fulfills the requirements of UNCLOS. Although it is not explicitly stated, it cannot only be at the moment of sponsorship that the UNCLOS requirements are to be fulfilled. It must be implied that the sponsoring State will keep the matter under active review, particularly if there are any changes in the corporate structure of the sponsored corporation. This must follow not only from the general obligation in UNCLOS, Article 139, under which States have a “responsibility to ensure” that “activities in the Area ... [are] carried out in conformity with [Part XI],”⁴³ but also from the obligation, identified by the Seabed Disputes Chamber, under which “sponsoring States ... [must] ... assist [ISA] in its task of controlling activities in the Area for the purpose of ensuring compliance with the relevant provisions of Part XI of [UNCLOS] and related instruments.”⁴⁴ One can also draw an analogy with the ICJ judgment in the *Pulp Mills* case, where the Court emphasized that, even though it had not found Uruguay in breach of its obligations towards Argentina, both States were nevertheless under a continuing obligation under the bilateral treaty.⁴⁵

The role of ISA

31. As to the role of ISA, it is for the LTC to review any application for a plan of work and a certificate of sponsorship in the first instance.⁴⁶ When the LTC’s recommendation is

⁴¹ ITLOS, Seabed Disputes Chamber. 2011. Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area, Case No. 17, Advisory Opinion, para 78.

⁴² Permanent Court of International Justice. 1923. Advisory Opinion No. 4, Nationality Decrees Issued in Tunis and Morocco.

⁴³ For a general exposition of the meaning of the term “responsibility to ensure,” see ITLOS, Seabed Disputes Chamber. 2011. Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area, Case No. 17, Advisory Opinion, para 107 ff.

⁴⁴ ITLOS, Seabed Disputes Chamber. 2011. Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area, Case No. 17, Advisory Opinion, para 124. The Seabed Disputes Chamber went on to say that “this obligation is to be met “by taking all measures necessary to ensure such compliance in accordance with article 139.”

⁴⁵ International Court of Justice. 2010. Reports of judgments, advisory opinions and orders, Case concerning Pulp Mills on the river Uruguay (*Argentina v. Uruguay*). Judgment of 20 April 2010, para 266. See also the Separate Opinion of Judge Greenwood, para 29.

⁴⁶ Under UNCLOS, Article 165(2)(b). As usual, the LTC should endeavour to take a decision by consensus (Part XI Agreement, Section 3, para 1), but ultimately can act by majority vote (Part XI Agreement, Section 3, para 1).

considered by the Council,⁴⁷ the latter's powers are restricted.⁴⁸ However, it would be open to any Member with concerns about such a recommendation to raise them in the Council. The Council should endeavor to act by consensus, and while, in the end, it can vote, the provisions of Part XI Agreement, Section 3, paragraph 5, would have to be respected. The Part XI Agreement specifically states that "where a dispute arises relating to the disapproval of a plan of work, such dispute shall be submitted to the dispute settlement procedures set out in UNCLOS."⁴⁹ In any event, if there is a dispute, it is open to ISA (in accordance with UNCLOS, Article 162(2)(u)), the State Party or the prospective contractor to initiate proceedings before the Seabed Disputes Chamber in accordance with UNCLOS, Article 187.

32. It follows that if there is a dispute between a State Party and ISA about the validity of the former's sponsorship of a legal person and that dispute cannot be resolved through the usual process of consultation, then the proper course is for the matter to be submitted to the Seabed Disputes Chamber. In this connection, it should be noted that under UNCLOS, Article 187, proceedings may be commenced by ISA, or the sponsoring State, or by the "prospective contractor," the latter having the right to challenge the "refusal of a contract," which could occur if the Council took the view that UNCLOS, Article 153(2)(b), was not complied with. It will then be for the Seabed Disputes Chamber to interpret the relevant provisions of UNCLOS in the light of the particular facts, including, if appropriate, the term "effective control." The Seabed Disputes Chamber will, of course, take its view of these issues.

Position of third States

33. Furthermore, no provision in UNCLOS allows a third State to unilaterally refuse to recognize the validity of a sponsorship made by a State Party. As stated, if a State has concerns, these should be raised in the ISA Council. The position is in contradistinction to that under air services agreements, which gives the non-designating party the right to challenge an airline's designation if it considers that the "substantial ownership and effective control" requirement is not met. Furthermore, an analogy can be drawn with the cases where third States have made attempts to dispute the validity of a ship's registration on the basis that there is no genuine link between the ship and the registering State. ITLOS has firmly rejected such attempts.⁵⁰ The European Court of Justice, now called the Court of Justice of the European Union, has held that a State cannot dispute the registration of a ship by another State even where there is a genuine link between the ship and the disputing State.⁵¹

Conclusions

⁴⁷ Under UNCLOS, Article 153(3). For the general procedure, see UNCLOS, Annex III, para 6.

⁴⁸ By virtue of Part XI Agreement, Section 3, para 11, replacing UNCLOS, Article 162(2)(j).

⁴⁹ Part XI Agreement, Section 3, para 12.

⁵⁰ *M/V "SAIGA" (No. 2) (Saint Vincent and the Grenadines v. Guinea)*, ITLOS Reports 1999, paragraphs 82-3; approved in *M/V "Virginia G" (Panama v. Guinea-Bissau)*, ITLOS Reports 2014, paragraphs 111-2.

⁵¹ European Court of Justice. 1992. *Anklagemyndigheden v Peter Michael Poulsen and Diva Navigation Corp*, Case C-286/90, Judgment of the European Court of Justice of 24 November 1992, para 16.

34. It seems appropriate to draw the following four general conclusions. The first is that the most cogent interpretation of the phrase “effective control” is that it was designed to cover not only the formal legal position but also the practical position regarding control over a corporation. The second is that given that in interpreting UNCLOS, Article 91, ITLOS has focused on regulatory control, one would expect the same interpretation to be applied to Articles 139 and 153(2). The third is that it is for the sponsoring State, in the first instance, to satisfy itself that the rules in UNCLOS are, and continue to be, complied with. A declaration of sponsorship, a specific act emanating from the will of the State or States of nationality and of effective control, amounts to a declaration by the sponsoring State that it complies with Article 153(2). And finally, it is for ISA to ensure and monitor compliance with the provisions of UNCLOS and its regulations. Any disputes which cannot be resolved should be submitted to the Seabed Disputes Chamber. Third States should raise any concerns in the Council.

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