



Republic of Nauru

Statement delivered by His Excellency David Aingimea

Permanent Representative of the Republic of Nauru to the International Seabed Authority

Council meeting of the ISA's 29th Session in July 2024

Eight meeting of the Informal Working Group on Institutional Matters

Agenda Item 10: Effective control

Thank you, co-facilitators, for giving my delegation the floor to address the issue of "effective control" and for your continued leadership on this matter.

Nauru has been an active participant in the discussions taking place within the Council regarding effective control and refers to its Non-Paper on State Sponsorship of Activities in the Area and the Interpretation of the Effective Control Requirements. We thank the Secretariat for making the non-paper available on the Authority's website. We also thank the Kingdom of the Netherlands for their Non-Paper on Parent Company Liability Statements and the associated seven textual proposals.

As outlined in Nauru's non-paper, we remain concerned that a change to an effective economic control test in this transitional stage between exploration and exploitation would undermine existing sponsorship arrangements. For over a decade sponsoring States and sponsored contractors have relied upon an interpretation of effective regulatory control grounded in the Convention and discernible ISA and State practice, and the subject of detailed analysis by the Legal and Technical Commission.

We consider that a proposed change to the interpretation of effective control would raise a host of legal challenges and practical problems in terms of its implementation. Our non-paper sets out in greater detail these challenges and consequences of an alternative interpretation, including the undermining effective participation of developing States in activities in the Area, and potential to privilege developed nations with access to capital and technology. We should also remember in

this context that no State can be obliged to become a sponsoring State, as highlighted by the Seabed Disputes Chamber.

Small island developing sponsoring States such as Nauru have formulated their domestic legislation around their international due diligence obligations reflected in the Convention, including the requirement to maintain effective regulatory control over sponsored entities. Nauru has implemented a best practice regulatory framework to maintain effective control over its sponsored entities following collaboration with international legal experts. Nauru has existing legislation in the form of the International Seabed Minerals Act 2015, which we are currently in the process of updating together with operating regulations incorporating administrative measures to implement the Act. We have a dedicated seabed minerals regulator, the Nauru Seabed Minerals Authority in place which will be resourced as necessary to administer the requirements of the Act, regulations and sponsorship agreement, including a comprehensive due diligence process on our sponsored entity, NORI, its parent company and key technical partner levels which is currently underway. Our regulatory framework will continue to evolve as activities in the Area evolve.

The proposals to change the test of effective control to one of “effective economic control” have been driven largely by concerns over the ability of subsidiary contractor companies to meet potential liability claims arising from their activities in the Area.

In this context, Nauru notes that the current draft exploitation regulations already contain a range of measures aimed at ensuring contractors have sufficient financial capabilities to carry out their obligations, as well as guarantees and funds to cover other potential “liability gaps”.

The current approach to “effective control” is consistent with the common legal approach to corporate law. Further, the most appropriate and efficient way to address any concerns with respect to liability through such corporate structures is through appropriate contractual arrangements not redefining what control means.

Nauru supports the adoption of a proposal along the lines of that proposed by the Kingdom of the Netherlands, along with retaining the meaning of the effective control as it has been traditionally understood and applied by this Authority. This will ensure an effective and consistent approach to these issues is taken.

Nauru considers the proposal of the Kingdom of the Netherlands to be a sensible option to fully resolving these concerns. Indeed, we consider that this proposal is a clearer and better way to address such concerns than re-interpreting the established understanding and application of “effective control”. Nauru is also putting in place an instrument of guarantee and indemnity between NORI, its parent and the Republic of Nauru.

As the Kingdom of the Netherlands’ non-paper explicitly acknowledges, corporate group structures are common in a variety of international business sectors (including in the extractive industries). In such structures, each corporate entity has its own legal personality and there are limitations on imposing liability for the actions of one entity on other entities in the corporate group.

A discussion of the appropriate tools and instruments to be put in place would have greater merit than a discussion over effective control. Such discussion should also ensure an even-handed approach across all ISA contractors and applicable sponsoring States, bearing in mind that most ISA contracts are held by States and State-owned enterprises. For example, it is unclear how the proposed drafting will accommodate State-Owned Entities. To ensure a level playing field, it is important that SOEs are required to have its liabilities similarly guaranteed by their States. We will also need to consider what arrangements could be put in place for States Parties that are contractors, noting that Article 4 of Annex III to the Convention provides that “the procedures for assessing the qualifications of States Parties which are applicants shall take into account their character as States.”

Additionally, it is also not initially clear to my delegation that the Convention contemplates or allows for non-Sponsored entities to contract directly or indirectly with the Authority in the manner that is being proposed. Similarly, we are still considering whether a unilateral statement by the parent company, as proposed by the Kingdom of the Netherlands, could create legally binding obligations between the Parent Company and the Authority. Alternative legal instruments may be required to achieve the aim set out in the Kingdom of the Netherlands’ Non-paper. Nauru will submit written comments to the textual proposals put forward by the Kingdom of the Netherlands following this meeting.

Co-facilitators,

We advocate for maintaining the current interpretation of effective control as one of regulatory control, which is simpler to apply and verify, while developing complementary measures through appropriate financial instruments to address liability and compensation concerns without altering this foundational concept. Setting parameters for effective economic control may be more challenging and could lead to an inherent bias in the application of the regime towards developed States. An interpretation of effective control also preserves the legitimate expectations of both sponsoring States and contractors that have engaged in activities in the Area and prepared their plans of work on the established practice of the Authority.

Finally, Nauru welcomes the discussion on parent company liability and effective control and the efforts to find a path to resolve these issues. In that context, Nauru in principle supports the proposal of the Kingdom of the Netherlands to have parent companies share the legal responsibility for the conduct of their contractors. We see this as an effective and appropriate avenue to addressing concerns raised about potential “liability gaps” arising from contractors’ corporate structures.

I thank you for your attention.