

Introductory Note to Standard on Effective Control of an applicant or Contractor

1. This is an Introductory Note that accompanies a draft *Standard on Effective control of an applicant or Contractor: Determination or Evidence*. It serves to clarify the concepts underlying the draft Standard.
2. At the outset, the relevant UNCLOS and 1994 Agreement articles most relied upon in devising this draft Standard, as well as the relevant findings of the Seabed Disputes Chamber in its 2011 Advisory Opinion, are recalled in the table that follows.
3. The Standard is drafted based on the following underlying notions:
 - (a) Previous proposals applied a regulatory or economic approach to the assessment of Effective Control, but this approach was not helpful. Therefore, a different approach is put forward, namely a ‘factual approach’: whether an applicant or Contractor factually has the ability to secure that the procedures, compliance, and operational conduct of the applicant or Contractor pertaining to the activities under an Exploitation Contract in the Area are conducted in accordance with the instructions or directions of an ‘effective controller’.
 - (b) The Standard has a dual purpose: to set out (1) the evidence which must support a certificate of sponsorship; and (2) the factors to be taken into account by the Legal and Technical Commission and the Council when assessing an application. The assessment is a factual determination, which should be conducted on a case-by-case basis. The definition needs to be high level to cover all potential scenarios.
 - (c) Article 4(3) of Annex III to UNCLOS envisages that only one State or its nationals can effectively control an applicant or Contractor (“[...] *in which event both States Parties shall sponsor the application*”). This implies that no other party can effectively control an applicant or Contractor if the ‘effective controller’ can.
 - (d) It is explicitly foreseen that a State of nationality might effectively control an applicant or Contractor in Article 9(4) of Annex III to UNCLOS. The Standard contemplates that a State of nationality might do so through either (i) a legally binding instrument, such as a contract or license; or (ii) measures provided for in its domestic laws, regulations and administrative measures that go beyond ensuring that a Contractor shall carry out activities in the Area in conformity with the terms of the contract. Both instruments under (i) and (ii) would necessarily have to have as effect that others cannot effectively control the applicant or Contractor.
 - (e) As such, the Standard regulates for the following three types of ‘effective controllers’ (i) a State of nationality; (ii) another State which is not the State of Nationality; or (iii) nationals of a State Party which is not the State of Nationality.
 - (f) The Standard does **not** presume that an applicant or Contractor is effectively controlled by a specific type of ‘effective controller’ unless the effective control by another type of controller is established. The Standard does prescribe a practical sequence through which the Legal and Technical Commission is to assess the evidence submitted by applicants or Contractors, in order for it to reach a conclusion on which entity effectively controls such applicant or Contractor. This sequence, outlined in paragraph 12, commences with an assessment of whether a State of nationality has certain instruments in place. This is not a presumption of outcome – it is a procedural starting point that frames the order by which the LTC should look at information. To clarify, the entire sequence in paragraph 11 must be examined by the Legal and Technical Committee, taking into account all relevant facts and circumstances, prior to a conclusion being reached.

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RELEVANT LEGAL ARTICLES & EXCERPTS FROM THE 2011 ITLOS ADVISORY OPINION

UNCLOS Articles referencing 'effective control'		
Annex III – Basic conditions of prospecting, exploration and exploitation	Article 4 – <i>Qualification of applicants</i>	Article 4(3): 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 the Authority.
	Article 9 – <i>Activities in reserved areas</i>	Article 9(3): Any State Party which is a developing State or any natural or juridical person sponsored by it and effectively controlled by it or by other developing State which is a qualified applicant , or any group of the foregoing, may notify the Authority that it wishes to submit a plan of work pursuant to article 6 of this Annex with respect to a reserved area. The plan of work shall be considered if the Enterprise decides, pursuant to paragraph 1, that it does not intend to carry out activities in that area.
Part XI – The Area	Article 139 – <i>Responsibility to ensure compliance and liability for damage</i>	Article 139(1): 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. The same responsibility applies to international organizations for activities in the Area carried out by such organizations.
	Article 153 – <i>System of exploration and exploitation</i>	Article 153(2)(b): Activities in the Area shall be carried out as prescribed in paragraph 3 (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 which meets the requirements provided in this Part and in Annex III.

Other UNCLOS Articles		
Part XI – The Area	<i>Article 148 – Participation of developing States in activities in the Area</i>	Article 148 The effective participation of developing States in activities in the Area shall be promoted as specifically provided for in this Part, having due regard to their special interests and needs, and in particular to the special need of the land-locked and geographically disadvantaged among them to overcome obstacles arising from their disadvantaged location, including remoteness from the Area and difficulty of access to and from it.
1994 Implementation Agreement Articles		
Agreement relating to the Implementation of Part XI	<i>Article 1 – Implementation of Part XI</i>	Article 2(1): The provisions of this Agreement and Part XI shall be interpreted and applied together as a single instrument. In the event of any inconsistency between this Agreement and Part XI, the provisions of this Agreement shall prevail.

ITLOS 2011 Advisory Opinion – “Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area”

74. The notion of “sponsorship” is a key element in the system for the exploration and exploitation of the resources of the Area set out in the Convention. Article 153, paragraph 2, of the Convention describes the “parallel system” of exploration and exploitation activities indicating that such activities shall be carried out by the enterprise, and, in association with the Authority, by States Parties or state enterprises or natural or juridical persons. It further states that, in order to be eligible to carry out such activities, **natural and juridical persons must satisfy two requirements. First, they must be either nationals of a State Party or effectively controlled by it or its nationals. Second, they must be “sponsored by such States”.** Article 153, paragraph 2(b), of the Convention makes the requirement of sponsorship applicable also to state enterprises.

77. **The connection between States Parties and domestic law entities required by the Convention is twofold, namely, that of nationality and that of effective control. All contractors and applicants for contracts must secure and maintain the sponsorship of the State or States of which they are nationals. If another State or its nationals exercises effective control, the sponsorship of that State is also necessary. This is provided for in Annex III, article 4, paragraph 3, of the Convention and confirmed in regulation 11, paragraph 2, of the Nodules Regulations and of the Sulphides Regulations.**

78. **No provision of the Convention imposes an obligation on a State Party to sponsor an entity that holds its nationality or is controlled by it or by its nationals.** As the Convention does not consider the links of nationality and effective control sufficient to obtain the result that the contractor conforms with the Convention and related instruments, it requires a specific act emanating from the will of the State or States of nationality and of effective control. Such act consists in the decision to sponsor.

163. It should be pointed out that the fifth preambular paragraph of the Convention emphasizes that the achievement of the goals of the Convention will “contribute to the realization of a just and equitable international economic order which takes into account the interests and needs of mankind as a whole and, in particular, the special interests and needs of developing countries, whether coastal or landlocked”. As noted above, **article 148 of the Convention speaks about the promotion of the effective participation of developing States in activities in the Area. What is more important is that article 9, paragraph 4, of the Convention specifically refers to the right of a developing State or any natural or juridical person sponsored by it and effectively controlled by it,** to inform the Authority that it wishes to submit a plan of work with respect to a reserved area. These provisions have the effect of reserving half of the proposed contract areas in favour of the Authority and developing States.

Together with those provisions mentioned in paragraph 157, they require effective implementation with a view to enabling the developing States to participate in deep seabed mining on an equal footing with developed States. Developing States should receive necessary assistance including training.