
Centre for International
Governance Innovation



Liability Issues for Deep Seabed Mining Series | Paper No. 7 – February 2019

Effective Control and Deep Seabed Mining: Toward a Definition

Andrés Sebastián Rojas and Freedom-Kai Phillips

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CIGI Masthead

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About the Project

The Liability Issues for Deep Seabed Mining project was developed by the Centre for International Governance Innovation (CIGI), the Commonwealth Secretariat and the Secretariat of the International Seabed Authority (ISA) to assist in clarifying legal issues of responsibility and liability underpinning the development of exploitation regulations for the deep seabed. CIGI, in collaboration with the ISA Secretariat and the Commonwealth Secretariat, in 2017, invited leading legal experts to form the Legal Working Group on Liability for Environmental Harm from Activities in the Area (LWG) to discuss liability related to environmental damage, with the goal of providing the Legal and Technical Commission, as well as members of the ISA with an in-depth examination of potential legal issues and avenues.

Papers in the series cover the following topics: the current legal architecture for liability/responsibility under the United Nations Convention on the Law of the Sea; the scope of activities covered under a liability regime; the responsible parties; the potential claimants; the range of recoverable damages; and the appropriateness of using insurance and compensation funds to ensure adequate resources for compensation. CIGI Senior Fellow Neil Craik coordinated the development of the paper series.

About the LWG

The LWG was co-convened by CIGI, the Commonwealth Secretariat and the Secretariat of the ISA, under the joint direction of Neil Craik (CIGI), Hannah Lily (Commonwealth Secretariat) and Alfonso Ascencio-Herrera (ISA Secretariat). Other members of the LWG were invited based on their expertise in areas related to international law of state responsibility and liability, international environmental law and law of the sea. While working under the auspices of the ISA, the LWG is an independent group of legal experts.

The members of the LWG are:

- Alfonso Ascencio-Herrera, Deputy Secretary-General, ISA
- Christopher Brown, Legal Officer, ISA
- Eden Charles, Independent Consultant on International Law, and Former Deputy Permanent Representative of Trinidad and Tobago to the United Nations*
- Neil Craik, Senior Fellow, CIGI, and Professor of Law, University of Waterloo*
- Tara Davenport, Research Fellow, Centre for International Law, National University of Singapore*
- Elie Jarmache, Special Adviser on the Law of the Sea, Member, Legal and Technical Commission, ISA
- Hannah Lily, Legal Adviser, Commonwealth Secretariat*
- Ruth Mackenzie, Reader in International Law, University of Westminster*
- Stephen E. Roady, Professor of the Practice of Law, Duke University School of Law
- Andres Rojas, Diplomat, Ministry of Foreign Affairs and Worship, Argentina*
- Dire Tladi, Professor, University of Pretoria, and Member, International Law Commission
- Guifang (Julia) Xue, Professor, KoGuan Law School, Shanghai Jiao Tong University*

*Contributing authors to the paper series.

About the Authors

Andrés Sebastián Rojas is a lawyer and diplomat for the government of Argentina. Having studied at the University of Buenos Aires and the Catholic University of Argentina Law School, Andrés pursued private practice, focusing on finance, and civil and commercial litigation. In 2016, Andrés joined the Ministry of Foreign Affairs and Worship, serving in the Office of the Legal Advisor, and acting as member of the Legal and Technical Commission of the International Seabed Authority.

Freedom-Kai Phillips joined CIGI's International Law Research Program (ILRP) as a research associate in 2016. At CIGI, his research interests include international environmental law, with a focus on marine and terrestrial biodiversity, traditional knowledge and climate change.

Freedom-Kai provides legal research in support of the ILRP's international environmental law stream, examining law and governance innovations and tools for implementing the United Nations Sustainable Development Goals (SDGs). Specifically, Freedom-Kai is assessing law and governance innovations for realizing the SDGs, including but not limited to water, access to justice and biodiversity.

In addition to his work at CIGI, Freedom-Kai is a member of the International Union for Conservation of Nature World Commission on Environmental Law and a legal research fellow with the Centre for International Sustainable Development Law. Prior to that, Freedom-Kai served as interim executive director of the Centre for Law, Technology and Society at the University of Ottawa, Faculty of Law.

Freedom-Kai holds a master of laws from the University of Ottawa, a bachelor of laws from the Schulich School of Law at Dalhousie University, a master of arts in diplomacy and international relations from the John C. Whitehead School of Diplomacy and International Relations at Seton Hall University, and an honours bachelor of science from Eastern Michigan University.

Acronyms and Abbreviations

ICAO	International Civil Aviation Organization
ICJ	International Court of Justice
ILC	International Law Commission
ISA	International Seabed Authority
ITLOS	International Tribunal of the Law of the Sea
LOSC	United Nations Law of the Sea Convention
LTC	Legal and Technical Commission
LWG	Legal Working Group on Liability for Environmental Harm from Activities in the Area
SDC	Seabed Disputes Chamber
VCLT	Vienna Convention on the Law of Treaties

Executive Summary

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 United Nations Law of the Sea Convention (LOSC),¹ contractors engaged in deep seabed mining activities and the states that sponsor those contractors bear primary responsibility for environmental harm arising from their respective roles in mining and oversight. A critical question in assessing which states should be involved in the sponsorship, and which entities could be liable for environmental harm from deep seabed mining activities, is the legal interpretation of the term “effective control.” This paper explores how the concept of effective control, as used in the LOSC, holds the potential to mean regulatory or economic control. Interpretive approaches drawn from other fora and international courts and tribunals are used to clarify the relationship between effective control and obligations of states parties related to mining activities in the deep seabed (“the Area”). Establishing a singular definition remains ambiguous. Yet, the unique features of the LOSC support the possibility of developing a liability framework that is balanced and responsive to the operational realities of deep seabed mining projects.

Introduction

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. The approach taken by the LOSC is that contractors engaged in deep seabed mining activities and the states that sponsor those contractors bear primary responsibility for environmental harm arising from their respective roles in mining and oversight. Determining which states bear responsibility for contractors is straightforward where the nationality

of the contractor is clear and where there is no issue relating to the multinational character of the contractor’s parent company. However, where a parent company is domiciled in another jurisdiction from the contractor, ambiguities may arise in relation to the legal responsibilities of the parent company, as well as the responsibilities of states whose nationals exercise control over contractors through corporate ownership.

A critical question in assessing which states should be involved in the sponsorship, and which entities could be liable for environmental harm from deep seabed mining activities, is the legal interpretation of the term “effective control.” This phrase appears in several places within Part XI of the LOSC (governing activities in the Area) and, as outlined below, may be interpreted as purely regulatory control or as economic control. This paper explores the interpretation of the term effective control under the LOSC.² While it is acknowledged that there is a vast body of international and domestic law on corporations,³ some of which touches on issues that might be relevant to this discussion, the purpose of this paper is to discuss the meaning of the phrase effective control under the LOSC.

To this end, this paper first examines how the concept of effective control, as used in the LOSC, has the potential to be defined as regulatory or economic control. Interpretive approaches from civil aviation, the maritime sector, and international courts and tribunals are used to clarify the relationship between effective control and obligations of states parties relating to activities in the Area. While the definition remains ambiguous, the LOSC has unique features suggesting the possibility of developing a *sui generis* liability framework that is balanced and responsive to the operational realities of deep seabed mining projects.

¹ United Nations Convention on the Law of the Sea, 10 December 1982, 1833 UNTS 397 (entered into force 16 November 1994) [LOSC].

² Given the importance of such an issue, the Legal and Technical Commission (LTC) in its twenty-third session welcomed the exploration of the concept of “effective control and its relevance in a liability context” by the LWG. See ISA, Report of the Chair of the Legal and Technical Commission on the work of the Commission at its session in 2017, 23rd Sess, ISBA/23/C/13 (2017) at para 23, online: <https://ran-s3.s3.amazonaws.com/isa.org.im/s3fs-public/files/documents/isba-23c-13_5.pdf>.

³ For example, in terrestrial mining, which is dominated by complex, multinational corporate structures, this issue has led to debate over the responsibility of states to exercise oversight over parent companies, whose subsidiaries might engage in harmful activities in foreign (often developing) countries. See Sara Seck & Anna Dolidze, “ITLOS Case No. 17 and the Evolving Principles for Corporate Responsibility under International Law” in Noemi Gal-Or et al, eds, *Responsibilities of the Non-State Actor in Armed Conflict and the Market Place* (Leiden, the Netherlands: Brill, 2015).

Relevance of the Concept in a Liability Context

Effective Control: A Regulatory and/or Economic Concept

Under the 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. Under article 139, states parties hold responsibility for ensuring activities carried out in the Area by the state or by entities that “possess the nationality of States Parties or are effectively controlled by them or their nationals” are in compliance with the convention.⁴ Effective control is also found in article 153, which identifies those entities that are permitted to carry out mining activities, which is limited to the Enterprise and “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.”⁵ Since article 153 identifies which entities may participate in mining, article 139, which identifies which parties may bear responsibility for harm arising from those activities, adopts parallel language. Therefore, effective control in both provisions should be given the same meaning.

The wording under the convention provides the potential for divergent interpretations of the scope of effective control. In order for a natural or juridical person to be eligible to carry out mining activities under article 153, they must either be a national of the sponsoring state or effectively controlled by it. In the event that the state of effective control differs from the state of nationality, the LOSC requires that both states issue certificates of sponsorship.⁶ If effective control is interpreted as meaning regulatory control — that is, the ability to exercise regulatory jurisdiction over the person — there is limited scope for joint sponsorship since states will have broad regulatory authority over their nationals. However, if effective control means some form of economic control through, for example, corporate ownership structures, then there is a much higher

scope for joint sponsorship. Under an economic control interpretation, article 139 could likewise be interpreted so that sponsoring state liability could extend to the entity’s state of nationality, but also to states in which a parent company exercising effective control over its subsidiary is domiciled. In such circumstances, the host state of the parent company exercising effective control would be expected to exercise some regulatory oversight also.

The issue of effective control has also arisen in the International Seabed Authority (ISA) context relating to questions of monopolization and abuse of dominant position.⁷ In this regard, the issue concerns the ability of a parent company that controls multiple contractors to use its economic control to unfairly affect competitive conditions in the minerals market.⁸ While the concerns respecting liability and competition are distinct, both focus on the legal responsibilities that may flow from economic control.

Unpacking Effective Control

As noted, discussions at the ISA so far suggest that the concept of effective control could mean either regulatory control or economic control or both. Consider the example of a mining company registered in and primarily owned (95 percent of its shares) by citizens of a developed state that wholly owns a subsidiary company that is registered in a developing state and applies for an exploration contract. If a regulatory control model was applied, only the developing state would be a sponsoring state for the (subsidiary) contractor. All obligations set forth in the deep seabed mining regime for sponsoring states would be borne by that country

4 LOSC, *supra* note 1, art 139(1).

5 *Ibid*, art 153(2)(b).

6 *Ibid*, Annex III, art 4(3).

7 ISA LTC, *Monopolization of activities in the Area*, 20th Sess, ISBA/20/LTC/11 (2014) [ISBA/20/LTC/11], online: <https://ran-s3.s3.amazonaws.com/isa.org.jm/s3fs-public/files/documents/isba-20ltc-11_1.pdf>; ISA LTC, *Issues related to the sponsorship of contracts for exploration in the Area, monopolization, effective control and related matters*, 22nd Sess, ISBA/22/LTC/13 (2016) [ISBA/22/LTC/13], online: <https://ran-s3.s3.amazonaws.com/isa.org.jm/s3fs-public/files/documents/isba-22ltc-13_1.pdf>; ISA, *Report of the Chair of the Legal and Technical Commission on the work of the Commission at its session in 2016*, 22nd Sess, ISBA/22/C/17 (2016), online: <https://ran-s3.s3.amazonaws.com/isa.org.jm/s3fs-public/files/documents/isba-22c-17_1.pdf>.

8 ISBA/22/LTC/13, *supra* note 7 at para 5.

as well as the liability arising from potential non-fulfillment of them. If an economic control model was applied, both the developing state and the developed state's certificate of sponsorship would be required for the contract to be granted to the subsidiary since the developed state's nationals (the parent) exercise economic control over the subsidiary. Both countries would be responsible for the obligations stemming from their status as sponsoring states, and both could be liable for damages flowing from their failure to comply with their oversight obligations as sponsoring states.

Importantly, 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.⁹ Lack of proper fulfillment of those obligations will function as a source of liability.¹⁰ Determination of who may become a sponsoring state and whose sponsorship is required for a contractor's application to be approved by the ISA is therefore crucial to the development of an effective liability system that properly reflects what is set out in the LOSC and the rest of the applicable international rules.

Interpreting the Concept of Effective Control

Effective Control in Applicable International Legal Instruments

As this analysis addresses a term in a treaty, reference ought to be made to articles 31 and 32 of the Vienna Convention on the Law of Treaties (VCLT), which provides rules respecting treaty interpretation. These rules are widely accepted as representing customary international law. The VCLT provides that treaties must be interpreted

in good faith, based on the "ordinary meaning" of the term, in the context of the object and purpose of the instrument.¹¹ In determining the object and purpose, consideration is to be provided to the complete treaty text (including the preamble and annexes), instruments made in connection or related to the treaty, subsequent agreements regarding interpretation or application of the provisions and any relevant rules of international law.¹² Notwithstanding, a term may be provided a special meaning where the parties to the treaty indeed intended it to be a term of art.¹³

In addition, recourse may be made to supplementary materials, including the *travaux préparatoires* and circumstances underpinning the conclusion of the negotiations, to confirm or shed light on the meaning of the term where previous interpretive methods leave ambiguity or lead to a "manifestly absurd or unreasonable" result.¹⁴ This analysis explores various treaty and other relevant sources applying these interpretive rules and identifies their implications in determining the meaning of effective control in this context.

The LOSC

As stated in the preamble, the LOSC aims to provide a framework for governance of global oceans to promote peaceful uses, equitable utilization of resources, marine scientific research, and protection and preservation of the marine environment.¹⁵ Effective control is used multiple times in the text of the convention and its annexes, outlining the responsibilities of sponsoring states and establishing a link to states parties where the activities are conducted by a private non-state entity. The principal references in the LOSC outline the obligations of sponsoring states vis-à-vis private actors conducting activities in the Area¹⁶ and establish the criteria for sponsorship: namely that the entities are required to be either nationals or effectively controlled by nationals of

9 SDC of the ITLOS, *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area* (2011), Advisory Opinion, No 17 [SDC Advisory Opinion 2011], online: <www.itlos.org/fileadmin/itlos/documents/cases/case_no_17/adv_op_010211.pdf>; see David Freestone & Freedom-Kai Phillips, "The United Nations Convention on the Law of the Sea (LOSC) and Sustainable Development Jurisprudence" in Marie Claire Cordonier Segger & CG Weeramantry, eds, *Sustainable Development in International Courts and Tribunals* (London, UK: Routledge, 2017) at 328–30.

10 LOSC, *supra* note 1, art 139(2).

11 *Vienna Convention on the Law of Treaties*, 1155 UNTS 331, 8 ILM 679 (1969) art 31(1) (entered into force 27 January 1980) [VCLT].

12 *Ibid*, art 31(2–3).

13 *Ibid*, art 31(4).

14 *Ibid*, art 32.

15 LOSC, *supra* note 1, Preamble.

16 *Ibid*, arts 139, 153; SDC Advisory Opinion 2011, *supra* note 9 ("in Article 139...of the Convention, the term 'responsibility' means 'obligation'" at para 65).

the sponsoring state.¹⁷ The SDC explicitly notes the twofold connection of “effective control,” requiring all contractors to maintain the sponsorship of the “the State or States of which they are nationals” and where another state or its nationals exercises effective control, their sponsorship as well.¹⁸ The critical point here is that the SDC indicates that where nationality and effective control involve two different states, sponsorship is required from both.

This is confirmed by a further set of references to effective control found in Annex III of the convention. Article 4(3) of Annex III envisions the potential role of multiple jurisdictions participating as sponsoring states. Where an application holds more than one nationality, “as in the case of a partnership or consortium of entities from several States,” all states parties must sponsor the application, except where the applicant is effectively controlled by another state party or its nationals, “in which event both States Parties shall sponsor the application.”¹⁹

Elements of article 4(3) of Annex III are key and explicitly provide an important consideration: an applicant can have the nationality of a state party and at the same time be effectively controlled by a different state, or by the nationals of a different state, and that circumstance would entail the necessity of having the sponsorship of both states parties.²⁰ Clearly, nationality and effective control appear as two distinct concepts; the opposition is expressed through the word “unless,” which makes clear that these notions embody alternative situations, which require different and appropriate solutions.

Article 6 of Annex III provides provisions that work to prevent the abuse of dominant position.²¹ Proposed plans of work may be approved except where submitted by a state party that already holds plans for exploration and exploitation which, if combined, would exceed 30 percent of

a 400,000 km² circular area.²² In addition, such plans of work submitted by a consortium are to be considered on a *pro rata* basis and may be approved, provided approval does not permit a state party or sponsored entities to “monopolize the conduct of activities in the Area” or act to hinder activities conducted by other states parties.²³ While specifically relating to only polymetallic nodules, these provisions clearly delineate the intention of the drafters to restrict anti-competitive practices. Furthermore, it also lends support to the utilization of an economic control model relating to effective control to allow for an accurate determination as to whether exploration and exploitation practices amount to abuse of dominant position.

An additional reference comes by way of article 9(4) of Annex III, which provides a way for developing states parties, or entities sponsored and effectively controlled by developing states parties, to notify the ISA of an intention to submit a plan of work relating to a “reserved area” set aside exclusively for developing countries.²⁴ As noted by the SDC, it is through this process, which reserves half of the proposed contract zones for developing countries, that equity and awareness of the special position of developing countries are achieved.²⁵ Interestingly, the formulation is different from all other references to effective control, requiring applicants to be both domiciled and effectively controlled by states parties from developing countries.

Lastly, article 5(3)(c) of annex III, relating to the facilitation of 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.²⁶ Cases where the contractor effectively controls the owner of the technology and yet fails to secure a usage right, are to be considered as material in the evaluation of subsequent applications for approval.²⁷

17 SDC Advisory Opinion 2011, *supra* note 9 at paras 74–75.

18 *Ibid* (“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” at para 77).

19 LOSC, *supra* note 1, Annex III, art 4(3).

20 SDC Advisory Opinion 2011, *supra* note 9 at para 190.

21 ISBA/20/LTC/11, *supra* note 7 at para 3.

22 LOSC, *supra* note 1, Annex III, art 6(3).

23 *Ibid*, Annex III, art 6(4).

24 *Ibid*, Annex III, art 9(4).

25 SDC Advisory Opinion 2011, *supra* note 9 at para 163.

26 LOSC, *supra* note 1, Annex III, art 5(3).

27 *Ibid*.

While this is the only occurrence of the concept of effective control that is not related to sponsorship, it makes the most direct reference to the economic reality of the relationship. Here, effective control is used concretely as an economic concept recognizing and limiting the extent to which corporate structures can be used to circumvent the obligation of technology transfer. Notwithstanding the different context, this article sheds additional light on the intended formulation of effective control when considering the ordinary meaning of the term, since the provision shows an intention to discourage entities from sheltering technology through the use of a parent or otherwise related companies.

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

Some provisions of the Final Act of the Third Conference on the Law of the Sea that mention effective control are also worth noting. Annex I, Resolution II, which creates a framework for preparatory investment in pioneer activities relating to polymetallic nodules, integrates a substantively similar formulation of effective control reflected in the convention in the definition of “pioneer investor,” specifically an entity that “possesses the nationality of or is effectively controlled by” a listed state party or its nationals.²⁸ Additional references in this section elaborate through notation of an entity having multiple nationalities²⁹ and groups of countries or entities collaborating.³⁰ Importantly, a change of nationality and sponsorship to any other state party to the convention is provided for, with such a change not affecting rights or priority relating to the pioneer area.³¹ Provisions of the Final Act of the Third Conference on the Law of the Sea that mention effective control indicate a consistent approach to treating effective control as an economic criterion distinct from nationality with its implication of regulatory control.

28 UN, *Final Act of the Third United Nations Conference on the Law of the Sea*, UN Doc A/CONF.62/121* (1982), Annex I, Res II, ss 1(a)(i), 10(a) [Final Act LOSC III], online: <https://treaties.un.org/doc/source/docs/A_CONF.62_121-E.pdf>.

29 *Ibid*, (“possess the nationality of one or more of the following States, or are effectively controlled by one or more of them or their nationals” s 1[a](ii)).

30 *Ibid*, (“any developing State...or any state enterprise or natural or juridical person which possesses the nationality of such State or is effectively controlled by it or its nationals, or any group of the foregoing” s 1[a](iii)).

31 *Ibid*, s 10(b-c).

ISA Exploration Regulations: The ISA Secretariat and LTC Documents

The ISA Exploration Regulations are binding texts negotiated by states as noted by the SDC³² and, as such, can be construed as subsequent agreements according to article 31.3(a) of the VCLT.³³ The formulation of effective control in these regulations reflects the text of the convention in substance (states parties, entities domiciled in a party jurisdiction or effectively controlled by them or their nationals) with the added recognition of the potential for multiple or groups of sponsoring states.³⁴

Article 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.³⁵ Where an applicant with one nationality is effectively controlled by another state or its nationals, all states involved must provide certification.³⁶ Similar requirements are set in the special procedures for approvals of work relating to a reserved area provided by developing country parties.³⁷ The relevant regulations pertaining to the mining of sulphides and crusts have the same numbers, except

32 ISA, *Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area*, ISBA/6/A/18 (2000); in 2013, the Regulations for Polymetallic Nodules were amended to be consistent with the regulations adopted in 2010 and 2012 for the other resources; ISA, *Decision of the Council of the International Seabed Authority Relating to Amendments to the Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area and Related Matters*, ISBA/19/C/17 (2013), Annex IV, s 16.1, online <https://ran-s3.s3.amazonaws.com/isa.org.jm/s3fs-public/files/documents/isba-19c-17_0.pdf>; ISA, *Regulations on Prospecting and Exploration for Polymetallic Sulphides in the Area*, ISBA/16/A/12/Rev.1 (2010) [Sulphides Regulations]; ISA, *Regulations on Prospecting for Cobalt-rich Ferromanganese Crusts in the Area*, ISBA/19/C/17 (2013) [Cobalt Crust Regulations]. These regulations will be referred to individually or collectively as the “Exploration Regulations.”

33 SDC Advisory Opinion 2011, *supra* note 9 at para 135.

34 Exploration Regulations, *supra* note 32, Reg 9(b).

35 *Ibid*, Reg 10.3.

36 *Ibid*, Regs 10.4, 11.1-2.

37 *Ibid*, Reg 17.1.

for Regulation 17.1, which is Regulation 18.1 in both the Sulphides and Crusts Regulations.³⁸

In a 2011 decision, the Council of the ISA requested the LTC to analyze Regulation 11.2 and report to the Council.³⁹ In order to help the LTC in accomplishing this task, the Secretariat of the ISA prepared an analysis of Regulation 11.2 and, in general, of the concept of effective control.

The Secretariat was of the opinion that “[t]he emerging trend is towards a test of effective control that emphasizes ‘regulatory control’ over ownership and investment criteria.”⁴⁰ Acknowledging the lack of a single definition, and the potential for aspects of effective control to be defined at the domestic level, the Secretariat noted that practices relating to the flagging of vessels, civil aviation and past practice under Part XI supported regulatory control as the critical, or dominant factor, practical realities of finance and management notwithstanding.⁴¹ Even where the entity was a complete subsidiary, place of incorporation was sufficient, provided the separation between the organizations was maintained.⁴² The LTC noted the decision to sponsor an entity was a domestic process, supporting the development of conditions and standards defining effective control at the national level and stressing the importance of the certificate of registration, identification of the place of business and domicile, and the certificate(s) of sponsorship were central to satisfying the conditions set out in the convention.⁴³

Despite the absence of an explicit definition, it should be noted that the ISA has, by its practice until now, implicitly interpreted effective control in purely regulatory terms, in that no contractor or potential contractor has ever been asked to

present a sponsorship certificate issued by the state of the nationality of its controllers. Whether this emphasis on regulatory control can be construed as a subsequent practice in the terms of VCLT article 31.3 is debatable since the practices are of select bodies of the ISA, not the signatories themselves.

It could be argued that these practices have been at least passively consented to by the member states of the ISA in that no objection nor, for that matter, endorsement has been expressed by member states. Weighed against such a conclusion, however, and even though the standing practice has not been subject to objection, is the fact that the representative organs of the ISA have explicitly noted that the matter is far from settled.⁴⁴

The LOSC *Travaux Préparatoires*

According to article 32 of the VCLT, the preparatory work of a treaty can be utilized as supplementary means of interpretation. In pursuing that task, the particular wording of that article must be borne in mind.

According to the “Report of the co-ordinators of the working group of 21 to the First Committee” during the ninth session of the conference, some parties identified problems related to the implementation of the effective control provisions while others deemed the inclusion of effective control essential.⁴⁵ The compromise proposed was the maintenance of multiple sponsorships and the addition of a qualifying phrase that requirements were to be set forth in rules, regulations and procedures of the ISA.⁴⁶ As discussed above, none of the subsequently adopted rules and procedures have provided a clear definition of effective control.

Observations

Some observations can be drawn from the excerpts of the respective instruments and the relevant analysis of the SDC. First, as noted by the SDC,

38 *Sulphides Regulations*, *supra* note 32; *Cobalt Crust Regulations*, *supra* note 32.

39 ISA, *Decision of the Council of the International Seabed Authority*, 17th Sess, ISBA/17/C/20 (2011) at para 4, online: <https://ran-s3.s3.amazonaws.com/isa.org/jm/s3fs-public/files/documents/isba-17c-20_0.pdf>.

40 ISA LTC, *Note by the Secretariat: Analysis of regulation 11.2 of the Regulations on Prospecting and Exploration for Polymetallic Nodules and Polymetallic Sulphides in the Area*, 20th Sess, ISBA/20/LTC/10 (2014) at para 20 [ISBA/20/LTC/10], online: <https://ran-s3.s3.amazonaws.com/isa.org/jm/s3fs-public/files/documents/isba-20ltc-10_0.pdf>.

41 *Ibid* at para 21.

42 *Ibid* at para 22.

43 ISA, *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*, 20th Sess, ISBA/20/C/20 (2014) at paras 27–28 [ISBA/20/C/20], online: <https://ran-s3.s3.amazonaws.com/isa.org/jm/s3fs-public/files/documents/isba-20c-20_0.pdf>.

44 ISA Council, *Decision to the Council of the International Seabed Authority relating to the report of the Chair of the Legal and Technical Commission*, 23rd Sess, ISBA/23/C/18 (2017) at para 18, online: <https://ran-s3.s3.amazonaws.com/isa.org/jm/s3fs-public/files/documents/isba-23c-18_1.pdf>.

45 UN, *Report of the co-ordinators of the working group of 21 to the First Committee*, *Documents of the First Committee*, 9th Sess, A/CONF.62/C.1/L.28 (1980), Add.1 at 162, online: <http://legal.un.org/docs/?path=../diplomaticconferences/1973_los/docs/english/vol_14/a_conf62_c1_l28_and_add1.pdf&lang=E>.

46 *Ibid*.

there is a twofold link between sponsoring states and contractors: nationality and effective control.⁴⁷ Second, all contractors must secure, at all times, the sponsorship of the state of their nationality and, if different, of the state that exercises effective control over it or of the state of the nationality of those who exercise effective control over it.⁴⁸ Lastly, nationality and effective control are seen by the SDC as different things, excluding interpretive orientations that tend to conflate both concepts. Notwithstanding these points, the practice of the ISA, to date, has not been to treat effective control as a matter of economic control but rather the ability to assert regulatory control based on place of incorporation over the contractor.

Effective Control in Other International Legal Contexts

This section explores how the concept of effective control has been interpreted in other international legal contexts. Comparison of its usage in different areas of international law provides further insight into the normative context for application in each case. An investigation into the “ordinary meaning” of the term through a comparative approach is in line with the interpretive rules as identified in article 31 of the VCLT.

Diplomatic Protection

Diplomatic protection of corporate entities and consideration of the equitable doctrine of lifting or piercing the corporate veil has been considered by the International Court of Justice (ICJ) in its seminal decision in *Barcelona Traction*.⁴⁹ The court noted that diplomatic protection was grounded in two criteria — jurisdiction of incorporation and

its registered office — but stressed state practice differed with some jurisdictions 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.⁵⁰ In addition, the court highlighted that the process of “lifting the veil,” while exceptional, was equally admissible under international law,⁵¹ emphasizing the wealth of domestic practice supported application in cases of fraud to prevent misuse of legal personality, protect third parties and prevent evasion of legal obligations.⁵² This approach was similarly endorsed and applied in *Tokios Tokelés*, with the Tribunal assessing the conduct of the claimant in relation to the four factors identified in *Barcelona Traction*.⁵³

Effective control under the LOSC is framed as a procedural element of Part XI to identify and extend responsibilities to the state where the entity is effectively controlled, should this be different from the jurisdiction of registration. This approach is confirmed in article 9 of the International Law Commission (ILC) Draft Articles on Diplomatic Protection, which notes nationality to be the jurisdiction of incorporation but emphasizes that where management and financial control are located elsewhere, it is that second jurisdiction where the seat of management is situated that is regarded as the state of nationality.⁵⁴ Both the concepts of lifting the veil and diplomatic protection in international law are reflected in the ILC Draft Articles and are responsive to the economic and practical concerns of nationality echoed in the LOSC rules and regulations.

47 SDC Advisory Opinion 2011, *supra* note 9 at para 77; LOSC, *supra* note 1, Annex III, art 4(3); Exploration Regulations, *supra* note 32, Reg 11.2.

48 SDC Advisory Opinion 2011, *supra* note 9 at para 190; LOSC, *supra* note 1, Annex III, art 4(3).

49 *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)* (New Application: 1962) – Judgment of 5 February 1970 – Second Phase – Judgments [1970] ICJ 1; ICJ Reports 1970 at 3; [1970] ICJ Rep 3 (5 February 1970) [*Barcelona Traction*], online: <www.icj-cij.org/files/case-related/50/050-19700205-JUD-01-00-EN.pdf>.

50 *Ibid* at para 70.

51 *Ibid* at para 58.

52 *Ibid* (“The wealth of practice already accumulated on the subject in municipal law indicates that the veil is lifted, for instance, to prevent the misuse of the privileges of legal personality, as in certain cases of fraud or malfeasance, to protect third persons... or to prevent the evasion of legal requirements or of obligations” at para 56).

53 *Tokios Tokelés v Ukraine*, ICSID Case No ARB/02/18, Award, (26 July 2007) at paras 54–55, online: <www.italaw.com/sites/default/files/case-documents/ita0863.pdf>.

54 ILC, *Draft Articles on Diplomatic Protection*, UNGAOR, 61st Sess, Supp No 10, UN Doc A/61/10 (2006), art 9, online: <http://legal.un.org/ilc/texts/instruments/english/draft_articles/9_8_2006.pdf>.

Vessel Flagging in the LOSC

The procedure for the nationality of ships established under the convention is also informative. Article 91 of the LOSC 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.⁵⁵ 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.⁵⁶ In addition, the flag state must “effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag,” including maintenance of a register as well as ensuring compliance with safety, labour, equipment and operational standards.⁵⁷ Control in the context of a flag state’s exclusive governance jurisdiction is a legal obligation derived from the process of flagging a vessel and differs from effective control in the context of deep seabed mining where effective control is a prerequisite for sponsorship by a jurisdiction.

The concept analogous to effective control in the context of flagging is that of “genuine link” in article 91 as opposed to references to “control” under article 94. No confusion between control in these articles should be made. Control in the former (Part XI) case is a fact that must be ascertained (i.e., who is effectively controlling the entity) while the latter case relates to governance obligations to be fulfilled by the flag state jurisdiction. Simply put, effective control in the context of flagging of vessels relates to the genuine link between registration and flag state nationality.

International Civil Aviation

International law relating to civil aviation also considers effective control a relevant standard. Under the “Policy and Guidance Material on the Economic Regulation of International Air Transport,” 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 obligations.⁵⁸ This section is left unchanged in the provisional version of the “Policy and Guidance Material on the Economic Regulation of International Air Transport” (2016), the result of the most recent review of the issue within the International Civil Aviation Organization (ICAO).⁵⁹ The concepts of effective control and substantial ownership are utilized under the ICAO as distinct yet linked, thus moving beyond “regulatory control” only. Comparing practice in national jurisdictions also confirms this interpretation.⁶⁰

Clarifying Effective Control

Lack of a Definition

Although effective control in the LOSC and other international rules is an international legal standard, the term is used in Part XI to describe the myriad types of relationships between a state, legal entities, persons or a group thereof, implicating multiple possible jurisdictions, as a component of the application process for a contract.

There is no explicit definition of effective control in Part XI or any other instrument under the convention. Rather, a definition must be derived from the context of usage of the term and, arguably, informed by the other legal sources in which the term, or variations of it, occurs. Analysis

55 LOSC, *supra* note 1, art 91(1).

56 *Ibid*, art 92.

57 *Ibid*, art 94.

58 ICAO, *Policy and Guidance Material on the Economic Regulation of International Air Transport 3rd Edition* (Doc 9587) (Montreal: ICAO, 2008), Part 1-B (“Each Contracting State reserves the right to withhold or revoke a certificate or permit to an air transport enterprise of another State in any case where it is not satisfied that substantial ownership and effective control are vested in nationals of a Contracting State, or in case of failure...to comply with the laws of the State over which it operates”, art 1, s 5).

59 ICAO, *Policy and Guidance Material on the Economic Regulation of International Air Transport* (Doc 9587) Provisional Version (15 August 2016), Part 1-B, art 1, s 5, online: <www.icao.int/Meetings/a39/Documents/9587-PROVISIONAL%20VERSION.pdf>.

60 It is important to highlight that the note by the Secretariat providing an analysis of article 11.2 does explore experience in civil aviation, which illustrates effective control as the primary consideration and mere ownership secondary, but suggests this comparison is problematic as ownership and control tests were “perceived to be archaic” and an impediment to efficient liberalization of the market. While these conclusions were delivered prior to the 2016 review of the ICAO framework, the continued inclusion in the ICAO framework suggests continued relevance. See ISBA/20/LTC/10, *supra* note 40 at paras 19–20.

of comparative legal sources and of the way in which ISA organs have treated the issue provides for two interpretations whereby effective control may mean either an economic concept (control or influence over the entity) or a regulatory one (jurisdiction of incorporation). 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.

An economic control approach, drawing from international jurisprudence and approaches reflected in domestic legislation, includes a number of factors as informative in determining where an entity exercises effective control: ownership of a majority of the applicant's shares; ownership of a majority of the applicant's capital; holding a majority of the applicant's voting rights; holding the right to elect a majority of the applicant's board of directors or equivalent body; having an influence over the applicant sufficient to determine its decisions; or any combination or variation of the above.⁶¹

Under the regulatory control approach, effective control is determined by "the act of incorporation, or the conferring of nationality," which, as has been suggested by the ISA Secretariat, "combined with the undertakings given as a sponsoring state seem to be sufficient to

establish 'effective control' for the purposes of meeting the sponsorship requirements."⁶²

Defining Effective Control under International Law?

Both the ISA Secretariat and the LTC agree that the definition of effective control could be clarified but were inclined to leave this to municipal law.⁶³ This solution derives from the conclusion that the ISA Secretariat reached that effective control entails regulatory control by a state over a company. Leaving to each state the determination of what constitutes effective control could lead to legal variability and undermine the coherence of the international framework. Effective control is, in many respects, an international standard, as it is established in international rules. There may be a risk of incoherence and gaps in the international system if states took inconsistent approaches to effective control. An internationally negotiated solution under the ISA would be preferred and could confer the legal certainty required by the Secretariat, the states parties and stakeholders.

Potential Approaches to Effective Control and their Implications: A Summary

Regulatory Control Approach

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 in article 153 and, as such, fulfills the relevant obligations of the convention.⁶⁴ This approach is the most straightforward and easiest to operationalize. Such a decision would also certainly renew the confidence of the stakeholders, in particular contractors, regarding the stability of the regime. The country that exercises regulatory control is the country of registration of the company. However, the language of Part XI requires us to look beyond this where effective control

61 *Barcelona Traction*, *supra* note 49 at para 70; a range of jurisdictions use similar factors such as majority of shares, direct or indirect influence or control, and power to make key appointments as indicative of a controlled entity. See Argentina, *Ley de Sociedades Comerciales 19.550* (1984), art 33 (unofficial translation), online: <<http://servicios.infoleg.gob.ar/infolegInternet/anexos/25000-29999/25553/textact.htm>>; Australia, *Corporations Act 2001* (Cth) No 50, 2001, Compilation No 77 (5 April 2017), s 50AA, online: <www.legislation.gov.au/Details/C2017C00129>; Brazil, *Código Civil - Lei no 10.406*, de 10 de Janeiro de 2002, art 1.098 (unofficial translation), online: <<https://presrepublica.jusbrasil.com.br/legislacao/91577/codigocivil-10406-02#art-1098>> (Lei 10406/02); Canada, *Canada Business Corporations Act*, RSC 1985, c C-44, Part I, s 3, online: <<https://laws-lois.justice.gc.ca/PDF/C-44.pdf>>; Italy, *Il Codice Civile Italiano* (R.D. 16 marzo 1942, n.262), art 2359 (unofficial translation), online: <www.jus.univr.it/cardoza/obiter_dictum/codciv/Lib5.htm>; Germany, *Aktiengesetz* (Stock Corporation Act), (1965, as amended 17 July 2017), s 17 (official translation), online: <www.gesetze-im-internet.de/englisch_aktg/englisch_aktg.pdf>; India, *The Companies Act* (Act No 18 of 2013), s 2(27), online: <www.mca.gov.in/Ministry/pdf/CompaniesAct2013.pdf>; South Africa, *Companies Act 71 of 2008* (as amended by Companies Amendment Act 3 of 2011), s 2(2), online: <www.justice.gov.za/legislation/acts/2008-071amended.pdf>; United Kingdom, *Companies Act 2006*, c 46, ss 1162, 1267, online: <www.legislation.gov.uk/ukpga/2006/46/pdfs/ukpga_20060046_en.pdf>; United States, U.S. Code: *Title 26. Internal Revenue Code* (Aug. 16, 1954, ch. 736, 68A Stat. 3; Pub. L. 99-514, § 2, Oct. 22, 1986, 100 Stat. 2095), § 1563 [National Legislation], online: <www.law.cornell.edu/uscode/text/26/1563>.

62 ISBA/20/LTC/10, *supra* note 40 at para 22.

63 *Ibid* at para 21; ISBA/20/C/20, *supra* note 43 at para 28.

64 ISBA/20/LTC/10, *supra* note 40 at para 21.

is exercised by others. Thus, there are instances of effective control in the LOSC and the general corpus of applicable international law that treat nationality and effective control as potentially different. Equating nationality and effective control provides a solution in cases where the state of nationality and that of operational control are the same, but it is unhelpful where the state of effective control or nationality of the effective controllers differs from that of registration. In such cases, a purely regulatory interpretation would ignore treaty language and disregard the economic reality of new business models as noted by the LTC, whereby a contractor is registered in a developing jurisdiction yet remains a wholly owned subsidiary of an experienced mining company in a developed jurisdiction.⁶⁵ Narrowing the meaning of effective control in this way could, in turn, lead to monopolistic practices and have negative consequences for the equity goals of the regime.⁶⁶ Such a narrow reading would also hold implications for liability. If only the state of nationality of the contractor is designated a sponsoring state, then only that jurisdiction can be liable for non-compliance with the obligations of sponsoring states. This may be a concern where profits are repatriated to the parent company and subject to taxation in that jurisdiction.

This narrow reading of effective control might also encourage forum shopping whereby contractors establish subsidiaries in countries with lower regulatory standards, leading to a regulatory “race to the bottom.” In addition, it could limit the availability of assets to address cases of environmental damage, which in turn would require robust insurance requirements to satisfy host states concerned about being able to recover damages in the case of an accident.

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. An economic control analysis is also needed to fulfill the concept of “effective control” under the LOSC, thereby providing a distinct alternative to nationality. 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.

Application of an approach that is responsive to the commercial reality of corporate ownership of subsidiaries could also assist in operationalizing protections against monopolistic activities and equitable development of reserved areas through the Enterprise found in articles 6 and 9 of Annex III, respectively.

Effective control, defined as including both regulatory and economic dimensions, would reflect generalized international and national practice⁶⁷ and avoid leaving regulatory, liability and redress gaps in complex international seabed exploration arrangements. As the ICJ noted in *Barcelona Traction*, international law has had to recognize the corporate entity as an institution created under a municipal regime and as such must refer to relevant rules of municipal laws when considering issues relating to them.⁶⁸

This approach could be interpreted as a change in current practice, requiring both the states of the nationality of the contractor and of its effective controllers to become sponsoring states. A shift of this nature would require consideration of the impacts on existing contracts. Only a single approved contract for exploration, the Interoceanmetal Joint Organization operating in the Clarion-Clipperton Fracture Zone in the Pacific Ocean to explore polymetallic nodules, has multiple sponsoring states: Bulgaria, Cuba, Czech Republic, Poland, Russian Federation and Slovakia.⁶⁹ The sponsoring state or states and the ISA would need to review the information provided and determine where effective control lies. The determination of who exercises effective control seems straightforward in cases of wholly owned subsidiaries but may be more difficult in cases of complex business arrangements.

⁶⁷ National Legislation, *supra* note 61.

⁶⁸ *Barcelona Traction*, *supra* note 49 at para 38.

⁶⁹ ISA, “Deep Seabed Minerals Contractors: Interoceanmetal Joint Organization” (contract start: March 2001, end: March 2021), online: <www.isa.org.jm/deep-seabed-minerals-contractors>.

⁶⁵ ISBA/22/LTC/13, *supra* note 7 at para 6.

⁶⁶ *Ibid* at paras 7–8.

Conclusion

This paper has examined 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. The appropriate organs of the ISA (foremost, the Council and the Assembly) could further examine the strengths and limitations of each approach and engage member states in a discussion of increasing importance as the exploitation phase approaches.

By shedding light on the international law relevant to interpreting the concept of effective control, it is hoped that this paper 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 and taking into account international practice and the interpretation given to the term by international courts and tribunals.

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