



Republic of Nauru

Statement delivered by Her Excellency Margo Deije

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

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

Agenda Item 10: Effective Control

Thank you, Madam facilitator for giving me the floor as well as your preparing the briefing paper on this conceptual topic to guide our thinking.

We have consistently shared our view in our written submissions and multiple statements, that effective control must be interpreted as effective “regulatory” control flowing from the state of nationality of the sponsored contractor or entity. This interpretation is grounded in the Convention itself, legal opinions of the ISA Secretariat, the advisory opinion of the Seabed Disputes Chamber, over a decade of consistent practice by the ISA's organs in issuing exploration contracts, State practice when issuing certificates of sponsorship as well as domestic legislation governing sponsored entities.

Changing to an effective economic control test mid-stream would disrupt existing sponsorship arrangements, undermine the effective participation of developing states in seabed mineral activities, create numerous practical challenges and potential legal conflicts, and inject instability and uncertainty in the Part XI regime.

The sponsorship regime is premised on the idea that sponsoring states exercise regulatory control over their sponsored entities through their national legal and administrative measures. This regulatory control enables sponsoring states to meet their due diligence obligations to ensure compliance by the contractor with the rules of the Authority and its contractual obligations. Thus, once nationality is established through incorporation or registration and the certificate of sponsorship issued, the sponsoring State must exercise effective jurisdiction and control over the sponsored entity to secure effective compliance of its contractual terms

under an ISA contract and the terms of the Convention and the 1994 Agreement. This is the essence of effective control.

Nauru's headline Act, the International Seabed Minerals Act of 2015, enshrines this approach of maintaining effective control through its dedicated seabed minerals regulator, the Nauru Seabed Minerals Authority which is empowered to take administrative action in cases of non-compliance.

An interpretation of effective regulatory control is also supported by article 9, paragraph 4 of the Convention. An alternative interpretation of effective economic control to this paragraph would produce a non-sensical result and would mean, in the context of any natural or juridical person, the only pathway for developing countries to get access to reserved areas would, in effect be through State owned enterprises, in which case Article 9(4) would have just referred to "state enterprises" rather than phrasing around effective control.

An interpretation of effective control being one of "effective economic control" based on economic and management control would upend existing arrangements that sponsoring States such as my own and sponsored contractors have relied upon in good faith. Such new interpretation risks undermining the participation of those developing states which have established domestic regulatory frameworks to maintain effective control in line with their international due diligence obligations. It cannot be assumed developing states are less regulated jurisdictions in these matters and I hope no one is suggesting as such. An effective economic control test would likely privilege developed State regulatory regimes, and indeed could provide developed States with a hidden veto over most deep seabed mineral activities given the availability of capital and expertise in mature markets. This is neither an intended legal nor policy outcome flowing from UNCLOS with one of the principles governing the Area being the effective participation of developing States in activities in the Area (article 148, UNCLOS).

An economic control test gives rise to uncertainties and would also be practically challenging to define and implement given the complexities of multinational corporate structures, joint venture arrangements, public listings, and changing ownership over time. At what precise points or chain in ownership would such an economic test be applied?

Additionally, we must be careful not to confuse sponsorship requirements and effective control with separate though important questions around liability for environmental damage. Developing robust mechanisms like funds, insurance, and securities at both international and national levels is the better path to ensuring compensation rather than redefining effective control.

Nauru advocates focusing on strengthening regulation across ISA and state bodies, rather than redefining effective control which has an established meaning in practice so far. Consequently, we see no need to provide a definition of effective control. The way it has been applied to date through the practice of ISA organs and sponsoring States is adequate to demonstrate its application.

A degree of international common sense needs to be applied to the interpretation of effective control considering the above discussion. Keeping the basis for effective control as one of regulatory control has clear merit in being simpler to apply and verify. It 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.

In conclusion, we urge this Council to maintain the long-standing interpretation that effective control means effective regulatory control by the sponsoring state over the contractor's activities. This provides the certainty, predictability and equal treatment envisioned by the Convention. Further discussions can address complementary measures regarding liability and compensation without altering this foundational concept.

We are finalizing a non-paper on this matter and will have this distributed to members through the ISA website before the July 2024 meetings of the Council.

Thank you, Madam co-facilitator.