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Study on the interpretation and application of the concept of "effective control" by the ISA

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The United Nations Convention on the Law of the Sea (UNCLOS) include the term of "effective control" in its sponsorship provisions but do not clarify its meaning. To arrive at a consensus on its connotation, the International Seabed Authority (ISA) began discussions on the concept of "effective control" that have been ongoing since 2014 but have still not yielded any definite conclusion. The interpretation and application of this concept tend to be construed as a regulatory standard in current discussion documents and practices of the ISA, where this allow contractors from developed countries to easily use the method of "sponsoring states of convenience" to apply for and obtain contracts to reserved areas. This is inimical to the goals of effective marine environmental protection and the implementation of preferential treatment for developing countries. The international community should pay attention to this issue and correct the unreasonable tendencies of the ISA in this regard.

KEYWORDS

the international seabed area, International Seabed Authority, sponsorship, effective control, sponsoring states of convenience

1 Introduction

The concept of "effective control" is part of the sponsorship requirements of the United Nations Convention on the Law of the Sea (UNCLOS). The International Seabed Authority (ISA) has incorporated the relevant provisions into its regulations regarding the international seabed area (the Area) in order to implement these requirements of the convention. The goal of these sponsorship requirements is primarily to ensure the effective jurisdiction of sponsoring states over entities operating in the Area. The concept of "effective control" needs to be interpreted and applied to implement such jurisdiction. If it is unreasonably interpreted and applied, this would make it difficult to regulate the behaviors of contractors, and may cause irreversible damage to the marine environment.

The interpretation and application of the concept of "effective control" is also related to the application by entities to qualify to operate in reserved areas. The designation of reserved areas guarantees the equal participation of all countries in such operations, and pays special attention to the interests and needs of developing countries. The aim is to

prevent the mineral resources of the international seabed, which have been identified as "the common heritage of mankind," from being monopolized by developed countries who have abundant funds and advanced technologies. The concept of "effective control" in the sponsorship provisions of the UNCLOS is related to the purposes for the designation of reserved areas. Although there is still no consensus on the interpretation and application of this concept, the International Seabed Authority is currently leaning toward a regulatory standard that would allow entities from developed countries to easily take advantage of the notion of "sponsoring states of convenience," by setting-up shell companies in developing countries and obtaining sponsorship from them (Willaert, 2019). These entities can thus obtain approval to carry out exploration activities in reserved areas. In this way, the share originally reserved for developing countries is being exploited and controlled by entities from developed countries. For example, Nauru Ocean Resources Inc., Tonga Offshore Mining Limited, and Marawa Research and Exploration Ltd. are actually controlled by The Metals Company from Canada. The Metals obtained the sponsorship of Nauru, Tonga and Kiribati through these three contractors, and obtained 52.5% of the exploration rights in areas generally reserved for developing countries under UNCLOS (Environmental Justice Foundation, 2023). Moreover, the reserved areas have exhibited a trend of negative growth since the ISA adopted a joint venture-sharing arrangement as a flexible arrangement for the submission of applications by contractors to operate in reserved areas.

With ongoing negotiations on the "Draft Regulation on Exploitation of Mineral Resources", the issue of the interpretation and application of the concept of "effective control" has once again attracted the attention of the international community. The international community needs to correct the prevalent attitude of the ISA to ensure the protection of the marine environment and prevent entities from developed countries from exploiting reserved areas.

2 Significance of the interpretation and application of "effective control"

During the formulation of the UNCLOS, the Area system was introduced as a model of the "common heritage of mankind" that is different from the notions of the freedom of the high seas and sovereignty in territorial waters (Scovazzi, 2015). It also generated many controversies. Disagreements arose over the kind of system that should be implemented to manage activities within the Area on behalf of all humankind. Developing countries originally advocated a unitary system of exploitation, with the hope of establishing a strong international authority to exercise "direct and effective control" over activities in the Area. Activities related to resource development in the Area were to be carried out either directly by such authority, or through cooperation based on special arrangements that ensured that it had direct and effective control of the relevant entities (United Nations, 1975). Developed countries objected to this unitary developmental system, and worried that such a management authority would become a "tyranny of the majority" due to the sheer number and voting power of developing countries. Specifically, they feared that the term "direct and effective control" would confer unlimited powers on such an authority such that it could unreasonably interfere with the activities of the relevant entities within the Area (Adede, 1977).

After complicated negotiations and many compromises, a parallel system was devised, and the expression "direct and effective control" was eliminated from the final agreement. Participating entities were no longer allowed to obtain access to the Area under the powerful discretion of the authority, but could do so only in compliance with the provisions of the UNCLOS. The international authority in the Area was no longer the dominator of developmental activities in the Area, but was to act as a supervisor and administrator to ensure that the rules pertaining to the Area were observed. The implementation of a series of sponsorship requirements in the UNCLOS bound private entities to act within the framework of international law (French, 2011).

The sponsorship requirements bind member states in the sense of treaty law, and require that they assume the corresponding obligations under the UNCLOS. The sponsoring state should ensure that the entities that it sponsors comply with provisions of the UNCLOS. It can ensure compliance by binding such entities through its domestic law. Private subjects would thereby be bound by the framework of the UNCLOS such that this would achieve the purpose of the sponsorship provisions (Rayfuse, 2011). Development activities inevitably have an impact on the marine environment, because of which the UNCLOS also imposes according obligations for environmental protection on the sponsoring states. If the concept of "effective control" in the sponsorship provisions is unreasonably interpreted and applied, this would make it difficult to ensure effective jurisdiction by the sponsoring states over entities sponsored by them. Hence the requirements of environmental protection in the UNCLOS would become challenging to implement. Moreover, some developing member states may establish loose domestic environmental rules and systems of enforcement to encourage entities from developed countries to apply for sponsorship in the service of their economic interests.

To ensure adherence to the spirit of the idea of "the common heritage of mankind," the parallel system divides the areas of activities for the development of mineral resources into contract areas and reserved areas. The reserved areas have been designated by considering the special interests of developing countries and making special arrangements in this regard. This is one of the major compromises that motivated developing countries to accept the parallel developmental system. The provisions governing the reserved areas were designed to prevent developed countries from monopolizing activities within the Area and promote the participation of developing countries. According to Article 8 of Annex III of the UNCLOS, applicants are required to divide a given area into two parts of equal commercial value, one of which is designated by the ISA as a reserved area. The reserved area has a relatively certain resource potential based on prior exploration and investigation by the provider. Applicants operating in this area will incur lower costs of exploration, and their expected commercial revenue will be more certain (Zhang, 2014b). According to Article 9

of Annex III to the UNCLOS, developing state parties, or entities sponsored and effectively controlled by them, have priority in applying for plans to work in reserved areas.

Whether the applicant seeks a contract area or intends to conduct activities in the reserved area, compliance with the "effective control" requirements of UNCLOS sponsorship rules is crucial. According to Article 153, paragraph 2(b) of UNCLOS regarding qualifications for Area activities, a natural or juridical person with the nationality of a contracting state, or effectively controlled by one, qualifies under the sponsorship of that contracting state. In essence, applicants for Area activities must secure sponsorship from their states of nationality or those with "effective control" over them. Coupled with the sponsoring state's obligations outlined in Article 139 of UNCLOS, this means ensuring compliance with UNCLOS rules by the sponsored entity under its nationality or effective control. The provision stipulates the sponsoring state's responsibilities to bind the sponsored subject within the UNCLOS framework. Simultaneously, sponsorship requirements in Article 4, paragraph 3 of UNCLOS Annex III state that if the applicant's state of nationality differs from the state exercising "effective control," the applicants must secure sponsorship from all relevant states involved. This regulation is integral to the three regulations of ISA on exploration, reinforcing the Convention's intent to effectively bind applicants. For those seeking engagement in reserved area activities, UNCLOS includes additional provisions related to "effective control" requirements. Paragraph 4 of Article 9 of UNCLOS Annex III, and paragraph 5 of Section 2 of the Agreement on the Implementation of Part XI state that a natural or juridical person sponsored by a developing state party, effectively controlled by it, has priority in submitting independent applications for reserved areas. Notably, developed countries and their entities are ineligible to independently submit applications for activities in reserved areas unless they fulfill specific conditions as corresponding reserve providers.

Taken together, the term "effective control" in the sponsorship requirements is related to the applicant's qualification to engage in activities within the Area, and its interpretation and application are important for ensuring the purpose and spirit of the Area system. First, it involves ensuring that the sponsoring state has effective jurisdiction over the applicant. As the Seabed Disputes Chamber emphasized in its advisory opinion, "the spread of sponsoring states 'of convenience' would jeopardize the uniform application of the highest standards of protection of the marine environment, the safe development of activities in the Area, and protection of the common heritage of mankind" (ITLOS, 2011, para. 159). Second, it also prevents developed countries from monopolizing activities in the Area and attaining a dominant position, while providing for the special treatment of developing countries. Thus, it is particularly important to identify effective links between entities carrying out activities in these areas and their sponsoring states (Peniche and Nicolas, 2012). In addition, as the supervisor and administrator of the Area system, the interpretation and application of the concept of "effective control" by the ISA is specifically related to its duty for the protection of the marine environment under Article 145 of the UNCLOS (Mgbeoji, 2014).

However, as the concept of "effective control" in the sponsorship provisions has not been clarified, the current attitude and practice of the ISA are biased toward the standard of regulatory control, because of which entities from developed countries have been able to use the approach of "sponsoring states of convenience." Such entities establish a shell company in a developing state that is party to the ISA, and obtain sponsorship from it to apply for activities in reserved areas. As they are based in developed countries, such entities have significant advantages in terms of capital and technology over their counterparts from developing countries. The reserved areas may thus be de facto monopolized by them in this approach, such that the special consideration accorded to developing countries in the ISA would become meaningless.

3 Current interpretation and application tendency of "effective control" by the ISA

3.1 Explanation of "effective control" in ISA discussion documents

The ISA has yet to clarify the concept of "effective control." The relevant, tendentious, documents published by it have not arrived a fully convincing conclusion to the issue. In 2011, its council requested the Legal and Technical Commission (the Commission) to conduct an analysis of the interpretation and application of the sponsorship provisions in the Exploration Regulations (ISA, 2011). Discussions on the concept of "effective control" under the sponsorship provisions of the Area system have thus officially become part the working arrangements of the ISA. On June 5, 2014, the ISA Secretariat conducted a preliminary analysis to assist the Commission in its work. The secretariat claimed that the precise meaning of "effective control" does not yet exist in international law. If a country deems it necessary, it can handle this issue through its domestic law. The acquisition of the relevant nationality and the commitment of the sponsoring country should be sufficient to convince the Commission that the "effective control" requirement has been met. It also argued that the relevant international legal systems and practices tend to favor the standard of regulatory control regarding the meaning of "effective control"—that is, the ability of a state to exercise regulatory jurisdiction over the applicant (ISA, 2014a).

On July 16, 2014, the Commission acknowledged the conclusions of the secretariat's preliminary analysis in its work summary report (ISA, 2014c). After reviewing the Commission's summary report, the council requested it to continue to deal with the issue of "effective control" as well as concerns related to the monopoly over activities within the Area (ISA, 2014b). On June 9, 2015, the secretariat provided separate explanations of these two issues in order to assist the Commission. It maintained its previous conclusion regarding the explanation of "effective control," and did not consider the two issues in conjunction (ISA, 2015a). On July 15, 2015, the Commission requested that the secretariat provide a more detailed analysis. Specifically, it asked that the secretariat explain the business model and trend of close relationships between the entities sponsored for operating in reserved areas by developing countries

and entities from developed countries, and provide a detailed explanation of the issue of a monopoly in the region (ISA, 2015b).

On June 21, 2016, the secretariat stated that the sponsorship provisions were part of the parallel system, and recalled that the parallel system was intended to prevent developed countries from monopolizing the seabed mining industry, all the while maintaining its previous conclusion. It also cited the sponsorship provisions together with Article 9 of Annex III to the UNCLOS, which deals with granting the right to apply for work plans for seabed activities in reserved areas to developing countries and the "Enterprise" (i.e., the organ of the ISA that is responsible for carrying out activities in the Area). However, the secretariat did not connect these issues with the interpretation and application of "effective control." Moreover, it noted the close connection between entities sponsored by developing countries and entities from developed countries, but still claimed that this arrangement did not go against the provisions of the UNCLOS (ISA, 2016a).

On July 13, 2016, the Commission reviewed the secretariat's report and emphasized that the trend of activities in reserved areas was based on the close relationship between entities sponsored by developing countries and entities based in developed countries. It claimed that this required a more complete examination of the impact of the key features and core issues of the common heritage of humans, and that the relevant matters needed to be kept in the working agenda (ISA, 2016b). Since then, the ISA has been silent on the issue of "effective control."

Discussions on the concept of "effective control" reappeared in the ISA's work with the commencement of negotiations on regulations on the exploitation of mineral resources. The discussion paper released by the authority in January 2023 again discussed the issue of "effective control" in detail, but still without arriving at a definite conclusion (ISA, 2023a). It claimed that the meaning of "effective control" included the actual state of control beyond the legal position, reviewed the preparatory work for the UNCLOS, and concluded that it provided little reference for the interpretation of "effective control." The authority also explored the relevant provisions of the UNCLOS, and claimed that based on the consistency of treaty interpretation, the standard of regulatory control provided in Articles 91 and 94 of the UNCLOS should be applied to the interpretation of the sponsorship provisions. It subsequently also referred to provisions in other international legal instruments and the relevant international practices, and concluded that a unified and precise interpretation of "effective control" had not yet been formed. On this basis, it cited the judgment of the International Court of Justice in the *Barcelona Traction Case*, where the court had held that companies are institutions created by domestic law. When legal issues arise regarding corporate rights and there are no relevant provisions in international law, the regulations of domestic law should be referred to. The ISA found that the regulations on "effective control" vary greatly between states and cover many practical situations, such as company ownership structures, which makes it difficult to draw a general conclusion.

In the final section of its discussion, the ISA report reviewed the obligation of the sponsoring state to ensure that the sponsored entity complies with the UNCLOS, maintained the attitude that the "effective control" of the relevant matters fell within the scope of the sponsoring state's domestic law, and concluded that whether the sponsored entity met the requirements of sponsorship of the UNCLOS remained a matter of self-determination by the sponsoring state. However, it also mentioned that the ISA has the duty to ensure and supervise compliance with the UNCLOS and regulations of the Area. Moreover, disputes between contracting states and the ISA on sponsorship issues can be submitted to the Seabed Disputes Chamber. This does not seem to exclude the possibility that the ISA can examine whether a given applicant complies with provisions involving the term "effective control."

3.2 Application of "effective control" in review practices by ISA

Despite the fact that the ISA has not reached a definitive conclusion on interpreting and applying the concept of "effective control," it is evident from its review practices on exploration activity applications that a regulatory standard is being employed. The authority has now signed contracts for the exploration of mineral resources in the Area with 22 contractors. Among them, six contractors are sponsored by developing countries but have close ties with entities in developed countries. In particular, Nauru Ocean Resources Inc., Tonga Offshore Mining Limited, Marawa Research and Exploration Ltd., and Blue Minerals Jamaica Ltd. are highly suspect. They are suspected of using the sponsoring country of convenience method to qualify to apply for activities in the reserved areas. These four companies are all subject to a high degree of control by their parent companies, which are located in developed countries. They have no independent financial and technical capabilities, while their sponsor developing states have very limited actual control over them.

Tonga Offshore Mining Limited and Nauru Ocean Resources Inc. are both wholly owned subsidiaries of a Canadian corporation called The Metals Company. Both submitted application plans for exploration work in reserved areas to the ISA in 2008 (ISA, 2008a; ISA, 2008b). The application materials included copies of their certificates of registration in the respective sponsoring countries as well as sponsorship certificates. The financial and technical records provided by them in fact proved their reliance on their parent companies in developed countries (Churchill, 2012). Although Marawa Research and Exploration Ltd. appears to be a Kiribati state-owned company, it does not have an independent office in Kiribati or its own financial budget. The company has a close cooperative relationship with The Metals Company. The relevant documents show that Marawa's contractual rights in the Area have been acquired by The Metals Company (Greenpeace, 2020). Marawa submitted an application plan for exploration work in the reserved areas to the ISA in 2012, and claimed to be wholly owned and controlled by Kiribati. In terms of technical capabilities, it vaguely claimed only that it would hire experts and utilize world-leading technology (ISA, 2012). Moreover, Blue Minerals Jamaica Ltd. is actually a subsidiary of a holding company linked to a Swiss group, and is led by the same board of directors as this group (Greenpeace, 2020). The company described itself in 2020 as a

multi-national corporation, in its application to the ISA for reserved areas, but it did not disclose the relevant information (ISA, 2020). Having reviewed these companies' applications for exploration in reserved areas, the ISA determined that they met the requirement of "effective control," based on the certificates of registration in their sponsoring states and commitments by the latter. The application of "effective control" tends to be the standard of regulatory control, and needs to only be under the jurisdiction of the developing state party that provides the sponsorship. The actual control of these companies was not reviewed. This constitutes a failure to uphold the purpose of design of the reserve system. The ISA did not examine whether such actions would affect actual participation by developing countries in seabed mining, and whether this would cause developed countries to de facto monopolize such activities in reserved areas.

During the Council's review of the Commission's recommendation for the approval of these applicants, some members, including Germany, the Netherlands, and some developing countries, questioned the qualifications of these contractors. They claimed that they were actually controlled by entities from developed countries, and thus should not be eligible to apply for activities in the reserved areas (Zhou, 2012). However, paragraph 11 (a) of Section 3 of Part XI of the UNCLOS states that the council shall approve the recommendation of the Commission unless two-thirds of the members who participate in the vote do not approve. The conditions for council members to overturn the recommendation of approval by the Commission are stringent. But this at least shows that there was disagreement among members of the council on the interpretation and application of the concept of "effective control" of the regulatory standard, and no consensus has since been reached on the issue.

4 Problems with the ISA's interpretation and application of "effective control"

The ISA's incorrect interpretation and application tendency of the concept of "effective control" will affect effective compliance with and the implementation of the Area system, adversely affect the participation of developing countries in activities for mineral resource development in the Area, and help normalize the use of the sponsoring states of convenience method by entities from developed countries. The more relaxed domestic legal regulatory environment of developing countries, their cheaper sponsorship fees, and especially their prioritized status for activities in reserved areas are very attractive to entities from developed countries. Developing countries are not as good as developed countries in terms of capital and technology, which makes it difficult for them to participate in activities in the Area. If the ISA continues to condone this behavior, the reserved areas originally intended to ensure the participation of developing countries will become occupied and dominated by the entities of developed countries. The reserved area systems will thus remain in effect in name only. Most importantly, the sponsorship provisions are primarily designed to ensure an effective connection between applicants and sponsoring states, so that these entities can be effectively bound by the framework of international law. Such an approach causes the entities sponsored by developing countries in reserved areas to be actually controlled by entities in developed countries, and in turn makes it difficult to ensure the effective jurisdiction of their sponsoring states over them. It would thus be difficult to ensure that contractors operating in the reserved areas comply with the UNCLOS and related regulations. In general, there are three main problems with the current interpretation and application of the concept of "effective control" by the ISA. We discuss them below.

4.1 Maintaining the erroneous premise that the "effective control" issue falls within the scope of domestic law

The ISA currently uses an incorrect premise in interpreting and applying the concept of "effective control," claiming that the concept is similar to the concept of nationality, and thus that matters related to it also fall within the scope of domestic law. First, the concepts of "effective control" and "nationality" are not identical in nature. "Effective control" is a de facto state of existence while nationality is a concept created by domestic law. Matters related to "effective control" should thus not be compared to those related to nationality, and thus the former do not simply fall within the scope of domestic law. Second, the interpretation and application of "effective control" involves the implementation of the Area system, is related to the interests of developing countries and humankind in the area of the international seabed, transcends the boundaries of the internal affairs of states, and is not suitable for consideration only within the scope of domestic law. Finally, the interpretation and application of "effective control" involves compliance with and the implementation of the UNCLOS and regulations pertaining to the Area. As the administrator and supervisor of the Area, the ISA has the obligation to ensure compliance with the UNCLOS. Based on the principle of due diligence, simply classifying it as a matter of domestic law and ignoring the relevant purposes of the UNCLOS is also a reflection of the ISA's failure to appropriately discharge its responsibilities of supervision and management in this area.

4.2 Singular use of the regulatory standard

The ISA currently favors a singular standard—the regulatory standard—to interpret and apply the concept of "effective control." The text of the UNCLOS itself leaves open the question of how to distinguish nationality from "effective control" (Oxman, 1981). In the relevant discussion documents and review work of the ISA, the repeated mention and continual application of the requirement that the applicant be incorporated in or have the nationality of a sponsoring state, coupled with the commitment by the sponsoring state, are sufficient to satisfy the requirement of "effective control." The authority confuses the concepts of nationality and effective control. In Article 153, paragraph 2 (b) and Article 4, paragraph 3 of Annex III of the UNCLOS, the word

that connects "nationality" to "effective control" is "or." This clearly implies that "nationality" and "effective control" are considered by the UNCLOS to be different concepts. Furthermore, the Seabed Disputes Chamber's advisory opinion reflects its attitude of treating these as two concepts as different. It states that "the connection between states parties and domestic law entities required by the UNCLOS is twofold, namely, that of nationality and that of effective control" (ITLOS, 2011, para. 77). The ISA ignores the actual status of control of applicants, thus rendering the requirement of "effective control" meaningless. Moreover, the regulatory standard can legally only reflect the sponsoring state's supervision of its applicant while ignoring the actual state of affairs. Entities from developed countries will be encouraged to use developing state parties as sponsoring states, set-up shell companies in these countries, then to control the activities of the shell companies in the reserved areas. Due to the advantages of their multi-national structure, it is unrealistic for the sponsoring developing countries to supervise the behaviors of these shell companies.

4.3 Missing the textual approach and the subjective approach

The ISA's current interpretation and application of the concept of "effective control" is based on the application of methods of treaty interpretation. However, in its application of these methods, did not give an full consideration. When applying methods of treaty interpretation to interpret the concept of effective control, the ISA has ignored the relevant provisions except for Articles 91 and 94 of the UNCLOS in the context of its textual approach, and has overlooked paragraph 3 of Article 4 of Annex III as well as the intention underlying the design of the reservation system in the context of the subjective approach. Although Articles 91 and 94 of the UNCLOS, regarding flag state provisions, are related to the concept of "effective control," they are not germane to the context of Part XI of the UNCLOS. This concept in Articles 91 and 94 involves the obligations of a flag state in the process of flagging a vessel. The concept in sponsorship provisions is the requirement for states to provide sponsorship. The interpretation of Articles 91 and 94 of the UNCLOS, as stipulated by the flag state, is thus of little significance for explaining the concept of "effective control" in the Area system.

In addition, paragraph 3 of Article 5 of Annex III of the UNCLOS contains the term "effective control," which is specifically understood as the standard of economic control. This indicates that the UNCLOS does not exclude the standard of economic control when using the term "effective control" (Rojas and Phillips, 2019). If we follow the ISA's view in its discussion paper, that there should be consistency in the interpretation of treaty provisions, then the standard of economic control should be included, in addition to the standard of regulatory control in Articles 91 and 94, when interpreting the term. In light of the founders' intentions, the formulation of paragraph 3 of Article 4 of Annex III stems from developing countries' concerns about the threat posed by uncontrolled multi-national corporations, and is intended to ensure effective jurisdiction over them (United States House Committee on Foreign Affairs, 1980). If the standard of economic control is not considered, trying to ensure that a sponsoring state can effectively restrain its contractor becomes unrealistic, and compliance with the UNCLOS and related regulations becomes problematic. Moreover, the sponsorship provisions of the UNCLOS and paragraph 4 of Article 9 of Annex III to it are all components of the system of reserved areas, and are designed to prevent developed countries from forming a monopoly over reserved areas while encouraging participation by developing countries in seabed activities (Egede, 2009). Therefore, when interpreting and applying the concept of "effective control," the ISA should also pay attention to the anti-monopoly purposes of the UNCLOS, implement preferential treatment for developing countries, and secure the Area system based on the principle of a common heritage for humankind.

5 Suggestions on the interpretation and application of "effective control"

The interpretation and application of the concept of "effective control" are matters of common interest to the international community. The issue is not only related to the effective protection of the marine environment, but is also germane to the implementation of the principle of a common heritage for humankind. The poor financial and technological conditions of developing countries are not conducive to their actual participation in activities of the Area. If commercial mining is allowed under the "two-year rule" that has been invoked in recent years, entities from developed countries with relatively advanced technologies can use the method of sponsoring states of convenience to start the commercial mining of mineral resources in the reserved areas, and this will help accelerate their monopoly over the resources of the region. The reservation system, which was originally set-up to provide preferential treatment to developing countries, would then benefit developed countries instead. Furthermore, the joint venture-sharing arrangement is an alternative to the reserved areas, in conjunction with the "Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area", and the "Regulations on Prospecting and Exploration for Cobalt-rich Ferromanganese Crusts in the Area". States inclined to use sharing arrangements to replace the obligation to provide the reserved areas, causing the reserved areas a negative growth trend (Zhang, 2014a). This further widens the gap between developing and developed countries in their activities in the Area, and will encourage the assumption of a dominant position by the latter in the region.

The interpretation and application of the concept of "effective control" as well as issues of monopolization of activities within the Area remain on the agenda of the Legal and Technical Commission, as part of its "Additional items" (ISA, 2023b). The international community should attend to discussions on this issue. We make the following suggestions in this regard:

In the context of methods of interpretation, the interpretation and application of "effective control" should be linked to paragraph 3, Article 5 and paragraph 3, Article 4 of Annex III of the UNCLOS, and with reference to the purpose for which the system of reserved

areas was formulated. Paragraph 3, Article 5 of Annex III contains the term "effective control," indicating that the UNCLOS does not exclude the application of the standard of economic control for this term. Moreover, paragraph 3 of Article 4 of Annex III was initially added in light of concerns by developing countries regarding effective jurisdiction over multi-national companies. The concept of "effective control" should be closer to the situation on the ground because this can help ensure compliance with the UNCLOS and related regulations. Furthermore, the parallel system is the product of a compromise between developing and developed countries. It adheres to the principle of common heritage of mankind and implements preferential arrangements for developing countries. The sponsorship provisions are an integral part of the parallel system. The interpretation and application of the concept of "effective control" must thus be subject to the purpose and spirit of the parallel system, and be used to avoid monopolization by developed countries and secure the implementation of preferential arrangements for developing countries.

We also propose that the issue of effective control be considered in conjunction with concerns related to the monopolization of activities in the Area, and that they should not continue to be treated as separate subjects. The essence of "the test of effective control" is the specific interpretation of sponsorship requirements. The sponsorship provisions and anti-monopoly provisions are both components of the system of reserved areas. The two subjects are closely related, and should be considered in concert. When clarifying the concept of "effective control," consideration of issues related to the monopolization of activities within the Area is a requirement of the special consideration of the interests of developing countries under the guidance of a common heritage for humankind. The clarification of the concept of "effective control" must be integrated into anti-trust considerations, in order to prevent entities from developed countries from using the method of sponsoring states of convenience to qualify for activities in reserved areas. The monopolistic position of developed countries may enable them to reap the benefit of the preferential treatment originally designed for developing countries. When Malta proposed the concept of a common heritage or humankind to the United Nations General Assembly in 1967, it included special considerations for the interests of developing countries. It can thus be claimed that the benefits and interests of developing countries were a crucial consideration from the very beginning of the development of the Area system (United Nations, 1967). Therefore, anti-trust issues should be considered when clarifying the concept of "effective control in order to adhere to the principle of a common heritage for humankind, which is the basis of the Area system. This involves implementing preferential treatment for developing countries, and preventing entities from developed countries from hijacking the benefits reserved for developing countries.

Finally, we suggest that the interpretation and application of "effective control" incorporate the standard of economic control in addition to that of regulatory control. The economic control standard serves as a metric for assessing the relationship between the applicant and sponsoring states from an economic standpoint. For example, this may involve scrutinizing corporate ownership structures to ascertain which states should provide sponsorship for the applicant's activities. The incorporation of the economic control standard extends the purview of sponsoring states beyond the applicant's state of nationality. Particularly in the case of "sponsoring states of convenience", the obligation to provide sponsorship may also encompass developed countries where entities exerting economic control over the applicant are domiciled. This expansion is instrumental in ensuring effective jurisdiction over applicants. Consequently, the applicant becomes ineligible for reserved area activities when sponsorship involves developed states, thereby averting the de facto control of shares initially reserved for developing countries by entities from developed countries. The concept of effective control, as a factual state of existence, itself includes economic control. Moreover, the relevant text of the UNCLOS does not exclude the use of the standard of economic control for this term. Furthermore, although there is no unified meaning of "effective control" in international law, we can conclude from the domestic legislation of various countries that many states have considered the standard of economic control when interpreting and applying this concept. Finally, the inclusion of standards of economic control will help prevent developed countries from monopolizing activities in the Area and implement preferential treatment for developing countries. The economic standard can be specifically set by referring to the specific provisions of the domestic laws of states, and choosing the appropriate one under the circumstances. This will increase the cost of using the method of sponsoring states of convenience by entities in developed countries. It might even force them to transfer certain funds or control rights to developing countries to qualify for activities in reserved areas, where this can motivate actual participation by developing countries in activities of mineral resource development in the Area.

6 Conclusion

The ISA's current interpretation and application of the concept of "effective control" in sponsorship provisions, both in its internal discussion documents and in its practice of reviewing work plans in reserved areas, favors the application of the standard of regulatory control. This standard does not consider the actual status of control of the sponsored entity, which is not conducive to ensuring the effective jurisdiction of the sponsoring state over it. This undermines purpose of the sponsorship provisions of the UNCLOS and its anti-monopoly motivation. The international community should seize the opportunity of current negotiations on the draft regulation on resource exploitation, and push for a consensus on a reasonable interpretation and application of the concept of "effective control." In this regard, it could consider incorporating the standard of economic control into the interpretation and application of the concept of effective control to realize aim of protecting the marine environment of the UNCLOS, prevent developed countries from enjoying a monopoly over reserved areas, and promote real participation by developing countries in activities in the Area.

Author contributions

JZ: Conceptualization, Formal analysis, Funding acquisition, Methodology, Supervision, Writing – review & editing. PL: Writing – original draft, Writing – review & editing.

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Conflict of interest

The authors declare that the research was conducted in the absence of any commercial or financial relationships that could be construed as a potential conflict of interest.

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