

Minutes of Public Sitings – Procès-verbal des audiences publiques

**INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA
TRIBUNAL INTERNATIONAL DU DROIT DE LA MER**



MINUTES OF PUBLIC SITTINGS

**MINUTES OF THE PUBLIC SITTINGS
HELD FROM 14 TO 16 SEPTEMBER 2010
AND ON 1 FEBRUARY 2011**

*Responsibilities and obligations of States sponsoring
persons and entities with respect to activities in the Area
(Request for Advisory Opinion submitted to the Seabed Disputes Chamber)*

PROCÈS-VERBAL DES AUDIENCES PUBLIQUES

**PROCÈS-VERBAL DES AUDIENCES PUBLIQUES
TENUES DU 14 AU 16 SEPTEMBRE 2010
ET LE 1^{ER} FÉVRIER 2011**

*Responsabilités et obligations des Etats qui patronnent des personnes
et des entités dans le cadre d'activités menées dans la Zone
(Demande d'avis consultatif soumise à la Chambre pour le
règlement des différends relatifs aux fonds marins)*

For ease of use, in addition to the continuous pagination, this volume also contains, between square brackets at the beginning of each statement, a reference to the pagination of the corrected verbatim records.

En vue de faciliter l'utilisation de l'ouvrage, le présent volume comporte, outre une pagination continue, l'indication, entre crochets, au début de chaque exposé, de la pagination des procès-verbaux corrigés.

Note by the Registry: The corrected verbatim records are available on the Tribunal's website at www.itlos.org.

Note du Greffe : Les procès-verbaux corrigés sont disponibles sur le site Internet du Tribunal : www.tidm.org.

**Minutes of the Public Sitings
held from 14 to 16 September 2010 and on 1 February 2011**

**Procès-verbal des audiences publiques
tenues du 14 au 16 septembre 2010 et le 1^{er} février 2011**

14 September 2010, p.m

PUBLIC SITTING HELD ON 14 SEPTEMBER 2010, 3.00 P.M.

Seabed Disputes Chamber

Present: *President* TREVES; *Judges* MAROTTA RANGEL, NELSON, WOLFRUM, YANAI, KATEKA, HOFFMANN, GAO, BOUGUETAIA, GOLITSYN; *Registrar* GAUTIER.

List of delegations:

International Seabed Authority

H.E. Mr Nii Odunton, Secretary General
Mr Michael W. Lodge, Legal Counsel
Dr. Kening Zhang, Senior Legal Officer
Ms Gwenaelle Le Gurun, Legal Officer

Germany

Dr Susanne Wasum-Ruiner, Legal Adviser, Director-General for Legal Affairs, Federal Foreign Office
Dr. Ingo Winkelmann, Head of Division, Federal Foreign Office
Mr Martin Lutz, Deputy Head of Division, Federal Ministry of Economics and Technology
Ms Ellen Maue, Deputy Head of Division, Federal Ministry of Justice
Ms Chia Lehnardt, Expert Assistant, Federal Ministry of Economics and Technology
Mr Dan Tidten, Expert Assistant, Federal Foreign Office

Netherlands

Dr Liesbeth Iijnzaad, Legal Adviser of the Ministry of Foreign Affairs
Prof Dr René Lefeber, Legal Counsel, Ministry of Foreign Affairs
Mrs Winifred Bradbelt, Legal Counsel, Ministry of Transport and Water Management

Argentina

Ambassador Susana Ruiz Cerutti, Legal Adviser, Argentine Ministry of Foreign Affairs
International Trade and Worship
Minister Manuel Angel Fernandez Salorio, Consul General of the Argentine Republic in Hamburg
Dr. Frida Armas Pflirter, Member of the Legal and Technical Commission of the International Seabed Authority as delegate

Chile

Minister Counsellor Roberto Plaza, Consul General of Chile in Hamburg

RESPONSIBILITIES AND OBLIGATIONS OF STATES WITH RESPECT TO ACTIVITIES IN THE AREA

Fiji

H.E. Mr Pio Bosco Tikoisua, High Commissioner of Fiji to the United Kingdom of Great Britain and Northern Ireland

Mexico

Ambassador Joel Hernandez G., Legal Adviser of the Ministry of Foreign Affairs

Nauru

Mr Peter Jacob, First Secretary, Nauru High Commission in Suva (Fiji)
Mr Robert Haydon, Advisor

United Kingdom of Great Britain and Northern Ireland

Sir Michael Wood KCMG, member of the English Bar and member of the International Law Commission
Mr Eran Sthoeger, New York University School of Law

Russia

Mr Vasily Titushkin, Deputy Director of the Legal Department, Ministry of Foreign Affairs
Mr Andrey Todorov, Attaché of the Legal Department, Ministry of Foreign Affairs

UNESCO/IOC

Mr Ehrlich Desa, Deputy Executive Secretary of UNESCO/IOC, Head of Budget and Finance of UNESCO/IOC's Capacity Development Section
Mr Nicolas Guerrero Peniche, Consultant for Legal Affairs Office of the Executive Secretary of UNESCO/IOC

IUCN

Mr Donald K. Anton, Barrister and Solicitor of the Supreme Court of Victoria, the Supreme Court of New South Wales, and the High Court of Australia; Member of the Bar of the State of Missouri, the State of Idaho, and the Supreme Court of the United States, and Senior Lecturer in International Law at the Australian National University College of Law, Counsel
Mr Robert A. Makgill, Barrister and Solicitor of the High Court of New Zealand, Counsel
Ms Cymie R. Payne, Member of the Bar of the State of California, the Commonwealth of Massachusetts, and the Supreme Court of the United States, Counsel

14 septembre 2010, après-midi

AUDIENCE PUBLIQUE TENUE LE 14 SEPTEMBRE 2010, 15 HEURES

Chambre pour le règlement des différends relatifs aux fonds marins

Présents : M. TREVES, *Président*; MM. MAROTTA RANGEL, NELSON, WOLFRUM, YANAI, KATEKA, HOFFMANN, GAO, BOUGUETAIA, GOLITSYN, *juges*; M. GAUTIER, *Greffier*.

Liste des délégations :

Autorité internationale des fonds marins

S. E. M. Nii Odunton, Secrétaire général
M. Michael W. Lodge, Conseiller juridique
M. Kening Zhang, juriste (hors classe)
Mme Gwenaëlle Le Gurun, juriste

République fédérale d'Allemagne

Mme Susanne Wasum-Rainer, Conseillère juridique, Directrice générale des affaires juridiques au Ministère fédéral des affaires étrangères
M. Ingo Winkelmann, Chef de division au Ministère fédéral des affaires étrangères
M. Martin Lutz, Directeur adjoint, Ministère fédéral de l'économie et de la technologie
Mme Ellen Maue, Directrice adjointe, Ministère fédéral de la justice
Mme Chia Lehnardt, experte assistante au Ministère fédéral de l'économie et de la technologie
M. Dan Tidten, expert assistant au Ministère fédéral des affaires étrangères

Pays-Bas

Mme Liesbeth Lijnzaad, Conseillère juridique au Ministère des affaires étrangères
M. René Lefeber, juriste au Ministère des affaires étrangères
Mme Winifred Bradbelt, juriste au Ministère des transports et de la gestion des eaux

Argentine

Mme Susana Ruiz Cerutti, Ambassadeur, Conseillère juridique au Ministère des affaires étrangères, du commerce international et du culte
M. Manuel Angel Fernandez Salorio, Consul général de la République argentine à Hambourg
Mme Frida Arnas Pfirter, membre de la Commission juridique et technique de l'Autorité internationale des fonds marins, en qualité de déléguée

Chili

M. Jorge O'Ryan, Ambassadeur du Chili en Allemagne
M. Roberto Plaza, Ministre conseiller, Consul général du Chili à Hambourg

RESPONSABILITÉS ET OBLIGATIONS DES ETATS
DANS LE CADRE D'ACTIVITÉS MENEES DANS LA ZONE

Fidji

S. E. M. Pio Bosco Tikoisuva, Haut-Commissaire des Fidji auprès du Royaume-Uni de Grande-Bretagne et d'Irlande du Nord

Mexique

M. Joel Hernandez G., Ambassadeur, Conseiller juridique au Ministère des affaires étrangères

Nauru

M. Peter Jacob, Premier Secrétaire, Haut-Commissariat de Nauru à Suva (Fidji)
M. Robert Heydon, Conseiller

Royaume-Uni de Grande Bretagne et d'Irlande du Nord

Sir Michael Wood, K.C.M.G., membre du barreau d'Angleterre et membre de la Commission du droit international
M. Eran Sthoeger, faculté de droit de la New York University

Fédération de Russie

M. Vasily Titushkin, Directeur adjoint du département juridique du Ministère des affaires étrangères
M. Andrey Todorov, Attaché au département juridique du Ministère des affaires étrangères

COI de l'UNESCO

M. Ehrlich Desa, Secrétaire exécutif adjoint de la Commission océanographique intergouvernementale de l'UNESCO et Chef de la Section du développement des capacités
Mr Nicolas Guerrero Peniche, consultant au Bureau des affaires juridiques du Secrétaire exécutif de la COI

UICN

M. Donald K. Anton, avocat à la Cour suprême de Victoria, à la Cour suprême de la Nouvelle-Galles du Sud, et auprès de la Haute Cour d'Australie ; membre du barreau de l'Etat du Missouri, de l'Etat de l'Idaho, et avocat auprès de la Cour suprême des Etats-Unis d'Amérique ; maître de conférences en droit international à la Faculté de droit de l'Université nationale australienne
M. Robert A. Makgill, avocat auprès de la Haute Cour de Nouvelle-Zélande
Mme Cymie R. Payne, membre du barreau de l'Etat de la Californie, de l'É du Massachusetts, et avocate auprès de la Cour suprême des États-Unis d'Amérique

OPENING OF THE ORAL PROCEEDINGS 14 September 2010, p. m.

Opening of the Oral Proceedings

[ITLOS/PV.2010/1/Rev.2, E, p. 1–4; F, p. 1–3]

Le Greffier :

Le 6 mai 2010, le Conseil de l'Autorité internationale des fonds marins a adopté la décision portant la cote ISBA/16/C/13 par laquelle il a décidé de demander un avis consultatif à la Chambre du Tribunal pour le règlement des différends relatifs aux fonds marins. Le texte de ladite décision a été transmis par une lettre du Secrétaire général de l'Autorité internationale des fonds marins, datée du 11 mai 2010, qui a été reçue au Greffe sous la forme d'un courrier électronique le 14 mai 2010. L'original de la lettre a été reçu au Greffe le 17 mai 2010.

La demande d'avis consultatif a été soumise sur la base de l'article 191 de la Convention des Nations Unies sur le droit de la mer et de l'article 131 du Règlement du Tribunal.

(Continued in English) The case has been entered in the list of cases as Case No. 17 and named *Responsibilities and Obligations of States sponsoring persons and entities with respect to activities in the Area (Request for Advisory Opinion submitted to the Seabed Disputes Chamber)*.

Mr President.

The President.

I declare open the hearing in Case No. 17 pursuant to article 133, paragraph 4, of the Rules of the Tribunal.

At the very beginning of this sitting I wish to highlight that the case in which we are hearing oral statements today and over the next two days is a double *première* in the history of the International Tribunal for the Law of the Sea and the Seabed Disputes Chamber. It is the first time that the Chamber is seized with a case and the first time at all that a request to render an advisory opinion has been brought to the Tribunal.

It is with regret that I have to say that on this special occasion one of the Members of the Chamber, Judge Chandrasekhara Rao, is prevented by illness from sitting on the bench during the hearing.

I now call on the Registrar to read out, from the decision of the Council of the International Seabed Authority, the questions on which the Chamber is asked to render an advisory opinion.

Mr Registrar.

The Registrar:

The questions read as follows:

1. What are the legal responsibilities and obligations of States Parties to the Convention with respect to the sponsorship of activities in the Area in accordance with the Convention, in particular Part XI, and the 1994 Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982?
2. What is the extent of liability of a State Party for any failure to comply with the provisions of the Convention, in particular Part XI, and the 1994 Agreement, by an entity whom it has sponsored under Article 153, paragraph 2(b), of the Convention?
3. What are the necessary and appropriate measures that a sponsoring State must take in order to fulfil its responsibility under the Convention, in particular Article 139 and Annex III, and the 1994 Agreement?

RESPONSIBILITIES AND OBLIGATIONS OF STATES WITH RESPECT TO ACTIVITIES IN THE AREA

Mr President.

The President:

By an Order dated 18 May 2010, the President of the Seabed Disputes Chamber decided that the International Seabed Authority and the organizations invited as intergovernmental organizations to participate as observers in the Assembly of the Authority are considered likely to be able to furnish information on the questions submitted to the Seabed Disputes Chamber for an advisory opinion.

By the same Order, States Parties to the Convention, the International Seabed Authority and the intergovernmental organizations referred to above were invited to present written statements on the questions submitted to the Chamber for an advisory opinion, and 9 August 2010 was fixed as the time-limit within which written statements might be presented.

By the same Order, the President of the Seabed Disputes Chamber also decided that oral proceedings should be held and fixed 14 September 2010 – that means today – as the date for the opening of the hearing at which oral statements may be submitted to the Chamber by the States Parties to the Convention, the International Seabed Authority and the intergovernmental organizations referred to above.

After receipt of a request for an extension, by an Order dated 28 July 2010, the time-limit for the presentation of written statements was extended to 19 August 2010.

Pursuant to article 131 of the Rules of the Tribunal, by a letter dated 30 July 2010, the International Seabed Authority communicated to the Chamber a Dossier of documents likely to throw light upon the questions submitted to the Chamber. The Dossier was placed on the website of the Tribunal.

Written statements were filed, in the order of receipt, by the following: Interoceanmetal Joint Organization; the United Kingdom of Great Britain and Northern Ireland; Nauru; the Republic of Korea; Romania; the Netherlands; the Russian Federation; Mexico; the International Union for the Conservation of Nature; Germany; China; Australia; Chile; the Philippines; and the International Seabed Authority. After the expiry of the time-limit, a further statement was filed by the United Nations Environment Programme. In accordance with article 134 of the Rules of the Tribunal, the statements were placed on the website of the Tribunal.

In addition, the Registry received a joint statement of Stichting Greenpeace Council (Greenpeace International) and the Worldwide Fund for Nature. In light of article 133 of the Rules of the Tribunal, the statement was not included in the case file. It was nonetheless placed on the website of the Tribunal.

As indicated, the Seabed Disputes Chamber of the Tribunal is meeting today to hear oral statements regarding the Request for an advisory opinion. In this regard, the Chamber has been informed that representatives of the following States and organizations wish to take the floor during the current oral proceedings: the International Seabed Authority, Germany, the Netherlands, Argentina, Chile, Fiji, Mexico, Nauru, the United Kingdom, the Russian Federation, the Intergovernmental Oceanographic Commission of the United Nations Educational, Scientific and Cultural Organization, and the International Union for the Conservation of Nature.

In preparation of the hearing, the Chamber yesterday listed four points which it would like the International Seabed Authority to address pursuant to article 76 of the Rules of the Tribunal. This list of points has been communicated to all delegations.

OPENING OF THE ORAL PROCEEDINGS 14 September 2010, p m

I would also like to mention that the Chamber may see a need to address questions to delegations. Such questions would be sent by the Chamber to delegations indicating to them a time-limit for the receipt of a written response.

The specific arrangements for the hearing have been made known by the Registry to the participating delegations. The schedule of the hearing has also been made public by a press release. This afternoon the Chamber will hear the International Seabed Authority. The other delegations that I have just mentioned will speak tomorrow and on Thursday.

I now give the floor to the representative of the International Seabed Authority. Your Excellency, Mr Odunton, you have the floor.

RESPONSIBILITIES AND OBLIGATIONS OF STATES WITH RESPECT TO ACTIVITIES IN THE AREA

Statements of the International Seabed Authority**STATEMENT OF MR ODUNTON
INTERNATIONAL SEABED AUTHORITY
[ITLOS/PV 2010/1/Rev.2, F, p. 4–5]***Mr Odunton:*

Mr President, Members of the Seabed Disputes Chamber, it is my great honour to appear before you today on behalf of the International Seabed Authority in my capacity as Secretary-General of the Authority. This is an historic occasion, since it is the first time that the Chamber has been called upon to exercise its important advisory jurisdiction under the Convention. I would like to recall that almost sixteen years ago, on 14 November 1994, when the Convention entered into force after the deposit of the sixtieth ratification, nobody could predict how well the three bodies to be established under the Convention would discharge their respective mandates. To our great satisfaction, the three bodies which were subsequently established, namely the International Tribunal for the Law of the Sea, the Commission on the Limits of the Continental Shelf and the International Seabed Authority, have all been functioning effectively and efficiently.

Mr President, in the case of the Authority, I am particularly pleased to see that in the past two years small island developing States such as Nauru and Tonga have agreed to sponsor entities registered in their countries to apply to the Authority for approval of plans of work for exploration in the reserved areas. In spite of the current deferral of consideration of their applications, this symbolizes another step towards the realization of the noble idea of "the common heritage of mankind."

The proposal by the Government of Nauru to seek an advisory opinion on the responsibilities and liabilities of a sponsoring State and the decision of the Council to make a request to the Chamber for such an opinion demonstrate the sincerity of States Parties to the Convention in participating in the activities in the Area and the good faith in fulfilling their treaty obligations. Furthermore, the prompt action of the Chamber to deal with the Request in accordance with article 191 of the Convention and [article] 131 of the Rules of the Tribunal demonstrates that the seabed disputes settlement mechanism as set out by the framers of the Convention is now fully functional.

Mr President, to give an advisory opinion on matters of concern to an important organ of the Authority is one of the most important functions given to the Chamber under Part XI of the Convention. The Chamber has a high responsibility to ensure that the provisions of Part XI of the Convention and the 1994 Agreement are implemented properly and the regime for deep seabed mining as a whole is properly interpreted and applied. You have all my confidence that the advisory opinion to be rendered by the Chamber on the questions raised by the Council of the Authority will be of far-reaching significance in guiding States Parties to the Convention in the proper interpretation and application of the relevant provisions of Part XI of the Convention and the 1994 Agreement.

Mr President, with your permission, I would now like to give the floor to the Legal Counsel, Mr Michael Lodge, to make an oral statement to the Chamber on behalf of the Authority on the present Case No. 17 on responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area. Mr Lodge's statement will be followed by supplementary statements by Mr Kening Zhang and Ms Gwenaelle Le Gurun, members of the delegation of the Authority, who will make additional comments on specific aspects of the issues involved.

I thank you.

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The President:

Thank you very much, Mr Odunton.

I understand that Mr Lodge is now going to take the floor.

RESPONSIBILITIES AND OBLIGATIONS OF STATES WITH RESPECT TO ACTIVITIES IN THE AREA

STATEMENT OF MR LODGE
INTERNATIONAL SEABED AUTHORITY
[ITLOS/PV.2010/1/Rev.2, E, p. 6–19]*Mr Lodge.*

Mr President, Members of the Seabed Disputes Chamber, I have the honour to appear before you today on behalf of the International Seabed Authority. It is a particular honour for me to appear on this occasion as it is the first ever occasion on which the Chamber has been called upon to exercise its jurisdiction to entertain a request for an advisory opinion pursuant to article 191 of the United Nations Convention on the Law of the Sea.

The responsibility of rendering an advisory opinion under Article 191 is one of the most important functions given to the Chamber under Part XI of the Convention. The Chamber has a responsibility to ensure that the provisions of Part XI of the Convention and the 1994 Agreement are implemented properly and that the regime for deep seabed mining as a whole is properly interpreted and applied. The guidance provided by the Chamber with respect to the proper interpretation and application of the relevant provisions of Part XI and the 1994 Agreement will inevitably be accorded the greatest measure of respect by States Parties to the Convention.

The importance of these proceedings for the work of the Authority is amply demonstrated by the fact that written statements on the issues involved have been submitted by 12 members of the Authority and three intergovernmental organizations which are observers to the Authority: the Interoceanmetal Joint Organization (which is also a contractor with the Authority); the International Union for Conservation of Nature and Natural Resources (IUCN); and the United Nations Environment Programme. No doubt these written statements will be of great assistance to the Chamber in its deliberations.

Mr President, the duty of all those participating in these proceedings is to assist the Chamber in its task. This is especially so in the case of the Authority and its Secretariat. Whilst it is only right that States Parties should express their individual positions on the interpretation of the relevant provisions of the Convention and the Agreement, the task of the Secretariat is primarily to assist the Chamber, as well as States Parties, by making sure that all relevant information is placed before the Chamber to enable it to come to a properly informed conclusion. It is in this spirit that the Secretariat has provided an extensive Dossier, pursuant to article 131 of the Rules of the Tribunal, which contains the relevant rules, regulations and procedures of the Authority as well as other documents, decisions and material likely to throw light upon the three legal questions on which the advisory opinion is requested. The Dossier is supplemented by a written statement on behalf of the Authority, in which we sought to provide the Chamber with necessary background information relating to the Request itself, as well as information on the regulatory regime governing activities of prospecting, exploration and exploitation in the Area.

My remarks today on behalf of the Secretariat will be organized as follows. I shall begin with some words about the factual background to the Request for an advisory opinion. Next I shall address questions of jurisdiction and admissibility, followed by comments on the applicable law. I shall then consider the questions put to the Chamber. In doing so, I shall attempt also to respond to the list of questions formulated by the Chamber, which I understand has already been circulated. I shall not repeat all that is said in the Authority's written statement.

Mr President, I wish to begin by describing briefly something of the background to the Council requesting the Chamber to give an advisory opinion. This background may be useful in order to provide a factual nexus, as well as to shed light on the actual questions before the Chamber, although it is important also to emphasize that the Chamber is not

STATEMENT OF MR LODGE – 14 September 2010, p.m.

required to make findings of fact or to express a legal opinion on any aspect of the application by Nauru Ocean Resources Incorporated that is presently pending before the Legal and Technical Commission of the Authority.

The factual background is set out in detail in Chapter 1 of the Authority's written statement. It is sufficient to summarise it here as follows.

On 31 March 2008, two companies, Nauru Ocean Resources Incorporated, sponsored by Nauru, and Tonga Offshore Mining Ltd., sponsored by Tonga, formally notified the Secretary-General of their intention to submit applications for approval of plans of work for exploration. According to the notification, Nauru Ocean Resources Incorporated, which I shall refer to as NORI, is a company which was incorporated in Nauru on 6 March 2008 and is also a subsidiary of another company by the name of Nautilus Minerals Incorporated.

Both these applications were for plans of work in the so-called "reserved areas". This is a term which is not defined in the Convention or the Agreement, but which lies at the heart of the "parallel system" for access to the mineral resources of the Area. The system is described in detail in Chapter 4 of the Authority's written statement at paragraphs 4.3 to 4.4. The applications by NORI and Tonga Offshore Mining Ltd. were in fact the first applications to have been made for plans of work in the reserved areas since the Convention entered into force in 1994. As such, they were subject to a special procedure set out in the Authority's Regulations and described in paragraph 1.5 of the Authority's written statement.

Under the Convention, reserved areas that are contributed by contractors with the Authority are to be reserved for use by the Enterprise, or, if the Enterprise indicates that it does not wish to submit a plan of work for such area, for developing States or an entity sponsored by a developing State. It is important to appreciate that the implementation of the relevant provisions of Annex III of the Convention has been substantially affected as a result of the 1994 Agreement and also, at a procedural level, by the Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area adopted by the Authority. The combined effect of these various provisions is described in paragraph 4.16 of the Authority's written statement.

The Enterprise, through its Interim Director-General, formally declared that it did not intend to carry out activities in the areas in question; the two applications were formally submitted through the Secretariat on 10 April 2008. As noted in the written statement, NORI's application covers a total surface area of 74,830 square kilometres in the Clarion-Clipperton Zone of the Pacific Ocean. (*Slide shown*). The area lies within the reserved areas and is divided into four regions, 1A, 1B, 1C and 1D, covering areas of the seabed from within reserved blocks 13, 15, 22 and 25. The chart that has been produced is intended to help put this into context for the Members of the Chamber by showing the geographical location of the areas under application, highlighted in yellow and red.

What then happened to the two applications is described in Chapter 1 of the Authority's written statement. In accordance with the procedures set out in the Regulations, they were considered by the Legal and Technical Commission in May 2008. As provided for in the Regulations, the deliberations of the LTC took place in closed session under conditions of confidentiality. Although the LTC considered the applications over four days, it reported that it had not reached a consensus with respect to a recommendation to the Council and therefore decided to continue its consideration of the applications at the next possible opportunity, which, in the normal course of events, would be the next regular session of the Authority in 2009.

Mr President, at this point it may be worth noting that, although in its paper to the Council at the sixteenth session in 2010, Nauru referred to differences of opinion amongst some members of the LTC, it now accepts that there were no such differences. This matter is also referred to at paragraph 1.8 of the Authority's written statement, which cites a statement

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made to the Council on this particular issue by the Chairman of the LTC. As noted above, the deliberations of the LTC with regard to applications for plans of work take place in closed sessions, in conditions of strict confidentiality. According to the practice of the Authority, the only official reports of such deliberations are contained in formal reports of the chairman of the LTC to the Council, or in formal recommendations to the Council on particular issues. I hope this clarifies this particular matter to the Chamber.

What then happened was that on 5 May 2009, in advance of the fifteenth session of the Authority, Mr Heydon, a director of both Tonga Offshore Mining and NORI, wrote to the Secretariat requesting postponement of the applications, given that they were the first by a commercial entity for exploration rights in a reserved area, as well as what was described as the uncertainty surrounding sponsoring State responsibility and liability. The letter also referred to the difficulty of raising capital due to the global financial crisis and the fall in nickel price and the closure of many nickel mines. As a result, the LTC postponed its consideration of the two applications "until further notice". The present status of the applications, therefore, is that they remain pending further consideration by the LTC. However, during the discussions in relation to the request for an advisory opinion at the sixteenth session Nauru indicated that it would be requesting the Secretary-General to reinstate the applications on the agenda for 2011.

On 5 May 2010, Nauru submitted its proposal that the Council seek an advisory opinion on certain matters regarding sponsoring State responsibility and liability. This proposal was issued as document ISBA/16/C/6. The proposal was added to the provisional agenda of the Council as item 7 and was discussed at the 155th, 160th and 161st meetings of the Council. Thirty-two delegations, including members of the Council and observers to the Council, took the floor to express their views on the issues. Formal written statements were made by Nauru on 3 May 2010 and by Fiji on 3 and 6 May 2010, and these statements are included in the Dossier submitted by the Secretariat. A summary record of the discussions in the Council has also been compiled by the Secretariat and is included in the Dossier.

As noted in the Dossier and in the various written statements, the eventual decision of the Council was not to adopt the proposal as formulated by Nauru, in which the questions were quite complex, lengthy and specific, but instead to follow the wishes of many participants in the debate and to ask for an opinion on three abstract but concise questions. The Council decision requesting the Chamber to give an advisory opinion was then adopted without a vote on 6 May 2010.

Mr President, that brings me on to the topic of jurisdiction and admissibility. On these particular aspects I wish to add only one short point to the comments made in Chapter II of the Authority's written statement: that is to agree with those who have contended that it is right that, whenever the Chamber receives a request for an advisory opinion, it should consider both whether it has jurisdiction, and – assuming that it does – whether there exist any reasons that require it to decline to respond to the questions put to it by the Council. Although many, including the Authority, have pointed out the differences in wording between article 191 of the Convention and Article 63 of the Statute of the International Court of Justice, I share the view expressed by other delegations that it is not necessary, for present purposes, for the Chamber to reach any firm conclusions as to the implications of that difference in language.

As far as the general analysis of the issues of jurisdiction and admissibility is concerned, I would simply refer the Chamber to the brief analysis at Chapter II of the Authority's written statement and to the more exhaustive analyses of the relevant legal provisions contained in the written statements submitted by Australia, Mexico and the United Kingdom.

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Mr President, the next question that would be considered by the Chamber is that of the applicable law. In general terms, the law to be applied by the Chamber is set out in Annex VI, article 38 of the Convention (the Statute of the Tribunal) and article 293 of the Convention. My colleague will deal with this issue in more detail in due course.

I wish to make only one general point at this stage and that is to remind the Chamber that the regime for the Area is a conventional regime, the basis for which is found in Part XI and Annex III of the Convention and in the 1994 Agreement. Annex IV of the Convention, (which contains the Statute of the Enterprise) and Resolutions I and II appended to the Final Act of the Third Conference, are also relevant in some respects, as are some other provisions of the Convention which deal with the protection and preservation of the marine environment. A particular point that must not be overlooked is that, in accordance with Article 2 of the 1994 Agreement, the provisions of the 1994 Agreement and Part XI of the Convention "shall be interpreted as a single instrument"; in the event of any inconsistency between the 1994 Agreement and Part XI of the Convention, the provisions of the 1994 Agreement shall prevail. The general principles set out in the Convention and the 1994 Agreement are given practical effect through the rules, regulations and procedures established by the relevant organs of the Authority pursuant to the specific powers and functions set out in the Convention and the 1994 Agreement. For present purposes the most important of these are the Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area, adopted by the Assembly in 2000.

Mr President, I now turn to the questions put by the Council to the Chamber. It is not my intention to address each of the three questions in detail. The Chamber has the benefit of copious arguments from States Parties in the form of both written and oral statements, and it would not be appropriate for the Secretariat to express a view with respect to the positions expressed by member States. I propose therefore to make only three general points with respect to the scope of the issues before the Chamber and then to spend some time to elaborate to the Chamber how the provisions of the Convention and the Agreement relating to State sponsorship and control by the Authority over activities in the Area have been implemented in practice. My colleague will then make some additional comments with specific relevance to question number 3.

The first general point I wish to make is to emphasize that the Council has clearly framed the three questions in an abstract manner, without reference to any particular situation or application for plan of work. This was a deliberate and conscious choice, as is apparent from the summary records of the meetings of the Council contained in the Dossier prepared by the Secretariat. The abstract formulation of the three questions inevitably affects the degree of detail which the Chamber can provide in response to the questions.

Second, and flowing from the first point, the questions have been framed in a very careful manner to focus on the obligations of the sponsoring States, rather than on the obligations of all States Parties to the Convention in general. Furthermore, the language of the questions is carefully directed towards the proper interpretation of the relevant provisions of the Convention and the Agreement. As I noted earlier, the regime for deep seabed mining is a Convention regime and the answer to questions relating to the obligations of sponsoring States must, first and foremost, lie within the provisions of the Convention itself (including the rules, regulations and procedures of the Authority). The obligations for States Parties which are sponsoring States arise because they are States Parties to the Convention. As we said in the Authority's written statement, "It would appear that the overriding intent of the Convention and the 1994 Agreement, and the Regulations, is that the purpose of State sponsorship is to ensure that a State Party takes responsibility in accordance with Article 139, Article 153, paragraph 4, and Annex III, Article 4, paragraph 4, of the Convention." This

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suggests that the answer to the questions before the Chamber, in particular Question 1, lies primarily in an interpretation of these provisions of the Convention.

The third general point I wish to make is to submit that there is nothing in Part XI or elsewhere in the Convention, or in the 1994 Agreement, to suggest that the obligations of sponsoring States vary in any way depending on their level of development. In several places Part XI does provide for special consideration to be given to the interests of developing States, but as others, including Australia, Germany and the Russian Federation, the United Kingdom and the IUCN have pointed out in their written statements, in every case where this occurs it is qualified by the words as "specifically provided for in this Part" (that is, of course Part XI). Examples where this occurs may be found in article 140, paragraph 1, article 148 and article 152, paragraph 2. Whilst there is real substance in the special considerations to be accorded to developing States under these provisions, such as for example the right to apply for "reserved areas", nowhere is there any suggestion that the other provisions of Part XI, such as those relating to the protection of the marine environment, should be applied with any less rigour depending on the state of development of the State concerned.

Having made these general points, it may be useful if I briefly outline for the benefit of the Chamber the current status of activities in the Area and then take some time to explain to the Chamber the way in which the criteria and procedures for State sponsorship are elaborated in the rules, regulations and procedures of the Authority, as required by Annex III, Article 4. A description of the overall regulatory regime governing activities in the Area is set out in some detail in Chapter IV of the Authority's written statement and I certainly do not intend to repeat that here.

There are currently eight contractors with the Authority. These are:

- (a) Yuzhmorgeologiya, which is a State enterprise sponsored by the Russian Federation;
- (b) Interoceanmetal Joint Organization (IOM), an international consortium composed of and sponsored by Bulgaria, Cuba, Slovakia, Czech Republic, Poland and the Russian Federation;
- (c) The Government of the Republic of Korea, sponsored by the Republic of Korea;
- (d) China Ocean Mineral Resources Research and Development Association, sponsored by China;
- (e) Deep Ocean Resources Development Company, sponsored by Japan;
- (f) IFREMER, sponsored by France;
- (g) The Government of India, sponsored by India;
- (h) The Federal Institute for Geosciences and Natural Resources of Germany, sponsored by Germany.

All contracts issued to date cover the exploration phase only. The contracts were entered into between 2001 and 2002 and, in accordance with the Regulations, each has a duration of 15 years. The obligations incumbent upon contractors are described in detail in the Authority's written statement. To date, the Authority has not issued any plan of work for exploitation of deep seabed minerals; nor has any application been made for such a plan of work.

As far as sponsorship requirements are concerned, the relevant provisions are found in the Regulations, in particular Regulation 11, which contains the following specific provisions. I would ask permission to read these out in full.

- (a) Each application by a State enterprise or one of the entities referred to in regulation 9(b) - which is a cross-reference to Article 153(2) of the Convention - shall be accompanied by a certificate of sponsorship issued by the State of which

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it is a national or by which or by whose nationals it is effectively controlled. If the applicant has more than one nationality, as in the case of a partnership or consortium of entities from more than one State, each State involved shall issue a certificate of sponsorship.

(b) Where the applicant has the nationality of one State but is effectively controlled by another State or its nationals, each State involved shall issue a certificate of sponsor.

(c) Each certificate of sponsorship shall contain, *inter alia*, a declaration that the sponsoring State assumes responsibility in accordance with Articles 139, Article 153, paragraph 4, and Annex III, Article 4, paragraph 4, of the Convention.

The Regulations do not provide for any particular format for the certificate of sponsorship, nor do they require that any sponsorship agreement or details of any legal or financial arrangements in existence between the sponsoring State and the applicant entity be disclosed to the Authority. None of the current contractors or sponsoring States have in fact provided copies of such agreements.

The situation is further complicated, however, by the fact that, with the exception of the German contractor, all of the current contractors had previously been registered pioneer investors under Resolution II of UNCLOS III. The 1994 Agreement contains special provisions relating to pioneer investors under which they were deemed to have satisfied the requirements of the Convention and the Agreement relating to the issue of plans of work for exploration provided they made a request within 36 months of the entry into force of the Convention. As such, the sponsoring States of these contractors were not required to submit new declarations of sponsorship, but instead were able to rely on the original sponsorship declarations that had been submitted to the Preparatory Commission in support of the applications for registration as pioneer investors. In the case of the German contractor, which was also subject to special treatment as a prospective investor under the terms of the 1994 Agreement, a certificate of sponsorship was submitted in the form of an undertaking signed by the relevant ministry having effective control and supervision of the contractor entity. The applications by the Nauruan and Tongan entities will thus be the first fresh applications to have been made completely in accordance with the 2000 Regulations and that are not subject to some sort of special procedure under the 1994 Agreement.

Regulation 11, paragraph 3(f), makes specific reference to the requirement in the certificate of sponsorship of a declaration that the sponsoring State assumes responsibility in accordance with articles 139, article 153, and article 4, paragraph 4, of Annex III of the Convention. This suggests perhaps that the form of the certificate is less important than the content of the duties and responsibilities attributable to the act of sponsorship. An understanding of the content of these duties and responsibilities is of course the issue which lies at the heart of the questions before the Chamber.

Taking the relevant provisions of the Convention and the views expressed in the various written statements as a whole, some general observations can be made. First, it is necessary that sponsoring States Parties adopt some measures within their legal systems to ensure compliance by the sponsored entity with Part XI, the rules, regulations and procedures of the Authority and the terms of the contract. In the absence of any such measures, sponsoring States Parties will fail to comply with their responsibility. Divergent views have been expressed with respect to the form of the legal instruments required, including what constitutes “necessary and appropriate measures” for this purpose. However, several States Parties have submitted that the terms “within legal systems” and “adoption of legislation”

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imply the need for a public legal order and exclude the possibility that a mere contractual arrangement would suffice. Another observation that can be made is that although the terminology referring to the measures to be taken shows variation, such as "necessary and appropriate measures" (article 139), "all measures necessary..." (article 153), and "reasonably appropriate measures" (article 4, Annex III), no real conclusion can be inferred from the slight variation of terms since they do not seem to alter the purpose for which such measures must be taken. As a practical matter, it seems obvious that the type and scope of necessary and appropriate measures would vary according to the mineral resources in question and the activities taking place – whether they cover prospecting, exploration or exploitation. My colleague will address the Chamber further on this particular issue in due course.

Mr President, for the last part of my statement I wish to return to the issue of exercise of control over activities in the Area by the Authority, specifically with reference to article 153, paragraphs 4 and 5, of the Convention. There is a number of ways in which the Authority exercises control over activities in the Area.

The first and most obvious way in which the Authority exercises control is by issuing rules, regulations and procedures for the conduct of the activities in the Area. In accordance with article 162, paragraph 2(o), of the Convention, these rules, regulations and procedures shall relate to prospecting, exploration and exploitation in the Area. Priority is to be given to the adoption of rules, regulations and procedures for exploration for an exploitation of polymetallic nodules. As a consequence, the Authority adopted the current regulations governing prospecting and exploration for polymetallic nodules in 2000 and has recently adopted similar regulations relating to seafloor massive sulphides. Given the current status of exploration activities, there has been no requirement so far for the Authority to issue regulations governing the exploitation phase.

The second way in which the Authority exercises control is through the binding contracts which are the only basis upon which an entity may carry out activities in the Area. This is a particularly important element when one considers the enforcement provisions found in the standard clauses of contracts as well as the dispute settlement provisions found in article 187 of the Convention. Indeed, the contractual nature of the relationship between the Authority and those wishing to conduct activities in the Area is not only fundamental to but is a defining characteristic of the legal regime established by the Convention and the Agreement.

The third way in which the Authority exercises control is through the requirement in the standard clauses that contractors provide an annual report on their activities. This report is reviewed by the Legal and Technical Commission, which then provides any necessary recommendations to the Secretary-General who in turn would transmit any requests for further information to the contractor. In addition, there is a requirement for periodic review of the implementation of the plan of work for exploration at intervals of five years, to be undertaken jointly by the contractor and the Secretary-General.

The Legal and Technical Commission has a particularly important role to play in the supervision of activities in the Area. Under article 165 of the Convention, it is required, *inter alia*, to supervise activities in the Area and to report to the Council, to make recommendations on the protection of the marine environment, to make recommendations to issue emergency orders and to make recommendations regarding the direction and supervision of inspectors. Under the Regulations, the Commission is also entitled to issue recommendations for the guidance of contractors to assist them in performing their obligations under the contract. To date, two sets of recommendations have been issued; one dealing with the implementation of environmental monitoring requirements, and one dealing with the methodology for reporting of financial expenditure.

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At the risk of being repetitive, it is important to reiterate that, by reason of the 1994 Agreement, the implementation of the regime under Part XI is progressive in nature. Under paragraph 5 of Section I of the Annex to the 1994 Agreement, the Authority is required to adopt "rules, regulations and procedures necessary for the conduct of activities in the Area as they progress". Such rules, regulations and procedures shall take into account the terms of the 1994 Agreement, the prolonged delay in seabed mining and the likely pace of activities in the Area.

The consequence of this is that the measures currently in place must be regarded as only partial measures. Both the Convention and the Regulations envisage that additional measures may be taken. Relevant provisions include, for example, Annex III, article 17, paragraph (1)(b)(xii), of the Convention which enables the Authority to adopt rules, regulations and procedures on "mining standards and practices, including those relating to operational safety, conservation of the resources and the protection of the marine environment" as well as article 162, paragraph 2(z), which envisages that the Authority would eventually have a staff of inspectors to monitor activities in the Area and whether the terms and conditions of contracts are being complied with.

Mr President, the Authority also exercises control over activities in the Area through the link that is established with the sponsoring State. The importance of this link is demonstrated by the fact that, under the Convention and the Regulations, there can never be a situation where there is no sponsoring State. A contractor is required to have sponsorship throughout the entire period of the contract and, in the event of a termination of sponsorship, is required to either find a new sponsor or suffer termination of the contract. The Regulations also contain other provisions of specific relevance to the relationship with sponsoring States. For example, Regulation 31(2) requires the Authority and sponsoring States to take a precautionary approach to exploration activities. Regulation 31(6) requires contractors and sponsoring States to cooperate with the Authority in the establishment and implementation of environmental monitoring programmes and Regulation 32 requires the sponsoring State to be notified of any incident that occurs which is likely to cause serious harm to the marine environment. It is only reasonable to assume that the purpose of notifying sponsoring States in this manner is to enable them to take necessary action to fulfil their responsibilities as sponsoring States. Finally, Mr President, I would also wish to draw the attention of the Chamber to article 190 of the Convention, which provides that the sponsoring State is entitled to participate in legal proceedings brought by or against a sponsored entity.

Mr President, that concludes my statement on behalf of the Authority. My colleagues will be making supplementary statements dealing with specific issues, beginning with my colleague Mr Kening Zhang, who will address you further on the question of the applicable law.

Mr President, I thank you and the Chamber for your attention.

The President:

Thank you very much, Mr Lodge.

The Chamber will now withdraw for a break of 30 minutes, so the hearing will be continued at 4.35 when we will listen to the further statements by the International Seabed Authority.

(Short adjournment)

The President:

The hearing now continues. I give the floor to Mr Zhang, who will continue the statement of the International Seabed Authority.

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STATEMENT OF MR ZHANG
INTERNATIONAL SEABED AUTHORITY
[ITI.OS/PV.2010/1/Rev.2, E, p. 19–23]*Mr Zhang:*

Mr President, Members of the Seabed Disputes Chamber, I have the honour to appear before you today in the hearing of Case No. 17 as a member of the delegation of the International Seabed Authority. Like the Secretary-General and Legal Counsel of the Authority, I am particularly honoured to appear on this historical occasion when the Chamber has been called upon for the first time since its establishment in 1996 to exercise its advisory jurisdiction as requested in accordance with article 191 of the United Nations Convention on the Law of the Sea.

As stated in our written statement, the law to be applied to Case No. 17 by the Chamber is set out, in general terms, in article 293 of the Convention and article 38 of the Statute of the Tribunal. The key provisions for the purposes of the present proceedings are to be found in Part XI of the Convention, which includes Annex III, and the 1994 Agreement. The relationship between Part XI of the Convention and the 1994 Agreement is provided under Article 2, paragraph 1, of the annex to the 1994 Agreement, which reads: "the provisions of this Agreement and Part XI shall be interpreted and applied together as a single instrument. In the event of any inconsistency between the Agreement and Part XI, the provisions of this Agreement shall prevail".

Other relevant provisions can be found elsewhere in the Convention, in particular in Part XII, dealing with the preservation and protection of the marine environment. Article 209, which specifically deals with pollution from activities in the Area, requests the establishment of international rules, regulations and procedures in accordance with Part XI of the Convention and the adoption by States of laws and regulations to prevent, reduce and control pollution of the marine environment from activities in the Area.

As introduced in the written statement of the Authority, although Part XII of the Convention deals in general terms with the obligations of States to protect and preserve the marine environment, there is no specific provision in Part XI which goes beyond the general requirement in article 145 that "necessary measures shall be taken in accordance with the Convention with respect to activities in the Area to ensure effective protection of the marine environment from harmful effects which may arise from such activities". However, article 145 does require the Authority to adopt rules, regulations and procedures for the prevention, reduction and control of pollution and other hazards to the marine environment, and of interference with the ecological balance of the marine environment. Under article 145 particular attention shall be paid to the need for protection from harmful effects of such activities as drilling, dredging, excavation, disposal of waste, construction and operation or maintenance of installations, pipelines and other devices related to such activities. Article 145 also requires the Authority to adopt the rules, regulations and procedures for the protection and conservation of the natural resources of the Area and the prevention of damage to the flora and fauna of the marine environment.

A similar enabling provision appears in Annex III, article 17, of the Convention, which obliges the Authority to adopt rules, regulations and procedures on "mining standards and practices, including those relating to operational safety, conservation of the resources and the protection of the marine environment". The 1994 Agreement also gives priority to the adoption of rules, regulations and procedures incorporating applicable standards for the protection and preservation of the marine environment and requires that an application for approval of a plan of work for exploration is accompanied by an assessment of the potential environmental impacts of the proposed exploration activities and a description of a

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programme for oceanographic and baseline environmental studies. All these provisions, along with other general principles set out in the Convention and the 1994 Agreement, are given effect and substance in the Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area, which were adopted 10 years ago in 2000 by the Assembly of the Authority in accordance with the Convention. For instance, Part V of the Nodule Regulations is devoted to the protection and preservation of the marine environment, which, with your permission, Mr President, I will elaborate as follows.

First, the Authority is under a duty to establish and keep under review environmental rules, regulations and procedures to ensure effective protection of the marine environment from harmful effects which may arise from activities in the Area. Second, the Authority and sponsoring States are required to apply a precautionary approach, as reflected in Principle 15 of the Rio Declaration, to activities in the Area. Third, the Regulations impose a duty on each contractor to “take necessary measures to prevent, reduce and control pollution and other hazards to the marine environment arising from its activities in the Area as far as reasonably possible, using the best technology available”.

The specific content of this duty on contractors is elaborated in the Nodule Regulations and in the standard clauses annexed to them, as well as in the recommendations for the guidance of the contractors for the assessment of possible environmental impacts arising from exploration for polymetallic nodules in the Area issued by the Legal and Technical Commission in 2001. Therefore, the contractor is required to gather environmental baseline data as exploration activities progress and to establish environmental baselines against which to assess the likely effects of its activities on the marine environment. The contractor is also required to establish and implement a programme to monitor and report on such effects. The Nodule Regulations also contain detailed procedures for the exercise by the Council of its power to issue emergency orders to prevent serious harm to the marine environment arising out of activities in the Area, pursuant to article 162, paragraph 2(w), of the Convention.

In addition, under Regulation 33, which deals with the rights of coastal States, any coastal State which has grounds for believing that any activity in the Area by a contractor is likely to cause serious harm to the marine environment under its jurisdiction or sovereignty may notify the Secretary-General in writing of the grounds on which such a belief is based. The Secretary-General shall then provide the contractor and its sponsoring State or States with a reasonable opportunity to examine the evidence provided by the coastal State. The contractor and its sponsoring State or States may submit their observations on the evidence to the Secretary-General within a reasonable time. Eventually, if there are clear grounds for believing that serious harm to the marine environment is likely to occur, the Secretary-General shall act in accordance with Regulation 32 and, if necessary, shall take immediate measures of a temporary nature as provided for in paragraph 2 of Regulation 32. Pursuant to article 34 on objects of an archaeological or historical nature, the contractors are obliged to immediately notify the Secretary-General of any finding in the exploration area of an object of an archaeological or historical nature and its location and take all reasonable measures to avoid disturbing such an object. The Secretary-General shall transmit such information to the Director-General of UNESCO.

All the aforementioned provisions depict the conventional regime of exploration and exploitation of the resources in the Area and deal expressly with issues of responsibility and liability in relation to marine environmental protection.

It is our submission that the relevant provisions of the Convention should be interpreted in accordance with Articles 31 and 32 of the 1969 Vienna Convention on the Law of Treaties, and in particular, for the purpose of the present case, in accordance with the principle that the provisions of a treaty should not be looked at in isolation, other than being

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read as a whole. This principle makes special sense to the interpretation of the various provisions dealing with the responsibility and liability of sponsoring States and should guide us on how to reconcile the use of slightly different terms and expressions in different provisions dealing with basically the same matter. We note that the written statement of the Republic of Korea takes and elaborates this position. It is also our submission that when referring to other provisions of the Convention we need to make sure that they are relevant to the questions put to the Chamber.

We submit that the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts, as adopted by the UNGA in 2001, should be treated as an indispensable source of "other rules of international law not incompatible with" the Convention, as referred to under article 293, paragraph 1, and "existing rules ... regarding responsibility and liability under international law" to be applied "without prejudice", as provided under article 304. The full text of the I.L.C.'s articles has been provided to the Chamber by the Secretary-General of the Authority as Dossier No. 64 for easy reference in its proceedings of the current case.

Mr President, with your permission, I would like to give the floor to my colleague, Ms Gwenaëlle Le Gurun.

Mr President, Members of the Seabed Disputes Chamber, I thank you for your attention.

The President.

Thank you very much, Mr Zhang.

I would now like to give the floor to Ms Le Gurun.

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STATEMENT OF MS LE GURUN
INTERNATIONAL SEABED AUTHORITY
[ITLOS/PV.2010/1/Rev.2, E, p. 23–29, Fr. p. 21–25]

Ms Le Gurun.

Monsieur le Président, Messieurs les Juges, j'ai l'honneur de comparaître devant vous aux fins de représenter l'Autorité internationale des fonds marins dans la première demande d'avis consultatif soumise à la Chambre pour le Règlement des différends relatifs aux fonds marins.

(Continued in English) Mr President, after making a few general comments, my remarks are going to elaborate on what "necessary and appropriate" measures for the purposes of article 139, article 153 and Annex III, article 4, paragraph 4, of the Convention may be considered, by way of illustration, from earlier legislation adopted by seven States in the 1980s under the Reciprocating States Regime and from two more recent domestic laws adopted by the Czech Republic and the Federal Republic of Germany to regulate prospecting, exploration and exploitation of mineral resources in the Area

My first general remark is that article 139, paragraph 2, article 153, paragraph 4, and article 4, paragraph 4, of Annex III require States Parties to enact legislation and adopt measures within their public legal framework. This is an obligation.

Those provisions of the Convention do not, however, elaborate on the "necessary and appropriate" measures that a sponsoring State is responsible for taking. In accordance with Article 31 of the Vienna Convention on the Law of Treaties, such interpretation should be done "in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose".

The objective of adopting legislation and enacting measures is to assist the Authority to secure that sponsored natural or legal persons carry out activities in the Area in compliance with Part XI of the Convention, with the Agreement, with the Regulations of the Authority and with the approved plan of work. Accordingly, "necessary and appropriate" measures are those that transpose in domestic public legal systems the international duties and obligations of a sponsoring State according to Part XI of the Convention as interpreted by the Agreement and elaborated on in the Regulations of the Authority, as adopted so far.

An observation to make is that the "necessary and appropriate" measures within public legal systems may vary with the function of the type of mineral resources of the Area, and it may also vary according to the activities in the Area: prospecting, exploration, and exploitation. For example, the Czech Act No.158 of 18 May 2000 on Prospecting, Exploration for, and Exploitation of, Mineral Resources from the Seabed beyond the Limits of National Jurisdiction and Amendments to related Acts

governs the rights and obligations of natural persons ... and of legal entities ... engaged in prospecting, exploration for and exploitation of mineral resources from the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction

Likewise, the German Seabed Mining Act of 6 June 1995, most recently amended by Article 160 of the Ordinance of 31 October 2006, applies in the Area to prospecting, exploration for, and exploitation of mineral resources which are, with the exception of water, all solid, liquid, or gaseous mineral resources found *in situ* at or beneath the seabed.

If the adoption of measures is mandatory, the interpretation of what constitutes "necessary and appropriate" measures is left very much to the discretion of the sponsoring State Party. The modalities of those measures as observed by several States in their written statement depend somewhat on all circumstances, including the particular characteristics of

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each national legal system. There is, for example, in the Convention, in the Agreement, or in the Regulations of the Authority no requirement to communicate or to give publicity to domestic legislation or other measures taken to implement article 139, article 153 and Annex III, article 4.

Article 21, paragraph 3, of Annex III, poses a limit to the discretion left to the State. It reads as follows:

No State Party may impose conditions on a contractor that are inconsistent with Part XI. However, the application by a State Party to contractors sponsored by it, or to ships flying its flag, of environmental or other laws and regulations more stringent than those in the rules, regulations and procedures of the Authority adopted pursuant to Article 17, paragraph 2(f) of this Annex shall not be deemed inconsistent with Part XI.

The first element that may be included among "necessary and appropriate" measures within public legal systems relates to general principles governing the conduct of activities in the Area under Part XI of the Convention. The "necessary and appropriate" measures may provide for the prohibition of activities in the Area without an approved plan of work, as set out in article 153 of the Convention. For example, section 9(1) of the Czech Act provides that activities in the Area are only carried out pursuant to a written contract concluded with the Authority. Likewise, section 4(2) of the German Act provides that, "Any person wishing to engage in activity in the Area requires the approval of the *Oberbergamt* and a contract with the Authority."

The second element concerns qualification standards for applicants as set out in article 153 and article 4 of Annex III, and elaborated on in the two sets of Regulations of the Authority. Those qualification standards relate *inter alia* to: nationality or control and the conditions for sponsorship; the procedures for prospecting and for approval of a plan of work for exploration; financial and technical capabilities; accepting as enforceable and complying with the applicable obligations created by the provisions of Part XI, and the Regulations of the Authority, the decisions of the organs of the Authority and terms of contract with the Authority; accepting control by the Authority of activities in the Area, as authorized by the Convention; and providing the Authority with a written assurance that obligations under the contract will be fulfilled in good faith.

As a result, a sponsoring State Party may adopt measures that relate to qualification standards and to other conditions required for approval of a plan of work. The Czech Act and the German Act illustrate how the requirements concerning the issuance of a certificate of sponsorship to a qualified applicant, pursuant to Regulation 11, as mentioned earlier, may be transposed. For example, section 4(6) of the German Act provides that an applicant shall be sponsored if the application and the plan of work meet the requirements of the Convention, the Agreement and the Regulations of the Authority, and contain in particular the obligations pursuant to article 4(6)(a) to (c) of Annex III to the Convention and the applicant: (a) provides the required reliability and guarantee that the activities in the Area will be carried out in a manner that is both orderly and serves the interests of operational safety, labour protection, and environmental protection; (b) has access to the required funds for the orderly carrying-out of the activities in the Area, and (c) can credibly show that the activities planned for the Area can be carried out in an economical manner.

The Czech and the German Acts also provide for the designation of an agency in charge of implementing legislation and ordinances.

Supervisory measures define how the authority in charge of implementing the national legislation will check the compliance of the activities in the Area with applicable law. For example, section 8 of the German Act provides that activities of prospectors and

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contractors in the Area are subject to the supervision of the *Oberbergamt*. For the exercise of supervision, the *Oberbergamt* can demand the information necessary to fulfil its tasks and undertake visits. The supervisors are entitled to enter operational facilities, business rooms, establishments and airborne and waterborne vehicles used for prospecting and activities in the Area. Likewise, the Czech Act includes section 16 on inspection activities. For purposes of overseeing compliance with the Czech Act, the Ministry of Industry and Trade is entitled to examine documentation and records referring to prospecting or activities in the Area; to inspect objects, facilities and workplaces used for prospecting and activities in the Area; to demand the submission of documents demonstrating fulfilment of obligations. This is in concordance with the Regulations, Annex 4, Section 14, entitled "Inspection", which elaborates on article 153, paragraph 5, article 162, paragraph 2(z), and article 165, paragraph 2(m), of the Convention.

Elaborating on article 149 of the Convention and on the Regulations of the Authority, a prospector or a contractor is required to notify any finding of an object of an archaeological or historical nature and its location. The German Act transposes that obligation by designating the person to which such discovery must be reported and treated, taking into account article 149 of the Convention.

Under article 235, paragraph 2, of the Convention, States Parties are required to ensure that recourse is available in accordance with their legal systems for prompt and adequate compensation or other relief in respect of damage caused by pollution of the marine environment by natural or juridical persons under their jurisdiction. This implies to put in place an effective regime of civil liability with recourse for prompt and adequate compensation or other relief and to ensure financial security.

National legislation may include administrative and enforcement measures which are particularly relevant in the context of emergency orders issued by the Authority. For example, under Regulation 32(7) of the Nodules Regulations, if the contractor does not provide the Council with a guarantee of its financial and technical capability to comply promptly with emergency orders or to assure that the Council can take such emergency measures, the sponsoring State or States, upon the request by the Secretary-General and pursuant to articles 139 and 235, must take necessary measures to ensure that the contractor provides such a guarantee or that assistance is provided to the Authority in the discharge of its responsibilities regarding the prevention of serious harm to the marine environment. For example, the Czech Act, section 11(b), requires that prior to starting prospecting or activities in the Area, insurance should be effected against damage caused in the Area with an insurer certified under a separate regulation; for that purpose, the Czech Act defines damage as death, damage to health or property, and harm to the marine environment in the Area.

Sponsoring States may find "necessary and appropriate" to include sanctions in the form of administrative fines and penalties in order to enforce their domestic provisions on control of person or entity under sponsorship. For example, section 11 of the German Act includes a list of violations of several provisions of the German Act that correspond to situations of non-compliance on the part of the natural or legal person under sponsorship. This list defines as administrative offences *inter alia* prospecting without registration or the conduct of activities without a contract with the Authority.

In accordance with article 21, paragraph 2, of Annex III, any State Party must make enforceable in its territory any final decision rendered by a court or tribunal having jurisdiction under the Convention relating to the rights and obligations of the contractor. Therefore, it is expected that domestic legislations envisage a mechanism in order to make enforceable such decisions.

National legislation may also address the issue of concurrent proceedings. This is the case of the Czech Act and of the German Act. Both Acts provide that if the Authority has

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implemented a procedure under Annex III, article 18, or for violation of the mandatory principles, rules, regulations and procedures issued by the Authority in connection with prospecting or activities in the Area, then none will be prosecuted under the domestic legislation. This is to avoid two procedures for the same offence taking place, while ensuring that a procedure takes place if none has been implemented by the Authority.

National legislation may also include transitional measures. Such transitional measures take into account the existence of a previous national legislation that was enacted prior to the entry into force of the Convention and of the Agreement. Other transitional measures address the application of the legislation in relation to the participation of a national under sponsorship in an international consortium (paragraph 22 of the Czech Act). Such a situation arises with one of the contractors that has concluded a contract for exploration for polymetallic nodules with the Authority. Interocceannmetal Joint Organization is an international consortium formed of six sponsoring States including the Czech Republic.

Mr President, also by way of illustration, some indication of the likely content of necessary and appropriate measures may be gleaned from the interim national legislation adopted in the early 1980s, in chronological order, by the United States of America, Germany, the United Kingdom, France, USSR, Japan and Italy. For example, with respect to the protection of the marine environment, the UK Deep Sea Mining (Temporary Provisions) Act 1981 provides framework rules for the protection of the marine environment and they are supplemented by a number of other provisions in subordinate legislation.

For example, under section 2(2), one of the relevant factors to which the Secretary of State must have regard in deciding on the issuance of a licence is "the desirability of keeping an area or areas of the deep sea bed free from deep sea bed mining operations so as to provide an area or areas for comparison with licensed areas in assessing the effects of such operations". Both the Regulations on Prospecting and Exploration for Polymetallic Nodules and those for Polymetallic Sulphides include a similar provision on environmental reference zones for the same comparison purpose.

(Poursuit en français) Monsieur Lodge va vous faire part de quelques remarques finales.

The President:

Merci beaucoup, Mademoiselle I.e Gurun.

(Continued in English) I call Mr Michael Lodge who will deliver the concluding remarks.

STATEMENT OF MR LODGE 14 September 2010, p.m.

STATEMENT OF MR LODGE
INTERNATIONAL SEABED AUTHORITY
[ITLOS/PV.2010/1/Rev.2, E, p. 29–30]

Mr Lodge:

President and Members of the Chamber, that concludes the oral statements on behalf of the Authority. I hope that these statements, together with the content of the Authority's written statement and the Dossier submitted previously, have helped to shed light on the legal questions on which the Advisory Opinion is requested and will be of assistance to the Chamber in its task.

As the Secretary-General indicated at the outset, the Authority welcomes any greater clarity and understanding that the Chamber can bring to the key provisions of the Convention concerning the obligations of sponsoring States. Most of all, it is in the interests of all States Parties that the provisions of the Convention and the Agreement are implemented properly and that there is a clear and consistent interpretation of the regime for deep sea bed mining.

Mr President, Members of the Seabed Disputes Chamber, thank you for your attention.

The President:

Thank you very much indeed, Mr Lodge.

This brings us to the end of today's sitting. The Chamber will sit again tomorrow morning at 10 o'clock. At that sitting the representatives of Germany, the Netherlands, Argentina, Chile, Fiji and Mexico will address the Chamber to present their oral statements.

The Chamber's sitting is now closed.

(The sitting closes at 5 13 p.m.)

RESPONSIBILITIES AND OBLIGATIONS OF STATES WITH RESPECT TO ACTIVITIES IN THE AREA

PUBLIC SITTING HELD ON 15 SEPTEMBER 2010, 10.00 A.M.

Seabed Disputes Chamber

Present. *President* TREVES; *Judges* MAROTTA RANGEL, NELSON, WOLFRUM, YANAI, KATEKA, HOFFMANN, GAO, BOUGUETAIA, GOLITSYN; *Registrar* GAUTIER.

List of delegations: [See sitting of 14 September 2010, 10.00 a.m.]

AUDIENCE PUBLIQUE TENUE LE 15 SEPTEMBRE 2011, 10 HEURES

Chambre pour le règlement des différends relatifs aux fonds marins

Présents : M. TREVES, *Président*; MM. MAROTTA RANGEL, NELSON, WOLFRUM, YANAI, KATEKA, HOFFMANN, GAO, BOUGUETAIA, GOLITSYN, *juges*; M. GAUTIER, *Greffier*.

Liste des délégations : [Voir l'audience du 14 septembre 2010, 15 heures]

The President:

Good morning. Today we will continue the hearing in Case No. 17 concerning the Request for an advisory opinion on Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area.

This morning we will hear statements from Germany, the Netherlands, Argentina, Chile, Fiji and Mexico.

I now give the floor to the representative of Germany, Dr Wasum-Rainer.

STATEMENT OF MS WASUM-RAINER – 15 September 2010, a.m.

STATEMENT OF MS WASUM-RAINER
GERMANY
[ITLOS/PV.2010/2/Rev.2, E, p. 1–5]

Ms Wasum-Rainer:

Mr President, distinguished Members of the Seabed Disputes Chamber, it is a great honour to appear before you today in these oral proceedings with regard to the Request for an advisory opinion submitted to you by the Council of the Seabed Authority. With your permission, I will present to you the comments of the Federal Republic of Germany and I should like to talk for approximately 15 minutes.

Let me begin by underlining the importance of this case for international law. For the first time, the Council of the Seabed Authority has decided to request an advisory opinion from the International Tribunal for the Law of the Sea. For the first time, the Seabed Disputes Chamber of the Tribunal has the opportunity to deliver such an opinion. Germany has welcomed the decision by the Council from the beginning and strongly believes that this case will pave the way for the further strengthening of the law of the sea.

Many provisions of the United Nations Convention on the Law of the Sea leave room for interpretation. The States Parties to this Convention would all benefit from any wisdom and guidance provided by the Tribunal on this subject. The jurisprudence of the Tribunal – the key judicial organ in this field – should be further developed. Advisory opinions would seem to be a suitable instrument for achieving this objective. I believe that they should be requested far more frequently.

For these reasons, among others, the Federal Government of Germany attributes great importance to the present procedure. Moreover, being among those States which have sponsored an entity undertaking exploration activities, Germany wishes to present its views on some aspects of the case. The German Government has an interest in helping shed more light on the complex relationship between sponsoring States, contractors and the Authority.

There can be no doubt about the jurisdiction of the Tribunal in the present case. The core problem regarding the extent of the “responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area”, as this Case No. 17 is tagged, has arisen within the scope of the activities of the Council, for the Council is charged with the final approval of the plans of work, a prerequisite of which is sponsorship through a State Party willing and able to meet its obligations under Part XI of the Convention.

The three questions formulated by the Council and which it decided by consensus to submit to the Tribunal contain a precise statement of the issues involved and thus fulfil the criteria of the Rules of the Tribunal for advisory opinions. The questions arose in the context of a plan of work submitted by Nauru Ocean Resources Inc., a Nauruan incorporated subsidiary of the Vancouver-located Nautilus Minerals Inc., which is sponsored by the Republic of Nauru, certainly a State Party to the UN Convention on the Law of the Sea.

Mr President, today I will neither try to give comprehensive answers to the questions submitted to the Tribunal, nor will I rephrase the written statement that has been submitted by my country. With your permission, I will limit our intervention to just four elements, four points, which Germany considers essential.

These elements are:

- (1) the paramount importance of the protection of the environment of the Area;
- (2) the absence of subsidiary or secondary liability for the sponsoring State;
- (3) the maintenance of high due diligence standards;
- (4) the need to retain a non-differentiated regime of due diligence standards.

RESPONSIBILITIES AND OBLIGATIONS OF STATES WITH RESPECT TO ACTIVITIES IN THE AREA

Mr President, as regards the first element, environmental protection in the Area, I would like to state the following. At the present stage, the activities in the Area, licensed by the Seabed Authority and sponsored by respective States, do not give rise to any major inherent risks. The ongoing activities serve exploration purposes only. They mainly consist of taking samples and collecting data. They can and should by no means be compared with large scale oil and gas extraction activities, and of course not with the disaster we have witnessed during the past months in the Gulf of Mexico.

With this proviso, I would like to strongly underline the paramount importance that all States, as coastal countries, distant observers or co-owners of the common heritage of mankind, much attach to the protection of the marine environment, including the seabed.

The seabed beyond national jurisdiction has been entrusted to the Seabed Authority. The standards and measures adopted by the Authority provide benchmarks for the protection of the marine environment from the harmful effects of seabed activities. All States Parties must assist the Authority and meet their benchmarks. It is in this context that Part XI of the Convention establishes a comprehensive regime of responsibilities and obligations for States sponsoring persons and entities that must be complied with.

Coming to the second element, I would like to stress that there should be no subsidiary or secondary liability for the sponsoring State. States Parties must ensure that contractors sponsored by them operate in compliance with the provisions of Part XI. Only those contractors that are sponsored by a State are eligible to submit a plan of work to operate in the Area. The obligations of sponsoring States are clearly different from those of the contractor. A State Party which has taken the necessary legislation and administrative measures to meet the obligations under the Convention cannot be held responsible for any breach of the provisions of Part XI by a contractor. The acts of a contractor are not as such attributable to the sponsoring State.

Germany takes the view that Part XI gives primary responsibility to the contractor. The sponsoring State is liable for failure to secure compliance by the contractor whom it sponsors, and thus for supervisory fault and nothing else. The obligations of the sponsoring State are obligations of conduct, not of result. Accordingly, there is no subsidiary or secondary responsibility on the part of the sponsoring State. This is a crucial element of the special regime of State responsibility established by the Convention.

The third element I would like to mention is the due diligence standard. Germany holds that in general a high standard of due diligence should apply. Both the uncertainties relating to the effects of deep seabed mining and its potential to cause serious damage demand this particularly high due diligence standard. The Convention, in view of the importance of the Area as common heritage of mankind, establishes a strong link between States Parties and contractors. Sponsoring States need to control contractors adequately. This responsibility of sponsoring States is one of the central elements of the mining regime. To this end, States need to have a strict regulatory regime in place.

Germany is convinced that this standard has been met (by way of example) by its own national legislation. The German Seabed Mining Act (*Meeresbodenbergbau-Gesetz 1995*) comprises a rigorous and comprehensive set of regulations, which include provisions on effective control and supervision by the designated national agency. It also contains a clear division of responsibilities and imposes sanctions if specific provisions are breached. The Seabed Mining Act should be regarded as an adequate means, or at least as one possible means, of implementing the obligations of States Parties under the Convention.

Finally, the fourth and last element that is important to Germany is the need to retain a non-differentiated regime of due diligence standards.

Germany is of the opinion that the same standards must apply to all States as regards the adoption of laws and regulations and their implementation and enforcement.

STATEMENT OF MS WASUM-RAINER – 15 September 2010, a.m.

A differentiated regime with different standards of due diligence applicable to States Parties cannot be accepted. This is what the carefully balanced rules of the Convention that reflect the fundamental need to protect the Area as the common heritage of mankind provide for

If it were otherwise, we would encourage a system of “eco-tourism” or “sponsor shopping”. In such a system, contractors – often subsidiaries of powerful mining companies from industrialized countries – could seek the sponsorship of States with lower due diligence standards in order to avoid stricter standards and control. In our view, such a development should definitely be prevented. It would be detrimental to the Area and in the end harmful to all States, whether industrialized or developing countries.

In this context, the Tribunal might also want to consider the legal implications of a contractor having more than one nationality or multiple States having effective control of the contractor. In this connection, Germany takes great interests in an argument submitted, *inter alia*, by the International Seabed Authority with regard to the possibility of multiple sponsorship. Articles 4(3) of Annex III and 11(1) of the Regulations on Prospecting and Exploration of Polymetallic Nodules in the Area seem to suggest that in such cases each State having a link to the contractor shall issue a certificate of sponsorship, making “sponsor shopping” more difficult.

Mr President, those are my essential points. They certainly do not cover all aspects of the questions asked, nor are they exhaustive, but I hope they will be of help to the Seabed Disputes Chamber in finding the pertinent answers to the three questions asked.

Thank you very much

The President

Thank you very much indeed, Dr Wasum-Rainer.

I now give the floor to the representative of the Netherlands, Dr Lijnzaad.

RESPONSIBILITIES AND OBLIGATIONS OF STATES WITH RESPECT TO ACTIVITIES IN THE AREA

STATEMENT OF MS LIJNZAAD
THE NETHERLANDS
[ITLOS/PV.2010/2/Rev.2, F, p. 5 16]

Ms Lijnzaad:

Good morning, Mr President, Members of the Seabed Disputes Chamber, Excellencies.

It is an honour for me to appear before this Chamber and clarify my Government's views on the questions submitted to you by the Council of the International Seabed Authority. I will speak for approximately 35 minutes.

The questions before us concern the governance of the deep seabed, one of the few remaining pristine areas on our planet. Inhospitable conditions and technological constraints have hitherto protected the deep seabed from the development of large-scale human activities. The drafters of the Law of the Sea Convention wisely anticipated that this might be different in the future. They designed a special legal regime for the sustainable development of the mineral resources of the deep seabed that protects the interests of the international community. The basic premise of this regime is that the deep seabed cannot be subject to State sovereignty and belongs to the common heritage of mankind. Your Chamber has an important role in protecting this regime.

Scientific research in the deep sea in recent years has brought to light the deep discoveries of biological diversity that have held many people in awe: exotic deep sea fish; serene cold-water coral reefs; and spectacular other life forms on deep seamounts and around hydrothermal vents. The existence of such rich deep sea life could not be imagined at the time of the conclusion of the Convention in 1982.

I therefore feel particularly privileged to address this Chamber in the International Year of Biodiversity. The answers to the questions before the Chamber will contribute to the protection of life in the deep by setting a standard for the appropriate supervision of human activities.

In my statement I will reflect on this standard and the three questions before this Chamber on the basis of the following points: the sponsorship of activities in the Area; the extent of liability; and the standard of due diligence.

Mr President, I now turn to the first issue, the sponsorship of activities in the Area. To answer the questions before us, there is merit in first considering the reasons for the introduction of the concept of sponsorship with respect to activities in the Area in the Convention. Activities in the Area are subject to a special legal regime that allows for the sustainable development of the mineral resources of the deep seabed. This regime enables States and their nationals to carry out activities in the Area but introduces a number of safeguards to protect the interests of mankind as a whole. One of those safeguards is the requirement of sponsorship. This requirement was introduced in the Convention for the following reasons: to prevent States not party to the Convention, and persons within their jurisdiction or control, from using the provisions of the Convention and the Agreement relating to the implementation of Part XI to obtain access to the mineral resources of the Area; to prevent States Parties to the Convention from becoming a jurisdiction of convenience through which access could be obtained to the mineral resources of the Area without the acceptance of international obligations to secure that the relevant provisions of the Convention and the Agreement will be complied with; and, finally, to assist the Authority in exercising control over activities in the Area in order to secure that the relevant provisions under the Convention and the Agreement will be complied with.

In our written statement, the legal responsibilities and obligations of States Parties to the Convention with respect to sponsorship and activities in the Area were categorized into four groups: the carrying out of activities in the Area by a sponsored entity; the transfer of

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technology and scientific knowledge to the Authority and developing States; the protection and preservation of the marine environment; and the termination of sponsorship.

These four categories concern legal responsibilities and obligations under the Convention and the Agreement that specifically apply to States Parties to the Convention which sponsor activities in the Area. Additionally, legal responsibilities and obligations under the Convention that generally apply to activities under the jurisdiction and control of States Parties to the Convention are applicable to activities in the Area as well. In this regard I would like to refer explicitly to Part XII of the Convention relating to the protection and preservation of the marine environment.

Mr President, I will now address the second question – the extent of liability. Sponsored entities are not parties to the Convention and the Agreement hence they are not as such bound by the provision of these instruments. The Convention and the Agreement foresee that obligations must be imposed on such entities through the conclusion of a contract with the Authority and the implementation of the Convention and the Agreement by the sponsoring State in its domestic law.

The Convention and the Agreement impose legal responsibilities and obligations on the sponsoring State related to compliance with these instruments by entities sponsored by it. In particular, the sponsoring State must ensure that an entity sponsored by it carries out activities in the Area in conformity with the terms of its contract with the Authority and its obligations under the Convention and the Agreement.

Pursuant to article 139, paragraph 2, of the Convention, a State Party is liable for damage caused by its failure to carry out its responsibilities under Part XI of the Convention and the Agreement. However, it appears from the context of this provision that the establishment of such liability depends on: the conduct of the sponsoring State in carrying out its responsibilities under the Convention and the Agreement; the sponsored entity's liability under the Convention; as well as the general rules of international law related to the liability of States.

Mr President, Members of the Seabed Disputes Chamber, pursuant to article 139, paragraph 2, a sponsoring State is not liable for damage caused by a failure of an entity sponsored by it to comply with its obligations if that State has taken all necessary and appropriate measures to secure effective compliance. To this end, article 4, paragraph 4, of Annex III of the Convention requires the sponsoring State to adopt laws and regulations and to take administrative measures within the framework of its legal system that are reasonably appropriate for securing compliance by persons under its jurisdiction. It appears from these provisions that the sponsoring State's responsibility to ensure that an entity sponsored by it complies with its obligations is not absolute, but depends on the efforts that the sponsoring State has made to discharge itself of that responsibility. It is a due diligence obligation, as has been pointed out in several written statements.

A due diligence obligation requires States to adopt, implement, supervise and enforce measures of a legislative, administrative or juridical nature to prevent legally protected interests from being harmed by the acts of State and non-State actors. In order to establish a breach of a due diligence obligation, it is necessary to determine the degree of diligence which must be observed by States. The case concerning *British Claims in the Spanish Zone of Morocco* provides some general guidance in this respect. States should act with *diligentia quam in suis*, that is the degree of diligence with which national interests are protected and the degree actually exercised may not be significantly less than the degree that other States may reasonably expect to be exercised.

Whether an obligation is a due diligence obligation can usually be inferred from its content, context, object and purpose. In general, obligations which focus on the action to be taken rather than on the result of such action, such as obligations which require States to take

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measures and irrespective of whether such measures must be appropriate, necessary or effective – can be characterized as due diligence obligations. The ultimate objective of such an obligation may be to achieve a certain result, for example, the prevention of damage, but the obligation itself is oriented towards the action to be taken, that is the adoption of measures. It is an obligation of conduct, as has indeed been concluded in several written statements before you.

There is an internationally wrongful act of a State when conduct is attributable to that State and such conduct constitutes a breach of an international obligation of that State. Such internationally wrongful acts involve legal consequences even in the absence of damage. In the event of damage, the responsible State is required to compensate for the damage caused by the internationally wrongful act. However, a responsible State is only required to compensate if there is a causal connection between the internationally wrongful act of that State and the damage. Accordingly, liability of a State under article 139, paragraph 2, of the Convention arises only if the damage is caused by the failure of that State to adopt, implement, supervise and enforce measures to secure compliance with the Convention and the Agreement by entities sponsored by it. Thus, as has been pointed out in several written statements, such a failure will thus not by itself result in an obligation on the sponsoring State to compensate for damage caused by an entity sponsored by it.

Mr President, Members of the Seabed Disputes Chamber, the liability of the sponsoring State is without prejudice to the liability of the sponsored entity under article 22 of Annex III of the Convention. The sponsored entity incurs responsibility and liability for any damage arising out of wrongful acts in the conduct of its operations. This liability is in every case for the actual amount of the damage. Liability for damage arising out of acts of the sponsored entity that are not wrongful is not provided for in the Convention or the Agreement.

As has been pointed out in several written statements, the liability system of the Convention and the Agreement imposes primary liability on the sponsored entity for damage arising out of wrongful acts in the conduct of its operations. Accordingly, a sponsoring State incurs liability only if it has failed to carry out its own responsibilities and the entity sponsored by it has not redressed the damage. This system channels liability and prevents double recovery of damage.

No liability arises under the Convention or the Agreement if neither the sponsored entity nor the sponsoring State has committed a wrongful act. If a sponsored entity does not provide redress for damage for which it is liable under the Convention and the Agreement – for instance, in the case of exonerations, time-limits or insolvability – neither the Convention nor the Agreement provide for residual liability of the sponsoring State, provided that the State has carried out its responsibilities.

Mr President, Members of the Chamber, the liability of the sponsoring State is also without prejudice to the rules of international law. The relevant rules of international law are those related to the responsibility of States for internationally wrongful acts and the liability of States for acts not prohibited by international law. Pursuant to article 304 of the Convention, the provisions of the Convention and the Agreement regarding responsibility and liability are without prejudice to the application of existing rules and the development of further rules regarding responsibility and liability. Since the adoption of the Convention and the Agreement, international law regarding responsibility and liability has been codified and further developed. These developments, however, do not affect the above analysis of the relevant provisions of the Convention and the Agreement.

Under the general rules of international law related to the responsibility of States for internationally wrongful acts, conduct is only attributable to a State under specific circumstances. In principle, conduct of natural or juridical persons under the jurisdiction of a

STATEMENT OF MS LUNZAAD 15 September 2010, a.m.

State is as such not attributable to that State. Accordingly, under general international law, a sponsoring State cannot be held responsible for the conduct of an entity sponsored by it. However, it has the responsibility to ensure that activities within its jurisdiction or control do not cause damage to the environment of other States or areas beyond the limits of national jurisdiction. This obligation is a due diligence obligation.

Under general international law, no residual liability of States arises for damage caused by activities within their jurisdiction or control irrespective whether the activities are considered hazardous. States should, however, take all necessary measures to ensure that prompt and adequate compensation is available for victims of transboundary damage caused by hazardous activities within its jurisdiction or control. Such an approach had already been adopted in the Convention with respect to damage caused by pollution of the marine environment. Article 235 paragraph 2, provides that States shall ensure that recourse is available within their legal systems for prompt and adequate compensation or other relief in respect of damage caused by pollution of the marine environment by natural or juridical persons under their jurisdiction. This obligation is applicable to sponsoring States.

Mr President, let me turn to the third and final issue, the standards of due diligence. The identification of the "necessary and appropriate" measures that the sponsoring State must take in order to fulfil its responsibility under the Convention and the Agreement is tantamount to identifying the standard of due diligence that State must observe with respect to activities in the Area sponsored by it.

It has become apparent from the written statements that the core issue underlying these questions before the Chamber is whether a sponsoring State can discharge itself of its responsibility to ensure that an entity sponsored by it carries out activities in the Area in conformity with the terms of its contract with the Authority and its obligations under the Convention and the Agreement by the conclusion of the contractual arrangement with such entity.

The introduction of legislation for highly specialised fields such as deep sea mining is a daunting task for many developing and developed States alike, in particular if such legislation will only apply to a limited number of companies.

My Government was recently confronted with a comparable challenge after a company operating communications satellites in outer space had established itself in the Netherlands. Being a State Party to the Treaty on Principles Governing Activities of States in the Exploration and Use of Outer Space including the Moon and Other Celestial Bodies – that is a lengthy title –, my Government was required to ensure that national activities in outer space are carried out in conformity with its provisions. Various approaches were considered, but ultimately it was concluded that a public domestic regulatory framework was necessary. In the Explanatory Note to the Space Activities Act it was set out that establishing such legislation was also desirable for various policy considerations:

By clarifying the way in which the Netherlands fulfils its international obligations, we shall help to promote a climate in which private-sector bodies can conduct . . . space activities in a stable environment . . . The proposed statutory regulations must guarantee the legal security of all of the parties involved. Not only will this serve to attract experienced and recognized space-travel companies that stand to benefit from a transparent and equitable regulatory environment, it also makes somewhat unreliable companies aware of a legal system with a stringent implementation and enforcement mechanism.

A public regulatory framework for the sponsorship of activities in the Area provides legal certainty for all stakeholders. It protects companies that would like to enter the market by setting non-discriminatory standards; it protects persons who suffer damage by setting

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public safety, health and environmental standards; and it protects governments against lobbies from companies for preferential treatment. Furthermore, a public regulatory framework enhances the legitimacy of sponsorship by providing a statutory basis adopted in accordance with applicable constitutional procedures.

We have taken note of the suggestion in one of the written statements that the development of national legislation may be cumbersome to developing States. It would appear to us that the development of elaborate deep seabed mining contracts, such as the contract underlying the relationship between Nauru and Nauru Oceans Resources Inc. in itself requires extensive legal work and implies a comparable assessment of potential risks, as the development of a public domestic regulatory framework would.

It may be that the International Seabed Authority could have a role in supporting the development of such required and necessary national legislation, given its knowledge and expertise of the international regulatory framework. I would venture to suggest through you, Mr President, that the International Seabed Authority is excellently qualified to assist States in building and understanding their technical capacity to regulate deep seabed mining, for instance by collecting and disseminating national legislation relevant to deep seabed mining and the relationship between the contractor and the sponsoring State. For now, I would congratulate Germany on distributing its legislation, as this may inform our discussions on ways of shaping the relationship between the contractor and the sponsoring State. I would call on other States to distribute their legislation widely to the Seabed Authority. This, we believe, will be a source of knowledge from which sponsoring and potential sponsoring States, whether developing States or developed States, may benefit when developing the required public domestic regulatory framework. I would add that I am heartened to have heard Ms Le Gurun's statement yesterday indicating that there is already quite a lot of knowledge available within the Seabed Authority on the specific issue of domestic regulatory frameworks.

As adequate as the substantive provisions of a contractual arrangement may be, it cannot provide for supervisory or enforcement powers that are equivalent to those of a State within its own jurisdiction. If the sponsored entity does not comply with the provisions of the contract, the sponsoring State may ultimately be permitted to terminate the sponsorship; however, the sponsoring State will not be able to use force to secure the exercise of its supervisory and enforcement powers, such as access to sites, inspection of documents, inspection of equipment, taking of samples, and the implementation of coercive measures, should that be necessary. If such measures are provided for under a contract, the sponsoring State would need a court order, and even such a court order may not permit calling in the use of force to implement it. Under the sponsorship agreement submitted by Nauru, it would even require a court order of a third State, and hence the submission of the sponsoring State, namely Nauru, to the jurisdiction of that third State, namely Canada, in fact British Columbia. This is a jurisdictional arrangement that the Netherlands would consider ill advised and quite unusual from the point of view of general international law.

It must have been policy considerations, such as these, that underlie the choice of words by the drafters of the Convention for the relevant provisions of the Convention. Article 4, paragraph 4 of Annex III, requires sponsoring States to adopt "laws and regulations" and to take "administrative measures". This wording does not allow for the implementation by means of a contractual arrangement; quite the contrary, it requires the establishment of a public domestic regulatory framework. On this point, the ordinary meaning of the text of the Convention is clear and there is no need to resort to another method of interpretation.

Mr President, Members of the Seabed Disputes Chamber, the laws, regulations and administrative measures of a sponsoring State must be "reasonably appropriate" for securing

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compliance by entities sponsored by it “within the framework of its legal system”. Accordingly, the text of the Convention allows for flexibility and the form and content of the laws, regulations and administrative measures of sponsoring States do not therefore have to be identical. Yet, compliance with a due diligence obligation requires the adoption, implementation, supervision and enforcement of measures. The flexibility relates to the substance of the measures and the methods of implementation, supervision and enforcement of such measures. This would imply factoring in aspects such as the type of mining activity, whether it is prospecting, exploration or exploitation, the nature of the resource and the area, the terrain, that is being mined. Accordingly, a sponsoring State has, for example, discretion to decide whether an authorization is required for activities in the Area by an entity sponsored by it, and whether such authorization attaches to an activity or an entity. This margin of discretion notwithstanding, the laws, regulations and administrative measures of a sponsoring State, as well as their implementation, supervision and enforcement, are not exempt from judicial review to assess whether they may be expected to secure compliance by entities sponsored by it. Irrespective whether damage has occurred, an assessment may reveal that the laws, regulations and administrative measures fall short of the required degree for due diligence and entail a State’s responsibility for an internationally wrongful act.

Such an assessment would involve an objective test. As I mentioned earlier, the degree of diligence required is the degree with which national interests are protected, and the degree actually exercised may not be significantly less than the degree other States may reasonably expect to be exercised. Although this objective test does not exclude a certain degree of differentiation between States, it is submitted that such differentiation would not be appropriate with respect to the sponsorship of activities in the Area. In this respect we find it relevant that the decision to sponsor activities has been left to the discretion of States: it is voluntary. I also would like to recall that the requirement of sponsorship was introduced in the Convention to protect the interests of mankind, in particular by preventing the emergence of jurisdictions of convenience and providing assistance to the Authority, which acts on behalf of mankind. The protection of the interests of mankind requires the observance of an identical degree of diligence by all States. The lack of technical capacity to regulate deep seabed mining may not justify a differential treatment that may impair the interests of mankind.

On this point too, it appears that the drafters of the Convention have chosen their words carefully. They recognized the special needs and interests of developing countries in the context of their effective participation in activities in the Area in article 148 of the Convention, and the exercise of powers and functions by the Authority in article 152 of the Convention. However, as has been pointed out in several written statements, the text of the Convention limits the promotion of such participation and the special consideration to be given by the Authority to the extent specifically provided for in Part XI of the convention relating to the Area. Neither the Convention nor the Agreement contains specific provisions on the special needs and interests of developing countries with respect to their sponsorship of activities in the Area. Accepting divergent standards of diligence may produce perverse effects, undermining the general aim of ensuring that public-safety, health and environmental standards are met.

Mr President, Members of the Seabed Disputes Chamber, I come to the conclusion of my presentation. As I said at the beginning of my statement, answering the questions before this Chamber is about nothing less than the protection of life in the deep sea by setting a standard for the appropriate supervision of human activities. Such protection must be based on a correct and consistent interpretation of the legal regime for the deep seabed so as to contribute, in accordance with the Convention’s preamble, to “the peaceful uses of the seas and oceans, the equitable and efficient utilization of their resources, the consideration of their

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living resources, and the study, protection and preservation of the marine environment". We believe that the submissions made in our written statement contribute to this objective, and we reaffirm them.

Mr President, Members of the Chamber, I thank you for your attention.

The President

Thank you very much, Ms Iijzad, for your statement.

I now give the floor to Ambassador Cerutti, representative of Argentina.

STATEMENT OF MS CERUTTI – 15 September 2010, a.m.

STATEMENT OF MS CERUTTI
 ARGENTINA
 [ITLOS/PV.2010/2/Rev.2, F, p. 16-25]

Ms Cerutti:

Mr. President, distinguished Members of the [Chamber], I am extremely privileged to appear before you representing the Government of Argentina.

This is indeed an important and auspicious occasion from Argentina's perspective. The legal questions addressed to the Seabed Disputes Chamber, and the Chamber's opinion to be rendered thereupon, are of such nature and relevance so as to influence for a long time the future of seabed mining, not only the participation of developing States, but also that of many developed States, and the general conduct of States in relation to the Area and its resources which are the common heritage of mankind. Furthermore, it is the first occasion in which the Chamber has been requested to render an advisory opinion, and also the first occasion in which Argentina appears before the International Tribunal for the Law of the Sea. Argentina has been and remains a strong supporter of the Tribunal and is fully confident that the Chamber will be able to shed light on the questions addressed to it by the Council of the International Seabed Authority.

I will commence by making some general points that, for being obvious, are not less important. I will continue thereafter by submitting what the answers should be, in Argentina's view, with regards to each of the questions.

I will not address the questions of jurisdiction and admissibility, as there can be no doubt, from Argentina's perspective, that the Chamber may and indeed *shall* provide the advisory opinion requested by the Council, in the terms of article 191 of the United Nations Convention on the Law of the Sea¹, as submitted by the International Seabed Authority in its written statement.²

According to the preamble and article 136 of the Convention, "the Area and its resources are the common heritage of mankind", a rule that already belongs to the *corpus* of customary international law. It must be recalled that the Convention developed in this regard a "basic principle" concerning the legal status of the deep seabed proclaimed by the United Nations General Assembly in 1970 in Resolution 2749.³ Article 311, paragraph 6, of the Convention provides that "States Parties agree that there shall be no amendments to the basic principle relating to the common heritage of mankind set forth in Article 136 and that they shall not be party to any agreement in derogation thereof." Article 311 prohibits not only *inter se* agreements but also agreements with third parties. Even if *all* Parties to the Convention were to conclude an amendment deviating from article 136, such agreement would constitute a breach of their obligations under the Convention. "Indivisibility" of international rules is inherent in the concept of *ius cogens*.

Because of the "common heritage" status, the exploration of the Area and the exploitation of its resources must be carried out for the benefit of mankind as a whole.⁴ The deep seabed resources are not subject to appropriation by any State or natural or juridical person and no sovereign claims are recognized. All rights in the resources of the Area are vested in mankind as a whole, on whose behalf the Authority acts. The minerals recovered

¹ Adopted on 10 December 1982 (hereafter 'UNCLOS' or 'the Convention').

² Written statement of the International Seabed Authority, 19 August 2010, paras. 2.1 to 2.8

³ UNGA Resolution 2749 (XXV) 19 December 1970: "Declaration of Principles Governing the Sea-Bed and the Ocean Floor and the Subsoil Thereof, beyond the Limits of National Jurisdiction"

⁴ Art. 140, UNCLOS; Paragraph 7, UNGA Resolution 2749 (XXV)

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from the Area may only be alienated in accordance with the relevant rules of the Convention, the 1994 Agreement⁵ and the regulations and procedures adopted by the Authority.⁶

To secure the common heritage of mankind, the Convention provides for an international mechanism where activities in the Area are organized and controlled exclusively by the International Seabed Authority⁷, together with a system of "public order" based upon State responsibility.⁸ According to article 139, paragraph 1, States Parties shall have the responsibility to ensure that activities in the Area by entities which possess their nationality or are effectively controlled by them or their nationals are carried out in conformity with the Convention.

The international obligations of sponsoring States stem from the Convention (*pacta sunt servanda*) and are to be performed in good faith. As the International Court of Justice recalled in the cases concerning *Nuclear Tests (Australia v. France)* and *Nuclear Tests (New Zealand v. France)* "[o]ne of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith. Trust and confidence are inherent in international cooperation".⁹ The Convention expressly stipulates that States Parties shall exercise the rights, jurisdiction and freedoms recognized in the Convention in a manner which will not constitute an abuse of rights, and fulfil in good faith the obligations assumed by them in order to ensure to all members of the Authority the rights and benefits resulting from membership.¹⁰

Nowhere does the Convention differentiate between the "obligations" of developing States and of other States regarding sponsorship. Argentina, being itself a developing country, does not decline its responsibility in the event of failing to ensure compliance regarding activities in the Area, having accepted in good faith its obligations under the Convention. Because the obligation of the sponsoring State is one of "due diligence", the burden appears to be equally onerous on developed and developing States.

This being said, I will focus now on the questions of the decision by the International Seabed Authority Council.

I will start by addressing what are the legal responsibilities and obligations of States Parties to the Convention with respect to the sponsorship of activities in the Area.

The sponsorship system is an effective form of securing compliance with the Convention. The Convention relies heavily on this system of State control, despite the responsibility that it places on the Authority itself. In addition to *assisting* the Authority in discharging its duties¹¹, according to article 139, sponsoring States "have the responsibility to ensure that activities in the Area" of a sponsored entity are "carried out in conformity with [Part XI of the Convention]".¹² It is to be recalled that article 139 also derives from General Assembly Resolution 2749.¹³

⁵ Agreement on the Implementation of Part XI of the United Nations Convention of the Law of the Sea, adopted on 28 July 1994 (hereafter the "1994 Agreement").

⁶ Arts. 137 and 133, UNCLOS.

⁷ Arts. 137, para. 2, 140, para. 2, 153, para. 1, and 157, UNCLOS.

⁸ Arts. 139 and 153 para. 4, UNCLOS. See also, Ian Brownlie, *Principles of Public International Law*, 6th Edition, Oxford University Press, 2003, pp. 242-43.

⁹ *Judgments, I.C.J. Reports 1974*, p. 26,8 para. 4,6 and p. 473, para. 49.

¹⁰ E.g., Arts. 300 and 157, para. 4, UNCLOS.

¹¹ Art. 153, para. 4, UNCLOS.

¹² Art. 139, para. 1, UNCLOS.

¹³ Paragraph 14 of UNGA Resolution 2749 (XXV), states: "Every State shall have the responsibility to ensure that activities in the area, including those relating to its resources, whether undertaken by governmental agencies or non-governmental entities or persons under its jurisdiction, or acting on its behalf, shall be carried out in conformity with the international régime to be established. The same responsibility applies to international organizations and their members for activities undertaken by such organizations or on their behalf. Damage caused by such activities shall entail liability."

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State sponsorship of activities in the Area is aimed at ensuring compliance of the sponsored entity and liability for damage. No natural or juridical person may be a contractor if not sponsored by a State.¹⁴ The case being that both the State of which the entity is a national *and* the State by which or by whose nationals it is effectively controlled shall each issue a certificate of sponsorship.¹⁵ In the event of termination of sponsorship, failure of the entity to obtain another sponsor results in the termination of the contract.

When an emergency order is issued by the Council of the Authority to prevent serious harm to the marine environment, if the contractor does not provide a guarantee of its financial and technical capacity to comply promptly with the order or to assure that the Council can take itself the practical measures necessary to that end, the sponsoring State or States must, in response to a request by the Secretary General and according to articles 139 and 235 of the Convention, take the necessary measures to ensure that the contractor provides such a guarantee or takes measures to ensure that assistance is provided to the Authority in the discharge of its responsibilities.¹⁶

These, among other stipulations of the Convention, convey a sense of the importance attributed to State sponsorship and the responsibilities that derive from it.

To discharge its duties and avoid responsibility properly, the State Party must take “all necessary and appropriate measures to secure effective compliance” with the terms of its contract and the relevant obligations under the Convention.¹⁷ These measures comprise both the exercise of the State’s “regulatory power”, by securing that appropriate laws and regulations are in place, and of its “enforcement power”, by taking preventive and corrective measures and securing compensation.

In either case, the applicable standard is one of “due diligence”¹⁸, which may be defined as “[t]he diligence reasonably expected from, and ordinarily exercised by, a person who seeks to satisfy a legal requirement or to discharge an obligation”.¹⁹ Indeed, it may be submitted that in view of the status and the importance of the Area as *res communis humanitatis*, “great”, “high” or “special” diligence must be exercised by the State to be legally protected.

Argentina concurs with other States Parties that the legal responsibilities and obligations of States to regulate and to enforce extend to ensuring that sponsored entities provide effective protection for the marine environment from harmful effects which may arise from deep sea mining.²⁰

In a recent case concerning *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, the International Court of Justice had occasion to indicate that the obligation to preserve the aquatic environment and in particular to prevent pollution is

an obligation to act with due diligence in respect of all activities which take place under the jurisdiction and control of each party. It is an obligation which entails not only the adoption of appropriate rules and measures, but also a certain level of vigilance in their enforcement and the exercise of administrative control

¹⁴ Annex III, Art. 4, para. 1, UNCLOS, Regulation 29 and Annex 4, Section 20, Regulations for Prospecting and Exploration of Polymetallic Nodules, adopted by the Assembly of the International Seabed Authority on 13 July 2000 (ISBA/6/A/18); Regulation 31 and Annex 4, Section 20, Regulations for Prospecting and Exploration of Polymetallic Sulphides, adopted by the ISA Assembly on 7 May 2010 (ISBA/6/C/L.5)

¹⁵ Regulation 11 on Polymetallic Nodules; Regulation 11 on Polymetallic Sulphides.

¹⁶ Regulation 32 on Polymetallic Nodules; Regulation 35 on Polymetallic Sulphides.

¹⁷ Arts. 139, para. 2, 153, para. 4, and Annex III, art. 4, para. 4, UNCLOS.

¹⁸ Written Statement of the Republic of Chile, 18 August 2010, para. 3.

¹⁹ *Black’s Law Dictionary*, 7th Edition, St. Paul, Minn., 1999, p. 468.

²⁰ See, e.g., written statement of Australia, 19 August 2010, p. 12.

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applicable to public and private operators, such as the monitoring of activities undertaken by such operators ...²¹

In order to protect the environment, to which Argentina attaches the greatest importance, the applicable "due diligence standard" may be said to be tantamount to applying a "precautionary approach". The obligation of sponsoring States to apply the precautionary approach in the "establish[ment] and [maintenance] under periodical review of environmental rules, regulations and procedures to ensure" the protection and preservation of the marine environment is expressly provided for in the Mining Code as adopted by the International Seabed Authority.²²

The second question submitted to the Seabed Disputes Chamber by the Council of the International Seabed Authority refers to the extent of liability of States Parties to the Convention for failure to comply with the provisions of the Convention and the 1994 Agreement by a sponsored entity.

Under article 139, paragraph 2, of the Convention, damage caused by the failure of a State Party to carry out its responsibilities under Part XI of the Convention and the 1994 Agreement entails liability. Article 139 is to be read together with article 304 which provides that "[t]he provisions of [the] Convention regarding responsibility and liability for damages are without prejudice to the application of existing rules and the development of further rules regarding responsibility and liability under international law".²³

To avoid liability the sponsoring State must have "adopted laws and regulations and taken administrative measures which are, within the framework of its legal system, reasonably appropriate for securing compliance by persons under its jurisdiction" with the terms of their contracts and their obligations under the Convention.²⁴

Yet, the State may be liable, regardless of the adoption of such law and regulations, in accordance with international law, for the fulfilment of its international obligations concerning the protection and preservation of the marine environment, as provided for in article 235, paragraph 1, including for the measures that the State takes in contravention of the Convention in respect of marine scientific research conducted by its natural or juridical persons. In this case, the State must provide compensation for damage resulting from such measures and for damage caused by pollution of the marine environment arising out of marine scientific research undertaken by the State or on its behalf, in accordance with article 235.²⁵

It must also be emphasized that article 139, paragraph 2, of the Convention states that its provisions concerning responsibility and liability for damage are "without prejudice to the rules of international law". However, article 139 refers to "damage caused by failure of a State Party ... to carry out its responsibilities under [Part XI of the Convention]". Therefore, damage not caused by a failure of a State Party to adopt laws and regulations or to take administrative measures reasonably appropriate to secure compliance by the sponsored entity does not cause liability under article 139.

The ability of the sponsoring State to exert effective control over the sponsored entity is paramount if a lacuna in responsibility and liability for damage caused by operations in the Area is to be avoided. To this end, the existence of an "effective link" between the sponsoring State and the sponsored entity must be taken into account by the Authority's organs, the

²¹ *ICJ Judgment of 20 April 2010*, p. 58, para. 197.

²² Regulation 31 2 on Polymetallic Nodules; Regulation 33 2 on Polymetallic Sulphides.

²³ Myron Nordquist, Satya Nandan, Shabtai Rosenne, Michael W. Lodge (eds.), *United Nations Convention on the Law of the Sea 1982: A Commentary*, Martinus Nijhoff Publishers, vol. VI, 2003, p. 119, para. 139.

²⁴ Annex III, Art. 4, para. 4, UNCLOS.

²⁵ Art. 263, paras. 2 and 3, UNCLOS.

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Legal and Technical Commission and the Council for this matter when assessing the qualifications of applicants. The principle of the substantial connection affirmed by the International Court of Justice in the *Nottebohm* case²⁶ applies equally here.

As to the extent of the liability, it shall be determined, in Argentina's view, by reference to the customary law of State responsibility. The basic rule remains *restitutio in integrum* and, if this is not possible, restitution in kind, as asserted by the Permanent Court of International Justice in the Judgment on the *Factory at Chorzów* (Merits)²⁷ and reaffirmed by the International Court of Justice in a number of cases thereafter²⁸, as well as in the International Law Commission Articles on Responsibility of States for Internationally Wrongful Acts.²⁹

Given the legal status of the Area as common heritage of mankind, on whose behalf the International Seabed Authority acts, it appears that financial compensation including interest, when due, shall be payable to the Authority³⁰, without prejudice to the right to compensation of any injured State or entity.

The last question concerns the measures that a sponsoring State must take in order to fulfil its responsibilities under the Convention, in particular article 139 and Annex III, and the 1994 Agreement.

The specific regulatory and enforcement measures that the sponsoring State must take to fulfil their responsibility under the Convention are in principle a matter for the State concerned. Such measures must secure compliance with all their obligations under the Convention.³¹ The means should be compatible to the end.

In this respect, it is submitted that in the regulatory and enforcement actions special regard must be shown to the obligations imposed by article 206 and the new international law of the environment, in particular, the need to conduct an environmental impact assessment (EIA), and to consult in the course of the EIA any coastal State across whose jurisdiction the resource deposit lies³², as well as the affected population as appropriate, notably of the coastal State likely to be affected by activities in the Area.

In the *Pulp Mills* case mentioned above, the International Court of Justice acknowledged that the obligation to protect and preserve,

has to be interpreted in accordance with a practice, which in recent years has gained so much acceptance among States that it may now be considered a requirement under general international law to undertake an environmental impact assessment where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context, in particular on a shared resource.³³

It is affirmed that the obligation to request and to secure that an environmental impact assessment is conducted is justified at the international level "as an expression of the

²⁶ *Judgment of 6 April 1955, I.C.J. Reports 1955, p. 23.*

²⁷ 1928, P.C.I.J., Series A, No 17, p. 47

²⁸ *Gabčíkovo-Nagymaros Project (Hungary-Slovakia), Judgment, I.C.J. Reports 1997, p. 81, para. 152; Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004, p. 198, paras. 152-153; Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, I.C.J. Reports 2007 p. 233, para. 460*

²⁹ Part Two, Chapter II: "Reparation for Injury", ILC Articles, adopted in 2001 (UNGA Resolution 56/83 of 12 December 2001).

³⁰ Arts. 137, para. 2, 140, and 160, paras 2 (f) and 2 g, UNCLOS.

³¹ Arts. 139, para. 2, and Annex III, art. 4, para. 4, UNCLOS.

³² Art. 142, UNCLOS

³³ *Judgment of 20 April 2010, pp. 60-61, para. 204.*

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precautionary principle given the lack of full scientific certainty and knowledge as to the scale and magnitude of impacts on the ecosystem of the deep ocean".³⁴

I would like to end this presentation, Mr President, by respectfully recalling that the advisory opinion requested from the Seabed Disputes Chamber by the Council of the International Seabed Authority, although triggered by a proposal of the Government of Nauru, is and shall be considered unrelated to the applications for approval of a plan of work for exploration in reserved areas made by Nauru Ocean Resources Inc. (sponsored by the Republic of Nauru) and Tonga Offshore Mining Ltd. (sponsored by the Kingdom of Tonga) in 2008, whose consideration by the Legal and Technical Commission of the Authority was postponed at the request of the very applicants "due to the current global economic circumstances and other concerns".³⁵

Mr. President, Members of the [Chamber], this concludes Argentina's presentation. I thank you for your attention.

The President.

Thank you very much, Ambassador Cerutti.

This an appropriate time for the Chamber to withdraw for a break of 30 minutes. The meeting is now suspended.

(Short adjournment)

The President:

May I advise you that the present sitting might be a little longer than anticipated because, with the consent of the interpreters, we will hear the three speakers even if we have to go beyond one o'clock, but let us hope not much beyond, so that we can avoid having a short, separate sitting in the afternoon.

On behalf of the interpreters, may I also ask the speakers not to speak too quickly? This creates some pressure which is not welcome.

May I add another remark? Yesterday I said that this proceeding contained two *première*. In fact, I should have said "three" but I did not dare; now I dare. It is also the first time that our hearings have been transmitted direct through the web all over the world. Yesterday I did not dare mention that because, being a *première*, we did not know whether it would work, but now I have news from many parts of the world that it does indeed work. Therefore, when you speak you should think that the public is not all here.

I now have the pleasure of giving the floor to the distinguished representative of Chile.

Mr Plaza, you have the floor.

³⁴ Written statement of Mexico, 17 August 2010, p. 30, para. 110

³⁵ Written statement of the International Seabed Authority, paras. 1.1 to 1.10

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CHILE
[ITLOS/PV.2010/2/Rev.2, E. p. 26–34]

Mr Plaza:

Mr President and Members of the Seabed Disputes Chamber, it is my great honour to appear before you today on behalf of the Government of Chile.

The Government of Chile has welcomed the invitation by the President of the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea to the States Parties to the United Nations Convention on the Law of the Sea to present views on questions posed by the Council of the International Seabed Authority on 6 May 2010, within the context of article 191 of the Convention.

Chile's comments will refer to the subjects embraced by these questions, taking into account fundamental principles of international public order embodied in the notion of the common heritage of mankind that inspires the United Nations Convention and the regime derived thereof.

We all agree that this regime represents one the most significant achievements in the process of institutionalization of the law of the sea assigning a primary role to the International Seabed Authority as the guarantor of the common heritage principle.

The system set out in article 153 of the Convention implies that the Enterprise, the States, together with State enterprises, and State-sponsored entities associated with the Seabed Authority all are involved in seabed area activities. This is more patent by the fact that the system of exploration and exploitation envisioned in the Convention subjects the activities to be undertaken to regulated procedures such as authorization and a contractual framework.

The Authority is bound to respond to the interest underlying its primary competences. The advisory opinion that is under consideration by the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea provides an opportunity to participate in the legal process of rendering effective the international public interest through assistance to the Authority in the accomplishments of its important goals.

There is no controversy in the assertion that States Parties are obliged to cooperate with the Authority in the performance of its function of controlling activities in the Area. The Authority is to secure compliance by States Parties and other entities with Part XI of the Convention, its relevant Annexes, the rules, regulations and procedures of the Authority and the terms of approved plans of work.

It is worth mentioning that the general conduct of States in relation to the Area shall be in accordance with the provisions of the Convention and with general international law, without distinctions; this is the common principle. At the same time, the leading goal of the regime embodied in the Convention is the benefit of mankind. This feature must inspire all activities in the Area.

Thus, activities with respect to the seabed resources shall take into consideration the interests and needs of developing States as members of mankind. This rule should inspire the whole application of Part XI and related norms. For this reason, we also face an opportunity to shed light on the assistance to States, mainly developing nations, who would like to play a more active role in the seabed activities and to contribute to the development of its resources. Through these introductory comments, Chile, as a State Party to the Convention, is pleased to advance some answers to the questions raised by the Authority with a view to cooperating with its important functions.

Provisions of the Convention constitute a comprehensive legal system to be interpreted in conjunction with the general principles of international responsibility of the

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States. Together, they constitute the fundamental framework to address issues such as the status of the sponsorship by States Parties of activities in the Area, the extent of liability of a State Party for any failure to comply with the provisions of the Convention by an entity whom it has sponsored under article 153, paragraph 2(b), of the Convention, and the scope and meaning of the necessary and appropriate measures that a sponsoring State must take in order to fulfil its responsibility. This assertion is particularly valid when activities are not conducted by the States themselves but by entities sponsored by States Parties.

The questions before us are:

1. What are the legal responsibilities and obligations of States Parties to the Convention with respect to the sponsorship of activities in the Area in accordance with the Convention, in particular Part XI, and the 1994 Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982?

2. What is the extent of liability of a State Party for any failure to comply with the provisions of the Convention, in particular Part XI, and the 1994 Agreement, by an entity whom it has sponsored under article 153, paragraph 2 (b), of the Convention?

3. What are the necessary and appropriate measures that a sponsoring State must take in order to fulfil its responsibility under the Convention, in particular article 139 and Annex III, and the 1994 Agreement?

These questions should be answered in the light of the general responsibilities of the States Parties with respect to activities in the Area.

We will refer first to the general obligations of States Parties to the Convention and then to the particularities that may be applicable to Part XI and the seabed regime. In this respect, it is reasonable to sustain that according to the 1969 Vienna Convention on the Law of Treaties, the United Nations Convention for the Law of the Sea provides the general systemic framework to deal with the obligations upon States Parties in the seabed area that comprise, among other obligations, those accrued to them as sponsoring States of contractors.

In this respect, we should also bear in mind article 304 on responsibility and liability for damage, which provides: "The provisions of this Convention regarding responsibility and liability for damage are without prejudice to the application of existing rules and the development of further rules regarding responsibility and liability under international law".

Provisions envisaged in article 235 of the Convention on Responsibility and Liability within the context of protection and preservation of the marine environment are also relevant to answer the questions submitted to the Chamber. It is clear that the assertion that "States are responsible and liable for the fulfilment of their international obligations concerning the protection and preservation of the marine environment", and their possible liability in accordance with international law, is a general principle that applies to activities in the Area.

Consequences arising from this general principle will comprise the adoption of measures so as to assure the existence of procedures and effective remedies for damage caused by pollution of the marine environment by natural or juridical persons under their jurisdiction. Hence, that is the relevance of dispute settlement procedures to deal with these issues.

As a general norm applicable to activities in the Area or that may have an impact on the Area, article 138 of the Convention sets out a common legal ground for all States Parties as follows:

The general conduct of States in relation to the Area shall be in accordance with the provisions of this Part, the principles embodied in the Charter of the United Nations and other rules of international law in the interests of maintaining peace and security and promoting international cooperation and mutual understanding.

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Answers to the Questions

Question 1: In compliance with the general rules, article 139 provides for basic obligations and standards of responsibility for States carrying out activities in the seabed area, first and foremost, the responsibility to ensure compliance and, after that, conditions and requirements for the liability for damage.

This is spelled out as follows: States Parties shall have the responsibility to ensure that activities in the Area, whether carried out by States Parties or State enterprises or natural or juridical persons which possess the nationality of States Parties or are effectively controlled by them or their nationals, shall be carried out in conformity with this Part. The same responsibility applies to international organizations for activities in the Area carried out by such organizations. This is a general obligation for all States Parties towards persons or entities subject to their jurisdiction due to the nationality or according to the effective control rule.

Paragraph 2 of article 139 provides that damage caused by the failure of a State Party or international organization to carry out its responsibilities under this Part shall entail liability. However, according to paragraph 3 of article 139, a State Party shall not be liable for damage caused by any failure to comply with this Part by a person whom it has sponsored under article 153, paragraph 2(b), if the State Party has taken all necessary and appropriate measures to secure effective compliance under article 153, paragraph 4, and Annex III, article 4, paragraph 4, of the Convention.

Moreover, the Authority is endowed with the competence to exercise control over the activities in the Area “as is necessary” for securing compliance with the relevant provisions of the Convention and rules relating thereto. In their turn, States Parties shall assist the Authority by taking all measures necessary to ensure such compliance in accordance with article 139.

Then we shall deal with the specific responsibilities related to the sponsorship of activities in the Area. Paragraph 4 of article 4 of Annex III of the Convention provides that “a sponsoring State or States shall, pursuant to Article 139, have the responsibility to ensure, within their legal systems, that a contractor so sponsored shall carry out activities in the Area in conformity with the terms of its contract and its obligations under this Convention.”

The obligation to ensure is qualified by the next sentence which provides that

A sponsoring State shall not, however, be liable for damage caused by any failure of a contractor sponsored by it to comply with its obligations if that State Party has adopted laws and regulations and taken administrative measures which are, within the framework of its legal system, reasonably appropriate for securing compliance by persons under its jurisdiction

The cornerstone of the system of responsibility and liability of the sponsoring State is hereby exposed. We should then refer to the scope of the obligation applicable to States, which is to ensure that a sponsored contractor carries out activities in conformity with the contract to which it is a party and its obligations under the Convention.

It is evident that the obligation to ensure does not mean to provide a guarantee by the sponsoring State to the conduct that a contractor may have. Operator's responsibility and liability does not entail the responsibility and liability of the sponsoring State. It is clear that the Convention does not attribute the activities of the operator to any sponsoring State, and that the Convention assigns primary responsibility to the contractor for its own activities.

Thence, the Convention adopts the pattern of other internationally negotiated instruments in relation to damage - including damage to the environment - which would not have occurred or continued if the sponsoring State had carried out its obligations under the

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Convention with respect to its operator. This poses the question of the status and scope of the applicability of the concept of residual liability of the sponsoring State according to the Convention.

It is thus expected that the sponsoring State adopts laws and regulations as well as administrative measures which are necessary and reasonably appropriate to secure compliance by the sponsored contractors of the obligations set out in the Convention. The assessment of what is necessary and reasonably appropriate for securing compliance may have to take into account the specific circumstances of the case, as there are no absolute obligations arising from these provisions.

Nevertheless, there must be a level of certitude of what is expected from a sponsoring State in order to assess whether the agreed standards of due diligence have been satisfied by the sponsoring State and by the operator. The Opinion of this Honourable Chamber will provide guidance to render these notions more accurate.

According to what has been said, the Convention attributes an important role to the internal legal system of each State Party desiring to participate in activities in the Area and to sponsor an entity subject to its jurisdiction.

Question 2 on State liability for a failure to comply with the provisions of the Convention and the 1994 Agreement by an entity it has sponsored raises two important legal questions: the existence of the elements conducive to State liability and the distinction between obligations accrued to a State from the obligations of the contractors.

There is no doubt that the general principles on State responsibility and consequent State liability apply in case of breach of international obligations attributed to the sponsoring State. Its consequence is the duty to make reparation for wrongful acts. Article 139 takes care of this obligation in paragraph 2, where it is envisaged the liability for damage caused by the failure of a State Party to carry out its responsibilities under Part XI, unless such State Party has taken all necessary and appropriate measures to secure effective compliance by the operator. The structure of this provision seems to be very important to understand how the system has been conceived.

We should not forget that the sponsoring State is a certifying authority of the nationality or the effective control exercised upon an applicant entity or its nationals, taking into consideration the place of registration and the primary place of business/domicile. The sponsoring State is also bound to assert that the applicant has the necessary financial resources to meet the estimated costs of a proposed plan of work for exploration. It means that the sponsoring State must show evidences of a substantial and genuine link with the contractor. The effective control test is of utmost importance.

While it is evident that the State Party does not assume responsibility for the conduct of a contractor whom it has sponsored, and that any liability will be the consequence of its own failure to comply with its own duties, it is also worth noticing that the Convention attaches consequences in cases where it can be demonstrated that there has been a causal link between the damage produced by the conduct of a contractor and the failure of the sponsoring State to comply with its own obligations.

In this context, a question may come up as to whether the breach of States obligations created the conditions for the failure of the contractor to abide by its obligations.

Environmental occurrences attributable to a breach of obligations by the contractor and the role of the sponsoring State regarding prevention and the status of the precautionary approach for such States pose more specific questions. For this purpose, the provision contained in the Regulations on Prospecting and Exploration adopted by the Seabed Authority aiming at the sponsoring State obligation to cooperate with the contractor in the establishment and implementation of monitoring programs regarding protection and preservation of the marine environment should be read together with the duty for a

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sponsoring State to apply the precautionary approach as reflected in the Rio Declaration (Principle 15) in order to ensure effective protection for the marine environment from harmful effects.

Question 3: While these questions may have to be decided by tribunals in the future, the third question posed to the Seabed [Disputes] Chamber encompasses elements which are more related to the definition of the substantive obligations of the sponsoring State in order to fulfil its responsibilities under the Convention and the 1994 Agreement.

The answer to this question is directly related to the status of obligations analyzed under Question 1. It is our view that the answer to this Question 3 depends on the establishment and enforcement of appropriate measures, as well as the enactment of laws and regulations applicable to the various stages of the contractor's involvement in seabed activities.

It might be important to characterize as effective the kind of control that a State is supposed to exercise over a contractor. That is to say, capable of ensuring the availability of legal and material resources of the operator to comply with the Convention

Thence, the standard of due diligence that should be expected from each State although undifferentiated in terms of its normative source and definition may be adjusted according to the specific circumstances of each case.

According to this, it is important to bear in mind the role of environmental principles and rules in the shaping of the concept of due diligence and its enforcement.

Mr President, Members of the Chamber, I come to my conclusions.

Recapitulating, the sponsoring State is bound to adopt laws and regulations to secure effective compliance with the terms of the contract between an operator and the Seabed Authority. The precise content of such regulations is not defined, but the Convention refers to "appropriate" and "reasonable" measures, notions to be assessed in controversial cases by means of dispute settlement procedures by reference to general applicable standards and the specific situation of each sponsoring State and contractor.

Due to the special role attributed by the Convention to the sponsoring State to assist the Authority to exercise the control over the activities in the Area, it is most plausible to assert that the obligation for States Parties is not only to adopt laws and regulations but also to render them effectively applied.

The role assigned to a sponsoring State is a consequence of the parallel system adopted for the organization of the conduct of operations by the Convention. It means a system based on the association between the Authority and States Parties and entities.

Being the contractor, the primary responsible actor in this system, it is important that the role of the sponsoring State for securing compliance by a contractor whom it has sponsored be subject to responsibility and liability principles for its own conduct and failures.

Mr President, Members of the Seabed Disputes Chamber, thank you for your attention.

The President:

Thank you very much, Mr Plaza.

I now come to the representative of Fiji.

Mr Tikoisuva, you now have the floor.

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STATEMENT OF MR TIKOISUVA
FIJI
[ITLOS/PV.2010/2/Rev.2, E, p. 35–42]*Mr Tikoisuva:*

President and distinguished Members of the Seabed [Disputes] Chamber of the International Tribunal for the Law of the Sea, allow me, Honourable President, to thank this Honourable Chamber for agreeing to allow the Republic of the Fiji Islands to present a statement on this very important issue of the seabed. Fiji is a small island State, amongst other neighbouring small island nations fully surrounded by the vast Pacific Ocean.

This statement is presented on behalf of the Republic of Fiji in respect of the questions submitted to this Honourable Chamber for an advisory opinion on the responsibilities and obligations of States sponsoring persons and entities with respect to activities in the international seabed area (known as "the Area").

At the outset, Fiji reiterates the basic requirement in article 140, paragraph 1, of the 1982 United Nations Convention on the Law of the Sea ("the Convention") that activities in the Area shall be carried out "taking into particular consideration the interests and needs of developing States". Moreover, the submissions that we make here are presented in strong support of "the effective participation of developing States in activities in the Area" as mandated under article 148. We are mindful of the definition of "activities" as stipulated in article 1, paragraph 1(3).

Despite their limited economic capacities, developing States have been given the opportunity to participate in and benefit from activities in the Area through partnerships with private sector enterprises. Whilst there is much scope to increase the involvement of developing States in activities in the Area, Fiji is fully cognizant of the need for developing States to do so with a clear understanding of the extent of the responsibilities and liabilities involved. In further recognition of the importance of environmental protection and the need for States to fully understand their responsibilities when it comes to activities in the Area, Fiji is exploring the opportunity to host a regional environmental seabed seminar in early 2011 in cooperation with the International Seabed Authority.

In line with the above measures, Fiji considers it important that advice be provided by this Honourable Chamber on the questions presented to it by the Council of the International Seabed Authority.

The three questions for this Honourable Chamber's consideration and determination are clearly set out in the Council's decision ISBA/16/C/13 of 6 May 2010. We will address them in turn in the course of this statement.

State Responsibilities and Obligations: The first question which this Chamber is required to consider and render its opinion on is: "What are the legal responsibilities and obligations of States Parties to the Convention with respect to the sponsorship of activities in the Area in accordance with the Convention, in particular Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982?"

In our view, the United Nations Convention on the Law of the Sea of 10 December 1982 ("the Convention") provides a comprehensive framework regarding the responsibilities and obligations of States Parties who sponsor individuals and enterprises that undertake activities in the Area. While Part XI of the Convention, together with the Agreement to implement Part XI ("the Agreement"), provides the legal framework governing activities in the Area, it is submitted that this Part cannot be read in isolation but has to be read and interpreted in conjunction with the other parts of the Convention and the Agreement to fully address this question.

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The provisions of the Vienna Convention on the Law of Treaties (VCLT) also make it clear that the terms of a treaty, such as the Convention, have to be interpreted in their context and in light of the treaty's object and purpose. The VCLT, under Article 31(3), clarifies that "any relevant rules of international law applicable in the relations between the parties" also need to be taken into account.

Indeed, the authoritative commentary on the Convention by Nandan, Lodge and Rosenne, *United Nations Convention on the Law of the Sea 1982: A Commentary*, Volume VI, published by Martinus Nijhoff Publishers of New York ("the Commentary"), observes at p.119 that "the provisions of the Convention regarding responsibility and liability are without prejudice to the 'application of existing rules and the development of further rules' regarding responsibility and liability under international law". That observation was made with reference to article 139 of the Convention, which should be read together with article 304.

As such, Fiji takes a slightly wider view of and approach to this question by making reference to other relevant provisions of the Convention that are not strictly within Part XI. Where applicable, reference is also made to other material to provide greater clarity.

In respect of the responsibilities of a sponsoring State, some of the key responsibilities include:

(a) Article 139, paragraph 1 - which requires that activities in the Area be carried out in compliance with the requirements of Part XI of the Convention (which deals with the development of resources in the Area).

(b) Article 153, paragraph 3 - requires the approval of the Authority to be obtained by a State-sponsored entity for activities in the Area in the form of a contract, since those activities in the Area are to be "organized, carried out and controlled by the Authority".

(c) Article 153, paragraph 4 - provides that a State Party must assist the Authority "by taking all measures necessary to ensure ... compliance" with article 139. As to what the phrase "all measures necessary" entail, this Honourable Chamber is invited to consider that issue in totality with the whole of Part XI. Some guidance in that regard is offered in Annex III, article 4, paragraph 4.

(d) Article 4, paragraph 4, of Annex III - which, as the Commentary cites at p. 126, "requires sponsoring States to ensure, within their legal systems, that contractors carry out activities in the Area in conformity with the terms of the contract with the Authority and their obligations under the Convention".

(e) Regulation 31(2) of the Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area ("the Regulations") adopted by the Authority - obligates a sponsoring State to adopt a precautionary approach to ensure the effective protection of the marine environment from harmful effects that may arise from activities in the Area.

(f) Article 235, paragraph 3 - in respect of damage caused by pollution of the marine environment, States are required to establish, where appropriate, an adequate compulsory insurance or compensation fund.

There are other more general responsibilities contained in the Convention, for instance under Part XII, which apply to all States, including States sponsoring activities in the Area. It will be apparent from the provisions of the Convention just outlined above, as well as from a reading of the other Parts of the Convention not highlighted here, that the legal responsibilities and obligations of States sponsoring activities in the Area are invariably the same as those imposed upon States who are involved directly in such activities.

Question two is with regard to the extent of a sponsoring State's liability. The second question before this Chamber is: "What is the extent of liability of a State Party for any failure to comply with the provisions of the Convention, in particular Part XI and the 1994

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Agreement, by an entity that it has sponsored under Article 153, paragraph 2(b) of the Convention?"

It will be clear from a reading of the provisions of article 139, paragraph 2, on liability that it is "without prejudice" to the rules of international law and article 22 of Annex III. Annex III, article 22, provides that a contractor is liable for any damage arising out of "wrongful acts in the conduct of its operations" undertaken in the Area and that in every case the liability is "for the actual amount of the damage".

In addition, Annex III, article 4, paragraph 4, makes it clear that the contractor is *prima facie* liable for any damage that it causes. As noted in the *Commentary* (at page 127), "this principle is restated in the Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area, which contain a provision [set out in Annex 4, section 16] relating to responsibility and liability as part of the Standard Clauses for Exploration Contracts".

The second limb of article 139, paragraph 2, also clarifies that:

A State Party shall not ...be liable for damage caused by any failure to comply with this Part by a person whom it has sponsored under Article 153, paragraph 2(b), if the State Party has taken all necessary and appropriate measures to secure effective compliance under Article 153, paragraph 4, and Annex III, article 4, paragraph 4.

In plain terms, a sponsoring State is not liable for any damage caused by the contractor if that State has "taken all necessary and appropriate measures" to secure effective compliance on the part of the contractor. Annex III, article 4, paragraph 4, provides some guidance as to what those "necessary and appropriate measures" might be. They include the adoption of laws and regulations as well as the implementation of "administrative measures which are, within the framework of its legal system, reasonably appropriate for securing compliance". Furthermore, it is noted from the *Commentary* (at page 127) that this "implies some flexibility in the type of measures [that might be imposed], and does not necessarily require sponsoring States to take enforcement action against contractors, but it does clearly require some action to be taken by the sponsoring State". In addition, it may be noted that State Parties also have the obligation, pursuant to article 209, paragraph 2, to

adopt laws and regulations to prevent, reduce and control pollution of the marine environment from activities in the Area undertaken by vessels, installations, structures and other devices flying their flag or their registry or operation under their authority, as the case may be.

In view of the clear language of the Convention, Fiji contends that so long as a sponsoring State enacts domestic legislation that properly regulates activities in the Area, seeks to protect the marine environment from pollution, establishes an adequate and compulsory insurance or compensation scheme, and undertakes other relevant administrative measures in respect of such activities in the Area, the sponsoring State will not be liable for damage caused by any failure of a contractor sponsored by it to comply with its obligations. In other words, there is no residual responsibility or liability on the part of the sponsoring State should the contractor fail to observe the standards established in the domestic legislation enacted in accordance with Part XI of the Convention and general international law.

Question three is with regard to the necessary and appropriate measures a State must take. The final question referred to this honourable Chamber for an opinion asks: "What are the necessary and appropriate measures that a sponsoring State must take in order to fulfill its

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responsibility under the Convention, in particular Article 139 of the Convention and Annex III, and the 1994 Agreement?”

From a developing State point of view, Fiji submits that the requirements and standards established under Part XI of the Convention apply equally to all States without regard to economic status or financial and other resources capability. In the absence of clear language or express provisions to the contrary, it can be inferred that the adoption of legislative frameworks and the implementation of administrative measures (Annex III, article 4, paragraph 4), as well as their enforcement by States, must be consistent with the standards established under the Convention.

Fiji holds the view that appropriate legislation which a State might adopt in respect of activities in the Area must be sufficient, effective and in accordance with international standards. That will ensure there is some element of uniformity across jurisdictions. To that end, Fiji submits that the Authority should consider assembling a model legislation that will assist State Parties in maintaining international standards in their domestic legislations. The Authority could ensure that such model legislation includes insurance provisions that cover the sponsoring State as a beneficiary and provides minimum insurance protection for each stage of the operation. For instance, article 235, paragraph 3, mandates that:

With the objective of assuring prompt and adequate compensation in respect of all damage caused by pollution of the marine environment, States shall cooperate in the implementation of existing international law and the further development of international law relating to responsibility and liability for the assessment of and compensation for damage and the settlement of related disputes, as well as, where appropriate, development of criteria and procedures for payment of adequate compensation, such as compulsory insurance or compensation funds.

To reinforce the point about uniform standards, it will be noted that article 194 of the Convention, dealing with the protection and preservation of the marine environment, provides that States are to take

all measures ... that are necessary to prevent, reduce and control pollution of the marine environment from any source, using for this purpose the best practicable means at their disposal and in accordance with their capabilities, and they shall endeavour to harmonize their policies in this connection.

Whilst it is accepted that this imports the element of due diligence in the discharge of a State's responsibilities under the Convention, what is actually meant by due diligence is unclear and varies in practice under different treaties. Malcolm Shaw QC, in his book on *International Law*, published by Cambridge University Press in 2003, observed at page 764 that:

The test of due diligence undoubtedly imports an element of flexibility into the equation and must be tested in the light of the circumstances of the case in question. States will be required, for example, to take all necessary steps to prevent substantial pollution and to demonstrate the kind of behavior expected of good government, while such behavior will probably require the establishment of systems of consultation and notification.

As a first step and in the absence of a model legislation, Fiji considers that the Convention already provides key requirements and standards that set the minimum threshold for the discharge of a sponsoring State's responsibility. Although certain aspects of the standards contained within some of the provisions, such as articles 139, 153 and Annex III.

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article 4, paragraph 4, are yet to be clarified, as already pointed out in this statement, enough indications are nevertheless presented by those and other provisions of the Convention that will guide sponsoring States in the discharge of their responsibilities under it.

This view accords with the basic duty of States that they are not to act in a manner that will adversely affect the rights of other States.

To conclude, Mr President, in summary, Fiji submits that:

(i) Part XI of the Convention provides a clear benchmark and framework setting out the responsibilities and obligations of a State that sponsors a contractor conducting activities in the Area.

(ii) The extent of a sponsoring State's liability is confined to a failure on its part to secure compliance by a contractor with the terms and conditions of its contract. The contractor bears the primary responsibility for any damage caused.

(iii) The types of measures, whether legislative or administrative, that a sponsoring State adopts in respect of activities in the Area must be sufficient, effective and in accordance with international standards.

Honourable President and Members of the International Tribunal of the Law of the Sea, thank you for attention and patience.

The President.

Thank you very much, Mr Tikoisua, representative of Fiji.

I now give the floor to the distinguished representative of Mexico, Ambassador Hernández.

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STATEMENT OF MR HERNANDEZ
MEXICO
[TTLOS/PV.2010/2/Rev.2, E, p. 42–54]

Mr Hernandez:

Your Honour, Judge Tullio Treves, President of the Seabed Disputes Chamber, distinguished Members of the Chamber, it is an honour for me to appear before you today in my capacity as Legal Adviser to the Ministry of Foreign Affairs of Mexico.

I feel particularly privileged today, 15 September, when Mexico is celebrating the 200th anniversary of the beginning of its War of Independence. This is the first occasion that the Chamber has been asked to render an advisory opinion in accordance with article 191 of the UN Convention on the Law of the Sea. We salute the opportunity to resort to the expertise and wisdom of the Tribunal and Members of this Chamber. The advisory opinion will enlighten the International Seabed Authority on a question of utmost importance for the exploration and exploitation of the deep seabed and will enrich international jurisprudence.

Mr President, Members of the Chamber, if you will allow me, I will now turn to the substance of my statement. I will speak for about 30 minutes.

First, it is the view of Mexico that the three questions posed by the Council call for a broad approach, which entails the need to look for the relevant provisions of the Convention and its annexes, the 1994 Agreement and the rules, regulations, and procedures of the Authority. That is not only warranted by the broad formulation of the questions posed by the Council but also, as other written statements have highlighted, by the operation of article 38 of the Statute of the Tribunal read in conjunction with article 293, paragraph 1, of the Convention. In that sense, “other rules of international law not incompatible with [the] Convention” may also be applied.

Secondly, one should not forget that the impacts of the activities in the Area on the marine environment of the deep seabed, particularly to its benthic ecosystems, are largely unknown. The uncertainties over the impacts to the marine biodiversity from seabed mining, in particular to the deep ocean ecosystems found at hydrothermal vents, have raised concerns from scientists, policy-makers and environmentalist, among others. Indeed, the environmental consequences of exploring and exploiting polymetallic sulphides at deep sea vents remain uncertain.

It is submitted that, in answering the questions framed by the Council, a broad approach and the application of the precautionary principle, given the existing scientific uncertainty, require to be duly taken into account as the background within which the nature and scope of the responsibilities and obligations of States sponsoring persons and entities with respect to activities in the international seabed area need to be assessed.

At the end, Mr President, a broad approach is also justified by the preamble of the Convention on the Law of the Sea which reminds us that “problems of ocean space are closely interrelated and need to be considered as a whole”.

Allow me now to address each of the questions raised by the Council of the Authority.

Question 1: Mexico is of the view that a broad approach should be considered in identifying the responsibilities and obligations of the sponsoring State under Question 1. Those responsibilities and obligations include prominently the need to prevent monopolization of activities in the Area, as well as the obligations to protect and preserve the marine environment as envisaged in the Convention, including its Part XII.

States have a wide variety of obligations to comply with sponsoring persons and entities for activities in the Area in conformity with article 153, paragraph 2(b), of the Convention.

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Part XI has specific references to obligations of the Authority and States Parties to protect and preserve the marine environment. These obligations need to be read together with the obligations of States consistent with the obligations found in Part XII of the Convention.

Article 145 prescribes the obligation to take necessary measures in accordance with the Convention with respect to activities in the Area to ensure effective protection for the marine environment from harmful effects which may arise from such activities. To that end, the Authority shall adopt appropriate rules, regulations and procedures for the prevention, reduction and control of pollution, the protection and conservation of the natural resources of the Area and the prevention of damage to the flora and fauna of the marine environment. These references include, in contemporary terms, the biodiversity of the deep sea bed beyond limits of national jurisdiction.

Apart from having effective legislation and administrative measures in that regard, States have the "obligation" to ensure that sponsored persons and entities comply with a number of environmental requirements in order to conclude contracts with the Authority for exploitation of the resources of the Area. In this connection, the regulations for polymetallic nodules and the regulations for polymetallic sulphides contain a variety of obligations to that effect.

At the outset, it is noteworthy to recognize the broad definition of "marine environment" found in common Regulation 1(3)(c) of both sets of regulations. This broad definition is not found in the Convention but could be considered a normative development if compared with article 1, paragraph 1(4), of the Convention which defines only "pollution of the marine environment."

These and other elements to address Question 1 are fully developed in Mexico's written statement.

Let me now turn to Question 2. It is well known that, under general international law, any breach of a State Party to carry out its obligations under the Convention entails State responsibility and gives rise to reparation for the inflicted injury by the internationally wrongful act.

That includes the breach of the general obligation of States to ensure that activities within their jurisdiction and control do not harm the environment or areas beyond national jurisdiction. The existence of the principle of prevention as a customary rule was confirmed by the International Court of Justice in the *Legality or Use of Nuclear Weapons* case, and also most recently in the *Pulp Mills on the Uruguay River* case.

In the context of the first sentence of article 139, paragraph 2, of the Convention, damage caused by the failure of a State Party to carry out its responsibilities under Part XI and the 1994 Agreement entails its liability. Such failure constitutes a breach of the obligations of the State Party under the Convention and thus engages the liability of the State for internationally wrongful acts.

In addition, according to the second sentence of article 139, paragraph 2, there might be instances where damage is caused by the sponsored entity for non-compliance with its obligations. In those cases, in order to engage the liability of the sponsoring State, it is necessary to convincingly establish a link between the damage inflicted by the sponsored entity resulting from its non-compliance and the State Party's failure to take all necessary and appropriate measures.

However, according to the second sentence of article 139, paragraph 2, the State will, *prima facie*, be absolved from being liable if it has taken all necessary and appropriate measures to secure effective compliance with the provisions of the Convention and related Annexes, as well as the rules, regulations and procedures of the Authority, including the approved plans of work, as reflected in article 153, paragraph 4. All "necessary and appropriate" measures are further elaborated in Annex III, article 4, paragraph 4. They refer

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to the adoption of legislative and administrative measures within the framework of the legal system of the sponsoring State.

The obligation of the sponsoring State to take all necessary and appropriate measures to secure effective compliance by adopting laws and regulations and by taking administrative measures within the framework of its legal system is one of due diligence. In order for the sponsoring State to discharge this obligation, it requires exercising a high threshold of due diligence inasmuch as there are scientific uncertainties relating to the impacts on the fragile ecosystems of the international seabed area. The content and scope of the concept of due diligence applied to this context will be further developed in my intervention when addressing Question 3.

Mexico is of the view, along with some other parties and entities which submitted written statements, that article 22 of Annex III, as well as Section 16.1 of Annex 4 to both Regulations on Polymetallic Nodules and on Polymetallic Sulphides, channels to the sponsored entity or persons the primary liability to cover the amount for the damage that it caused, including the costs of reasonable measures to restore or reinstate the marine environment and reasonable measures to prevent or limit damage to the marine environment.

However, channelling primary liability to the sponsored entity does not absolve entirely in every case the sponsoring State from being held subsidiarily liable. For instance, that situation might arise if the sponsored entity lacks sufficient financial resources to fully cover the amount of the damage or is no longer available. This subsidiary liability might be a reflection that the State has failed to take all necessary measures to secure compliance for not providing the appropriate recourse within its legal system to ensure prompt and adequate compensation, or that it has not introduced the obligation of the operator to maintain an adequate financial security as envisaged in article 235, paragraph 2, of the Convention.

As in many other liability regimes, the Convention also attempts to emphasize the reparative function of liability. By attaching primary liability to the sponsored entity, the obligation to repair is shifted to the entity which caused the damage. This is in line not only with the “polluter-pays” principle but is also a matter of equity and fairness to allocate the burden to those who benefit from the activities in the international seabed area; otherwise, they would have been unjustly enriched. However, in addition to the sponsored entity, as I already explained, the sponsoring State may also be liable if certain conditions are met, including when the sponsored entity has insufficient financial resources to fully repair. To argue otherwise would be tantamount to accepting irremediably that a key provision in the system of the exploration and exploitation of the resources of the Area contains a gap.

Mr President, Members of the Chamber, I now turn to the issue of the general rules of international liability of States.

It seems that other rules of international law need to be taken into account since the introductory sentence to article 139, paragraph 2, refers to them by indicating that such provision is “[w]ithout prejudice to the rules of international law.” Other articles of the Convention also prescribe that the provisions regarding responsibility and liability are without prejudice to the application of existing rules and the development of further rules, particularly articles 304 and 235, paragraph 3. In addition, the reference to other rules of international law may seem also necessary when interpreting the text of the Convention, if one considers the effect of Article 31, paragraph 3(c), of the 1969 Vienna Convention on the Law of Treaties, which stipulates that there shall also be taken into account “any relevant rules of international law applicable in the relations between the parties.”

Having expressed that, Mr President, Members of the Chamber, with your permission, I will now turn to address Question 3. In our view, this question is closely linked to Question 1.

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My task now, Mr President, will be to address the issue of the necessary and appropriate measures that the sponsoring State must take in order to fulfil its responsibility under the Convention. In doing so, we raise the following central issues: first, the necessary laws, regulations and administrative measures, adopted within the framework of the legal system of the sponsoring State, shall conform to a high due diligence threshold in order to fulfil its responsibility under the Convention; second, in that context, the application of a strict liability regime and the need to ensure prompt and adequate compensation will be explored as "necessary and appropriate measures" for the sponsoring State in order to fulfil its responsibility under the Convention.

Mr President, regarding the first of those two central issues, Mexico is of the view that Annex III, article 4, paragraph 4, further elaborates the content of the "necessary and appropriate measures" that a sponsoring State needs to take in order to secure compliance by the sponsored entity. Those relate to the adoption of laws, regulations and administrative measures, adopted within the framework of the legal system of the sponsoring State. Part of those legislative and administrative measures shall also give effect to article 209, paragraph 2, which requires taking legislative steps to prevent, reduce, and control pollution of the marine environment from activities in the Area, which shall be no less effective than the international rules and regulations. In doing so, article 209 sets minimum standards as to the scope of such measures.

In that respect, the Regulations on Polymetallic Nodules and on Polymetallic Sulphides provide further elaboration of the necessary and appropriate measures that States must take so as to fulfil their responsibilities. In particular, the regulations detail a broad range of environmental obligations.

The application of a high degree of due diligence becomes necessary because, first, there are scientific gaps in knowledge regarding the impacts on the marine ecosystems of the deep sea from the activities of seabed mining; second, those marine ecosystems, including the biodiversity which they harbour, are characterized by their fragility and rarity; and, third, the Area and its resources are part of the common heritage of mankind.

Having that in mind, the due diligence standard is not merely discharged with the adoption of laws, regulations and administrative measures. In order for the sponsoring State to fulfil its obligations under the Convention, it is necessary that such laws, regulations and administrative measures conform to a high due diligence threshold.

In that connection, such legislative and administrative measures require adequate and rigorous monitoring, supervision and enforcement. The International Court of Justice recently stated in the *Pulp Mills on the River Uruguay* case:

[the obligation to prevent pollution] entails not only the adoption of appropriate rules and measures, but also a certain level of vigilance in their enforcement and the exercise of administrative control applicable to public and private operators, such as the monitoring activities undertaken by such operators ...

While it may be true that the State enjoys a measure of flexibility in the type of measures that it introduces, given the particularities of its own legal system, that assumption does not, however, prevent it from identifying some key aspects or minimum requirements in order to apply a high degree of due diligence.

Mr President, I now turn to deal with three aspects which, in our view, the sponsoring State shall include in the legislative and administrative measures within its legal system to conform to it to a high degree of due diligence. By no means will it be an exhaustive list, since many of the relevant issues were outlined in the context of our written observations concerning Question I.

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First, the obligation to carry out environmental impact assessments. In the recent judgment concerning the *Pulp Mills on the River Uruguay* case, the International Court of Justice recognized that an environmental impact assessment “may be now considered a requirement under general international law where there is a risk that a proposed industrial activity may have significant adverse impact in a transboundary context.” It also added that “an environmental impact assessment must be conducted prior to the implementation of a project.”

Although article 206 of the Convention does not, strictly speaking, contain an express reference to an obligation to undertake an environmental impact assessment, it does, however, prescribe that States shall assess the potential effects on the marine environment of certain activities under their jurisdiction and control. Seabed mining seems to be an activity within the meaning of article 206. More specific references to this obligation are found in section 1, paragraph 7, of the Annex of the 1994 Agreement, which provides that any application for approval of a plan of work shall be accompanied by an assessment of the potential environmental impacts of the proposed activities. This provision is given effect in Regulation 18(c) and Annex 4, section 5.5, of the Regulations on Polymetallic Nodules, as well as in Regulation 20, paragraph 1(c), and Annex 4, Section 5.2(a), of the Regulations on Polymetallic Sulphides.

Second, I refer to the obligation to provide for periodic reviews. Mr President, in order to discharge a high threshold of due diligence, it seems necessary that laws, regulations and administrative measures adopted within the legal systems of the sponsoring States require periodic review mechanisms. In this respect, in its Articles on Prevention of Transboundary Harm from Hazardous Activities, the International Law Commission has recognized that

[w]hat would be considered a reasonable standard of [...] due diligence may change with time: what might be considered an appropriate and reasonable procedure, standard or rule at one point in time may not be considered as such at some point in the future. Hence, due diligence in ensuring safety requires a State to keep abreast of technological changes and scientific developments

This is particularly true in deep seabed mining where the technology is evolving and where many important scientific questions remain.

In the context of international rules and regulations concerning seabed mining in the Area, the obligation for periodic review is found, *inter alia*, in articles 209, paragraph 1, and 154 of the Convention.

Third, the obligation to monitor implementation and enforcement of laws, regulations and administrative measures, within the framework of the sponsoring State legal system. In the already mentioned *Pulp Mills on the River Uruguay* case, the International Court of Justice held that “[...] once operations have started and, where necessary, through the life of the project, continuous monitoring of its effects on the environment shall be undertaken.”

In this regard, States Parties, in accordance with article 153, paragraph 4, are to assist the Authority by taking all measures necessary to ensure compliance. In particular, sponsoring States shall cooperate with the Authority in the establishment and implementation of programmes for monitoring and evaluating the impacts of deep seabed mining on the marine environment. Therefore, it seems necessary that the sponsoring State, within its legal system, has in place an adequate and rigorous monitoring scheme.

The same applies to enforcement measures. These may include the termination of the sponsorship itself, as well as civil and criminal sanctions for non-compliance on the part of the sponsored entity. In addition to those measures, we are of the view that setting up a strict liability regime, within the legal system of the sponsored State, for damage caused by the sponsored entity in tandem with an appropriate scheme to ensure prompt and adequate

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compensation, is consistent with the need to discharge a high threshold of due diligence so as to fulfil the responsibility envisaged in article 139 of the Convention.

I now turn to the final point of my intervention. I will now address the issue as to whether the establishment of a strict liability regime, including the need to ensure prompt and adequate compensation could be construed as part of the "necessary and appropriate measures" taken within the legal system of the sponsoring State.

Mr. President, a strict liability regime is justified for the following reasons:

(i) Such a regime should fulfil the reparative and preventive functions of liability ensuring adequate compensation and inducing the operator to act with extreme caution and care in order to avoid liability.

(ii) In light of the scientific uncertainties of the impacts to the marine eco-systems, including to the benthic biodiversity, from activities in the Area, it calls for the application of the Principle 15 of the Rio Declaration. This Principle is in turn embodied in various provisions of both sets of Regulations on Polymetallic Nodules and on Sulphides.

(iii) Article 304 of the Convention is without prejudice the application of existing rules and the development of further rules regarding responsibility and liability under international law. Article 235, paragraph 3, calls for similar developments "with the objective of assuring prompt and adequate compensation in respect of all damage caused by pollution of the environment." Channelling strict liability to the operator has been done at the national and international level, wherever the activities "carry with them certain inherent risks of causing significant harm." This is also consistent with Principle 13 of the Rio Declaration of 1992.

(iv) Having mentioned that, it seems appropriate to express that, without prejudice to Annex III, article 22, the Convention itself does not prohibit developing further rules on liability. Moreover, this does not seem to be precluded by the somehow ambiguous formulation of Regulation 32 of the Regulations on Sulphides.

(v) Even if the latter was not the case, it seems that the application of a strict liability regime targeted to contractors sponsored by a State Party in order to ensure the protection and preservation of the marine environment of the Area, is possible. The Convention provides for the application of more stringent environmental rules or regulations in conformity with Annex III, article 21, paragraph 3. Indeed, such approach shall not be deemed inconsistent with Part XI.

(vi) Finally, article 235, paragraph 2, obliges States to ensure that recourse is available in accordance with their legal systems for prompt and adequate compensation or other relief in respect of damage caused by pollution of the marine environment by persons under their jurisdiction.

Mr President, it may be of assistance to sponsoring States, when designing an appropriate strict liability regime, that they take due account of the International Law Commission (ILC) Principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities developed under the rubric of the topic "International Liability for Injurious Consequences arising of Acts not Prohibited by International Law." In particular, Principle 4 provides that, in imposing strict liability to ensure prompt and adequate compensation, States should consider the following three measures:

(a) The requirement on the operator to establish and maintain financial security, such as insurance, bonds or other financial guarantees.

(b) In case that proves to be insufficient to provide adequate compensation, industry-wide funds at the national level may also be considered. As the International Seabed Authority moves closer to the exploitation phase of the resources of the Area, it may be appropriate to think also in the future of the possible establishment of a compensation fund at

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the international level within the ambit of the Authority, inspired, perhaps, by the existing International Oil Pollution Compensation Fund.

(c) If those measures still remain insufficient, States should also ensure that additional financial resources are made available.

Now, Mr President and Members of the Chamber, if you allow me, I will present to you our concluding submissions:

The Area and its resources are the common heritage of mankind. However, there are scientific uncertainties concerning the impacts of seabed mining of the ecosystems and biodiversity of the deep sea. In the light of that, we respectfully request that the questions addressed to the Seabed Disputes Chamber of the Tribunal can be answered as follows.

On Question 1, a broad approach should be considered in identifying the responsibilities and obligations of the sponsoring State in conformity with the Convention and the 1994 Agreement. Those responsibilities and obligations include prominently the need to prevent monopolization of activities in the Area, as well as the obligations to protect and preserve the marine environment as envisaged in the Convention, including its Part XII;

On Question 2, primary liability should be attached to the sponsored entity. However, under certain circumstances, the sponsored State may also be liable in case the compensation of the operator proves to be insufficient or unavailable. In this connection, the Chamber may wish to consider that fact as a possible reflection of the sponsoring State's failure to provide the necessary and appropriate legislative and administrative measures to ensure adequate compensation. Consequently, the State would not be exercising the necessary due diligence in order to secure effective compliance under the Convention and the 1994 Agreement.

Finally, on Question 3, Mexico submits that the necessary laws, regulations and administrative measures, adopted by the sponsoring State, shall conform to a high degree of due diligence in order to fulfil its responsibility under the Convention. In that context, we also ask the Chamber to find that the establishment of a strict liability regime, including the need to ensure prompt and adequate compensation, is to be construed as part of the "necessary and appropriate measures" within the legal system of the sponsoring State in order to fulfil its responsibility under the Convention.

Mr President, distinguished Members of the Chamber, this concludes Mexico's oral arguments. I thank you for your attention.

The President:

Thank you very much, Ambassador Hernández.

This brings us to the end of today's proceedings. As indicated yesterday, the Chamber may see a need to address questions to delegations. Such questions would be sent by the Chamber to delegations indicating a time-limit for a response.

The Chamber will sit again tomorrow at ten o'clock in the morning. At that sitting the Representatives of Nauru, the United Kingdom, the Russian Federation, the Intergovernmental Oceanographic Commission of the United Nations Educational, Scientific and Cultural Organization and the International Union for the Conservation of Nature will address the Chamber to present their oral statements.

It is possible that tomorrow's sitting will extend into the afternoon. The Chamber's sitting of today is now closed.

(The sitting closes at 1 15 p.m.)

RESPONSIBILITIES AND OBLIGATIONS OF STATES WITH RESPECT TO ACTIVITIES IN THE AREA

PUBLIC SITTING HELD ON 16 SEPTEMBER 2010, 10.00 A.M.**Seabed Disputes Chamber**

Present. *President* TREVES; *Judges* MAROTTA RANGEL, NELSON, WOLFRUM, YANAI, KATFKA, HOFFMANN, GAO, BOUGUETAIA, GOLITSYN; *Registrar* GAUTIER.

List of delegations: [See sitting of 14 September 2010, 10.00 a.m.]

AUDIENCE PUBLIQUE TENUE LE 16 SEPTEMBRE 2011, 10 HEURES**Chambre pour le règlement des différends relatifs aux fonds marins**

Présents. M. TREVES, *Président*; MM. MAROTTA RANGEL, NELSON, WOLFRUM, YANAI, KATEKA, HOFFMANN, GAO, BOUGUETAIA, GOLITSYN, *juges*; M. GAUTIER, *Greffier*.

Liste des délégations : [Voir l'audience du 14 septembre 2010, 15 heures]

The President.

Good morning. We will now continue the hearing in Case No. 17 concerning the Request for an advisory opinion on responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area.

Today we will hear statements of Nauru, the United Kingdom, the Russian Federation, the Intergovernmental Oceanographic Commission of the United Nations Educational, Scientific and Cultural Organization and the International Union for the Conservation of Nature. It is to be expected that not all participants will be able to speak during the morning sitting and the hearing will be continued by holding a sitting at 3 p.m.

I now give the floor to the delegation of Nauru, which has requested a speaking time of one hour and twenty minutes.

Before I call Mr Jacob to the lectern, I invite all speakers, as I did yesterday, not to speak too quickly because the interpreters sometimes have difficulty following them.

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NAURU
[ITLOS/PV.2010/3/Rev.2, E, p. 1-21]

Mr Jacob:

Good morning, Honourable President, Members of the Seabed Disputes Chamber. It is indeed an honour to be here this morning to make this presentation on behalf of my Government, the Republic of Nauru, and the people of Nauru.

Mr President, with your permission the Nauruan delegation wishes to commence by reflecting upon the fundamental purpose of the Convention and the reason we are here today, which is: to promote global economic and social advancement in accordance with the purposes and principles of the Charter of the United Nations, specifically, in accordance with Article 1(3).

As clearly detailed in the preamble of the United Nations Convention on the Law of the Sea, the States Parties to the Convention are, paragraph 1: "... aware of the historic significance of this Convention as an important contribution to the maintenance of peace, justice and progress for all peoples of the world"; paragraph 5: "Bearing in mind that the achievement of [the Convention's] goals will contribute to the realization of a just and equitable international economic order which takes into account the interests and needs of mankind as a whole and, in particular, the special interests and needs of developing countries"; and paragraph 7: "Believing that the Convention will promote the economic and social advancement of all peoples of the world, in accordance with the Purposes and Principles of the United Nations as set forth in the Charter".

Additionally, in stipulating the policies specifically relating to activities in the Area, article 150 provides that

Activities in the Area shall . . . be carried out in such a manner as to foster healthy development of the world economy and balanced growth of international trade, and to promote international cooperation for the over-all development of all countries, especially developing States, and with a view to ensuring (a) the development of the resources of the Area . . .

Mr President, we must not lose sight of the gravity and practical meaning behind those words adopted by the architects of UNCLOS, particularly in regard to progress, international economic order, promotion of economic and social advancement, healthy development of the world economy, and development of the resources of the Area.

That is why we are here today. That is the purpose of the Convention as set out in the preamble: progress, promotion, advancement, and development.

Let us now consider this fundamental question: how can the Convention, in a practical and meaningful sense, achieve its critical mandate of promoting global economic and social development?

To answer this question, we must make a further inquiry: where does economic and associated social development come from? What fuels economic growth and increases the livelihoods of populations? What provides the basis for masses of people to be brought out of hunger, disease and poverty and enables them to obtain the fundamental human needs? What are the basic ingredients essential for economic and associated social development? The answer, quite simply, is natural resources. Economic development simply cannot occur without those basic ingredients for growth such as iron ore and the primary metals including nickel, copper, and alumina.

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The Nauruan delegation wishes to point out for those unaware that nickel and copper are of course the metals of greatest economic interest in seabed polymetallic nodules in the Area.

From the Stone Age to the Bronze Age to the Iron Age, human evolution and progress has been defined by harnessing materials, minerals, and advancing tool-making and metal technology; this has ensured the survival and development of humanity. From providing early civilizations with the resources to build shelters and effectively hunt and gather food; to fuelling the industrial revolution; to advancing our scientific knowledge and medical development; and today, to providing the means of building clean alternative energy solutions and pollution abatement technology, which in many instances demand significantly more copper and nickel than traditional energy sources.

It can be noted that nickel is used in over 300,000 applications, and copper is essential to telecommunications, architecture, energy, plumbing, heating and transport. Indeed, copper and its alloys have been used by human civilization for over six thousand years. It has taken a tremendous amount of copper and steel to get developed States to where they are today and to give those States the things which are these days taken for granted. In 1900 we used just under 1 pound of copper per person. Today we use 6 pounds per person per year; and yet the vast majority of the world's citizens have yet to participate in even the most basic progress.

Put simply, Mr President, there cannot be economic development without these raw materials, and we must identify a way to ensure developing States have an affordable and accessible supply of such primary metals. In particular, there are many developing States that simply do not have nickel and copper deposits; such States of course are the ones most in need of participating in seafloor polymetallic nodule mining in the Area.

Now let us reflect back on the original question posed: how can the Convention, in a practical and meaningful sense, achieve the goals set out in its preamble and promote global economic and social development? The answer is, of course: by promoting the development of the resources in the international seabed area so as they can be utilized to fuel economic and social growth. Harnessing the value of these seafloor resources, particularly those containing nickel and copper, is essential if we are to maintain the standard of living in the developed world, and is critical if we are to simultaneously increase the standard of living of people in the developing world.

Indeed, over 30 years ago the United Nations realised the importance of seafloor polymetallic nodules to the future world economy and commissioned the United Nations Ocean Economics and Technology Office to further investigate the potential of the resource.

Ultimately, every human being deserves to have their basic rights and needs met, including: freedom from extreme poverty, hunger and disease; quality education; the right of women to give birth without risking their lives; productive and decent employment; and good health and shelter, all of which require the provision of housing, shelter, schools, hospitals, water pipes and electrical cables which in turn require huge quantities of metals from mineral resources.

Mr President, in the light of the significant ramifications for global economic and social development, the interpretation of the Convention's provisions pertaining to the Area has great significance for the livelihood of millions, if not billions, of people around the world today, and into the future. Extreme care is therefore warranted in interpreting these provisions here at the Seabed Disputes Chamber. Depending upon whether the interpretation encourages commercial development of seafloor resources, or discourages it, will mean the difference between life and death for millions of people moving forward.

Development of the resources of the Area is not just critical to economic and social progress, but these seafloor resources must be developed to help ensure the future environmental sustainability of the planet

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It is a simple fact that the metals required for economic and social growth must come from somewhere. The billions of people living in developing States such as China, India and Africa have a right to have their basic needs met and a higher standard of living. Unfortunately, the current supply of new and recyclable metals is simply not enough to feed this growth at sustainable prices.

Given that the demand for raw materials will only increase, we must look to the seafloor to provide a more environmentally friendly source of metals. Indeed, there are fundamental environmental advantages of obtaining our metal from the seafloor rather than from land.

For example, seafloor mining requires little terrestrial production infrastructure, and there will be minimal overburden as the ore occurs directly on the seafloor and will not require large pre-strips or overburden removal.

Importantly, obtaining our minerals from the seafloor avoids deforestation, as no trees will be cleared for the mining operation, and therefore, it will not decrease the earth's carbon absorption capacity. Conversely, the current main source of nickel, that being from land-based Nickel laterites, generally occur in equatorial regions, and every year that nickel is *not* mined from the seafloor means another year that virgin rainforests are stripped in equatorial regions causing associated tropical ecosystems to be destroyed as well as a decrease in the earth's carbon absorption capacity.

We must also consider that land represents only 30 per cent of the planet's surface but is currently subject to 100 per cent of world nickel and copper mining. Consequently, the emerging underwater mining industry has great potential to improve the global environmental footprint of the mining industry.

Moreover, as we know, key to environmental quality in the future is developing clean technologies, and minerals are essential to building such alternative energy and pollution abatement technologies. For example, a sum of approximately 500 kg of nickel plus 1000 kg of copper is required to build just one wind turbine, meaning that this single turbine requires 12 times more copper to create 1 kilowatt of power than conventional power sources. As well, nickel contributes to sustainable development through water purification and distribution systems, air pollution abatement hardware, renewable energy infrastructure and new energy solutions such as fuel cells, concentrating solar power and cellulosic ethanol. Furthermore, alternative energy systems depend heavily on copper to transmit the energy they generate with maximum efficiency and minimum environmental impact. Outside of precious metals, copper is the best conductor of electricity and heat – improving energy efficiency of electrical equipment thereby assisting to reduce energy consumption on a global level.

It must also be acknowledged that poverty and environmental degradation are closely linked, and to achieve a sustainable global environment, poverty must be eliminated. Those living in poverty do not have the luxury or finances to worry about environmental sustainability, and the immediate need to survive leads to pollution and mismanagement of resources in their surrounding environment. Conversely, higher living standards and GDP per capita results in:

- Technological innovation which is essential for developing pollution abatement technology, cleaner and less resource-intensive production technologies, more fuel efficient and less-polluting fuels and improved energy efficiency in homes and businesses;
- Movement in the economy away from energy intensive manufacturing industries to service industries with decreased pollution;

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- A demand for improved environmental quality that leads to the adoption of stricter environmental protection measures and regulations that internalize pollution externalities;
- Lower fertility rates which reduces population strain on resources; and
- Higher rates of education and increase in national knowledge base and awareness of the importance of healthy ecosystems and how to more efficiently manage resources.

Developing the resources of the seafloor will assist in supplying the raw materials necessary for this economic transition and increasing the environmental sustainability in developing States.

The rules and regulations governing the development of these resources have been diligently prepared over nearly four decades and show an overriding concern for the safeguarding of the environment, with significant input and direction from environmental experts and leading environmental groups from around the world. The rules have been agreed upon and adopted by 160 States.

It is comforting to know that exploitation of polymetallic nodules under the ISA's regulatory regime ensures that mining will only occur pursuant to stringent regulations that are internationally accepted and will be overseen and judged by the international community.

Having said that, if the regulations are uncommercial, or if the regulations are interpreted in such a way as to discourage private sector investment, it will most certainly be counterproductive and could bring greater harm to the planet's overall environment, given that such discouragement would force the mining industry to continue its focus on land based sources.

As previously highlighted, by not encouraging seafloor mining, you are effectively encouraging further terrestrial environmental degradation.

It must also be acknowledged that we are dealing with mining potato-sized rocks, and not oil and gas which can cause significant pollution and can be highly unstable if "lost" into the environment. There is a significant environmental difference between a vessel spilling oil into the ocean and one that might spill polymetallic nodules which would simply sink and rest on the ocean floor. Unlike oil, the nodules are stable in the sea and on the seafloor as nature has placed them in a stable form.

When interpreting the provisions, the Chamber is also encouraged to ensure that a discrepancy is not created between what activities humans permit on land and what activities we permit on the seafloor. In order to fully inform the Chamber of the issues at hand, it can be noted that at the centre of a lot of the environmental debate surrounding the abyssal plains of the Area are microorganisms and small worms.

Now, whilst activities in the Area must occur in a sustainable manner in accordance with the relevant international environmental rules and regulations, and Nauru's applicant Nauru Ocean Resources Inc. is committed to complying with whatever regulations the ISA sees fit to adopt, we must nevertheless acknowledge that the abundance of life that exists on the abyssal plains in the Area pales in comparison to that which exists on land. If the pendulum swings too far in favour of protecting those microorganisms on the seafloor, it will directly result in humans being forced to obtain more metals from land which would be to the detriment of more "significant" life forms such as mammals, birds and reptiles. Worse still, it would, as previously pointed out, prejudice the supply of more accessible and affordable metals and thus decrease the rate of economic and social growth and thus result in more unnecessary hunger, disease and loss of life experienced by those living in poverty.

Therefore, whilst mining must take place sustainably and in such a manner that ensures no long-term serious environmental harm, unreasonable and uncommercial terms to

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protect the microorganisms on the abyssal plains could in effect also directly contribute to the deaths of millions of people living in poverty.

The Chamber may also like to consider that just about every coastal State approves dredging for ports and harbours and land reclamation and to supply sand and aggregate for cement. Indeed, the dredging industry currently dredges around 2 billion tonnes off the seafloor per year in areas close to the coastline where the abundance of life is exponentially richer than on the abyssal planes in the Area. In comparison, a single polymetallic nodule mining operation would merely harvest around 7 million tonnes of ore from the seafloor per annum in areas where there is far less abundance of life.

To quote one of the Authority's publications: *Deep-Seabed Polymetallic Nodule Exploration: Development of Environmental Guidelines*, on page 44:

The abundance of life at the abyssal seafloor is relatively very low...the total macrobenthic biomass is roughly 0.05-0.5 g wet weight/m², which is indeed very low. In comparison, macrofaunal biomass on the continental shelves (i.e. > 50g / m², figure 3) is about 100 times greater. This is also true for macrofaunal abundance. For example, total macrofaunal abundance at 9° N, 140° W in the CCFZ is approximately 300 individuals / m² whereas macrofaunal abundance in shelf habitats often attains 20,000-30,000 individuals / m².

Indeed, it is hard to understand why some States would seek to discourage the development of polymetallic nodule mining on the seafloor by the private sector, particularly since States taking such a stance would seem to be in breach of the Charter of the United Nations, which certainly does not direct States to protect microorganisms at the expense of economic and social growth and at the possible expense of millions of human lives. Quite the contrary, the purposes and principles of the Charter, to which all States are bound and which UNCLOS has a mandate to promote, demands that such resources be developed to ensure economic and social growth. That is, in accordance with Chapter 1, Article 1(3), the Purposes of the United Nations are "To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character..."

Moreover, when we consider tropical rainforests, where nickel laterites are mined, scientists can only take a guess at the abundance of life because it is simply just too rich and diverse. Indeed, when carrying out an environmental impact assessment to mine nickel laterites the effect on microorganisms is not taken into account. That is humanity has an accepted environmental impact assessment system for mining on land and dredging below water, but the permitting of those activities does not even take into account the associated effect on microorganisms, notwithstanding those activities occur in areas where the abundance of life is exponentially richer than that on the abyssal plains. Likewise, a freeway in America or an autobahn in Germany or cropping of farmland around the world does not involve a detailed study of microorganisms. People are not worried about the impact on microorganisms on land when it comes to these activities because humanity has determined that sustaining human life is more important than protecting microorganisms, which exist in trillions and are not a threatened species. Moreover, every one of us kills microorganisms every day whether we like it or not. Indeed, every time you breathe in air you are killing living organisms. Even human beings contribute to the killing of billions of microorganisms which are killed when humans eat food due to the growing and harvesting of crops.

These examples are useful to consider for the mere fact that it suggests seafloor mining will take place under environmental guidelines that are far more rigorous than terrestrial regimes, therefore implying that it should provide an environmentally advantageous alternative to terrestrial mining.

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In order for the Chamber to see for themselves that seafloor mining can be carried out sustainably and as an environmentally advantageous alternative to terrestrial mining, our delegation would encourage the Chamber to review Nautilus Minerals Inc.'s Environmental Impact Statement, which was the culmination of many years of work done by leading environmental scientists and international groups, and represents one of the most comprehensive environmental studies ever carried out on the seafloor environment. This study is available to the public and has significantly advanced the public's knowledge and understanding of the seafloor environment. This EIS has led to the Government of Papua New Guinea granting an environmental permit for seafloor mining development in the Bismarck Sea at Nautilus' Solwara 1 deposit.

Also, should the Chamber deem it helpful to shed light on the questions at hand, it can be noted that there was also previously an environmental impact statement prepared by the Office of Ocean Minerals and Energy and the National Oceanic and Atmospheric Administration, under the Department of Commerce in the United States, which, according to the President and General Manager of Ocean Management Incorporated, "showed very little change outside the mining area, and after a year, changes were not detectable except for the actual tracks of our nodule collector". It can be noted that Ocean Management Incorporated was a private sector enterprise that successfully trial mined 800 tonnes of polymetallic nodules in the Clarion Clipperton Zone in the 1970s.

Of course, the advantages of seafloor mining are not just limited to the environment. For example, seafloor production does not require the social dislocation and the resulting impact on culture or disturbance of traditional lands common to many land-based operations, and the operation is largely robotic and will not require operators' exposure to typically dangerous mining or "cutting face" activities.

Obviously seafloor mining has many more advantages. However, the ones already highlighted are sufficient for the purpose of demonstrating that it is now time to develop these resources for the benefit of humanity as was originally intended: to foster, as articulated in article 150 of UNCLOS, a "healthy development of the world economy and balanced growth of international trade, and to promote international cooperation for the over-all development of all countries".

So what does all that mean for us here at the Chamber today? Well, it demonstrates quite conclusively the pressing need to develop the resources in the Area.

How can the Chamber ensure that the regulatory regime encourages such resource development to promote economic and social progress and to ensure that the environmental benefits of developing those resources are realized?

The answer is to interpret the rules and regulations in such a way as to encourage private sector investment. Without the private sector the development of polymetallic nodules in the Area will continue at an extremely slow pace and the objectives of the Convention may never be met. The last 30 years have shown that without private sector investment, these resources may never be developed.

It might be useful for the Chamber to note that trial mining of polymetallic nodules took place in the Clarion Clipperton Zone in the 1970's by private sector entities. Due to factors such as the uncertainty of legal title and uncommercial mining terms, private sector involvement ceased, and polymetallic nodule development activity has stalled ever since. Consequently, notwithstanding the Convention coming into effect many years ago, not a single payment has been distributed to a developing State through the Authority as a result of mining proceeds. By encouraging the private sector, all the international community will share in the rewards of the development of seafloor polymetallic nodules: by way of exploratory and environmental findings; by the technological advances involved; by

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increased training and employment opportunities; and by way of sharing in the resulting royalties.

So, how can the Chamber encourage the private sector to invest, and how should we interpret the articles of the Convention?

Firstly, we must provide legal certainty, without which it is unrealistic to expect anyone to commit the approximately 4 billion dollars required to carry out a full-scale polymetallic nodule mining and processing operation.

Secondly, we must ensure that the regulatory regime encourages States to sponsor the private sector; and since the sponsoring State's responsibility is directly linked to the contractor's obligations, we need to ensure that the contractor's obligations are unambiguous and commercially realistic.

The delegation of Nauru believes that it is well qualified to address today the questions put to the Chamber, given that Nauru is the first State to sponsor an application to the ISA by a private sector entity which has spent many years thoroughly investigating the legal and practical issues at hand.

Given the significance of private sector involvement in the Area, the delegation of Nauru believes that it is important to provide the Chamber with a brief background of Nauru's sponsorship and demonstrate the practical effects that this Advisory Opinion will have on a sponsoring State intending to carry out activities in the Area through the private sector.

Obviously Nauru, like many other developing States, does not have the financial and technical capacity to carry out polymetallic nodule exploration without the assistance of the private sector. Neither does Nauru have any commercial entities capable of such endeavours. This reality is evidenced by the fact that until Nauru's application, no developing State had applied for a plan of work for exploration within the reserved Area.

As a result, Nauru required assistance from an entity that was willing to invest in our country by establishing a national entity within Nauru that was willing to bring to Nauru the financial and technical capacity required to carry out the project. Indeed, for most developing States, the only means of participating in and directly benefiting from the activities in the Area is to partner with private sector enterprise and attract foreign investment.

Of course, this still presents a challenge as it is not easy to identify entities in the private sector currently willing to risk significant financial resources to carry out large scale polymetallic nodule exploration and pioneer the first mining operation in an unproven industry. That said, once the first mine can be proven, this will help to de-risk the industry and encourage other private sector entities to invest in the Area and partner with developing States.

Recognizing this need to partner with the private sector, Nauru is currently sponsoring an application to the ISA for a polymetallic nodule exploration contract submitted by Nauru Ocean Resources Inc., a Nauruan incorporated entity with access to the finances and technical expertise necessary to explore and develop the polymetallic nodule resource.

Nauru Ocean Resources is incorporated and registered in Nauru and subject to the laws and jurisdiction of Nauru, and therefore comes under Nauru's effective control. The Republic of Nauru has ultimate control over Nauru Ocean Resources, because the State can deregister the company at any time, forcing the company to cease its operations. No other State has control over the company – only Nauru.

Nauru's Minister for Commerce, Industry and Resources, Hon. Frederick Pitcher, signed a Certificate of Sponsorship for Nauru Ocean Resources Inc. on behalf of the Government of Nauru on 6 March 2008. The Certificate of Sponsorship states that the applicant is sponsored by and under the effective control of the Republic of Nauru and

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provides a declaration that the Republic of Nauru assumes responsibility in accordance with article 139, article 153, paragraph 4, and Annex III, article 4, paragraph 4, of the Convention.

Furthermore, a binding sponsorship agreement is in place between Nauru Ocean Resources and the Republic of Nauru, providing a legal mechanism through which Nauru can effectively control the company to ensure that Nauru Ocean Resources complies with the ISA contract for exploration, the regulations, and the Convention.

Whilst the sponsorship agreement is quite exhaustive and confers numerous powers upon Nauru to assist the State to take the necessary measures to fulfil its sponsorship responsibilities, Nauru believes that the Seabed Disputes Chamber may be able to clarify whether there are any additional measures the sponsoring State must take. If there are additional measures, additional safeguards can then be incorporated into the sponsorship agreement or, if required, legislation can be enacted.

Mr President, this request is not an attempt to diminish responsibility, but rather it is an attempt to ensure that the State can fulfil its obligations under the Convention to the highest degree.

From the very beginning Nauru has been excited to be involved in this partnership. At that time the Australian Government had just closed its refugee detention centre in Nauru, which left a large hole in Nauru's small economy. This partnership represented a valuable opportunity for Nauru to pursue an alternative avenue of development and could make a significant difference for the Nauruan people. As many Members may be aware, Nauru relies on foreign aid and support as well as imported food. Importantly, Nauru's land resources have been significantly depleted due to overharvesting of its phosphate deposits by other countries. This mining by foreign countries in the 1900s has since caused our island to be 80 per cent uninhabitable. Indeed, 80 per cent of our country is now virtually a moonscape, and this has in turn significantly impaired Nauru's opportunities to develop industries and grow its own food. Moreover, it has had significant ramifications for the habitation of indigenous Nauruans. This partnership to explore for minerals in the Area therefore allows us to benefit from resource development without our country being further raped of what few resources we have left. In effect, this provides us with a second chance and a chance for the mining industry to give back to a country ravaged by past excavation. Given that Nauru does not have any commercially prospective non-living seafloor minerals in its EEZ, the State is particularly interested in participating in activities in the Area.

Under our partnership with Nauru Ocean Resources, Nauru will receive significant benefits, including annual tax revenues, annual monetary contributions to health and education in Nauru, monetary payments during exploration, employment in the project for Nauruan nationals and training and capacity building for Nauruan nationals.

In addition to pioneering the development of an alternative source of minerals critical to global economic and social development, Nauru Ocean Resources will be promoting the development of and directly contributing to an international regime that will distribute a percentage of mining proceeds to developing States, particularly those least developed and most in need of economic assistance.

This is the type of partnership the World Bank is actively seeking to encourage through such bodies as the International Finance Committee, whereby access to finance and technology is being brought to developing States.

Thus, how can the Chamber ensure that the regulatory regime encourages development and that a sufficient quantity of primary metals can be supplied to the world to promote economic and social progress?

The Nauruan delegation urges the Chamber to consider what our delegation has put forward and see fit to interpret UNCLOS in favour of promoting development and legal clarity, which is the fundamental purpose of UNCLOS as stated in its preamble. We have

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confidence that the Chamber will keep this critical need for development at the forefront of its deliberations on the issues raised by the questions put to the Chamber.

In providing certainty we must not compromise but rather promote the need for commercially viable regulations that encourage private sector investment, without which the development of polymetallic nodules in the Area will most likely not occur.

It is also necessary that the responsibilities and obligations of sponsoring States be interpreted and defined with sufficient clarity to assist developing States to determine accurately what their responsibilities are and efficiently allocate the necessary resources to fulfil these obligations.

Importantly, since the sponsoring State's responsibility is directly linked to the contractor's obligations, it is necessary for the Chamber to ensure that the contractor's obligations are unambiguous and realistic. This can be explained as follows: If one studies the three questions put to the Chamber, it is clear that Question 3 is dependent upon Question 1, that is, one cannot ascertain what "necessary and appropriate measures" a sponsoring State must take to fulfil its legal responsibilities and obligations until the extent and scope of such responsibilities and obligations is determined; and, given that the State has a fundamental obligation to ensure the compliance of the contractor with the contractor's own obligations, it is necessary to first determine comprehensively what the obligations of the contractor actually are. This reasoning has been eloquently highlighted by Mr Michael Lodge, Legal Counsel to the ISA, in paragraph 5.8 of his written statement.

Given that it is critical to first determine what the obligations of the contractor are, the Nauruan delegation believes that it is absolutely essential to discuss here these obligations in detail, and if it is determined that the contractor's obligations cannot be precisely defined because the relevant provisions are either too broad or vague, we believe that it will then be necessary for the Chamber to narrow the scope of such provisions and provide a much more specific interpretation.

First, as stipulated in Regulation 30, the contractor shall continue to have responsibility for any damage arising out of wrongful acts in the conduct of its operations. This regulation is also reflected in Section 16.1 of the standard exploration contract:

The contractor shall be liable for the actual amount of any damage, including damage to the marine environment, arising out of its wrongful acts or omissions, and those of its employees, subcontractors, agents and all persons engaged in working or acting for them in the conduct of its operations under this contract ...

Unfortunately, there exists no definition of the term "operations" as used in Regulation 30 and Section 16.1; this is problematic. It is absolutely essential that this term be defined, as the interpretation of what constitutes the contractor's operations is critical to determining the extent of contractor responsibility and liability, and in turn critical to determining the extent of sponsoring State responsibility and liability.

For example, Section 16.1 places liability on the contractor for wrongful acts or omissions of subcontractors. However, it is unclear whether that obligation extends to all subcontractors or only those subcontractors acting for the contractor in the conduct of its operations under the specific exploration contract. Upon analysis, it does not seem logical for that term to mean all subcontractors, because the contractors may have many different subcontractors acting for them around the world in the marine environment but with nothing to do with the particular exploration contract in question. Therefore, Section 16.1 must refer to only those subcontractors that are acting in the conduct of the contractor's operations under the contract. Having made that determination, we are left with the even harder task of

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determining what types of activities are included in the term "operations". This term therefore needs to be defined and narrowed in scope.

Secondly, pursuant to Regulation 31(3), the contractor must take necessary measures to prevent, reduce and control pollution and other hazards to the marine environment arising from its activities in the Area as far as reasonably possible, using the best technology available to it.

In the case of Regulation 31(3), the scope and extent of the contractor's responsibility, and in turn the scope and extent of the sponsoring State's responsibility, and thus the answer to Question 1, hinges upon the definition of "activities in the Area" and whether or not the event that has caused damage can be considered to be part of the contractor's activities in the Area.

Thus we look to the definition of "activities in the Area", which is defined in article 1, paragraph 3, of UNCLOS as meaning "all activities of exploration for, and exploitation of, the resources of the Area". In turn, we need to further consider what constitutes exploration and exploitation. Once we precisely ascertain the definition of "exploration" and "exploitation", we can then determine the extent of the contractor's obligations, and in turn the extent of the sponsoring State's responsibilities, and thus put ourselves in a position to solve Question 1 and be given assistance in answering Question 3, as the measures that the sponsoring State must take will differ depending upon the scope of the contractor's obligations.

Unfortunately, confusion may arise when interpreting the definition of "exploration" and "exploitation" which are defined in Regulation 1(3)(b) and Regulation 1(3)(a), respectively.

Now, for example, the term "transportation systems", which is adopted in both definitions, could be either a reference to transporting the nodules from the seafloor to the surface or, given the reference to "marketing of metals", it could extend to transporting the ore across the high seas from the mine site to the destination State, or both. Clearly this needs clarification.

We interpret "transportation systems" to be a reference to transporting the nodules from the seafloor to the surface. Indeed, the only reference to "transporting" in *The Recommendations For The Guidance Of The Contractors For The Assessment Of The Possible Environmental Impacts Arising From Exploration For Polymetallic Nodules In The Area* issued by the Legal and Technical Commission, which refers to information to be provided by the contractor, and with respect to transportation, limits this information to "methods for transporting the nodules to the surface".

Likewise, in article 145(a), the activities to which the Authority shall take necessary measures include "such activities as drilling, dredging, excavation, disposal of waste, construction and operation or maintenance of installations, pipelines and other devices related to such activities". The transportation of ore across the high seas, or the manoeuvring of vessels, is clearly not included in article 145(a); and we submit this is because the contractor is only responsible for those activities that it directly controls which will be limited to mining activities on the seafloor and we respectfully seek the Chamber's approval of this interpretation.

Certainly, it would cause numerous problems if the sponsoring State's responsibility and liability was extended to the point where it may impinge upon flag State responsibility, which of course is inappropriate, and we must provide clarity that the sponsoring State's responsibility is much narrower than that.

In this regard, it is important to note that a full-scale seafloor polymetallic nodule mining operation will likely involve upwards of 25 different vessels that, notwithstanding they will be operating in the high seas above the Area, will not be involved in the direct

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harvesting operation. These ancillary vessels will be required to service the mining vessel and to transport the ore and/or concentrate from the mining vessel and/or processing facility to steel refineries on land.

Those service and transport vessels will most likely not be owned or controlled by the contractor, and will most likely not be controlled by the sponsoring State: rather, they will be registered in numerous other flag States which have responsibility for the compliance of those vessels under the Convention and the various other international conventions and treaties governing shipping on the high seas.

Nevertheless, for the purpose of certainty, we respectfully urge the Chamber to make it absolutely clear that the contractor is not responsible or liable for such transport and service vessels, notwithstanding they are being used by the contractor to transport the ore and service the mining vessels. That is, those vessels must not fall into the definition of “transportation systems” as used in the definition of “Exploration” and “Exploitation”.

It is necessary that this be clarified and an explicit limit be placed on what activities the contractor is responsible for so that commercial contracts can be drafted that allocate risks appropriately between the different commercial entities operating in the Area and so that insurance providers can determine what type and level of cover is required. A key step in the negotiation of any mining contract is for each party to identify and assess the risks inherent in the proposed mining work. Risks need to be identified and allocated as clearly as possible. An assessment must be made about who is best able to carry or manage each risk, or how they should be shared, in a way that promotes efficiency and effectiveness in the safe performance of the work. If the definition is left, broad private investment will be discouraged and confusion will prevail.

The Nauruan delegation would also like to take this opportunity to detail why it is necessary that those types of activities that are not being directly carried out by the contractor on the seafloor be expressly excluded from the contractor's and the sponsoring State's obligations and responsibilities.

Firstly, if activities such as the transportation of ore are considered to be part of the contractor's “activities in the Area”, this will not only conflict with other parts of the Convention and other international conventions and treaties that consider those activities a flag State responsibility, but it will also set a very dangerous precedent, as it will imply that every vessel transporting ore in the high seas above the international seabed area must be sponsored under Part XI because that vessel is carrying out “activities in the Area”.

There are currently thousands of vessels transporting billions of tonnes of ore and raw materials on the high seas. Every one of those vessels could potentially cause damage to the international seabed area by accidentally dumping ore or polluting. As we know, none of those vessels are required to be, nor have they ever been, sponsored by a State under Part XI of the Convention.

However, if it is determined that the contractor is responsible for the transport of ore from its mine site in the Area to the country to which the ore is sold, then it is also being determined that those vessels transporting the ore are carrying out “activities in the Area”. If that was the case, every vessel that transports ore across the high seas, whether the ore originates from a mine on the seafloor or from a mine on land, must be sponsored because it is carrying out an activity in the Area. This would set a dramatic precedent and literally require the immediate sponsorship of thousands of vessels around the world. This was obviously not the intention of the Convention.

Moreover, when a land-based mining company loads its ore onto a vessel at port it no longer has responsibility or liability for the movements of the vessel transporting the ore to another country. For example, the major Australian and Brazilian iron ore miners are not responsible and liable for the ships that carry their iron ore across the high seas to Asia, and

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neither is the Commonwealth of Australia nor the Federal Republic of Brazil responsible or potentially liable, provided that the transport vessel is not registered in either country. Rather, it is the captain of the vessel, the owner of the vessel and the flag State in which that vessel is registered who are responsible and potentially liable. There should be no difference between ore that is mined on land and transported across the high seas and ore which is mined from the international seabed area and transported across the high seas. If damage or pollution occurs to the Area during the process of transportation the contractor simply cannot be held responsible, and neither can the sponsoring State, with the exception being when the sponsoring State is also the flag State of the relevant vessel, or when the contractor or the sponsoring State have ordered the vessel to commit a wrongful act.

Mr President, I have a few more pages to read out but I believe my time is running out, I am informed. Nevertheless, you have the written statements in front of you. I would like to go on, but I have been told to stop. Before I step off the podium, I would like to give my colleague, Mr Robert Haydon, the final concluding remarks to our presentation.

The President.

Thank you very much, Mr Jacob. The Chamber is grateful for the careful management of the time allotted. We have, of course, your paper.

I would like now to give the floor to the other representative of Nauru, Mr Haydon.

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STATEMENT OF MR HAYDON
NAURU (CONTINUED)
[JILLOS/PV.2010/3/Rev.2, E, p. 21–32]

Mr Haydon:

By now I trust that my colleague has sufficiently demonstrated to the Chamber that it is necessary to firstly determine the contractor's obligations prior to answering the three questions at hand pertaining to sponsor State responsibility, and I also hope it is now evident that such responsibilities must be limited and distinguished from vessels and installations flying the flag of a different State.

As has also been highlighted, the policy pertaining to the Area in article 150(a) provides that "Activities in the Area shall ... be carried out in such a manner as to foster healthy development of the world economy and balanced growth of international trade ... and with a view to ensuring (a) the development of the resources of the Area ..."

The Nauruan delegation has submitted that this fundamental policy will most likely only be fulfilled, and the Convention's purposes met, if the private sector is encouraged to participate. Likewise, it has also been made clear that this in turn requires the relevant rules and regulations to be interpreted in such a way as to encourage commercial investment.

My colleague has set forth a number of examples detailing how certain provisions pertaining to sponsor State responsibility must be interpreted in order to achieve this end. I hope that in this statement I can demonstrate to the Chamber that, in interpreting other provisions necessary to answer the three questions at hand, it would be prudent for the Chamber, where necessary and required, to seek further input and consultation from those private-sector entities currently engaged in commercial seafloor mineral exploration, particularly given there has to date been no non-government affiliated commercial enterprises involved in activities in the Area under the Authority's regulatory framework. The Nauruan delegation also considers it appropriate to address here certain commercial realities that may assist to further shed light on the issues we have raised.

I, too, find it necessary to start by making reference to the purposes and principles of the Charter of the United Nations, as well as the preamble to the Convention, and I would like to state that Nauru Ocean Resources Inc. is committed to unlocking an alternative supply of minerals that will provide more affordable and accessible primary metals necessary to achieve these universal principles and facilitate global social and economic development for current and future generations, which in turn will lead to a more stable, more just, and more secure world. At the same time the company intends to demonstrate that seafloor mining can be both environmentally and socially advantageous relative to terrestrial mining.

In effect, Nauru Ocean Resources, with the assistance and guidance of the ISA Secretariat, has pioneered a unique partnership agreement through which it can bring direct benefits to a developing State including employment; training; capacity building; technology transfer; foreign investment; increased tax revenue; and national self-determination, without causing the negative impacts generally associated with the extractive industry such as community dislocation and degradation of the natural environment and land.

Throughout the history of the Convention there have been divergent and opposing views between developing States looking for assistance and developed States seeking to promote the aspirations of their private sector. Nauru Ocean Resources' partnership with the Republic of Nauru represents now an alignment of these divergent views.

The Company intends to not only provide benefits to Nauru, but to work directly to ensure that economic and social progress occurs in other developing States by making supply of metals to those States more readily available. The Company is committed to ensuring that the metals produced from its operations in the International Seabed Area reach the

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communities most in need of raw materials. Through Nauru Ocean Resources' operations a percentage of minerals mined from the seafloor will be distributed to developing States, through either monetary contributions to community projects and/or direct supply of raw materials. Again, this will be a benefit Nauru Ocean Resources will provide to other developing States on top of the benefits provided to Nauru, and the company will work with the ISA, other International organisations, local governments and communities from around the world to identify areas of greatest need.

Specifically, the company will focus on building and implementing water purification and distribution systems in third world countries.

The company has chosen to focus on this humanitarian issue for two reasons; first, because the company is an underwater resource company, and it is in the business of working with water; but, secondly, and more importantly, lack of safe water and sanitation is the world's single largest cause of illness according to UNICEF, and about 4,500 children die each day from unsafe water and lack of basic sanitation facilities.

Consequently, Nauru Ocean Resources has established an initiative called the Clean Water from Underwater Metals Initiative, and through this initiative Nauru Ocean Resources will be supplying sustainable access to safe drinking water and basic sanitation to those developing States most in need.

Nauru Ocean Resources will also collaborate with scientific institutions currently studying the Great Pacific Garbage Patch to identify ways to best address this massive environmental problem and clean up the pollution. For those unaware, the Great Pacific Garbage Patch is a massive gyre of pollution in international waters located in the central North Pacific Ocean, including areas near the Clarion-Clipperton fracture zone. The patch is characterized by exceptionally high concentrations of pelagic plastics, chemical sludge, and other debris suspended in the upper water column that have been trapped by the rotational currents of the North Pacific gyre, which for decades have been drawing in waste material from across the North Pacific Ocean, predominantly from rubbish washing out from beaches, rivers and watersheds in North America and eastern Asia.

During commercial production, Nauru Ocean Resources will carry out clean-up operations in the Great Pacific Garbage Patch.

The company will also be committed to providing monetary donations to the ISA's Endowment Fund, which promotes and encourages the conduct of collaborative marine scientific research in the Area. By providing valuable training opportunities on board exploration and exploitation vessels contracted by the company, Nauru Ocean Resources will also be able to assist the ISA in its endeavour to promote the participation of qualified scientists and technical personnel from developing countries in marine scientific research programmes and activities.

Nauru Ocean Resources is looking forward to being able to play an important role in addressing world poverty and promoting higher standards of living, employment, and conditions of economic and social progress, as well as ensuring sustainable supply of natural resources for future generations. This, as detailed in Article 55 of the Charter of the United Nations, will assist to create conditions of stability and well-being which are necessary for peaceful and friendly relations among nations.

On top of striving to achieve those significant goals, the company is also committed to operating in line with the following internationally accepted environmental, social and governance principles and standards, including: the United Nations Global Compact; the Millennium Development Goals; the IFC Performance Standards on Social and Environmental Sustainability; the World Bank Group Environmental, Health, and Safety Guidelines; and of course the Precautionary Principle.

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Regarding the United Nations Global Compact, the company will adhere to the ten principles of the Compact which asks companies to embrace, support and enact, within their sphere of influence, a set of core values in the areas of human rights, labour standards, the environment and anti-corruption. These Ten Principles enjoy universal consensus and are derived from: the Universal Declaration of Human Rights; the International Labour Organization's Declaration on Fundamental Principles and Rights at Work; the Rio Declaration on Environment and Development; and the United Nations Convention against Corruption.

Importantly, Nauru Ocean Resources will also be assisting to achieve the Millennium Development Goal targets for poverty, unemployment, education, gender equity, childhood health and survival, maternal health, nutrition and disease.

Nauru Ocean Resources recognizes that the supply of more accessible and affordable raw materials to developing States is absolutely critical to promoting their economic development and alleviating the poverty, disease and hardship faced by billions of people around the world. The company believes in striking a balance between the environment and addressing these critical human needs and rights, and is determined to play an important role in supplying those in need with the raw materials necessary to help bring them out of poverty.

The company's management have been working to pioneer seafloor mining for nearly a decade, which has involved gaining an in-depth understanding of the various regulatory regimes governing such activities, and, in particular, how to appropriately balance the needs and interests of all stakeholders. Therefore, the company believes it could provide assistance should it be required by the Chamber moving forward on matters regarding seafloor mineral development activities. In addition to that offer, our delegation would also like to highlight here one or two points that demonstrate how such knowledge could be of assistance.

Firstly, when dealing with the three questions put to the Chamber it is necessary to analyze article 153(b), which stipulates that activities in the Area may be carried out by "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]."

Our delegation wishes to point out that similar to flag State registration, States sponsoring activities in the Area will often be sponsoring an entity which is related to another entity. In regards to this situation, it must be appreciated that notwithstanding one company may be related to, or may be a subsidiary of, another entity, if the applicant company is registered in and effectively controlled by a State, then that State, and only that State, need be the sponsor of the applicant.

In Nauru's case, for example, Nauru Ocean Resources Inc. is registered in and subject to the laws and jurisdiction of Nauru, and therefore comes under Nauru's effective control. The Republic of Nauru has ultimate control over Nauru Ocean Resources. On top of controlling the company through its national legislation, Nauru also controls the company through a binding sponsorship agreement.

There are multiple reasons why it may be necessary to have companies which are related to another entity in a separate country. For example, in Nauru Ocean Resources' case, its parent company is registered in Canada. The sole reason the parent was registered in Canada was to enable it to attract from the large financial markets in North America the significant capital required to undertake large scale seafloor exploration.

The President:

I am sorry to interrupt you for a second. I am informed that the French interpreters are having difficulty in following you, so please slow down. When we get to the end of your allotted time, we will see how we proceed.

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Mr Haydon:

Thank you, Mr President. I apologize.

This financial arrangement has nothing to do with control of the Nauruan company, which is exclusively controlled by the Republic of Nauru.

Indeed it would seem crazy to suggest that the State (where the parent is incorporated) must also be a sponsor because, using Nauru's case again, the State of Canada cannot exert any control over Nauru Ocean Resources. For example, Canada cannot order the Nauru Ocean Resources' parent to change the board of directors of the subsidiary.

Moreover, there may be a number of entities and mining companies that are shareholders of Nauru Ocean Resources' (indeed, to raise \$4 billion will likely involve significant investment from other major mining houses). Therefore, it could be a subsidiary of many companies incorporated in many different States. Also, the parent company may be registered in one State, but its owner and major shareholder may be registered in another State altogether. For entities listed on the stock market, the composition of their share register is constantly changing, so that would mean you would need to constantly change the sponsoring State.

The Nauruan delegation would also like to explain why there should be no residual liability, as has been suggested by one or two of the written statements submitted by other States to this Chamber. Indeed, residual liability would significantly harm investment and be prohibitive to many States looking to sponsor activities in the Area. Not only do article 139, paragraph 2, and Annex III, article 4(4) specifically imply the exclusion of residual liability, the very notion of residual liability completely ignores the commonsense appreciation that no human activity can be totally risk free. If the same logic were applied to the risks associated with automobile travel, which, though small, are much larger than those of seafloor mining, no one would ever ride in an automobile. Mining, like any other human activity, cannot guarantee absolute certainty. However, we do have the ability to compare the risks of alternative human actions against their benefits. The alternative to mining the seafloor for minerals carries the risk of a world increasingly unable to meet the development needs of all its human inhabitants. That risk far outweighs any possible benefits of imposing residual liability on Sponsoring States, which is a burden that is unacceptably high and could seriously halt economic and social development.

The Nauruan delegation would also like to take a moment to address a concept which has been raised by one member State, and that is "monopolisation", which is defined as the "exclusive control of a commodity or service in a particular market, or the market condition that exists when there is only one seller."

With regards to the polymetallic nodule industry, it should be clear when considering my following points that it would be virtually impossible ever to create a monopoly in the Area.

First of all, there are already eight contractors in the Area; thus it is, on first glance, fairly clear that a monopoly will not arise in the Area concerning polymetallic nodules, as there are already eight competitors.

Moreover, the international seabed area covers over 150 million square kilometres, with polymetallic nodule deposits occurring in every ocean. It is very easy to conclude from a simple arithmetic calculation that it would be virtually impossible to create a monopoly in the polymetallic nodule industry simply because there is too much international seabed area for others to explore and develop, and no single contractor would likely be able to finance the programme of work that the ISA would require to be carried out on all those licence areas.

Importantly, the Chamber must note that no contractor has been able yet to demonstrate that 75,000 square kilometres is sufficient to justify a mining operation. On the contrary, the fact that no mining has taken place yet would suggest that that size is *not*

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sufficient, particularly when seafloor topography may render much of the contractor's area unsuitable to mining.

Supporting that conclusion is the fact that to process polymetallic nodules a contractor will need to design and build a processing plant that can produce approximately 60,000 tonnes of nickel per annum in order to justify the significant mining costs and processing capital and operating costs, and in order to compete with nickel laterite mines on land.

Regarding the current main source of nickel, being land-based nickel laterites, it can be noted that the combined capital expenditure for the Ambatovy, Goro and Koniambo nickel projects is approximately US\$12 billion. Moreover, Ambatovy has a project life of 30 years and Koniambo has the potential to extend its mine life to well in excess of 50 years.

In order to justify the approximately \$4 billion capital expenditure for a seafloor polymetallic nodule project in the Area and to compete with these and other land-based nickel laterites, polymetallic nodule contractors will need to be able to mine a resource that will sustain economic production for similar or greater periods of time, and this simply may not be possible with an area as small as 75,000 square kilometres; therefore, it is probable that more than one licence will be required to sustain a viable operation.

It must also be acknowledged that the polymetallic nodule exploration regulations have been in place for approximately a decade, and notwithstanding significant advancements in offshore technologies and the witnessing of one of the biggest mining booms of all time, there has been no rush by the private sector to secure ground and no significant development of the resource. It is becoming increasingly clear that no party is willing to commit the significant capital required to fund the first polymetallic nodule project given the significant risk of being first, and that such a project will need to be financed from a private sector company which can attract investors and mining groups who are comfortable taking on such risk. Of course, such investors and mining groups require enough potential upside to reward them for funding an unproven and novel industry. Therefore, the project needs to have the potential to generate several nodule mines to be attractive to financiers, technology and mining industry partners. A single licence, whilst perhaps appropriate for a research group or secondary mining operations once the concept is proven commercially, may not provide the return on capital required by a company seeking to finance the technology it must develop for the first mine, especially given that the cost for the first mine will be greater than that of competitors developing the second mine, who will have a much lower technology risk and cheaper finance (and therefore an unfair advantage to the party establishing the first mine).

The President:

Excuse me for interrupting you, Mr Haydon. Do you think you would be able to conclude within the next five minutes?

Mr Haydon:

Yes.

The President:

We will take our recess at the conclusion of your intervention.

Mr Haydon:

Thank you, Mr President.

Finally, the Nauruan delegation reasserts that we must all work together through the framework of the Convention to promote the development of seafloor minerals. This in turn will provide the continued supply of metals necessary to ensure those living in developed

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States can maintain their levels of education, health and freedoms, and will also provide the additional supply of minerals necessary to ensure that developing States can be brought out of poverty and build vital infrastructure and homes for nearly one billion slum dwellers; clean water distribution systems for nearly one billion people without access to safe drinking water; and hospitals and medical equipment to combat disease which result in millions of young children dying unnecessarily each year.

Mr President, I respectfully request that the Chamber keep this need for development in mind when interpreting the relevant provisions, as well as the consequences of such interpretation to private sector investment

Importantly, let us learn from the lessons of the past. In the 1970s the private sector was set to develop seafloor polymetallic nodules in the Clarion Clipperton Zone. However, there were legal uncertainties at the time surrounding seafloor resources in the international seabed area, as well as sentiment of uncommercial mining terms. These reasons contributed to the private sector walking away, which meant that mining did not eventuate, and because mining did not eventuate in the late 1970s, it is likely that millions of people have died in the past 30 years from deaths that could have been prevented had such mining been encouraged and taken place. Such mining would have, over that period of time, provided more affordable and accessible supply of minerals to developing States, and thus significantly promoted global economic and social growth.

Here we are, some 30 years on, and the private sector, through Nauru Ocean Resources, is finally again showing a willingness to risk the significant investment required to explore and develop this seafloor resource in a sustainable manner.

The Nauruan delegation is hoping that the Seabed Disputes Chamber ensures that the UNCLOS system is interpreted now to encourage, not deter, this private sector participation. Indeed, it would be a pity if failure to provide legal certainty and failure to encourage private sector investment in the Area were to contribute to denying developing States access to the raw materials they require to pull themselves out of poverty. As we know, without affordable and accessible copper and steel there can be no growth and economic development in these developing States, in effect condemning millions of the world's poor to continuing malnutrition, hunger, and disease.

Mr President, it is with this in mind that the Nauruan delegation urges the Chamber and all States Parties to reflect again on the fundamental purpose of the Convention as clearly stated in its preamble: progress, promotion, advancement, and development.

Finally, please reflect on what those four words mean for the poor, the starving, and the sick living in the developing world. What does UNCLOS represent, in real, every day terms, for the children living in poverty now and their children in the future?

Put simply: UNCLOS represents hope.

Thank you, Honourable President and distinguished Members of the Seabed Disputes Chamber.

The President.

Thank you very much, Mr Haydon. Of course, the oral statement of Nauru will appear in the *procès-verbal* of this session and as such it will be part of the case file. However, as some of the information contained in the original written statement has not been transmitted, Nauru could not give the whole of their original intervention. The Chamber, if Nauru so authorizes, will of course put at the disposal of participants the complete text as a service for information purposes only. Does Nauru agree to that?

Mr Haydon.

Yes.

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The President.

The hearing will now be suspended for 30 minutes. We will reconvene at 12.05.

(Short adjournment)

The President:

I now give the floor to the representative of the United Kingdom, who has requested a speaking time of 45 minutes.

Sir Michael, you have the floor.

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STATEMENT OF MR WOOD
UNITED KINGDOM
[ITLOS/PV.2010/3/Rev.2, E. p. 32–49]*Mr Wood.*

Mr President, Members of the Seabed Disputes Chamber, it is an honour to appear before you in these proceedings, and to do so on behalf of the United Kingdom.

Mr President, it is an advantage to address the Chamber late in this oral hearing, since I can agree with much that has been said by earlier speakers, for example, by Germany, by Argentina and by Fiji. It is also a disadvantage because it is difficult to say anything new, and for that I apologize; I will do my best.

My remarks will be organized as follows. I shall begin with some words about the factual background of the Request for an advisory opinion. Next I shall address questions of jurisdiction and admissibility, followed by applicable law. I shall then turn to each of the three questions put to the Chamber. I shall not repeat what is said in the United Kingdom's written statement, which remains the basic account of our position.

Mr President, I need not to describe the facts in any detail. That has been done by the International Seabed Authority in both its written and oral statements. I should like to add that we are very grateful to the Authority for both the Dossier and its statements. I am sure that these will be of great assistance to the Chamber.

It was Nauru that proposed that the Council seek an advisory opinion.¹ As the representatives of the Authority explained on Tuesday, following an extensive debate, the Council did not adopt the proposal as formulated by Nauru. Instead, the Council followed the suggestion of many participants in the debate and asked for an opinion on three concise and abstract questions.²

The Chamber is not concerned with the particular facts of the applications by the Nauru entity and the Tonga entity, which remain pending before the Legal and Technical Commission; nor, in my submission, is the Chamber called upon to pronounce upon the 68-page draft sponsorship agreement between Nauru Ocean Resources Inc., United Nickel Inc. (a company registered in British Columbia), and the Republic of Nauru, which is summarized at length in their written statement and set out in full in an appendix to that statement. Members of the Chamber, I think I need not go into the questions of nationality or effective control that these arrangements raise; they are difficult questions.

It seems to have been generally understood, during the debate in the Council of the Authority, that the request for an advisory opinion and consideration of the two applications for plans of work were entirely distinct.³ The delegate of Fiji, on the day the request was made by the Council, referring to the relationship between Nauru's application for an exploration licence and the proposal then before the Council to seek an advisory opinion from the Chamber, said "these are two very distinct and materially unrelated things".⁴ As the delegate of Canada in the Council put it, article 191 "was never meant to provide a mechanism for individual States Parties to seek a legal opinion".⁵ Unlike a judgment in a

¹ Proposal to seek an advisory opinion from the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea on matters regarding sponsoring State responsibility and liability. Submitted by the delegation of Nauru, ISBA/16/C.6 (UK Written Statement - hereafter "WS", flag A).

² List of speakers and summary records of the 155th, 160th and 161st meetings of the Council prepared by the Secretariat [Dossier No. 3].

³ List of speakers and summary records of the 155th, 160th and 161st meetings of the Council prepared by the Secretariat [Dossier No. 3], paras. 47 (South Africa), 52 (Fiji), 81 (Republic of Korea), 90 (Uganda).

⁴ 6th May 2010 Statement by the Fiji Delegation [Dossier No. 4], third para.

⁵ List of speakers and summary records of the 155th, 160th and 161st meetings of the Council prepared by the Secretariat [Dossier No. 3], para. 104.

STATEMENT OF MR WOOD 16 September 2010, *id.*

contentious case, an advisory opinion, however authoritative, is not itself legally binding. These points were all noted by speakers in the debate in the Council leading to this request.⁶

Mr President, I shall make three short points on jurisdiction and admissibility.⁷

My first point is that, as others have said, whenever the Chamber receives a request for an advisory opinion, it should consider both whether it has jurisdiction, and, assuming that it does, whether there are any reasons that would require it to decline to respond to the questions put to it. It should do so, if necessary, *proprio motu*.

Second, the Chamber only has jurisdiction to respond to legal questions, and only to legal questions arising within the scope of the activities of the requesting organ. On this issue I can do no better than to refer to the excellent analyses in the written statements of Australia⁸ and Mexico.⁹ I would like to add just one point. The first two questions put to the Chamber are clearly legal questions. The third can also be construed as a legal question, if it is understood as requesting the Chamber to indicate what measures a sponsoring State is legally required to take in order to fulfil its responsibility under the Convention. In so far as a question put to the Chamber might lead into policy areas, it is incumbent upon the Chamber to confine its answer to those aspects of the question that can be answered on the basis of law.¹⁰

Yesterday I listened with great interest to Mexico's eloquent appeal for the introduction by sponsoring States of a strict liability regime.¹¹ However, in my view, this would require a policy decision by States Parties, whether taken through a collective decision or on an individual basis. It is not, I would suggest, for the Chamber to recommend to individual sponsoring States what policy choices they should make as to how to fulfil their responsibility within their own legal systems, since in doing so it would be stepping outside its judicial role. As the Permanent Court said in the *Eastern Carello* case, "The Court, being a Court of Justice, cannot, even in giving advisory opinions, depart from the essential rules guiding their activity as a Court."¹²

My third point as regards the question of admissibility is that there is an obvious difference between the apparently mandatory wording of article 191 of the Law of the Sea Convention ("shall give") and the clearly permissive wording of Article 65 of the Statute of the International Court ("may give").¹³ As others have said, the Chamber must have some discretion to decline to respond to a request for an advisory opinion, if it is to be in a position to protect its judicial role. Nevertheless, in the present case, in my submission the Chamber does not need to consider this question since it has not been suggested by anyone that there are any plausible grounds for exercising that discretion; indeed, there are none. Therefore, in my submission, the Chamber should be careful on this occasion not to rule out such discretion absolutely.¹⁴

⁶ List of speakers and summary records of the 155th, 160th and 161st meetings of the Council prepared by the Secretariat [Dossier No. 3].

⁷ See also ISA WS, paras. 2.1-2.8.

⁸ Australia WS, paras. 4-13.

⁹ Mexico WS, paras. 22-4. See also China WS, paras. 4-8.

¹⁰ As Judge Ndiaye has written, in his private capacity, "one has to try to retain only the legal aspects *per se* of a question . . .". T.M.Ndiaye, "The Advisory Function of the International Tribunal for the Law of the Sea", 9 *Chinese JIL* (2010), para. 80.

¹¹ ITLOS/PV.2010/2, pp. 50-52.

¹² (1923) P.C.I.J. Series B, No. 5, p. 29; cited with approval, most recently, in the *Accordance with international law of the unilateral declaration of independence in respect of Kosovo* Advisory Opinion, 22 July 2010, para. 29.

¹³ *United Nations Convention on the Law of the Sea 1982: A Commentary*, Volume VI (S. Nandan, M. Lodge, Sh. Rosenne, eds.), p. 641 (paras. 191.1, 191.7(a)).

¹⁴ *Contra Mexico* WS, paras. 50-54.

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I turn now to the question of the applicable law. The law to be applied by the Chamber is described, in very general terms, in article 38 of the Statute of the Tribunal¹⁵ and article 293 of the Convention.¹⁶ The key provisions, for the purposes of the present proceedings, are to be found in Part XI of the Convention, including Annex III, and in the 1994 Agreement. As the representative of the Authority explained on Tuesday, it is important to note that the provisions of the Agreement and Part XI of the Convention are to be interpreted and applied together as a single instrument; and in the event of any inconsistency between the Agreement and Part XI, the provisions of the Agreement prevail.¹⁷

I shall not seek to describe the complex system for the exploration and exploitation of the resources of the Area – the so-called “parallel system”. I would simply draw attention to the full, very good outline of the regulatory regime that is set out in Chapter IV of the Authority’s written statement.¹⁸ As others have pointed out¹⁹, there are essentially three parties involved when a sponsored entity (the contractor) engages in activities in the Area, and the relationship between them is complex. They are the Authority, the sponsoring State or States, and the contractor. Others have already emphasized the essential role that sponsorship plays in ensuring compliance with the rules of the system.

As the Chamber is aware, the relevant provisions of the Convention are to be interpreted in accordance with the rules set forth in Articles 31 and 32 of the Vienna Convention on the Law of Treaties. In particular, the provisions of a treaty should not be looked at in isolation, but read together. This is particularly relevant to the interpretation of the various provisions in Part XI and Annex III dealing with the responsibility and liability of sponsoring States.²⁰

However, the fact that the Convention must be interpreted as a whole does not mean that the Chamber should go outside the specific questions put to it, and seek to apply the general principles set forth in the Convention or general international law, as some appear to suggest.²¹ Moreover, when referring to other provisions of the Convention, care must be taken to ensure that they are in fact relevant to the questions put to the Chamber. Article 304, for example, has been referred to²², but in my submission it is a classic “without prejudice” clause; it is not in itself a source of obligation for States Parties to the Convention or sponsoring States in particular. What it says is that the specific provisions of the Convention regarding responsibility and liability for damage are without prejudice to (i) the application of existing rules (where such rules are applicable) and (ii) the development of future rules (which, when developed, will then apply in accordance with their terms). Likewise, article 194, paragraph 1, is a very general obligation imposed upon all States. It is to be found among the general provisions of Part XII of the Convention. It requires States to take all measures that are necessary to prevent, reduce and control pollution of the marine environment “using for this purpose the best practicable means at their disposal and in accordance with their capabilities”. The words that I have just quoted cannot and do not

¹⁵ Annex VI to the Convention.

¹⁶ United Kingdom WS, paras XX.

¹⁷ UNGA res. 48/263 of 28 July 1994, para. 4; Agreement, art. 2, para. 1. This formula has been repeated in most instruments adopted with reference to Part XI since 1994 – see, for example, the Introductory Notes to the Rules of Procedure of the Assembly and Council.

¹⁸ ISA WS, paras 4.1–4.28.

¹⁹ Republic of Korea WS, paras 14–15, Romania WS, paras. 12–25.

²⁰ Republic of Korea WS, paras. 2–5.

²¹ Mexico WS, paras 59–68.

²² Statement of Stichting Greenpeace Council (Greenpeace International) and the World Wide Fund for Nature, (not part of the case-file, but nevertheless on the Tribunal’s website), pp. 4, 9.

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qualify specific obligations laid down elsewhere in the Convention, including the obligations incumbent upon those who choose to be sponsoring States.²³

The Chamber will no doubt take care to distinguish between existing rules of law that are applicable and what may loosely be termed *lex ferenda* or “soft law”. The Chamber will no doubt be conscious of the approach of the International Court of Justice and other international courts and tribunals when considering the sources of international law listed in Article 38 of the Statute of the Court. Reference has been made in the present proceedings, through the prism of article 304, to the International Law Commission’s draft principles on allocation of loss in the case of transboundary harm arising out of hazardous activities.²⁴ Quite apart from the fact that the Commission expressly stated that it was not dealing with global commons, which in its view required separate treatment,²⁵ the Commission was also explicit that, while the draft principles were intended to contribute to the process of the development of international law,²⁶ the Commission did not attempt to identify the current status of the various aspects of the draft principles in customary international law, and the way in which the draft principles are formulated is not intended to affect that question.²⁷ Therefore, I think the status of those principles is clear.

Mr President, I now turn to the three questions put by the Council to the Chamber, but I would like to begin with six points that appear to me to be central to the present case.

First, the Chamber is not being asked to describe the obligations of States Parties in general, but rather those of sponsoring States; that is clear from the text of the questions. It is also reflected in the title that has been given to these proceedings. Given the scope of the questions, it seems, for example, out of place to urge the Chamber to pronounce on the obligations of States Parties in the field of anti-monopolization.²⁸

Second, as I have already noted, the Council has framed the questions in an abstract manner, without reference to any particular situation or application for a plan of work. As the representatives of the Authority made clear on Tuesday, this was a deliberate and conscious choice.²⁹ The abstract formulation of the three questions inevitably affects the degree of detail which the Chamber can provide in response. In my view, the Chamber is not being asked to set out in detail all of the obligations incumbent on sponsoring States. To do so would involve writing a treatise (covering the different stages of prospecting, exploration and exploitation, and the various resources that may be found in the deep seabed). Any attempt to do so could scarcely be exhaustive and would risk becoming out-of-date since the content of these obligations will evolve over time.

Third, it is important to recall, as many others have done, that the protection of the environment is at the heart of this case. The representatives of Nauru this morning painted a very broad, impressionistic picture of the economic, social and environmental considerations facing deep seabed mining in an overall perspective³⁰, but we are concerned today with the specific question of the obligations of sponsoring States.

In this regard we must recall that the deep seabed contains many fragile and sensitive ecosystems, which, once damaged, could take years, decades, to regenerate. It is essential that

²³ UNEP WS.

²⁴ Statement of Stichting Greenpeace Council (Greenpeace International) and the World Wide Fund for Nature, Sections IV and V.

²⁵ *Yearbook of the International Law, Commission 2006*, vol II, Part Two, para. 67(8).

²⁶ *Yearbook of the International Law Commission, 2006*, vol. II, Part Two, para. 67(5).

²⁷ *Yearbook of the International Law, Commission, 2006*, vol. II, Part Two, para. 67(13).

²⁸ Mexico WS, paras. 98-100.

²⁹ List of speakers and summary records of the 155th, 160th and 161st meetings of the Council prepared by the Secretariat [Dossier No. 3].

³⁰ ITLOS/PV.2010/3, pp. 2-11.

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sponsoring States, and the entities that they sponsor, have the necessary measures in place for the purpose of preventing serious harm to the marine environment.

To say that, Mr President, is not to discourage seabed mining.³¹ I do not believe it is the intention of anyone taking part in these proceedings to do that. No one is seeking to discourage private-sector investment in deep seabed mining; but a proper balance has to be struck with environmental concerns. Striking that balance is a matter for the Authority, and for the States Parties acting through the Authority.

It is right that the Convention, including Part XI, and the 1994 Agreement accord the highest importance to the protection and preservation of the marine environment. The Convention itself contains an important series of provisions to that end.³² The protection of the marine environment was also one of the key issues dealt with during the negotiation of the 1994 Agreement.³³ Awareness of the importance of the preservation of the marine environment is likewise reflected in the Nodule Regulations³⁴, and the Sulphides Regulations adopted as recently as May this year.³⁵ It is clear that among the most important functions of sponsoring States is to ensure that the entities they sponsor comply scrupulously with the environmental provisions of the Convention, and the rules, regulations and procedures of the Authority, as well as those contained in their contracts.

My fourth general point is that in its written statement Nauru argued that there should be some differentiation of obligation based on levels of development.³⁶ I note that they have not repeated that suggestion today in their oral statement. It may nevertheless be helpful to say a few words about the point. As others have said, there is nothing in Part XI, or elsewhere in the Convention, or in the 1994 Agreement, to suggest that the obligations of sponsoring States vary depending upon their level of development. Any other conclusion, which could lead to what one might term a "sponsoring State of convenience", could seriously jeopardise the Part XI regime, not least its provisions for environmental protection. It cannot have been intended that the standard of protection of the Area, "the common heritage of mankind", should depend upon which group of States the sponsoring State belongs to. The Convention might be thought to go some way towards mitigating what Germany referred to as "sponsor shopping", in that it requires more than one sponsoring State in some circumstances.³⁷ Article 4, paragraph 4, of Annex III itself begins with the words "The sponsoring State or States shall ..." However, this requirement for dual (or multiple) sponsorship would not assist where there is only one sponsoring State, or where each sponsoring State has some lesser obligations because of its level of development. Even where the co-sponsoring States have different levels of development, it would lead to a most curious result, with undesirable legal uncertainty, if in that case their obligations were to differ.

³¹ Cf Nauru, ITLOS/PV 2010/3, p. 1.

³² Part XI (arts. 145, 162.2(w)); Part XII (arts. 209, 215), Annex III, art. 17.

³³ Under the Agreement, no less than four of the priority tasks of the Authority relate to this matter 1994 Agreement, annex, section 1, para. 5 (g), (h), (i) and (k).

³⁴ ISBA/6/A/18 [Dossier No. 16]. See, in particular, regulations 31 (Protection and preservation of the marine environment) and 32 (Emergency orders) as well as Sections 5 (Environmental monitoring), 6 (Contingency plans and emergencies) and 16 (Responsibility and liability) of the 'Standard clauses for exploration contract' at annex 4 to the Regulations.

³⁵ ISBA/16/A/12; ISBA/16/C/L.5, e.g., Regulation 5 (Protection and preservation of the marine environment during prospecting), Regulation 32 (Responsibility and liability), Regulation 35 (Emergency orders) And Part V (Protection and preservation of the marine environment).

³⁶ Nauru WS, paras. 2, 12-16. A similar suggestion had been made in the paper submitted by Nauru to the Council of the International Seabed Authority, *Proposal to seek an advisory opinion from the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea on matters regarding sponsoring State responsibility and liability*, ISBA/16/C/6.

³⁷ Article 4(3) of Annex III; Nodules and Sulphides Regulations, regulation 11 (1) and (2).

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This morning Nauru addressed the meaning of “effective control”, which is relevant to determining which State or States are required to be sponsoring States in a particular case.³⁸ In my submission, the Chamber does not need to go into that no doubt difficult question. It is a question that relates to identification of the sponsoring State, not to its obligations.

In its written statement Nauru appeared to base much of its argument for differentiation on references to developing States in article 140, paragraph 1, and article 148. It described these as “principles”, and quoted them at the outset of its written statement, without, however, pointing out that in each case the reference was qualified by the words “as specifically provided for in this Part” (that is, Part XI). In other words, in each case there is a *renvoi* to other specific provisions of Part XI. The same is true of article 152, paragraph 2, relating to the exercise of the powers and functions of the Authority, which stipulates that “special consideration for developing States ... specifically provided for in this Part shall be permitted”.³⁹ (One such specific provision, by no means insignificant, is the right for developing States to apply for “reserved areas”.)

Those who drafted Part XI took care to avoid introducing broad and general preferences; the express language referring only to such preferences as were specifically provided for in Part XI was deliberate, and it is clear. This is by no means unusual: similar care is taken in other contexts where States take upon themselves specific differentiated responsibilities, differing, at times, between developing and developed States, but also among the developed States themselves. Examples can be found in the WTO agreements⁴⁰, and those relating to climate change.⁴¹ None of the provisions of Part XI relating to the obligations of sponsoring States specifically provides for any special position for specific categories of sponsoring States. The United Kingdom therefore agrees with those who have submitted that the provisions relating to the obligations of sponsoring States apply regardless of levels of development, economic situations or other circumstances.⁴² The representative of Fiji put it very well yesterday when he said: “The requirements and standards established under Part XI of the Convention apply equally to all States without regard to economic status or financial and other resources capability.”

My fifth general point is that the obligations of sponsoring States are, as Germany and others have clearly set out, conceptually distinct from those of the contractor. The contractor is liable for violations of the terms of the contract with the Authority, including those relating

³⁸ ITLOS/PV.2010/3, p. 13.

³⁹ *United Nations Convention on the Law of the Sea 1982: A Commentary*, Vol. VI (M. Nordquist, S. Nandan, Sh. Rosenne, M. Lodge, eds.), paras. 148.11(a) and 152.11(b).

⁴⁰ See the WTO “schedule of concessions” system, e.g., General Agreement on Tariffs and Trade, art. II 55 U.N.T.S. 194 (1947), incorporated into the General Agreement on Tariffs and Trade, 1867 U.N.T.S. 187 (1994), art. 1(b), General Agreement on Trade in Services, 1869 U.N.T.S. 183 (1994), art. XX.

⁴¹ See the United Nations Framework Convention on Climate Change, 1771 UNTS 107 (1992), art. 4 on the “common but differentiated responsibilities” of States with respect to the Convention and, accordingly, the list of States provided in Annex 1 to the Convention, differentiating those States from the States not listed in the Convention. The Kyoto Protocol to the United Nations Framework Convention on Climate Change, UN Doc FCCC/CP/1997/7 Add.1, Dec. 10, 1997, then defines States listed in the Annex to the Convention and those that are not separately (art. 1.6, 1.7 to the Protocol); provides for specific emission goals for the States listed in Annex 1 to the Convention (art. 3.1 to the Protocol); reiterates the differing responsibilities of States with respect to their specific obligations under the Protocol (art. 10); art. 3.5 provides a special procedure to establish the base year for the determination of the level of carbon stocks of States listed in Annex 1 to the Convention, which are undergoing a transition to a market economy, as opposed to the procedure provided for other States listed in Annex 1 (art. 3.4); and art. 3.6 grants “a certain degree of flexibility” in the implementation of the Protocol to States listed in Annex 1 to the Convention undergoing a transition to a market economy.

⁴² Australia WS, para. 21; Germany WS, paras. 15-21; Russian Federation WS, paras. 3-11, IUCN WS, paras. 58-60.

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to the protection of the environment. The obligations of sponsoring States, on the other hand, are those set forth in the Convention, and include the adoption of laws and administrative measures. The international responsibility of sponsoring States arises from any failure to live up to their obligations under the Convention, for example from a failure to have in place the necessary laws and administrative measures.

My sixth and final general point about the questions is that the obligations of States with regard to these questions are set out in Convention itself. Whilst there may be some utility in having regard to the general principles of the law of State responsibility, ultimately the answers to the questions posed are to be found in particular provisions of the Convention. That is why my statement today, and the United Kingdom's written statement, concentrate upon the proper interpretation of the relevant provisions of Part XI. Any obligations for sponsoring States in relation to the matters which are the subject-matter of this request arise because they are parties to the Convention and, as Argentina stressed yesterday, must be implemented in good faith.

Mr Chairman, I now turn to the first question of the Chamber. This was considered at paragraphs 3.7 to 3.9 of the United Kingdom's written statement.

I will begin with three preliminary matters. First, I do not think that any particular importance attaches to the use of the rather cumbersome expression in the question, "legal responsibilities and obligations". This no doubt reflects differing terminology in the Convention, but it can only be a reference to a single concept, which I shall refer to as the sponsoring State's "obligations". Mexico's thorough analysis in its written statement seems to reach the same conclusion.⁴³

The second preliminary point: Question 1 asks about the obligations of sponsoring States under the Convention, in particular Part XI, and the 1994 Agreement. The acts of any entity that a State Party sponsors in accordance with the Convention are not, as such, attributable to the State concerned in accordance with the rules on State responsibility. This is clear from paragraph 1 of article 139. If the acts of the entity were attributable to the State Party, that paragraph, setting out the obligations of the sponsoring State, would not have been necessary. Furthermore, if the sponsored entity is a commercial enterprise, its acts would not in any event meet the criteria for attribution of conduct to a State in accordance with customary international law. The sponsored entity would neither be an organ of a State, for the purposes of article 4 of in the IOC's Articles, nor be exercising "governmental authority", for the purposes of Article 5.

The third preliminary point arose this morning when the representative of Nauru raised an important point about the meaning of the term "activities in the Area".⁴⁴ This is, indeed, a key term that is used throughout Part XI and the associated instruments. Article 139, like the other provisions we are considering, uses this term "activities in the Area". I will just offer a couple of personal thoughts in response to the question put by Nauru this morning. As he said, the Area is defined in article 1 of the Convention; and so too is the term "activities in the Area". That is defined to mean all activities of exploration for, and exploitation of, the resources of the Area. Article 133 defines the term "resources of the Area" to mean mineral resources *in situ* in the Area at or beneath the seabed, and it distinguishes the use of the term "resources" and the use of the term "minerals", which applies when they are recovered from the Area. So it might be thought that the definition of "activities in the Area" in covering the exploration and exploitation of resources incorporates that definition of resources that refers to "resources *in situ*". There are other provisions that shed light on the term, but particularly clear is article 1 of Annex IV of the Statute of the

⁴³ Mexico WS, paras. 69-78.

⁴⁴ ITLOS/PV 2010/3, pp. 17-18

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Enterprise, which says that the Enterprise is the organ of the Authority which shall carry out activities in the Area directly, as well as the transporting, processing and marketing of minerals recovered from the Area.

Mr President, going back to Question 1, what then are the obligations of sponsoring States under the Convention? As the Authority said in its written statement, and as its representatives reiterated on Tuesday,

[I]t would appear that the overriding intent of the Convention and the 1994 Agreement, and the Regulations, is that the purpose of State sponsorship is to ensure that a State Party takes responsibility in accordance with Article 139, Article 153, paragraph 4, and Annex III, Article 4, paragraph 4, of the Convention.⁴⁵

Other speakers have dealt with these provisions in full and I do not intend to repeat everything they have said.

Article 139, paragraph 1, provides that State Parties “shall have the responsibility to ensure that activities in the Area ... shall be carried out in conformity” with Part XI. According to this provision, this responsibility exists whether the State is itself carrying out activities, or they are carried out by a State enterprise, or by its nationals, or by an entity which it or its nationals effectively controls.

Article 139, paragraph 2, makes it clear that damage caused by State’s failure to carry out this responsibility entails liability (the extent of which is the issue raised by Question 2). The paragraph further stipulates that, in the case of a sponsoring State, the “responsibility to ensure” entails taking “all necessary and appropriate measures to secure effective compliance” by the contractor, referring to article 153 and article 4 of Annex III to the Convention.

Article 4, paragraph 4, of Annex III spells out in more detail the responsibilities of sponsoring States. This paragraph stipulates that a sponsoring State has the responsibility to ensure, within its legal system, that the contractor carries out its obligations under the contract with the Authority. Thus, a sponsoring State is obliged to ensure, in its domestic legal order, that the contractor meets the obligations contained in the contract.

Consistent with article 139, a failure by a sponsoring State to meet its obligations under article 4, paragraph 4, of Annex III entails liability for damage caused by such failure. The article also sets the scope of a sponsoring State’s responsibility, stating that it must adopt laws and regulations and take administrative measures that are reasonably appropriate, within its own legal system, for securing compliance of persons under its jurisdiction. Thus the responsibility of sponsoring States arises not only in the event of damage to the environment but and this is equally important – at the outset, when it is required to adopt laws and take measures aimed at preventing damage. In addition, States Parties are obliged to take “all measures necessary” to assist the Authority in fulfilling its own duty, that is, in ensuring compliance with the relevant legal instruments mentioned in article 153, paragraph 4. This provision refers back to article 139, and has particular relevance for sponsoring States.

These provisions set the basic legal framework within which a sponsoring State operates under the Convention’s legal regime. A sponsoring State cannot be held liable for the actions of a private entity, which is not its organ, as such. These provisions do not attribute the actions of sponsored entities to the State. The responsibility to ensure compliance by sponsored contractors entails the duty of the sponsoring State or States to take reasonably appropriate measures, in the language of article 4, paragraph 4, [of Annex 3] in its internal legal order, to prevent such breaches by sponsored entities.

⁴⁵ ISA WS, para 5.2.

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In conclusion, and as I have already said, the articles on the responsibility and scope of liability of a sponsoring State need be read in conjunction with one another. Article 139 refers to article 4, paragraph 4, of Annex III, which is the more specific article with respect to sponsoring States. So measures deemed to be reasonably appropriate for securing compliance, as required by article 4, paragraph 4, should be considered to meet the standard of "necessary and appropriate measures" in the language of article 139.

I now move to Question 2, which we discussed at paragraphs 3.10 to 3.15 of our written statement. I will try to be very brief, Mr President.

As the Tribunal recalled in its Judgment on the merits in the *MT "SAIGA" (No. 2) Case*⁴⁶, citing the *Factory at Chorzów* judgment.

[i]t is a well-established rule of international law that a State which suffers damage as a result of an internationally wrongful act by another State is entitled to obtain reparation for the damage suffered from the State which committed the wrongful act and that 'reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed'.⁴⁷

If the sponsoring State and the Authority could not agree, it would ultimately be for an international court or tribunal to decide the precise "extent of liability" of a sponsoring State for a breach of the Convention. The answer will follow from the evidence presented to the court or tribunal, and its appreciation thereof, as well as the relevant legal factors, some of which I have just mentioned. Indeed, it could well fall to this Chamber to decide the matter in the exercise of its contentious jurisdiction under article 187, paragraph (b)(i), in a dispute between the Authority and a sponsoring State about whether the latter has fulfilled its obligations. Judge Ndiaye, writing in his private capacity, asked the question: "[w]hat would happen if the dispute submitted to the Chamber or the Tribunal concerns a legal question for which an advisory opinion has already been rendered? Will they be able to extricate themselves from the principles and solutions adopted in the advisory opinion?"⁴⁸ The Chamber may wish to avoid tying in its hands in any future contentious case by making too detailed a pronouncement in this advisory opinion.

I now turn to Question 3 which, as others have said, is closely related to Question 1. I once again draw attention to our written statement, this time paragraphs 3.16 to 3.19.

Again, the various provisions of the Convention need to be read together and in context. In particular, one needs to note the provisions of the second sentence of article 139, paragraph 2, and of the second sentence of article 4, paragraph 4, of Annex III. Under the former, a sponsoring State is absolved from liability if it "has taken all necessary and appropriate measures to secure effective compliance"; under the latter if it "has adopted laws and regulations and taken administrative measures which are, within the framework of its legal system, reasonably appropriate for securing compliance". The test is an objective one.⁴⁹ While the measures need to be tailored to the sponsoring State's own legal system, that does not mean that what is necessary and appropriate is left to its sole appreciation. Nor is this a field in which the obligations are softened by a "margin of appreciation" doctrine. As the

⁴⁶ *The MT "SAIGA" (No. 2) Case (Saint Vincent and the Grenadines v. Guinea)*, (July 1, 1999), para. 170

⁴⁷ *Merits, Judgment No. 13, 1928, P.C.I.J., Series A, No. 17*, p. 47. See also *Australia WS*, paras 27-42.

⁴⁸ T.M Ndiaye, "The Advisory Function of the International Tribunal for the Law of the Sea", 9 *Chinese JIL* (2010), para. 52

⁴⁹ *Australia WS*, para. 46. Cf. *Nauru WS*, para. 22.

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Netherlands has convincingly shown, it is misleading to speak of “flexibility” in this context.⁵⁰

In addition to the general requirements found in article 139, article 4, paragraph 4, of Annex III specifies in plain terms what necessary and appropriate measures a State must take in order to meet its responsibility. According to that paragraph, a State will not be held liable for damage caused by a sponsored contractor if it has enacted “laws and regulations and taken administrative measures ... reasonably appropriate for securing compliance”.

It follows that the first of the positive steps a State must take is to put in place what the Netherlands termed yesterday a “public domestic regulatory framework”. In other words, it must enact laws and regulations aimed at ensuring that entities it sponsors comply with their legal obligations specified in the Convention and in their respective contracts.⁵¹ In these oral hearings, no one has suggested the contrary. Article 209, paragraph 2, reinforces this by providing that “States shall adopt laws and regulations to prevent, reduce and control pollution of the marine environment from activities in the Area undertaken by vessels, installations, structures and other devices ... operating under their authority”. For the avoidance of doubt, I would recall that, contrary to what may have been suggested this morning, the flag State has clear obligations in relation to pollution matters arising for ships flying its flag.

On Tuesday, the Authority indicated some of the kinds of provisions that one might expect to find in legislation giving effect to the obligations of sponsoring States. She referred in particular to the German law, the *Meeresbodenbergbaugesetz*, and to the Czech law.

Among other things, legislation is essential if victims are to have rights under domestic law. A contractual arrangement would be wholly inadequate for this. Nor can it be accepted that a sponsoring State is absolved from enacting laws and regulations because, and I quote from one of the written statements, “[e]nacting legislation specifically to regulate deep sea mining may prove too costly”.⁵²

But legislation in itself is not sufficient to relieve the State from its responsibilities. As is made clear in article 4, paragraph 4, of Annex III, administrative measures must also be taken by the sponsoring State for the purpose of securing compliance with the laws and regulations of the State.⁵³ Hence, following the enactment of appropriate legislation, a State is under a continuing obligation to take positive measures to ensure that the contractor fulfils the legislative requirements imposed upon it. Thus, whether a State has taken the necessary and appropriate measures and has lived up to its responsibilities is a matter that will depend upon the ongoing action or inaction of the State, and must be continuously evaluated.

The sponsoring State’s responsibility is a conduct-based obligation, rather than a result-based one.⁵⁴ Taken together with the continuing nature of the obligation, this makes it difficult in practice to determine *ex ante* that a State has met its obligation to take the necessary and appropriate measures to secure compliance. Such a determination will vary in the context of each case, and will be measured against the requirements provided in article 139 and, more specifically, the measures articulated in article 4, paragraph 4, of

⁵⁰ Netherlands WS, para. 4.3, commenting on *United Nations Convention on the Law of the Sea 1982: A Commentary*, Volume VI (S. Nandan, M. Lodge, Sh. Rosenne, eds.), p. 127.

⁵¹ Australia WS, paras. 24-25; China WS, paras. 32(a), 34; Mexico WS, para. 86-88, Netherlands WS, paras. 3.6, 4.2, Republic of Korea WS, para. 6; Philippines WS, *passim*; Romania WS, para. 33; IUCN WS, paras. 44-57.

⁵² Nauru WS, para. 26.

⁵³ Republic of Korea WS, para. 7.

⁵⁴ China WS, paras. 21(c) and (d), 26; Germany WS, paras. 7-8; Netherlands WS, paras. 3.6-3.8, Republic of Korea WS, paras. 12-13; Romania WS, paras. 30-33.

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Annex III on a continuous basis.⁵⁵ It is clear that for the sponsoring State merely to conclude a contract with the sponsored entity would not in practice be sufficient.⁵⁶

Thus, to answer the question whether a State had fulfilled its responsibility under the Convention and the 1994 Agreement, and especially article 139 and Annex III, an international tribunal, and specifically this Chamber, if the matter comes before it in a contentious case, will have to take into account all of the circumstances, including the points I have just made. In practice, this decision can only be made *ex post facto* by evaluating the legislation enacted and the measures taken over time by the State concerned.⁵⁷

Mr President, Members of the Seabed Disputes Chamber, I hope the observations made in the United Kingdom's written statement, and again today, will assist the Chamber in its important task of ensuring the correct and consistent interpretation of the regime for the deep seabed. We welcome any greater clarity and understanding that the Chamber can bring to the key provisions of the Convention concerning the obligations of sponsoring States.

Mr President, Members of the Chamber, I am grateful for your attention

The President.

Thank you very much, Sir Michael.

The Chamber will now recess and meet again at 3 p.m. sharp to listen to the statements of the Russian Federation, the Intergovernmental Oceanographic Commission of the United Nations Educational, Scientific and Cultural Organization and the International Union for the Conservation of Nature.

(The sitting closes at 12.56 p.m.)

⁵⁵ Australia WS, para. 22; IUCN WS, paras. 24-29

⁵⁶ Netherlands WS, para. 4.2, Republic of Korea WS, para. 10

⁵⁷ IUCN WS, para. 29

12 September 2011, p.m

PUBLIC SITTING HELD ON 16 SEPTEMBER 2010, 3.00 P.M.

Seabed Disputes Chamber

Present: *President* TREVES; *Judges* MAROTTA RANGEL, NELSON, WOLFRUM, YANAI, KATEKA, HOFFMANN, GAO, BOUGUETAIA, GOLITSYN;
Registrar GAUTIER.

List of delegations: [See sitting of 14 September 2010, 10.00 a.m.]

AUDIENCE PUBLIQUE TENUE LE 16 SEPTEMBRE 2011, 15 HEURES

Chambre pour le règlement des différends relatifs aux fonds marins

Présents : M. TREVES, *Président*; MM. MAROTTA RANGEL, NELSON, WOLFRUM, YANAI, KATEKA, HOFFMANN, GAO, BOUGUETAIA, GOLITSYN, *juges*;
M. GAUTIER, *Greffier*.

Liste des délégations : [Voir l'audience du 14 septembre 2010, 15 heures]

The President:

I now wish to give the floor to the representative of the Russian Federation, Mr Titushkin.

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STATEMENT OF MR TITUSHKIN
RUSSIAN FEDERATION
[ITLOS/PV.2010/4/Rev.2, E, p. 1 9]*Mr Titushkin:*

Mr President, distinguished Members of the Chamber, it is a great honour to represent my country, the Russian Federation, before the Chamber in these public hearings.

The Russian Federation regards the Chamber as one of the most authoritative bodies in the sphere of the international law of the sea and the one that contributes most consistently and effectively to the progressive development of this highly important branch of international law.

The Russian Federation is eager to maintain and develop full cooperation with the Tribunal and this is one of the reasons for our decision to present our oral statement that follows on the arguments and comments my country has already made in writing.

In our written statement we mentioned that the Convention – namely article 139, article 153, paragraph 4, and Annex III, article 4, paragraph 4 – contains vague terms that need clarification.

Let me make some specific comments on the questions that are under the Chamber's consideration. I will quote them. First: What are the legal responsibilities and obligations of States Parties to the Convention with respect to the sponsorship of activities in the Area in accordance with the Convention, in particular Part XI and the 1994 Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982? Question 3: What are the necessary and appropriate measures that a sponsoring State must take in order to fulfil its responsibility under the Convention, in particular article 139 and Annex III, and the 1994 Agreement?

Mr President, today in our oral statement we would like to address the problem of interpretation of these provisions and share with you our understanding of these issues.

Article 139 provides that States shall have the responsibility to ensure that the activities in the Area performed by enterprises which they sponsor shall be carried out in conformity with the Convention. The article goes on to stipulate that a State Party shall not, however, be liable for damage caused by any failure to comply with the Convention by a person whom it has sponsored under article 153, paragraph 2(b), if the State Party has taken all necessary and appropriate measures to secure effective compliance under article 153, paragraph 4, and Annex III, article 4, paragraph 4.

As we can see, when describing the prerequisites for a State to be released from liability, article 139 refers to two other provisions of the Convention. One of them, article 153, paragraph 4, provides that the Authority shall exercise control over activities in the Area and that States Parties shall assist the Authority by taking all measures necessary to ensure such compliance in accordance with article 139. The other one – Annex III, article 4, paragraph 4 – contains a more detailed presentation of the circumstances when a State cannot be considered liable for the damage mentioned. It states that a sponsoring State shall not be liable for damage caused by any failure of a contractor sponsored by it to comply with its obligations if that State Party has adopted laws and regulations and taken administrative measures which are, within the framework of its legal system, reasonably appropriate for securing compliance by persons under its jurisdiction.

On our way to perceiving the notion of the responsibilities and obligations of States as initially designed by the founders of the Convention, in going from one article to another we permanently encounter an obstacle – uncertainty of the terms in question.

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For instance, article 139 speaks of “all necessary and appropriate measures”; Article 153 then goes on with “all measures necessary”; Annex III, article 4, paragraph 4, finally, ends up with “reasonably appropriate” laws, regulations and administrative measures.

It is obvious that there is not only uncertainty but also an overlap of terms used to define the same thing; in particular, these terms are used to describe the character of the measures that a State should take in order to fulfil its responsibility to ensure compliance.

The Russian Federation believes that it is in the interests of neither States Parties to the Convention nor enterprises which they sponsor that such uncertainty and confusion should continue to exist. The Russian Federation sees the task of the Chamber as to eliminate this uncertainty when answering questions numbered 1 and 3.

Mr President, distinguished Members of the Chamber, although there are a number of difficult points of interpretation as to the question of responsibilities and obligations of States sponsoring entities, there is still a number of quite clear issues which I would like to highlight.

Annex III, article 4, paragraph 4, stipulates that the sponsoring States shall have the responsibility to ensure, within their legal systems, that a contractor so sponsored shall carry out activities in the Area in conformity with the terms of its contract and its obligations under this Convention.

I would like to draw your attention to the following point. Article 4 speaks of the responsibility of States sponsoring contractors and then of terms of contract and obligations under the Convention attributing them to contractors.

In the provisions of article 139 there is also the distinction between the responsibility of sponsoring States and the obligations on contractors (entities). The same state of affairs appears in article 153. Proceeding from that, we can say that the responsibilities and obligations of States and entities are clearly distinguished by the Convention. We should bear this in mind in future when analyzing the conclusions.

Now, Mr President, allow me to skip to another point which may help us understand the nature of the responsibilities of sponsoring States and their liability that again lies within the provisions of article 153.

Article 153 provides for the primary role of the Authority in supervising all activities of any entity in the Area. It states that the Authority shall exercise control over activities in the Area as is necessary for the purpose of securing compliance with the relevant provisions of the Convention and that States shall assist the Authority by taking all measures necessary to ensure such compliance in accordance with article 139.

According to that, the Authority is primarily responsible for ensuring compliance with the provisions of the Convention by entities acting in the Area. States take a secondary role by assisting the Authority by taking all measures necessary to ensure such compliance. This does not, of course, mean that States bear less responsibility than the Authority. In our belief, in conceiving this provision the founders of the Convention wished to point out that the Authority as the partner of the entity with which it makes a contract to act in the Area disposes of certain means of control — monetary, contractual, and administrative. States have some measure of control too, from mainly administrative measures to penal sanctions.

Analyzing the provisions of the three articles in question, the Russian Federation has come to provisional conclusions which can give us some hints, but unfortunately not the answers, to Question 1: (a) the Convention distinguishes the responsibility of States and obligations of contractors; the contractor's duty is to comply with the provisions of the Convention and the terms of its contract, whereas the responsibility of States may be expressed by the phrase “ensure such compliance by entities”, as described in Annex III, article 4, paragraph 4. Such responsibilities include, *inter alia*, adopting laws and taking

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administrative measures which are reasonably appropriate for securing compliance by persons under their jurisdiction; and (b) the Authority bears primary responsibility to control the compliance by any entity with the Convention while the State's duty is to assist the Authority.

Mr President, now allow me to briefly comment on the question as to the necessary and appropriate measures that a sponsoring State must take in order to fulfil its responsibility, which is Question 3.

Once again, let me refer to Annex III, article 4, paragraph 4. In their written statements some delegations suggested that the problem of the liability of sponsoring States can be resolved through a sponsoring contract. My Government is of the view that it is not a solution of the problem, since a bare fact of making a sponsoring contract with an entity does not exempt a State from liability. Annex III, article 4, does not include a conclusion of sponsoring contracts since it is not an administrative or legislative measure, but pertains rather to the sphere of civil law.

It is also clear that the simple act of adopting laws will not be sufficient either. For a State to fulfil its responsibilities, a multilevel system of control measures over activities of sponsored entities should be constructed. Laws should be enforceable enough and there should be administrative bodies that would be responsible for enforcing them, preventing violation thereof and imposing sanctions against the violators.

Mr President, bearing in mind these conclusions as to Questions 1 and 3, let us come to Question 2: What is the extent of liability of a State Party for any failure to comply with the provisions of the Convention, in particular Part XI, and the 1994 Agreement, by an entity whom it has sponsored under article 153, paragraph 2(b), of the Convention?

Article 139 contains a general provision stipulating that damage caused by the failure of a State to carry out its responsibilities under Part XI of the Convention shall entail liability. Article 22, Annex III, states that it is the contractor who shall have responsibility or liability for any damage arising out of wrongful acts in the conduct of its operations. Article 139, however, exempts a State from liability for damage caused by any failure of a contractor to comply with the Convention if it has taken all necessary measures elaborated in article 4, Annex III.

The Russian Federation believes that a State can be held liable only for something for which it is really responsible. Therefore, as we concluded previously, a State may be liable only for an inability to adopt laws and take administrative measures, not for the activity of entities, and only in the case of damage being caused by any failure of a contractor sponsored by the State to comply with its obligations.

Accordingly, the strong persuasion of the Russian Federation is that a contractor takes primary liability for the damage resulting from its activity in the Area, whereas there is no subsidiary liability of States for that damage.

Having expressed the position of the Russian Federation on the questions put forward before the Chamber by the Authority, we would like as well to share our views on some other issues relating to the standards of responsibility.

At the 16th session of the Seabed Authority, the delegation of Nauru distributed a proposal to seek an advisory opinion of the Chamber on matters regarding sponsoring State responsibility and liability – I refer to the document ISBA/16/C/6 – in which some relevant questions were raised and Nauru's interpretation of the problem was expressed. Nauru also confirmed its position in the written statement submitted to the Chamber.

In particular, Nauru considers that, taking into account the lack of clarity on the issue, it will be difficult for a State to assess potential risks and liability before commencing activities in the Area, and this fact may prevent some States – for instance, developing ones – from participating in activities in the Area. That would supposedly constitute a breach of the

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Convention clause, providing the promotion of effective participation of developing States in activities in the Area - article 148 of the Convention.

In Nauru's view, the vague terms describing responsibility and liability of the sponsoring States should be clarified with regard to the limited capabilities of developing States to control contracting entities, which in most cases are independent from the sponsoring State, thus leading to their failure to ensure effective compliance with the Convention's requirements.

Moreover, Annex III, article 4, paragraph 4, of the Convention, by stating that a sponsoring State shall not be liable if it has adopted laws and regulations and taken measures which are "within the framework of its legal system, reasonably appropriate for securing compliance", implies, in Nauru's opinion, a subjective element and supposedly gives grounds to assume that the measures required may vary from State to State.

The Russian Federation believes that such an approach is erroneous and contradicts the basic principles of the Convention.

In the view of the Russian Federation, the Convention contains no subjective elements which could allow States to interpret it [on the basis of] their own economic or any other capacities. The words "necessary" and "(reasonably) appropriate", though in some sense unclear, are strongly linked to the basic provisions of the Convention governing the activities in the Area and can be interpreted only in integrity with them. They imply an entirely objective standard for the liability and responsibility of the sponsoring States.

As to the preclusion of developing States from effective participation in activities in the Area due to their inability to assess potential risks and liabilities, we would like to draw the Chamber's attention to the wording of article 148, which envisages the promotion of developing States only in cases "specifically provided for in this Part". There are clear provisions stipulating certain privileged conditions for developing States: for example, article 143, paragraph 3(b) - developing programmes for the benefit of developing States; article 144, paragraph 1(b) - the transfer of technology and scientific knowledge to developing States; or article 150(h) - the protection of developing States from adverse effects. Thus, the approach presupposing application of different standards of responsibility and liability to developed and/or developing States as a form of promotion of the latter would go beyond the principle introduced in article 148, as there is no such provision in the Convention that refers to a special approach to the needs of developing States in terms of their responsibility or liability.

Furthermore, article 150(g) refers to "the enhancement of opportunities for all States Parties, irrespective of their social and economic systems or geographical location, to participate in the development of the resources of the Area" as one of the policies relating to activities in the Area. In case different standards of State responsibility and liability are applied, the opportunities for developing States to carry out activities in the Area would be substantially higher than those of the developed ones. That may lead to a situation where private companies seeking a sponsoring State would prefer only those States where potential risks are lower and liabilities are less onerous.

The same approach of developing a single standard of responsibility for all States should be applied when analyzing the issue of the necessary and appropriate measures that a sponsoring State must take in order to fulfil its obligations under the Convention. The wording of Annex III, article 4, paragraph 4, of the Convention, though containing uncertainty, does not, however, imply any subjective element. In the view of the Russian Federation, the words "... within the framework of its legal system ..." should not be interpreted so as to imply a different standard of responsibility for each State. The aforementioned phrase is used only to point out possible differences in the legal nature or form of regulations and measures adopted by States in order to fulfil their obligations under

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the Convention. For instance, such a difference may emerge due to objective reasons: different States may have quite different legal systems – Anglo-Saxon, continental, et cetera.

Bearing in mind the arguments referred to above, the Russian Federation has come to the following conclusions:

First, the Convention distinguishes the responsibility of States and obligations of contractors. The contractor's duty is to comply with the provisions of the Convention and the terms of its contract, whereas the responsibility of States is described in Annex III, article 4, paragraph 4, and consists of adopting laws and taking administrative measures which are reasonably appropriate for securing compliance by persons under their jurisdiction. At the same time the Authority bears primary responsibility to control the compliance by any entity with the Convention while the State's duty is to assist the Authority by adopting laws and taking administrative measures.

Second, the necessary and appropriate measures that a sponsoring State must take in order to fulfil its responsibility consist in constructing a multilevel system of control measures over activities of sponsored entities, adopting enforceable laws and establishing administrative bodies that would be responsible for enforcing them, preventing violations thereof and imposing sanctions against the violators. The bare fact of making a sponsoring contract with an entity will not exempt a State from liability.

Third, a State may be liable only for omission to adopt laws and take administrative measures, not for activity by entities, and only in case of damage being caused by any failure of a contractor sponsored by the State to comply with its obligations. A contractor shall take primary liability, whereas States take no subsidiary liability.

Fourth, a single standard should be applied with regard to the responsibilities, obligations and the extent of liability of sponsoring States and to what necessary and appropriate measures a sponsoring State is required to take.

I would like to thank you, Mr President, and distinguished Members of the Chamber.

The President:

Thank you very much, Mr Titushkin.

I now give the floor to the representative of the Intergovernmental Oceanographic Commission of the United Nations Educational, Scientific and Cultural Organization.

Mr Desa, you have the floor.

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STATEMENT OF MR DESA
UNESCO/IOC
[ITLOS/PV.2010/4/Rev.2, E, p. 9–14]

Mr Desa:

Mr President, distinguished Members of the Seabed Chamber, it is an honour for the Intergovernmental Oceanographic Commission of the United Nations Educational, Scientific and Cultural Organization (UNESCO/IOC) to appear before the Tribunal in the present advisory proceedings.

I will present to you the comments of UNESCO/IOC regarding the questions for which the advisory opinion is sought. These proceedings are of great importance for UNESCO/IOC, which is following them with keen attention.

Mr President, I wish to present the views of UNESCO/IOC on some scientific aspects of the questions on which the Chamber is requested to advise, which are of particular relevance to UNESCO/IOC in the light of its mandate and the work that it has developed.

As you know, science looks at the seabed and ocean floor and subsoil thereof as natural laboratories decoupled from anthropogenic influences. These laboratories need preservation for this reasons and because they are the refuge of unique and vulnerable marine ecosystems comprising abundant and rare biodiversity. These ecosystems comprise species that have slow growth rates, high longevity and low fecundity which may or may not recover from any sort of adverse impacts.

As human exploration of our seas reaches deeper and further from shores, technology is reaching its limits and starts to fail, in some cases expensively and destructively. Liabilities can be in excess of the GDP of many least developing countries seeking mineral exploration in the Area, leading to unrecoverable damages to the common heritage of mankind.

It is for all the above reasons and more that UNESCO/IOC advocates the precautionary principle in its approach to the exploitation in the Area, thereby complying with what is established in article 209 of UNCLOS.

Mr President, my intention now is not to analyze issues concerning the threshold of compliance nor of State responsibility, but to focus on the content of the obligations contained in UNCLOS and on the 1994 Agreement, and among these only those directly related to the mandate and work of UNESCO/IOC, in particular marine scientific research and transfer of marine technology, as UNESCO/IOC is recognized by the United National General Assembly as a competent international organization in the field of transfer of marine technology in accordance with Part XIV of UNCLOS and as a focal point on matters of marine science. Additionally, article 144 and section 5 of the annex to the 1994 Agreement establish obligations relating to the transfer of marine technology, including the obligation to promote international technical and scientific cooperation with regard to activities in the Area by developing scientific and cooperation programmes in marine science and technology and the protection and preservation of the marine environment.

In accordance with article 143 of UNCLOS, States Parties may carry out marine scientific research in the Area provided that they promote international cooperation by ensuring that the research is conducted for the benefit of all nations, including developing countries, and by effectively disseminating the results and analysis.

Towards that end, in 1997 UNESCO/IOC established, through Resolution XIX-19, the Advisory Body of Experts on the Law of the Sea (IOC/ABE-LOS) with the mandate to develop criteria and guidelines for the implementation of the general obligation of transfer of marine technology contained in article 271 of UNCLOS.

In 2003 IOC/ABE-LOS approved the final draft of the *Criteria and Guidelines on the Transfer of Marine Technology*. Later that year, the UNESCO/IOC Assembly endorsed them

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at its 22nd session through Resolution XXII-12. For its part, the UN General Assembly, through Resolution 58/240, welcomed their adoption and encouraged UNESCO/IOC to continue to disseminate and implement them, and, similarly, encouraged States to use them.

As for marine scientific research, in 2001 the UN General Assembly, through Resolution 53/12, invited UNESCO/IOC to request IOC/ABE-LOS to develop, in cooperation with the Division of Ocean Affairs and Law of the Sea (DOALOS) and with regional or sub-regional organizations, procedures under Part XIII of UNCLOS related to marine scientific research.

In 2006 the IOC/ABE-LOS approved the "Procedure for the application of Article 247" through Resolution XXIII-8. The UN General Assembly, for its part, welcomed it.

Mr President, although resolutions of UNESCO/IOC Assembly do not fall under the category of sources of international law as defined in Article 38 of the Statute of the International Court of Justice, they set forth guidelines and recommendations for the Member States and are considered a vital part of international law making process. For instance, UNESCO/IOC's guidelines on transfer of marine technology as well as the implementation procedure for marine scientific research, adopted by its Assembly, sometimes serve as a base from which national legislation is drawn in Member States. Therefore, the impact of these resolutions on the State practice in the field of marine scientific research cannot be underestimated.

For example, the criteria and guidelines on the transfer of marine technology further develop what is established in part XIV of UNCLOS by defining what "marine technology" means and by establishing some useful criteria of how the transfer of marine technology should benefit all parties concerned. As for the implementation of Part XIII of UNCLOS, that regulates marine scientific research, for example the procedure, and seeks to enhance the transparency of State Parties' conditions required for obtaining an authorization to carry out research activities

Mr President, in this sense note has thus to be taken that out of the 160 States Parties to UNCLOS (as of 1 March 2010), UNESCO/IOC Member States amount to 138 (as of 14 September 2010). While part of UNESCO/IOC membership differs from the Parties to UNCLOS, it is however fair to say that the great majority of UNCLOS States Parties are also Members of the Commission.

We would furthermore like to offer UNESCO's assistance regarding addressing the threat to submerged archaeological sites located in the Area.

The oceans are filled with the traces of human existence. This includes some millions of shipwrecks, prehistoric dwellings, ruins and artefacts. Many of them are located in the Area and are of immense importance for the comprehension of the development of humanity. Unfortunately, many cases arise, where such submerged archaeological sites are damaged or destroyed by negatively-impacting activities. These range from pipeline laying, drilling, mineral extraction, trawling and dredging to international treasure hunt.

In respect of articles 149 and 303 of UNCLOS, UNESCO has complemented these regulations, as it has the protection of culture in its mandate. Its General Conference adopted in 2001 the Convention on the Protection of the Underwater Cultural Heritage that complements UNCLOS in all respects of its provisions additionally providing useful guidance in general in the matter of submerged cultural heritage. The UNESCO Underwater Cultural Heritage Convention has been ratified by 33 States.

The UNESCO Underwater Cultural Heritage Convention explains in much greater detail than UNCLOS the obligations of States to preserve underwater cultural heritage in the Area. It contains also scientific guidelines on how to intervene on underwater heritage. While it only applies yet to its 33 States Parties, the UNESCO Underwater Cultural Heritage

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Convention may give the Chamber a general picture of what exactly underwater cultural heritage is, how it should be protected and which measures States would have to take to protect it. The UNESCO Underwater Cultural Heritage Convention gives, for example, in its Article 5, a direction on which measures should be taken to prevent damage through industrial activities. The Scientific and Technical Advisory Body of the UNESCO Underwater Cultural Heritage Convention has also pronounced on which measures should be taken, including more considerate authorization procedures and the sharing of information between the various authorities. I draw especially attention to its recent recommendations STAB 1/5 available at UNESCO's website.

In conclusion, Mr President, UNESCO/IOC respectfully considers that some of the elements of both its criteria and guidelines on the transfer of marine technology and of the procedure for the application of article 247 of UNCLOS could be useful for the Chamber to answer the question submitted by the Seabed Authority.

UNESCO/IOC believes that the compliance of the provisions related to the transfer of marine technology and the conduct of marine scientific research contained in UNCLOS and elaborated by the two UNESCO/IOC instruments should be analysed in relation to the overall principle governing the activities in the Area; that is the notion of common heritage of mankind.

Furthermore, it is our firm conviction that for the implementation of these and all other provisions relevant for the matter under examination, the principle of special and differential treatment for developing countries has to be kept in mind. This principle has produced specific and differentiated rights and obligations for developing countries explicitly set in the text of the Convention which aim to take into account their interest and protect the notion of common heritage of mankind.

The special and differential treatment for developing countries, explicitly provided for within the provisions themselves, have resulted in the incorporation into the legal norm the *de facto* differences between these and the rest of the States Parties to UNCLOS.

Mr President, distinguished Members of the Chamber, on behalf of UNESCO/IOC, I thank you for your attention and hope these elements will help the Seabed Chamber in the outcome of the present proceedings.

The President:

Thank you very much, Mr Desa.

I now give the floor to the representatives of the International Union for the Conservation of Nature, who requested a speaking time of 45 minutes.

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STATEMENT OF MS PAYNE

IUCN

[ITLOS/PV.2010/4/Rev.2, E, p. 14–19]

Ms Payne:

Mr President, Members of the Chamber: It is an honour to appear before you today on behalf of the International Union for the Conservation of Nature.

I propose, first, to discuss the special legal nature of areas beyond national jurisdiction, which include the Area, and the consequences of their status as global commons. My colleague, Mr Makgill, will then speak of remaining differences in views concerning legal obligations and the nature and content of necessary and appropriate measures to be taken by States. My colleague Mr Anton will address differences concerning the nature and extent of the liability of States and will offer a summary of our statement.

In these introductory remarks, I invite you to consider the context in which the obligations and measures of which we speak will come into play. Our concern is not only for harm to the mineral resources of the deep seabed, but to the physical and biological systems of the ocean that are found on the sea floor, the water column and the surface.

What liability regime is established by the Convention, the 1994 Agreement and other relevant principles of international law, with regard to activities in the Area and their effect on the areas beyond national jurisdiction or areas within national jurisdiction?

First, specific treaty terms applicable to the Area are intertwined with the international legal rules and norms that govern the global commons.

Second, international law recognizes an obligation *erga omnes* of States to ensure that activities within their jurisdiction and control do not harm the environment of areas beyond national jurisdiction, that is, the global commons.

Third, a seamless and complete liability scheme is needed to protect the shared interests of all States in the global commons, as trustees for all humanity.

Mr President, Members of the Chamber, the Area is, by definition, limited to “the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction”, and it, “as well as its resources, are the common heritage of mankind”.

In the early days of international law, such regions beyond national jurisdiction were considered *res nullius* – that is, owned by no-one.

Taking account of new facts and deeper knowledge, today the Area is considered *res communis*, part of the global commons. The innovative and complex regime described in Part XI of the Convention and the 1994 Agreement was developed to protect this community interest in the mineral resources of the Area on a non-discriminatory basis.

But there is greater complexity in the concept of *res communis*: Arvid Pardo said, in 1971, “Ocean space is an ecological whole, vital to man.” Its common heritage resources include the high seas and environmental resources whose protection may invoke the “global concerns of humanity as a whole”.

Ambassador Pardo went on to express concern that “[p]resent international law is not designed to cope with the new intensity and diversity of our use of ocean space.” He pointed out that we cannot think of the seas and oceans in terms of “sectors divided by fictitious legal lines” but – and we submit, this is particularly true in the context of responsibility and liability – “as a whole, comprising the surface, water column, ocean floor and its subsoil”. A number of States have referred to the norms that pertain to the international law of the environment, which has developed significantly since 1971.

The legal concept of the common heritage has developed progressively in international law. In the middle of the twentieth century, “common heritage of mankind” was primarily, though not exclusively, understood as a statement of common ownership of

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resources on a non-discriminatory basis, but focused on “elements of wealth”, that is, minerals.

“Equally, however, it was meant as a statement of legal norms indicating the moral imperative of protecting the marine environment and its resources ... as a legacy for future generations.”

The Convention provides for both, with a set of rules to implement cooperation with regard to mineral resource development in Part XI and the 1994 Agreement. It provides for management and protection of other resources elsewhere, and particularly in Part XII.

We ask this honourable Chamber to consider the development in scientific knowledge of the ocean’s resources, humanity’s increasing exploitation of them, and the law’s commensurate growth in this area. While minerals and fisheries are ocean resources with market value, the ocean system’s role in stabilizing climate and marine biodiversity are examples of public natural resources that evoke the common concern of humankind.

An indication of the seriousness with which States and intergovernmental organizations consider this is their undertaking of marine ecosystem-based management and marine spatial planning to ensure that all of the ocean’s valuable resources are preserved and used in a sustainable manner, for example through the Intergovernmental Oceanographic Commission of UNESCO.

International law and domestic law recognize the value of non-market ecosystem services, even when they are not priced commercially. Treaties, domestic legislation, and general international law consider damage to non-market natural resources as compensable harm, and have developed methods of valuing them.

The potential harm that may result from activities to develop mineral resources in the Area, which is the subject of this inquiry, threatens ocean resources which are the subjects of humanity’s common concern.

The existence of obligations *erga omnes*, those “obligations of a State towards the international community as a whole”, was recognized by the Hague Court in the *Barcelona Traction* case in 1970. The Court explained that “[b]y their very nature [such obligations] are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.”

More recently, in the *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, the Court also recognized,

that the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn. The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment.

This leads to the conclusion that the protection of areas beyond the limits of national jurisdiction, which include but are not limited to the Area, is an obligation of all States to the international community, which is represented by States in a role that is sometimes described as that of “trustees”.

States recognize, in their statements submitted to this Chamber, that one consequence of the special status of the Area is the need to prevent, mitigate and control any harm that may arise from activities undertaken there. Many States have argued that although international law does not provide a precise definition of due diligence, a high standard is called for in this case because the Area is the common heritage of humankind, and exploration, prospecting and exploitation entail a high level of risk. The proposed activities in the Area are to be undertaken remote from land, often at great depth. For these reasons, and

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because of the experimental nature of these activities, they are potentially hazardous to scientific research, to the living resources of the sea, to the ocean system, and even to future exploitation of mineral resources.

Other States point out that all States Parties to the Convention bear an equal responsibility within the Area, as a consequence of its status as part of the common heritage. This responsibility entails a commensurately high level of environmental protection.

I submit, and Mr Anton will further discuss, that the higher standard should include assurance that, although the primary focus is on the sponsored contractor, there should be no gap in liability, a view shared by a number of States. We do not believe that the relevant contractors and other potentially responsible parties which may be directly responsible for damage will always be capable of providing a sufficient remedy. "Appropriate and necessary measures" are those that assure the strongest prevention. And emphasis should be on precaution because of the risk of irreparable harm. This all will need national regulation to implement each State's obligations, which must at least attain the minimum of international standards and observe that the customary obligations of cooperation, notice, exchange of information and no harm, are applied to common areas.

We have only to look at the recent blow-out of the Deepwater Horizon exploratory oil drilling rig in the Gulf of Mexico to see that difficulties in providing environmental protection exist even for States that have strong legislative authority for protection of the environment during hazardous resource extraction. We see that, even within the 200 mile limit, working far from shore and at great depth increases risk of catastrophe. We see that major development calls for multiple operators, some with their chief assets located in a different country. The strict, joint and several liability that the US Oil Pollution Act imposes removes the burden of proving fault or negligence as a threshold matter. The Act also recognizes pure environmental damage and requires reinstatement of the environment. Without these provisions, it is unlikely that the damaged marine and coastal environment would be fully restored in the Gulf of Mexico.

Legal measures at least this strong are consistent with the purpose of the Convention and are appropriate in light of the danger of causing irreparable harm to valuable common resources and "to ensure the conservation and sustainable and equitable use of all high seas resources", as called for in the IUCN 10 Principles for High Seas Governance.

As I noted in my introduction, this is a new area of law, as the common heritage of mankind is itself a new principle of international law, relatively speaking. The Chamber may decide that some of these principles are not yet firmly anchored in international law. In that case, we invite the Chamber to ensure that this opinion does not foreclose the further development and integration of these principles as practice and experience dictate.

Mr President, Members of the [Chamber], this concludes my presentation and I thank you for your kind attention. I would be grateful, Mr President, if you could now call upon Mr Makgill.

The President:

Thank you very much, Ms Payne.

I now call on Mr Makgill.

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STATEMENT OF MR MAKGILL
IUCN (CONTINUED)
[ITLOS/PV.2010/4/Rev.2, E, p. 19–25]

Mr Makgill:

Mr President, Members of the Chamber, it is an honour to appear before you today on behalf of the IUCN.

I propose to address the legal obligations of sponsoring States under the Convention, and the necessary and appropriate measures that they must take in order to fulfil those obligations.

My submissions are that sponsoring States must satisfy three principal obligations under the Convention. These are:

(a) The obligation to balance their aspirations for development of the Area with its preservation and protection.

(b) The obligation to adopt laws and regulations and to take administrative measures within their legal systems for securing compliance by persons under their jurisdiction.

(c) The obligation to satisfy international standards of due diligence when making provision for laws and measures within their legal systems.

Turning to my first submission, it is important, in light of Articles 31(1) and (2) of the Vienna Convention on the Law of Treaties, to consider the Convention in accordance with its purpose and in its entirety when determining the legal obligations of States sponsoring seabed mining in the Area.

Particular consideration should be accorded to the development of resources together with the protection and preservation of the marine environment, as provided for under the preamble to the Convention and its subsequent parts, especially articles 145 and 193.

This approach accords with the concept of sustainable development recognised by the World Commission on Sustainable Development in its report, *Our Common Future*, and commonly applied as a guide for international action.

The concept of sustainable development calls for a balancing of development with environmental protection, as recognised by the International Court of Justice in the *Gabčíkovo-Nagymaros* case. Most recently in the *Pulp Mills* case, the International Court of Justice observed that it is “the balance between economic development and environmental protection that is the essence of sustainable development.”

It is acknowledged that the concept of sustainable development is relatively new in terms of international law. The precise term is unlikely to have been at the forefront of the minds of the architects of the Convention when they drafted Parts XI or XII.

Nevertheless, the “Area and its resources are the common heritage of mankind”, as set out under article 136 of Convention. The principle of common heritage, as discussed by my colleague Ms Payne, was formulated with the intention of recognising that while States Parties were entitled to develop the Area’s resources on a non-discriminatory basis, they were also under a duty to protect the ecological values of that environment.

It is possible, in this sense, to read the notion of sustainable development into the purpose of the Convention insofar as resource use and environmental protection are set out in the Convention’s preamble and its subsequent parts. This was indeed the approach of the International Court of Justice when faced with similarly worded provisions in the *Pulp Mills* case, as alluded to in the earlier quote that I cited. This point is not simply one of academic interest. It supports the view expressed in the IUCN’s written statement that the interpretation of a sponsoring State’s obligations under the Convention should be read subject to the provisions of both Part XI and Part XII of the Convention.

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It is too narrow a reading of the Convention to interpret a sponsoring State's obligations under the Convention as compartmentalised within Part XI. Rather, when the purpose of the Convention is read together with references to the Convention *per se* under article 145 of Part XI and Annex III, article 4, paragraph 4, it is evident that a sponsoring State's obligations also need to be considered in light of Part XII.

This approach is given further weight under article 142, paragraph 3, of the Convention which expressly provides that any rights granted under Part XI shall not "affect the rights of coastal States to take such measures consistent with the relevant provisions of Part XII as may be necessary to prevent, mitigate or eliminate grave and imminent danger to their coastlines ..."

At least two States Parties concur with this view. Indeed, it appears that the Seabed Authority included reference to the Convention in Question 1 specifically to expand its scope beyond Part XI.

The balancing of development aspirations with environmental protection under the Convention calls for the various rights of sponsoring States pertaining to the development of resources in the Area to be read together with the full range of measures available for protection and preservation of the marine environment under the Convention.

This is important because we maintain that the measures that sponsoring States have an obligation to make provision for within their legal systems are derived from both Parts XI and XII of the Convention.

Turning to my second submission, it is important to recognise that the Seabed Authority and sponsoring States both have obligations under Part XI of the Convention.

Article 153, paragraph 4, places the primary obligation on the Seabed Authority to control activities in the Area and a corresponding obligation on sponsoring States to assist the Authority with compliance.

While article 153, paragraph 4, provides that the Authority's obligation is to regulate activities in the Area under international law, Annex III, article 4, paragraph 4, makes it clear that States Parties have the obligation of "securing the compliance of persons under [their] jurisdiction."

Indeed, sponsoring States must adopt legislative and administrative measures to secure compliance with the Convention. This approach is supported in the *Pulp Mills* case where the International Court of Justice found in respect of similarly worded provisions that: "[T]he obligation assumed by the Parties ... is to adopt appropriate rules and measures within the framework of their respective domestic legal systems to protect and preserve the ... environment and prevent pollution".

One State says that "[i]ntroducing and enforcing domestic laws and regulations constitutes a crucial element of the obligations of States Parties under Art. 139 of the Convention and Article 4 paragraph 4, of Annex III." Another State adds, in respect of Annex III, article 4, paragraph 4, that it requires monitoring and enforcement in a meaningful manner. "[T]he word 'securing' is employed instead of such terms as 'facilitating', 'encouraging' or 'urging' compliance. The test must then be that such measures, whether legislative or administrative, must be effective enough to 'secure' compliance by the sponsored entity with the applicable rules."

The approach of the aforementioned States Parties is supported insofar as article 139 and Annex III, article 4, paragraph 4, are interpreted as requiring a sponsoring State to enact and enforce legislation designed to ensure the compliance of its nationals with the provisions of the Convention. Authority for this approach is again found in the *Pulp Mills* case.

Turning to my third submission, the measures that sponsoring States are obliged to take when enacting legislation to ensure compliance in the Area are derived from Parts XI and XII of the Convention, and so we can see a continuing theme to my argument. This

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includes *inter alia* the regulations promulgated by the Seabed Authority under Part XI and other sources of international law under article 235, paragraph 1, of the Convention.

Some parties emphasize that the measures to be adopted under domestic legislation are for the sponsoring State to determine and that this Tribunal has no jurisdiction to make findings on the specific content of domestic legislation. This is correct insofar as States Parties must retain sovereign jurisdiction to tailor measures to their own legal systems.

Nevertheless, there seems to be a general acceptance amongst the States Parties that the measures taken under domestic legislation must not fall below international standards of due diligence. In the *Pulp Mills* case the Court identified this as a level of due diligence that ensures: "... that the rules and measures adopted by the parties both have to conform to applicable international agreements and to take account of internationally agreed technical standards".

The rationale for requiring sponsoring States to satisfy international standards must be that those States do not exercise sovereignty or sovereign rights over the Area as set out under article 137, paragraph 1. Sponsoring States must in effect enact legislation making provision for "necessary and appropriate measures" in order to be able to exercise rights under the Convention to develop resources in the Area.

As my colleague Ms Payne points out, the measures that sponsoring States should take under Parts XI and XII of the Convention cannot be set out in a definitive list without a factual basis against which to position them. Nevertheless, I invite the Chamber to consider that both the Convention and customary international law make provision for international standards of due diligence that need to be incorporated within domestic legislation and used to guide the "necessary and appropriate measures" that sponsoring States must take. These include *inter alia*:

(a) adherence to the following environmental principles: (i) protection and preservation as required under articles 145, 192 and 194, paragraph 5, of the Convention; (ii) best practice as required under article 194, paragraph 1, of the Convention; (iii) the duty to prevent damage as set out under article 194, paragraph 2, and generally required under customary international law; (iv) the duty of cooperation as set out in the *MOX Plant Case*; and (v) the precautionary approach as provided for under Article 31(2) of the Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area.

(b) (The international standards of due diligence also include) implementation of the following environmental practices: (i) appropriate, transparent scientific data collection and research as set out under article 200 of the Convention and Article 31(4) of the Regulations; (ii) environmental impact assessment as set out in the *Pulp Mills* case; (iii) notification as provided for under article 198 of the Convention; (iv) contingency planning as required under article 199; and (v) monitoring as provided for under Article 32(6) of the Regulations.

A number of these measures are referred to in the written statements of the other parties. Key amongst these measures are the following:

- (a) the precautionary approach;
- (b) monitoring and evaluation; and
- (c) Environmental Impact Assessment.

Likewise, we heard in oral submissions yesterday of certain fundamental measures to be taken within a sponsoring State's legal system. These include:

- (a) Again, the obligation to carry out Environmental Impact Assessment;
- (b) The obligation periodically to review laws, regulations and administrative measures; and
- (c) The obligation to monitor the implementation of laws, regulations and administrative measures.

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It is respectfully submitted that sponsoring States must make provision for the above international standards of due diligence when enacting domestic legislation to secure compliance under the Convention. These international standards are by and large expressly provided for under the Convention and its regulations. Sponsoring States are of course entitled to choose how these standards are expressed within their legislative systems, but they must, it is submitted, nonetheless ensure that those standards are provided for.

The Chamber is invited to address these standards in order to offer sponsoring States the clarity they have sought as to the level of due diligence that must be satisfied when enacting legislation to secure compliance with the Convention.

Mr President, Members of the [Chamber], this concludes my submissions. Thank you for the opportunity to be heard. I would be grateful, Mr President, if you could now call upon Mr Anton.

The President:

Thank you very much, Mr Makgill.

I now call on Mr Anton to take the floor.

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STATEMENT OF MR ANTON
IUCN (CONTINUED)
[ITL.OS/PV.2010/4/Rev.2, E, p. 25–32]

Mr Anton

May it please the Chamber. Mr President, Members of the Chamber, I am very conscious that I have the high honour on behalf of the IUCN of concluding the oral statements in this historic hearing on the first request for an advisory opinion by this Chamber – a daunting prospect, following so many learned submissions by my eminent counterparts who, after the past three days, I now count among friends.

I am also conscious of the time. I had intended to make five submissions to you today, but in the interest of expediting matters I will limit my submissions to three.

I now turn to the final part of the submission on behalf of the IUCN, that is the extent of state liability for the failure of a sponsored entity to comply with the provisions of the Convention.

The President

If I may interrupt you, Mr Anton, you can take your time, but please go slowly for the interpreters. Please do not feel that you are pressed by time.

Mr Anton

Thank you, Mr President. My submission highlights issues that appear to remain open and is in three parts: first, the liability of a sponsoring State will arise in certain circumstances under the Convention and general international law for injury caused to the Area and marine environment by the lawful activities of a sponsored entity; second, in the context of hazardous activities, the exercise of due diligence by a sponsoring State does not exculpate that State from responsibility or liability for injury caused by a sponsoring State under its jurisdiction and control; and, third, under the Convention and general international law, States have a residual liability to ensure prompt and adequate compensation for injury, including remediation of the marine environment in the event that the primary liability of a sponsored entity or other parties, for whatever reason, is not engaged or is insufficient.

I now turn to my first submission, that the liability of a sponsoring State will arise in certain circumstances under the Convention and general international law for injury caused to the Area or marine environment by the lawful activities of a sponsored entity.

The starting point for analysis is the Convention's provisions that anticipate the application of extra-Conventional rules on the subject of liability, particularly article 139, paragraph 2, article 235, paragraphs 1 and 3, and article 304. Aside from one exception, we have generally heard during this hearing that these articles establish that liability under the Convention is to be both in accordance with general international law on liability and without prejudice to its further development or application.

I submit that article 304 is not a mere "without prejudice" clause, as has been suggested. While "without prejudice" clauses are in themselves important to the application of law outside the Convention, article 304 is different. Article 304 reads: "The provisions of this Convention regarding responsibility and liability for damage are without prejudice to the application of existing rules." It is clear that the article 304 reference to the existing rules regarding responsibility and liability is a reference to present legal norms and not mere policy, as has been suggested. This conclusion is confirmed by a look at article 235, which, in relation to international obligations concerning the protection and preservation of the marine environment, provides that States are responsible for the fulfilment of those obligations and shall be liable in accordance with international law. Of course, the Convention is part of international law, but international law is more general.

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Accordingly, the application of these provisions plainly requires a regard for not only the extent of liability provided for by the Convention but also, under the Convention's own terms, for that provided by general international law. This has two important ramifications.

First, it is beyond cavil today that the practice of States accepted as law establishes that a State's responsibility and liability for injury in the Area and beyond remains fully engaged with regard to the actions of its agents, organs or individual actors, including the sponsored entities, that it directs or controls. This is a well-settled doctrine under the law of State responsibility.

Second, and more relevant for my first submission, the obligation to prevent environmental harm, discussed by my co-counsel Mr McGill, includes the duty of a State to protect the environment in areas beyond national jurisdiction against harm caused by private activities under its jurisdiction and control. This obligation runs to sponsored entities operating in the Area. It is a primary obligation resting on sponsoring States, the breach of which gives rise to state responsibility and, without more, the duty to make appropriate reparations.

More importantly, the obligation to prevent harm applies to harm caused by lawful activities, including those of a sponsored entity under a sponsoring State's jurisdiction and control.

The President.

Mr Anton, the interpreters are still having difficulty.

Mr Anton:

I am sorry. I will slow down. This means that the apparent limitations on a sponsoring State's liability under article 139, paragraph 2, and Annex III, article 4, paragraph 4, of the Convention have no bearing in the circumstances.

When these limiting provisions do apply, in the ordinary course of events, a State that takes all reasonable measures to ensure that a sponsored entity complies with its obligations under the Convention will limit its liability accordingly. That seems to be the plain meaning of these provisions, in context and in light of the objects and purposes of the Convention.

However, they do not apply in the context of injury caused by lawful activities carried out by a sponsored entity, because by the terms of the Convention these limitations on State liability only apply to wrongful acts by the sponsored entity, namely a failure to comply with its obligations under Part XI and, more broadly, the Convention.

Additionally, general international law establishes that a State will be liable for injury in two further situations, even in the face of the limitations on State liability established in article 139, paragraph 2, and Annex III, article 4, paragraph 4, as my second and third submissions will show.

Before turning to these submissions, however, I want to emphasize that the apparent limitations on a sponsoring State's liability under a narrow interpretation of the Convention create at least two situations in which no party will be held liable for injury to the common heritage of humanity or the marine environment.

These gaps in liability will present themselves if (1) injury arises because a sponsored entity fails to comply with its obligations but is insolvent or its assets shielded and the sponsoring State has taken all necessary and appropriate measures, or (2) injury is caused by a sponsored entity in absence of fault, due diligence is the standard of care required of the sponsoring State in the circumstances, rather than a higher standard of care, and the sponsoring State has met this standard through appropriate and necessary measures.

Mr President, Members of the Chamber, I submit that a gap in coverage in responsibility and liability for injury to the Area and the marine environment was not

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intended by the drafters of the Convention. Article 139, paragraph 2, article 235, paragraphs 1 and 3, and article 304 clearly demonstrate that the drafters were well aware that the law of responsibility and liability lives and grows and that they could not envisage all eventualities and developments. I submit that the application of the plain meaning of these provisions, as intended, largely eliminates the possibility of unremedied injury, as I will explain.

I turn now to my second submission, that, in the context of hazardous activities, the exercise of due diligence by a sponsoring State does not exclude that State from responsibility or liability for injury caused by the hazardous activities of a sponsored entity under its jurisdiction and control.

As we have heard in, I believe, every submission before the Chamber, under general principles of international law a State's responsibility and liability for the activity of private entities has been considered to ordinarily consist of an obligation of some form of due diligence in taking all reasonable and appropriate measures of prevention. There is, however, an exception which imposes a more onerous standard.

In cases that involve inherently dangerous or hazardous activities, it has been asserted that the principle of absolute or strict liability applies as one of the general principles of law recognized by civilized nations. This view finds support in the practice of States and is confirmed by the writings of eminent publicists.

In terms of a general principle of law, it has long been recognized that strict liability for the risk of harm from hazardous activities is part and parcel of many municipal legal systems. Recently the eminent Chinese scholar and now Judge of the International Court of Justice, Judge Hanqin, has written that strict liability related to hazardous activities forms part of the law of a large number of disparate States – for example, Austria, China, Germany, India, Switzerland and the United States; and, of course, there are more.

In recognizing that strict liability is a general principle of law in relation to injury caused by hazardous activities in the Area, this Chamber would be recognizing the underlying considerations that make it an important feature of any legal system. In particular, both equity and justice indicate that a sponsoring State ought to shoulder the ultimate burden of liability for sponsored hazardous activities in the area. This is because the State is ultimately responsible for exposing the marine environment and the common heritage of humankind to high risks and devastating consequences and at the same time reaping significant benefits from the activity.

The application of this doctrine to hazardous activities carried out by a sponsored entity in the Area imposes strict liability on sponsoring States in the establishment, implementation and enforcement of protective measures under the Convention, the Agreement and general international law.

I now turn to my third submission, that under the Convention and general international law States have a residual liability to ensure prompt and adequate compensation for injury, including remediation of the marine environment, in the event that the primary liability of a sponsored entity or other parties, for whatever reason, is not engaged or is insufficient.

In the present context, residual liability is a stop gap measure and arises only when the primary liability of the contractor under Annex III, article 22, of the Convention is unavailable. It extends beyond the secondary liability of a sponsoring State under the Convention for failure to take necessary and appropriate measures. Indeed, residual liability starts at this point because of the lacuna that I have indicated would otherwise exist.

The emerging trend in response to gaps in liability is reflected in the International Law Commission's Principles on Allocation of Loss in the Case of Transboundary Harm Arising out of Hazardous Activities. In terms of legal status, the Principles have been said by Professors Birnie, Boyle and Redgwell to "show that the Commission has made use of

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general principles of law [and] successfully reflects the modern development of civil liability treaties, without in any way compromising or altering those which presently exist”.

The point of departure for the Principles on Allocation, like the Convention, is the establishment by Principle 4, paragraph 2, of liability for a private operator in the first instance. However, the Principles recognize that a situation may arise, as presently possible under the Convention, in which prompt and adequate compensation for harm by a private operator, like a sponsored entity, fails. In such a situation, a residual liability remains with the State under Principle 4, paragraph 5, “to ensure that additional financial resources are made available”, including resources to remedy harm to the environment.

The role and relationship of a sponsoring State to the common heritage and the nature of the Area makes it particularly appropriate for the Chamber to have regard to residual liability. Residual liability ensures that damage to the world’s common heritage is not left unremedied by a party deriving the principal benefit from the exploitation of global public goods in the Area.

Accordingly, I invite the Chamber to make allowance for the advent of the principle of residual State liability embodied in Principle 4, paragraph 5, of the ILC Principles on Allocation of Loss.

Alternatively, as we heard yesterday in sapient and persuasive oral submissions, the Chamber can reach the same legal result in terms of residual liability through its inclusion in a strict liability regime that is part and parcel of the necessary and appropriate measures required of sponsoring States in order to fulfil their responsibilities under the Convention.

Application of the principle of residual liability would prevent the occurrence of the two situations identified previously in which no party is responsible for environmental harm to the common heritage of humankind.

I will now turn up the submission of the IUCN. One of the most important norms upon which the Convention rests is the common heritage. The establishment of the Area, together with its common heritage legal status in article 136 of the Convention, was a major achievement in the history of the law of the sea and indeed in the history of international law. The actual implementation of the concepts of common heritage, common spaces and common concern through the work of the International Seabed Authority will mark another milestone.

In terms of obligations of sponsoring States and necessary and appropriate measures, three conclusions flow from our submissions: first, the principle of sustainable development found embodied in the preamble to the Convention requires sponsoring States to comply with the obligations found in Parts XI and XII of the Convention; second, the obligation of a sponsoring State to adopt laws and measures is accompanied by a concomitant obligation to enforce those laws and measures in order to secure compliance with the Convention; and, third, a sponsoring State has an obligation to ensure that the laws and measures that it adopts pursuant to the Convention satisfy international standards.

As the international community moves closer to exploiting the resources of the deep seabed, it is imperative that an adequate and effective liability regime is in place to protect and preserve a mostly unknown environment. The environment of the Area has importance for activities other than mining. For instance, deep in the hydrothermal vent ecosystems of the Area may lay life forms that still await discovery and development of options for energy, food, and medicine for present and future generations. Moreover, we are largely ignorant of the full implications of how mining will affect the environment. For example, it is still unknown how mining will impact benthic life and its food supply away from mining areas.

An erroneous reading of the extent of liability established by the Convention has the potential to render the liability regime inadequate and ineffective. Fortunately, the Convention itself provides a solution by recognising explicitly that international law beyond

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the Convention may be brought to bear in these situations. As demonstrated, the application of the doctrine of strict liability in connection with hazardous activities and the use of contemporary developments in international law in the form of the ILC Principles on Allocation establishes residual state liability in case a sponsored entity (or any other party) escapes liability or is insolvent. In this way existing international law provides the solution.

This concludes our oral statement. On behalf of the IUCN delegation, I have the honour to thank the Chamber for its very kind attention. We wish it well – I am sure on behalf of all the parties - in its deliberations.

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Closure of the Oral Proceedings

[ITLOS/PV.2010/4/Rev.2, E, p. 32–33]

The President:

Thank you for your statement, Mr Anton.

This brings us to the end of the oral proceedings in Case No. 17. As indicated on the previous days, the Chamber may see a need to address questions to delegations. Such questions would be sent by the Chamber to delegations indicating to them a time-limit for a written response.

I would also like to take this opportunity to thank representatives and delegates of all participating States and organizations for their excellent statements made before the Chamber over the past three days. In particular, the Chamber appreciates the professional competence and courtesy exhibited by all participants to the hearing.

The Registrar will now address questions in relation to transcripts.

The Registrar:

Mr President, in conformity with article 86, paragraph 4, of the Rules of the Tribunal, all representatives have the right to correct the transcripts in the original language of their statements made by them in the oral proceedings. Any such corrections should be submitted as soon as possible but in any case not later than 27 September 2010.

The President:

The Chamber will now withdraw to deliberate on the case. The advisory opinion will be read on a date to be notified.

(The hearing closes at 4 35 p.m.)