

**(i) Written Statement of the International Union for Conservation of Nature**

**INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA**

**CASE NO. 17: RESPONSIBILITIES AND OBLIGATIONS OF STATES SPONSORING PERSONS AND ENTITIES WITH RESPECT TO ACTIVITIES IN THE INTERNATIONAL SEABED AREA**

**REQUEST FOR ADVISORY OPINION SUBMITTED TO THE SEABED DISPUTES CHAMBER BY THE COUNCIL OF THE INTERNATIONAL SEABED AUTHORITY**

**WRITTEN STATEMENT OF INTERNATIONAL UNION FOR CONSERVATION OF NATURE AND NATURAL RESOURCES, COMMISSION ON ENVIRONMENTAL LAW, OCEANS, COASTAL AND CORAL REEFS SPECIALIST GROUP**

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**STATEMENT OF INTERNATIONAL UNION FOR CONSERVATION OF NATURE,  
COMMISSION ON ENVIRONMENTAL LAW, OCEANS SPECIALIST GROUP**

**CHAPTER 1**

**INTRODUCTION**

**I. International Union for the Conservation of Nature and Natural Resources**

1. In its Order 2010/3 dated 18 May 2010, the President of the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea ("the Chamber") invited States and intergovernmental organizations to submit written statements on three questions in Case No. 17 regarding the responsibilities and obligations of states sponsoring persons and entities with respect to activities in the international seabed area.
2. The International Union for Conservation of Nature and Natural Resources ("IUCN") is an intergovernmental organization that participates as an observer in the Assembly of the International Seabed Authority. As such, it was invited by communication from the Registrar on 9 June 2010 to provide this written statement to the Chamber.
3. IUCN is the world's oldest and largest global environmental network. It has a democratic membership union with more than 1,000 government and NGO member organizations, and almost 11,000 volunteer scientists and other experts in more than 160 countries. Its mission is to help the world find pragmatic solutions to our most pressing environment and development challenges. It supports scientific research, manages field projects all over the world and brings governments, non-government organizations, United Nations agencies, companies and local communities together to develop and implement policy, laws and best practice.
4. The Commission on Environmental Law ("CEL") of IUCN is an extensive global network of over 500 environmental law specialists in more than 130 countries who provide their services to IUCN *pro bono publico*. The CEL advances environmental law by developing legal concepts and instruments, and by building the capacity of societies to employ environmental law for conservation and sustainable development.

## II. Background

5. The Republic of Nauru has sponsored an application by Nauru Ocean Resources Inc. ("NORI") for a plan of work to undertake exploration for polymetallic nodules in the Area. Nauru states that, like other developing States, it does not yet possess the technical or financial resources to undertake seabed mining in international waters. Nauru states that the cost of damages that might arise from a seabed mining in the Area could exceed its financial capacities.<sup>1</sup>
6. Article 139 of the United Nations Convention on the Law of the Sea<sup>2</sup> ("the Convention") generally provides that "damage caused by the failure of a State Party . . . to carry out its responsibilities . . ." under Part XI of the Convention " . . . shall entail liability". However, the article goes on to provide that
 

A State Party shall not however be liable for damage caused by any failure to comply with this Part by a person whom it has sponsored . . . if the State Party has taken all necessary and appropriate measures to secure effective compliance . . .
7. Nauru states that its sponsorship of NORI was premised on the assumption that, should the application be approved, it could take specified steps to limit its liability for any damage.<sup>3</sup> In particular, Nauru appears to have considered that, if it took all necessary and appropriate measures to secure NORI's compliance with Part XI, it would not be liable for any damage caused by NORI as a result of a failure to comply with Part XI. Nauru therefore requested that the Council of the International Seabed Authority ("the Council") seek an advisory opinion from this Chamber concerning the "measures the sponsoring State must take".<sup>4</sup>
8. Nauru sought advice in respect of, *inter alia*, standards to be observed in the Area in order to "promote protection of the environment".<sup>5</sup> It would seem fair to conclude from this that Nauru is particularly concerned about the potential liability that might arise should a failure by NORI to comply with the requirements of Part

<sup>1</sup> 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, U.N. Doc. ISBA/18/C/8 (5 March 2010), 1

<sup>2</sup> All references to the Convention are taken from the United Nations, *The Law of the Sea. Official Text of the United Nations Convention on the Law of the Sea with Annexes and Index, Final Act of the Third United Nations Conference on the Law of the Sea, Introductory Material on the Convention and Conference*, U.N. Pub. Sales No. E 83 V.5 (1983)

<sup>3</sup> *Supra* note 1, U.N. Doc. ISBA/18/C/8 (5 March 2010), 1.

<sup>4</sup> Dossier No.4, of Dossier submitted pursuant to Order 2010/3 of 18 May 2010 of the President of the Tribunal and Article 131 of the Rules of the Tribunal, 2

<sup>5</sup> *Ibid.*, Dossier No.4, 2

XI of the Convention result in serious damage to the surrounding marine environment.<sup>6</sup>

9. The Council's subsequent proposal to seek an advisory opinion from the Chamber provides further confirmation that the central issue is liability for damage to the marine environment. In particular, the Council has indicated that its discussions on Nauru's position have included suggestions that a sponsoring State might fulfil its sponsorship obligations if (a) the State had powers to verify the sponsored entities environmental audit and (b) the entity undertook to comply with the requirements of the Authority and its exploration contract with the sponsoring State.<sup>7</sup>
10. The Authority has, accordingly, asked this Chamber to render an advisory opinion to address three questions pursuant to Part XI, Article 159, and Part XI, Article 191 of the Convention.<sup>8</sup> These 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

<sup>6</sup> Naturally, the Advisory Opinion issued by the Chamber will have broad ramifications beyond the aspirations of Nauru. At present, there are eight contracts with approved plans of work allowing exploration in the Area. Another two are pending. See Report of the Secretary-General of the International Seabed Authority under Article 186, paragraph 4, of the United Nations Convention on the Law of the Sea, U.N. Doc. ISBA/16/A/2 (8 March 2010), 15-17. Of the eight contracts in force, at least one contractor appears to be a sponsored entity under Article 153(2)(b). See Contract for Exploration between the International Seabed Authority and Deep Ocean Resources Development Co., Ltd., Dossier 21, Dossier submitted on behalf of the Secretary-General of the International Seabed Authority pursuant to Article 131 of the Rules of the Tribunal. The pending applications for approval of plans by the Republic of Nauru and the Kingdom of Tonga both involve sponsored entities. See Report of the Secretary-General of the International Seabed Authority under Article 186, paragraph 4, of the United Nations Convention on the Law of the Sea, U.N. Doc. ISBA/15/A/2 (23 March 2009), 17.

<sup>7</sup> *Supra* note 1, U.N. Doc. ISBA/16/C/6 (5 March 2010), 1 to 2.

<sup>8</sup> International Seabed Authority, Decision of the Council of the International Seabed Authority requesting an advisory opinion pursuant to Article 181 of the United Nations Convention on the Law of the Sea, U.N. Doc. ISBA/16/C/13 (6 May 2010).

the Convention, in particular Article 139 and Annex III, and the 1994 Agreement?

11. It is possible that there are a range of matters to which the aforementioned questions might apply. It is appropriate given the background briefly summarised above, however, to give particular attention to a sponsoring State's responsibilities and liability, and necessary measures that a sponsoring State must take to fulfil its responsibilities, in respect of the marine environment.
12. The Advisory Opinion Request applies to activities within the Area (Articles 134, 191). The Chamber's advisory jurisdiction in respect of these questions is limited to the scope of authority of the Council (Article 191). The Council is, in relevant part, authorized to adopt rules, regulations and procedures for prospecting, exploration and exploitation in the Area in conjunction with the Assembly (Articles 160(2)(f)(ii), 162(o)(ii)) and to 'exercise control over activities in the Area in accordance with Article 153, paragraph 4, and the rules, regulations and procedures of the Authority' (Article 162(l)).
13. In rendering its Opinion, the Chamber applies the Convention, other rules of international law not incompatible with the Convention (Article 293); as well as the rules, regulations and procedures of the Authority (Article 38 of Annex III). It has been suggested that of these, the Convention has precedence.<sup>9</sup>

### III. Summary of argument

14. The Commission on Environmental Law, Oceans, Coastal and Coral Reefs Specialist Group of the International Union for Conservation of Nature and Natural Resources appreciates the opportunity to submit this written statement, and to present to the Chamber the bases for the following conclusions.

#### A. Question 1 – State obligations and responsibility

15. States Parties are responsible for complying with the objects and purpose of the Convention, which establishes an international framework for the equitable and efficient utilization of the sea's resources and the protection and preservation of the marine environment. The Convention, most pertinently Parts XI and XII, forms a comprehensive regime whose individual provisions should be interpreted as a complete whole, in conjunction with other relevant rules of international law. Taken together, they establish primary obligations for States sponsoring activities in the Area, including obligations to secure compliance with the Convention by sponsored entities and to protect and preserve the marine environment with regard to all activities in the Area. [paras. 33 to 39].

<sup>9</sup> Tafsir Ndiaye, *The Advisory Function of the International Tribunal for the Law of the Sea*, *Chinese Journal of International Law Advance Access* published July 22, 2010 (2010), para. 38

16. A sponsoring State is obliged take measures to ensure sponsored entities' compliance with Part XI of the Convention, a responsibility it holds in concert with the Authority. This responsibility entails the obligation for the sponsoring State to ensure, within its legal system, that sponsored contractors carry out their activities in the Area in conformity with the terms of their contracts and the Convention. A sponsoring State has a concomitant enforcement obligation. [paras. 40 to 43].
17. A sponsoring State is obliged to consider its responsibility to protect and preserve the marine environment in planning and undertaking resource use under Part XI and in the discharge of its responsibility to ensure compliance by sponsored entities under Article 139. Part XII of the Convention provides guidance to a non-exclusive list of specific measures that indicate the scope of this obligation, which includes:
- (a) using the best practical means at a State's disposal to prevent, reduce and control pollution;
  - (b) ensuring that activities in its jurisdiction or control do not cause damage to other States or to areas beyond national jurisdiction;
  - (c) minimising pollution from activities used in exploration or exploitation of the natural resources of the seabed and subsoil; and
  - (d) taking the measures that are necessary to protect and preserve the marine environment.

Other measures that implement this obligation which are required by the Convention include: environmental impact assessment; use of a precautionary approach; monitoring and evaluation of the impacts of deep seabed mining on the marine environment; preparation of contingency plans; scientific data collection and research which is essential to risk management; development of capacity to prevent and respond to incidents and to assessment of liability as well as notification of imminent or actual damage. The State must enact domestic legislation to give effect to these measures, and they must ensure that the legislation is enforced. [paras. 44 to 53].

18. The sponsoring State's responsibility to ensure that activities in the Area conform to Part XI should be interpreted as including its international obligations concerning the protection and preservation of the marine environment. This in turn requires sponsoring States to take measures to ensure compliance with their international obligations. Sponsoring States should in turn take steps to give these measures legislative effect, and ensure that such legislation is enforced through administrative measures. [paras. 54 to 57].
19. The Convention promotes developing State participation in the Area to the extent specifically provided for in Part XI, including economic assistance and transfer of technology. However, the specific support for developing State participation does

not include diminished responsibility in the context of sponsorship of activities in the Area. (Articles 148 and 152). [paras. 58 to 60].

**B. Question 2 – the extent of State liability**

20. As a general matter, when States breach their responsibilities, under the Convention and general principles of international law, they are liable for reparations that will “as far as possible, wipe-out all the consequences ... and re-establish the situation which would, in all probability, have existed if that act had not been committed”. [paras. 74, 98]. This result is tempered under certain circumstances; however, in the context where irremediable environmental harm may result, strict rules may be considered necessary to create a strong incentive for prevention and to avoid orphan liability.
21. It is widely agreed, and expressly provided in Article 139 of the Convention, that a State that has exercised “due diligence” in taking all necessary and appropriate measures for prevention of harm by private activities under its jurisdiction and control may be determined to have satisfied its responsibility and may therefore be found to have incurred no liability. If, on the other hand, the State has failed to take adequate measures to obtain compliance, then it incurs full liability for reparations. [paras. 98 to 104].
22. Present day conditions and evolving norms must be taken into consideration in interpreting the Convention. [paras. 106 to 107]. The current primitive state of human knowledge about the living and mineral resources of the seas and sea bed, our growing awareness of their fragility, and the risks of novel technology for exploiting the resources of the Area are considerations to take into account in determining whether a State’s liability for damage resulting from activities in the Area should be measured by the standard for inherently dangerous or hazardous activities, for which a state has absolute liability. [paras. 76 to 84, 108 to 110].
23. The Chamber is invited to consider the principle of residual state liability to ensure that the exploitation of valuable common resources does not lead to harm to human life, health or the environment for which no party is responsible. [paras. 111 to 113].

**C. Question 3 – Necessary and appropriate measures**

24. It is submitted that no complete list “necessary and appropriate measures” can be provided, such that a sponsoring State can be assured that, if it adopts them in its domestic legislation, it will have entirely fulfilled its responsibility under the Convention. Should an incident occur, it will be for the organs of the Convention, including this Chamber, to judge whether the measures taken, including oversight and enforcement of compliance were adequate. Without safeguards and liability, the common heritage of all humanity is jeopardized.



25. The Convention specifies certain measures required of States, including some specifically provided for in Part XI to address the particular concerns regarding the Area, as outlined in chapter 2. These measures are implemented by the more specific provisions of the Regulations. It should be remembered that the Regulations are not yet complete and in any event do not provide rules to cover every circumstance for prospecting, exploration and exploitation in the Area. [paras. 119 to 121].
26. The "necessary and appropriate measures that a sponsoring State must take in order to fulfil its responsibility", depend on the specific obligations on which these measures are based. A review of the general and relevant obligations provided for in the Convention reveals that many of the relevant obligations provided for in relation to the protection of the environment are reiterated in the Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area<sup>10</sup> ("the RPEN"). Although these regulations apply only to activities related to polymetallic nodules, new regulations applicable to other minerals and based on the RPEN are in the process of adoption. Thus, the obligations contained in the RPEN are a reliable guide to some of the obligations of sponsoring States engaged in prospecting, exploration and exploitation of minerals in the Area. [para. 123].
27. The RPEN sets out specific measures that a sponsoring State must take to fulfil its responsibility under the Convention. They include:
- (a) extensive environmental monitoring programmes of the impacts of deep seabed mining, in general and in the context of specific activities,
  - (b) environmental impact assessments;
  - (c) the practice of the precautionary approach;
  - (d) cooperation with the Authority and with the contractor for the establishment of training programmes;
  - (e) cooperation with the Authority is mandated to ensure that the contractor submits a satisfactory contingency planning. Notifications and/or enforceable measures can also be required from sponsoring State in circumstances such as emergency orders.
- [paras. 124 to 137].
28. With regard to the implementation of these measures, laws, regulations and administrative measures are all important, to ensure
- (a) jurisdictional power over the contractor and its activities;

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<sup>10</sup> International Seabed Authority, Decision of the Council adopting the Regulations on Prospecting and exploration for Polymetallic Nodules on 13 July 2000 ISBA/6/C/12 and Decision of the Assembly relating to the Regulations on Prospecting and exploration for Polymetallic Nodules of 13 July 2000 ISBA/6/A/18, pursuant to United Nations Convention on the Law of the Sea, Articles 160(2)(f)(a) and 162(o)(ii).

- (b) compliance of the activities carried out by the sponsored contractor with the applicable laws; and
- (c) execution of specific obligations contained in the RPEN.

[paras. 138 to 139].

29. However, the difficulty is to determine the standard that laws, regulations and administrative measures must meet to be considered as "necessary and appropriate". Best practices generally provide useful guidance for laws and regulations, although, given the requirement that the laws, regulations and administrative measures be reasonably appropriate within the framework of the state's legal system, a contextual analysis is required. Administrative measures also require such contextual analysis taking circumstances into account to determine whether they are sufficient to fulfil the sponsoring State's responsibility. Furthermore, such analysis can only take place after the measures have been taken. Thus, the guidance, directions, recommendations and measures from the Authority play a critical role in guiding the necessary and appropriate administrative measures which might be needed. [paras. 140 to 149].

## CHAPTER 2

**QUESTION 1: WHAT ARE THE LEGAL RESPONSIBILITIES AND OBLIGATIONS OF STATES PARTIES TO THE CONVENTION WITH RESPECT TO THE SPONSORSHIP OF ACTIVITIES IN THE AREA?**

**I. The scope of the first question**

30. In relation to Chapter 2 of this Statement, the Authority has asked the Chamber to render an advisory opinion on "the legal responsibilities and obligations of States Parties" ("legal responsibilities") with respect to the sponsorship of activities in the Area<sup>11</sup> under the relevant provisions of the Convention.<sup>12</sup> Significantly the scope of this question is limited to the legal responsibilities under the Convention. It does not call for an opinion on the responsibilities under other sources of international law. However, such sources may be relevant to the first question to the extent that they are applicable in relation to the interpretation of Convention.
31. The first question is principally concerned with the sponsorship of activities in the Area under Part XI of the Convention. Part XI sets out a regime that States Parties must follow if they wish to develop activities in the Area. It follows that the first question necessitates consideration of the specific requirements that must be satisfied in order to obtain approval for the sponsorship of development activities in the Area. It is important to note, however, that the first question does not exclude consideration of other parts of the Convention. This is because the interpretation and implementation of Part XI is informed by other parts of the Convention.
32. As explained in paragraph 11, it is appropriate when considering the legal responsibilities and obligations of states to pay particular attention to the marine environment. This requires consideration of legal responsibilities in respect of the marine environment when undertaking development activities in the Area under Part XI. It also requires consideration of legal responsibilities in respect of the marine environment under those other parts of the Convention that inform the interpretation and implementation of Part XI.

<sup>11</sup> Article 1(1)(1) of the Convention provides that "Area" means the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction."

<sup>12</sup> International Seabed Authority, Decision of the Council of the International Seabed Authority requesting an advisory opinion pursuant to Article 191 of the United Nations Convention on the Law of the Sea, U.N. Doc. ISBA/16/C/13 (6 May 2010).

## II. Treaties must be interpreted as a whole

33. As paragraph 31 indicates, in considering the legal responsibilities and obligations of a state the entirety of the Convention must be considered. The requirement to interpret treaties as a whole was established in the case of the *Diversion of Water from the Meuse*:<sup>13</sup>

The Treaty brought into existence a certain regime which results from all of its provisions in conjunction. It forms a complete whole, the different provisions of which cannot be dissociated from the others and considered apart by themselves.

34. Likewise, the Vienna Convention on the Law of Treaties ("VCLT") requires that the terms of a treaty "shall be interpreted ... in their context and in light of its object and purpose" (Article 31(1)). The "context" includes the entire text of the treaty "including its preamble and annexes" (Article 31(2)). In addition, "any relevant rules of international law applicable in the relations between the parties" also need to be taken in account (Article 31(3)(c) of the VCLT).
35. The Convention is intended to codify customary law and set out a comprehensive set of norms governing almost all aspects of the Law of the Sea. Its basic objective, set out in the preamble, is to establish:

... a legal order for the seas and oceans which will facilitate international communication, and will promote the peaceful uses of the seas and oceans, the equitable and efficient *utilization of their resources*, the conservation of their living resources, and the study, *protection and preservation of the marine environment* ...

36. For the purposes of the first question, taking into account Nauru's intention to sponsor development in the Area and its desire to clarify its legal responsibilities, the objective of the preamble can be summarized as setting an international framework for the utilization of the sea's resources and the protection and preservation of the marine environment. This requires "the equitable and efficient utilization of [the seas' and oceans'] resources" under the Convention to be balanced by "the conservation of their living resources, and the ... protection and preservation of the marine environment" (preamble). This approach accords with the concept of sustainable development recognised by the World Commission on

<sup>13</sup> (*Netherlands v. Belgium*) Merits, Judgment No. 25, 1937, P.C.I.J., Series A/B, No. 70, p. 21 (emphasis added)

Sustainable Development in its report, *Our Common Future*,<sup>14</sup> and recognized by the International Court of Justice in the *Gabčíkovo-Nagymaros Case*.<sup>15</sup>

37. The preamble's objective is given further expression under Parts XI and XII of the Convention. The utilization of resources in the Area is provided for under the development provisions of Part XI of the Convention. The protection and preservation of the marine environment is generally provided for under Part XII of the Convention. The general requirements of Part XII are complemented by express provision for protection of the marine environment under Part XI. The Convention also makes provision for protection of the marine environment by reference to other relevant rules of international law.
38. When Parts XI and XII of the Convention are read as a whole they establish primary obligations of State responsibility for sponsored activities in the Area that include provision for the:
- (a) responsibility to ensure compliance with Part XI (Articles 139(1), 153 and Annex III, Article 4(4));
  - (b) obligation to protect and preserve the marine environment (Articles 192, 194 and 209(2));
  - (c) responsibility to fulfil international obligations concerning protection and preservation of the marine environment (Articles 235(1)); and
  - (d) participation of developing States in the Area (Articles 148 and 152).
39. The above responsibilities and obligations of sponsoring States, and the rights of developing States, under the Convention are addressed *seriatim* under the following subheadings numbered III. to VII.

### III. Obligation to ensure compliance

40. Sponsoring States have "the responsibility to ensure that activities in the Area" are "carried out in conformity with" Part XI (Article 139(1)). Part XI sets out a regime for the "development of resources in the Area". States or persons sponsored by a State must obtain authorization from the Authority for a "plan of work"<sup>16</sup> to undertake exploration and exploitation activities in the Area (Articles 153(2)(b) and 153(3)).

<sup>14</sup> U.N. Doc. A/42/47 (1987), reprinted in World Commission on Environment and Development, *Our Common Future* (1987)

<sup>15</sup> *Case Concerning Gabčíkovo-Nagymaros Project* (Hungary/Slovakia), Merits, 1997 I.C.J. Reports 7, at 38.

<sup>16</sup> The plan of work is to be prepared in accordance with Annex III. In the case of sponsored works the plan must take the form of a contract in accordance with Annex III, Article 3.

41. The Authority has control over all activities in the Area "for the purpose of securing compliance" with Part XI, "the rules, regulations and procedures of the Authority" and the plan of work. Nevertheless, States Parties must assist the Authority "by taking all measures necessary to ensure such compliance in accordance with Article 139" (Article 153(4)).
42. Furthermore, the Convention provides that sponsoring States "pursuant to Article 139, have the responsibility to ensure, within their legal systems," that sponsored contractors carry out their activities in the Area in conformity with the terms of their contracts and the obligations under the Convention (Annex III, Article 4(4)).
43. In simple terms sponsoring States have a general responsibility to ensure activities in the Area are undertaken in conformity with Part XI (Article 139(1)). Sponsored contractors must obtain approval for a plan of work to undertake activities in the Area. The Authority has direct control over the contractor's activities in terms of securing compliance with Part XI. Nevertheless, in a "belts and braces" approach that accords with the sponsoring State's general responsibility<sup>17</sup>, the sponsoring State must also take measures to ensure compliance with Part XI (Article 153(4)). Furthermore, the general responsibility<sup>18</sup> is given additional effect through the requirement for the sponsoring State to ensure within its domestic legislation that contractors undertake their activities in the Area in accordance with the Convention (Annex III, Article 4 (4)). It is important to note that the responsibility to enact domestic legislation is accompanied by concomitant responsibility to enforce that legislation (see paragraph 51).

#### IV. Obligation to protect and preserve the marine environment

44. The objective of the Convention calls for resource use to be balanced with protection and preservation of the marine environment (preamble). This balanced approach should be applied to the interpretation of the specific provisions of the Convention, as the Chamber has been asked to do by the Council in this Advisory Opinion. In particular, it should be applied to the interpretation of the resource use provisions under Part XI of the Convention. States Parties to the Convention have undertaken general responsibilities and obligations, including the obligation to protect and preserve the marine environment (Article 192). These States have agreed to further, specific obligations identified under Part XII of the Convention. It is appropriate having regard to the objective and Part XII of the Convention that the obligation to protect and preserve the marine environment is interpreted as applying to sponsoring States in the course of planning and undertaking resource use under Part XI and in the discharge their responsibilities under Article 139 of the Convention.

<sup>17</sup> Pursuant to Article 139(1)

<sup>18</sup> *Ibid*

45. For the sake of clarity, the sponsoring State's responsibility to ensure activities in the Area conform with Part XI (Article 139(1)) should be interpreted as including an obligation to protect and preserve the marine environment. This approach is supported by the requirement under Part XI for the Authority "with respect to activities in the Area to ensure effective protection for the marine environment" in accordance with the Convention (Article 145). This is because a sponsoring State must take measures to ensure compliance with Part XI and enact (and enforce) domestic legislation to ensure contractors undertake activities in the Area in accordance with the obligations *under the Convention*. The fact that Part XI thus imports obligations under the Convention *per se* makes it clear that sponsoring States must satisfy those obligations set out Part XII.
46. The general obligation to protect and preserve under Part XII is accompanied by a number of more specific obligations. In particular, States are required to take measures to prevent, reduce and control pollution using the best practical means at their disposal (Article 194(1)). They must take all measures necessary to ensure that activities under their jurisdiction or control do not cause damage to other States and their environment (Article 194(2)). The measures taken are to be designed to minimise to the fullest possible extent "pollution from installations and devices used in the exploration and exploitation of the natural resources of the seabed and the subsoil" (Article 194(3(c))). Finally, the measures must include those "necessary to protect and preserve" the various component parts of the marine environment including ecosystems, habitat, species and other forms of marine life (Article 194(5)).
47. The measures that States are required to take to prevent, reduce and control pollution should be treated as guiding the kinds of measures that sponsoring States must take to ensure compliance with Part XI (Article 153(4)), and protection and preservation of the marine environment (Article 192). Although the measures under Article 194 are limited to pollution, they do indicate that the measures taken under Part XI should:
  - (a) be based on best practice (Article 194(1));
  - (b) not cause damage to other States and their environment (Article 194(2));
  - (c) be designed to minimize to the fullest possible extent adverse effects on the marine environment (Article 194(3)(c)); and
  - (d) protect and preserve the various component parts of the marine environment, particularly "rare and fragile ecosystems as well as the habitat of depleted, threatened or endangered species and other forms of marine life" (Article 194(5)).

48. Further guidance under the Convention as to the kinds of measures that sponsoring States should take can be found in the requirement *inter alia*.
- (a) for the notification of imminent or actual damage to States likely to be affected and the competent international organizations (Article 198). It can be inferred that the Sponsoring State must require that it is promptly and fully informed by a contractor of any damage so that it can satisfy its obligation of notification;
  - (b) for the preparation of contingency plans (Article 199). It can be inferred that the Sponsoring State must require that the contractor develop contingency plans against pollution;
  - (c) to undertake appropriate, transparent scientific data collection and research (art 200), which is essential to risk management, development of capacity to prevent and respond to incidents, and to assessment of liability in case of such incidents (see also art 204, 205);
  - (d) to undertake an Environmental Impact Assessment (Article 206);
  - (e) to take a precautionary approach (Article 31(2) of the RPEN); and
  - (f) monitoring and evaluation of the impacts of deep seabed mining on the marine environment (Article 32(6) of the RPEN).
49. Another set of specific obligations includes the dual requirements to cooperate in the establishment of international laws and to adopt domestic legislation to prevent, reduce and control pollution of the marine environment in the Area (Article 209).
50. The first of these obligations directly pertains to Part XI requiring the establishment of "[i]nternational rules, regulations and procedures" in accordance with that part "to prevent, reduce and control pollution of the marine environment from activities in the Area" (Article 209(1)). These rules and regulations should give effect to the measures set out in Part XII (e.g. Articles 194, 198, 199, 200, and 204 to 206). The RPEN are one example of these kinds of international instruments. As explained in paragraph 41, such instruments fall under the control of the Authority for the purposes of ensuring compliance with Part XI (Article 153(4)).
51. The second of these obligations requires States to "adopt laws and regulations to prevent, reduce and control pollution of the marine environment from activities in the Area" (Article 209(2)). 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.”<sup>19</sup>

52. State laws and regulations are to “be no less effective than the international rules, regulations and procedures” referred to under Article 209(1) (Article 209(2)). Once again the requirement to give effect to marine protection under international law through domestic legislation reflects the hierarchical nature of compliance under Part XI, which requires States to give legislative effect to the obligations under the Convention (Annex III, Article 4(4)). These must include the obligations under Part XII of the Convention.
53. In summary, the sponsoring State’s responsibility to ensure activities in the Area conform with Part XI (Article 139(1)) should be interpreted as including an obligation to protect and preserve the marine environment. In particular, sponsoring States need to take measures to ensure compliance with Part XI (Article 153(4)). These include measures to ensure protection and preservation of the marine environment (Article 192). The kinds of measures that sponsoring States might take are guided by Part XII (e.g. Articles 194, 198, 199, 200, and 204 to 206) and the RPEN (e.g. Articles 31(2) and 32(6)). Sponsoring States must in turn enact domestic legislation to give effect to these measures (Annex III, Article 4(4) and Article 209(2)). States must in turn ensure that such legislation is enforced.<sup>20</sup>

**V. Obligation to fulfill international obligations concerning protection and preservation of the marine environment**

54. States are responsible for fulfilling “their international obligations concerning the protection and preservation of the marine environment” (Article 235(1)). This obligation should be read together with the general principle of interpretation that “any relevant rules of international law applicable in the relations between the parties” also need to be taken in account (Article 31(3)(c) of the VCLT).
55. This places a duty on sponsoring States to fulfil international obligations and apply relevant international law when they are ensuring compliance with their responsibilities under Part XI of the Convention. Those international obligations and international law should be interpreted as applying to the responsibilities under Part XI in a similar manner to the obligations under Part XII. In particular, they must be interpreted as guiding the kinds of measures that States must take and the kinds of laws that they must enact.

<sup>19</sup> *Pulp Mills on the River Uruguay (Argentina v. Uruguay)* Merits, Judgment, I.C.J. Reports 2010, para. 197. See also, Article 215 (“Enforcement of international rules, regulations and procedures established in accordance with Part XI to prevent, reduce and control pollution of the marine environment from activities in the Area shall be governed by that Part.”).

<sup>20</sup> *Ibid*

56. The principal sources of international obligations and international law are treaties and customary international law. Those treaties and customary laws that are applicable to a sponsoring States obligations under the Convention include the:

- (a) principle of prevention, which has its origins in the due diligence that is required of a State in its territory;<sup>21</sup>

It is 'every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States' (*Corfu Channel (United Kingdom v. Albania)* Merits, Judgment, I.C.J. Reports 1949, p 22). A State is thus obliged to use all means at its disposal in order to avoid activities which take place in its territory, or in any area under its jurisdiction, causing significant damage to the environment of another State. This Court has established this obligation 'is now part of the corpus of international law relating to the environment' (*Legality of the Threat or Use of Nuclear weapons Advisory Opinion*, I.C.J. Reports 1996 (I), p.242, para 29).

In addition States have 'the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction (Article 3 of the Convention on Biological Diversity 1992).<sup>22</sup> The application of this principle to areas 'beyond the limits of national jurisdiction' clearly indicates that it applies to sponsoring States and contractors undertaking activities in the Area.

- (b) duty of cooperation, in respect of which this Tribunal has held "the duty to cooperate is a fundamental principle in the prevention of pollution of the marine environment under Part XII of the Convention and general international law and [that] rights arise therefrom which the Tribunal may consider appropriate to preserve under Article 290 of the Convention."<sup>23</sup>
- (c) duty to undertake an Environmental Impact Assessment, which "has gained so much acceptance among States that it may 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."<sup>24</sup>

<sup>21</sup> *Ibid.*, para. 101.

<sup>22</sup> U.N. Doc. UNEP/Bio.Div/CONF/L.2 (22 May 1992), 1760 U.N.T.S. 142 (1993). The Convention on Biological Diversity is binding as a matter of treaty on all states except the United States of America. See further *infra* n 34.

<sup>23</sup> *The MOX Plant Case (Ireland v. United Kingdom)* ITLOS Reports 2001, p. 95, para. 82.

<sup>24</sup> *Pulp Mills on the River Uruguay (Argentina v. Uruguay)* Merits, Judgment, I.C.J. Reports 2010, para. 204.

(d) duty to undertake monitoring. In particular, "once operations have started and, where necessary, throughout the life of the project, continuous monitoring of its effects on the environment shall be undertaken."<sup>25</sup>

57 In summary, the sponsoring State's responsibility to ensure activities in the Area conform with Part XI (Article 139(1)) should be interpreted as including their international obligations concerning the protection and preservation of the marine environment" (Article 235(1)). This in turn requires sponsoring States to take measures to ensure compliance with their international obligations (Article 153(4)). Sponsoring States should in turn take steps to give these measures legislative effect (Annex III, Article 4(4)), and ensure that such legislation is enforced through administrative measures.<sup>26</sup>

#### VI. Participation of developing States in the Area

58. The effective participation of developing States in activities of the Area is promoted as specifically provided for under Part XI (Article 148). Likewise the Authority in the exercise of its powers and functions should give special consideration to developing States as specifically provided for under Part XI (Article 152(2)).

59. Articles 148 and 152(2) do not diminish the responsibility for developing states to comply with Part XI when sponsoring activities in the Area. They cannot therefore be read as setting a lower (or differentiated) threshold of compliance for developing states under the Convention.

60. Rather, those Articles 148 and 152(2) encourage developing State participation in the Area to the extent that such participation is specifically provided for under Part XI. Provision for developing State participation under Part XI include measures designed to provide economic assistance (e.g. Article 150(h) and Annex, section 7(1) of Agreement relating to implementation of Part XI 1994) transfer technology (Annex, section 5(1)(b) of Agreement relating to implementation of Part XI 1994).

<sup>25</sup> *Ibid.*, para. 205.

<sup>26</sup> 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." *Ibid.* para. 197

## CHAPTER 3

**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?**

**I. The scope of the second question**

61. In its second question, the Council of the International Seabed Authority has asked the Chamber to render an advisory opinion on "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 who it has sponsored under Article 153, paragraph 2(b) of the Convention".<sup>27</sup>
62. At the outset, the narrowness of the question posed must be highlighted. States have comprehensive and detailed obligations established by a large number of treaties and customary international law to protect and preserve the marine environment in a host of different ways.<sup>28</sup> These obligations to protect and preserve the marine environment are detailed in Chapter 2 of this Statement.
63. A breach of these wide-ranging obligations caused by deep seabed mining that is attributable to the state is a wrongful act for which a state is responsible under international law and for which the state must make reparations.<sup>29</sup>

<sup>27</sup> International Seabed Authority, Decision of the Council of the International Seabed Authority requesting an advisory opinion pursuant to Article 191 of the United Nations Convention on the Law of the Sea. U.N. Doc. ISBA/16/C/13 (8 May 2010).

<sup>28</sup> Some of these obligations beyond the Convention are confirmed by this Tribunal's jurisprudence in *Southern Bluefin Tuna Cases* (Australia v Japan; New Zealand v Japan), ITLOS Cases Nos. 3 & 4 (27 August 1999)(Provisional Measures)(addressing scientific uncertainty and requirements of 'prudence and caution'); *MOX Plant Case* (Ireland v UK), ITLOS Case No. 10 (3 December 2001)(Provisional Measures)(prescribing measures relating to exchange of information monitoring risk, and pollution prevention based on requirements 'co-operation' and 'prudence and caution'); *Case Concerning Land Reclamation by Singapore in and around the Straits of Johor* (Malaysia v Singapore), ITLOS Case No. 12 (8 October 2003)(Provisional Measures)(to the same effect as *MOX Plant*). See further Alan Boyle, *The Environmental Jurisprudence of the International Tribunal for the Law of the Sea* (2007) 22 *Int'l J. Marine & Coastal L.* 369.

<sup>29</sup> On responsibility see *Phosphates in Morocco*, [1938] P.C.I.J. Reports, Ser. A/B, No. 74, p 10 at p 28 (Preliminary Objections); *Case Concerning Corfu Channel* (UK v Albania), 1949 I.C.J. Reports 4, at 23 (Merits); *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v US), 1986 I.C.J. Reports 14, at paras. 283 and 292 (Merits); *Case Concerning Gabčíkovo-Nagymaros Project* (Hungary/Slovakia), 1997 I.C.J. Reports 7, at 38 (Merits). See also *Rainbow Warrior* arbitration, XX RIAA 217, at 251 (1990). On reparations see *Factory at Chorzów*, 1927 P.C.I.J. Reports, Ser. A, No. 28, p 21, at p 47 (Jurisdiction); *LaGrand Case* (Germany v US), 2001 I.C.J. Reports 468, at 485 (Merits).

64. It is important to recognise that the question posed is but a narrow aspect of this much broader responsibility on the part of states. Even if state liability is in some manner limited (under Article 139(2) or Article 4(4) of Annex III to the Convention) for damages caused by a sponsored entity as a result of its breaches of Part XI of the Convention, a state's broader responsibility will still remain. And, a state will continue to be responsible for any breach of its broader obligations occasioned by the same harm to the marine environment. This is so because Article 139(2) is expressly "[w]ithout prejudice to the rules of international law" and each and every internationally wrongful act entails the responsibility of a state.<sup>30</sup>

## II. The framework for liability in relation to the second question

### A. Applicable law

65. Article 38 of the Statute of the International Tribunal for the Law of the Sea sets forth the applicable law in the Seabed Disputes Chamber. Article 38 directs the Chamber to "apply," *inter alia*, the "provisions of Article 293" of the Convention. Article 293, in turn, requires the application of the "Convention and other rules of international law not incompatible with [the] Convention."
66. The Convention itself confirms, in a number of places, the injunction of Article 38 of the Statute to apply relevant and compatible rules of international law outside the Convention. In the context of Question 2 in the matter *sub judice*, as highlighted below, Articles 235(1), 139(2) and 304 preserve the application of general international law outside the Convention in the context of responsibility and liability.

### B. The relevant Convention norms of responsibility and liability

67. Turning to the specific question raised, the liability of a state arising from a sponsored entity's failure to comply with the provisions of the Convention is governed by the general responsibility and liability provisions set out in Article 235 of the Convention, as well as the more specific provisions of Articles 139(1) and (2) and Annex III, Article 4(4).<sup>31</sup> In addition, in determining the scope of liability Article 304 of the Convention requires "the application of existing rules . . . regarding responsibility and liability under international law." This includes "further rules" of customary international law on responsibility and liability

<sup>30</sup> Art. 1, Responsibility of States for Internationally Wrongful Acts, G.A. Res. 56/83, Annex, U.N. Doc. A/RES/56/83 (28 January 2002)

<sup>31</sup> The Convention contains other responsibility and liability provisions that are not implicated by the question presented, including Articles 31, 42(5), 106, 110(3), 232, and 263, and are thus not included in the framework for analysis presented. However, these provisions may lend assistance in the interpretation of the framework as indicated by Article 31(2) of the Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331.

"develop[ed]" since the adoption of the Convention, as well as general principles of international law.<sup>32</sup>

1. *General responsibility and liability concerning the marine environment*

68. Article 235 of the Convention establishes general rules of responsibility and liability in relation to Convention's broad obligations to protect and preserve the marine environment. It provides in pertinent part:

1. States are responsible for the fulfilment of their international obligations concerning the protection and preservation of the marine environment. *They shall be liable in accordance with international law.*

2. States shall 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.

3. 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 . . .

2. *Responsibility and liability under Part XI of the Convention*

69. Article 139 of the Convention sets forth more specific responsibility and liability for states in relation to activities in the Area under Part XI of the Convention. Article 139 does, however, include the proviso that it is "without prejudice to international law." It provides in pertinent part:

1. States Parties shall have the responsibility to ensure that activities in the Area, whether carried out by States Parties, or state enterprises or natural or juridical persons which possess the nationality of States Parties or are effectively controlled by them or their nationals, shall be carried out in conformity with this Part. . . .

<sup>32</sup> *The M/V "Saiga" (No. 2)* (Saint Vincent and the Grenadines v. Guinea), ITLOS Case No. 2 (1 July 1999) (Merits), at paras 189-171 (applying "Article 42, paragraph 1, of the Draft Articles of the International Law Commission on State Responsibility"), reprinted in (1999) 38 I.L.M. 1323, 1357. For expert analysis of this aspect of the case see Louise de la Fayette, ITLOS and the Saga of the Saiga: Peaceful Settlement of a Law of the Sea Dispute, (2000) 15 *Int'l J. Marine & Coastal L.* 355, 388-391. See also Commentary – The 1982 United Nations Convention on the Law of the Sea and the Agreement on Implementation of Part XI (1995) 8 *U.S. Department of State Dispatch* (Supplement No. 1) 5, 51; Moira L. McConnell & Edgar Gold, *The Modern Law of the Sea Framework for the Protection and Preservation of the Marine Environment?* (1991) 23 *Case W. Res. J. Int'l L.* 83, 88.

2. *Without prejudice to the rules of international law and Annex III, Article 22, damage caused by the failure of a State Party or international organization to carry out its responsibilities under this Part shall entail liability; States Parties or international organizations acting together shall bear joint and several liability. A State Party shall not however 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.*

70. Annex III of the Convention addresses the basic conditions set for prospecting, exploration and exploitation in the Area. Article 4 of Annex III prescribes the qualifications that applicants seeking to engage in activities in the Area must possess. In relation to qualified sponsored entities, such as contractors, under Article 153(2) of the Convention, Article 4(4) of Annex III provides:

The sponsoring state . . . 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. 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

### 3. *Further responsibility and liability under international law*

71. As explained above, in the context of the Convention's responsibility and liability provisions (including Articles 253, 139 and Annex III, Article 4(4)), Article 304 of the Convention anticipates the application of contemporary rules on the subject as they emerge. Article 304 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.*

C. Other rules of international law on responsibility and liability not incompatible with the Convention

1. *Liability for failure to prevent environmental harm caused by private actors under state jurisdiction and control*
72. As elaborated in Chapter 2, all states have the legal obligation to ensure that activities under their jurisdiction and control do not cause harm to the environment of other states or areas beyond national jurisdiction, including the Area. This obligation is a fundamental principle of contemporary international law with a long history and early derivation in law as the principle *sic utere tuo ut alienum non laedus*.<sup>33</sup>
73. The duty to prevent harm is reflected in the practice of states accepted as law<sup>34</sup> and in international jurisprudence.<sup>35</sup> The obligation is contained in Article 3 of the Convention on Biological Diversity, which as a matter of ratification is binding on every state except the United States.<sup>36</sup> It is also expressed in the International Law Commission's (ILC) Draft Articles on Prevention of Transboundary Harm from Hazardous Activities.<sup>37</sup>
74. The obligation to prevent environmental harm includes the duty of a state to protect the environment within the jurisdiction of other states and in areas beyond national jurisdiction against harm caused by private activities under its jurisdiction

<sup>33</sup> See Glanvil, *De Legibus et Consuetudinibus Regni Angliae* (1187-1189)(Beal's edition of Beame's translation), pp 270-277; Bracton, *De Legibus et Consuetudinibus Angliae* (1250)(Traves Twiss edition), vol. 3, pp 472-481, 552-593. For an early international legal articulation, see Moore, II *Digest of International Law* (1906), at 446 ('it is the duty of a state, within the bounds of legal responsibility, to prevent its territory . . . from being used to the injury of another state').

<sup>34</sup> *Survey of State Practice Relevant to International Liability for Injurious Consequences Arising out of Acts Not Prohibited by International Law*, [1985] II(1)(Addendum) *Yearbook of the International Law Commission* 1-144, U.N. Doc., A/CN.4/SER.A/1985/Add.1 (Part 1/Add.1).

<sup>35</sup> *Legality of the Threat or Use of Nuclear Weapons* [1996] ICJ Reports 226, 241-242 (Advisory Opinion); *Case Concerning Pulp Mills on the River Uruguay (Argentina v Uruguay)*, Judgement of 20 April 2010 Judgment, at pp. 56-59, Paras. 199-202, available at: <http://www.icj-cij.org/docket/files/135/15877.pdf>

<sup>36</sup> Art. 3. See the Secretariat webpage for the status of the parties <http://www.cbd.int/convention/parties/list/>. The United States is, of course, bound by Article 3's mirror customary law obligation to prevent harm. In addition, it is probable that Article 3 has 'of itself' generated custom binding on the United States under the test enunciated in *North Sea Continental Shelf Cases* (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands) [1969] I.C.J. Reports 3, 41-45.

<sup>37</sup> Articles 3-5, *Prevention of Transboundary Harm from Hazardous Activities*, G A Res. 62/68, Annex, U.N. Doc. A/RES/62/68 (8 December 2007). Leading international environmental lawyers have asserted that '[t]he 2001 Articles [on Prevention] offer an authoritative exposition of the existing law', noting that the Articles draw on case law, state practice and treaties. Patricia Birnie, Alan Boyle & Catherine Redgwell, *International Law and the Environment* (3rd ed., 2009), at 141.



and control.<sup>38</sup> It is a primary obligation resting on states, the breach of which gives rise to state responsibility and, without more, the duty to make reparations.

75. Under general principles of international law a state's responsibility and liability for the activity of private entities in the transboundary air pollution context has been considered by states,<sup>39</sup> the majority of commentators<sup>40</sup> and non-official bodies of international lawyers<sup>41</sup> to consist of an obligation of "due diligence" in taking all reasonable and appropriate measures of prevention,<sup>42</sup> at least where the activity is not inherently dangerous.
76. In cases that involve inherently dangerous or hazardous activities, it has been asserted by one state that "[t]he principle of absolute liability applies to fields or activities having in common a higher degree of risk."<sup>43</sup> It is repeated in numerous international instruments and is one of "the general principles recognised by

<sup>38</sup> *Trail Smelter Case* (U.S. v Canada), III UNRIAA 1905, 1938-1981 (1949); *Legality of the Threat or Use of Nuclear Weapons*, [1996(I)] I.C.J. Reports 226, 241-242.

<sup>39</sup> See *Case Concerning Gabčíkovo-Nagymaros Project* (Hungary/Slovakia), Counter-Memorial of the Republic of Hungary, Vol. I, para. 6.134; *Ibid.*, Counter-Memorial of the Slovak Republic, Vol. 1, Chap IX, para. 9.03 (5 December 1994); *Introductory Document Prepared by the Italian Government for the Forum on International Law of the Environment, Siena, 17-21 April 1990* (1990), at 57 (highlighting UNCLOS is mostly based on a due diligence test). In addition to articles already highlighted see Article 194 of the Convention (states are obliged to control pollution "using . . . the best practicable means at their disposal").

<sup>40</sup> For an excellent doctrinal treatment see Phoebe Okowa, *State Responsibility for Transboundary Air Pollution in International Law* (2000), at 77-83 (collecting extensive state and treaty practice) See also P.-M. Dupuy, Overview of the Existing Customary Legal Regime Regarding International Pollution, in *International Law and Pollution* (Daniel B. Magraw, ed., 1991) 61, at 80.

<sup>41</sup> International Law Association, Committee on Legal Aspects of Long-Distance Air Pollution, 61<sup>st</sup> Conference Report (1984), at 198-204 (Draft Article 3); Institute of International Law, *Air Pollution Across National Frontiers* (1987), at 193-229; American Law Institute, 2 *Restatement (Third) Foreign Relations Law of the United States* (1967), at §601 OECD, *Legal Aspects of Transfrontier Pollution* (1979), at 386.

<sup>42</sup> It is important to bear in mind, however, "that different primary rules of international law impose different standards ranging from "due diligence" to strict liability, and that breach of the correlative obligations gives rise to responsibility without any additional requirements. There does not appear to be any general principle or presumption about the role of fault in relation to any given primary rule, since it depends on the interpretation of that rule in light of its object or purpose." James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* 13 (Cambridge Univ. Press, 2002).

<sup>43</sup> Department of External Affairs, Canada, *Claim against the Union of Soviet Socialist Republics for Damage Caused by Soviet Cosmos 954*, Annex A, Statement of Claim, para. 22, reprinted in (1979) 18 I.L.M. 899, 907.

civilised nations.<sup>44</sup> This view finds support in the practice of other states<sup>45</sup> and is confirmed by the writings of eminent publicists.<sup>46</sup>

77. Support for the principle of absolute, or more properly strict liability, for damage caused by hazardous activities of private actors has been recently expressed by the ILC in its Draft Principles on the Allocation of Loss in the Case of Transboundary Harm Arising Out of Hazardous Activities ("Principles on Allocation").<sup>47</sup>
78. The question presented specifically asks "what is the *extent* of liability" (emphasis added), and it is submitted that traditional limits on liability are under reconsideration as activities that, in the formative days of international law, had no impact on other states begin to have serious effects on human and environmental well-being. The twentieth century practice of limiting liability to encourage development and expansion of economic activity is beginning to cede to the recognition that human health, life and valuable environmental resources are thereby put at risk. The Convention was drafted at a time when there was little or no experience in exploring and exploiting minerals as far offshore as the Area or at the benthic depths. The Chamber may wish to take into consideration the severe impacts of recent maritime disasters on human and marine life, as well as ecosystems. Incidents like the Deepwater Horizon explosion and blowout of the Macondo well in the Gulf of Mexico have sharply increased international concern about the risks of such activities.
79. Two examples of intergovernmental agreements attempting to provide protection from the actions of private parties illustrate this point. In the case of the civil liability conventions established to manage the costs of oil spills from tankers, pressure from national groups particularly vulnerable to oil spill damage led to the addition of the Supplementary Fund Protocol to the International Oil Pollution Compensation Funds, thus doubling the funds available to compensate damage.

<sup>44</sup> *Ibid.*

<sup>45</sup> International Law Commission, Survey of liability regimes relevant to the topic of international liability for injurious consequences arising out of acts not prohibited by international law (International liability in case of loss from transboundary harm arising out of hazardous activities) - Prepared by the Secretariat, U.N. Doc. A/CN.4/543 (24 June 2004)

<sup>46</sup> See, e.g., Xue Hanqin, *Transboundary Damage in International Law* (2003), 299-300; Francisco Orrego Vicuña, State Responsibility, Liability and Remedial Measures Under International Law: New Criteria for Environmental Protection, in *Environmental Change and International Law: New Challenges and Dimensions* (Edith Brown Weiss, ed., 1992), 124, at 133-35; C. Wilfred Jenks, Liability for Ultrahazardous Activities in International Law (1968-1) 117 *Recueil des Cours* 99, 158-168 (analysis of liability for deep seabed activity).

<sup>47</sup> Principles on the Allocation of Loss in the Case of Transboundary Harm Arising Out of Hazardous Activities, G.A. Res. 61/36, Annex, U.N. Doc. A/RES/61/36 (4 December 2006). See the ILC Commentaries on the Principles at, [2006] II(2) *Yearbook of the International Law Commission* 110, at 156 (forthcoming), available at [http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9\\_10\\_2006.pdf](http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_10_2006.pdf)

from any one incident.<sup>48</sup> In the case of Annex VI (Liability Arising from Environmental Emergencies) to the Antarctic Treaty's Protocol on Environmental Protection, negotiators sought to establish a strict liability regime with no limitation on liability "if it is provided that the environmental emergency resulted from an act or omission of the operator" committed either intentionally or recklessly.<sup>49</sup> Moreover, in this regime, the limits on liability are to be reviewed every three years with the benefit of scientific and technical advice.<sup>50</sup> It might be noted that state liability is similar to the Convention in that,

A Party shall not be liable for the failure of an operator, other than its State operators, to take response action to the extent that that Party took appropriate measures within its competence, including the adoption of laws and regulations, administrative actions and enforcement measures, to ensure compliance with this Annex.<sup>51</sup>

2. *The duty to provide prompt and adequate compensation for harm arising from hazardous activities*
80. As reflected in Article 235(2) of the Convention in connection with pollution, general international law also recognizes that prompt and adequate compensation is required for damage to the environment caused by activities carried out under the jurisdiction or control of a state.<sup>52</sup>
  81. Similarly, as reflected in Annex III, Articles 4(4) and 22, international law also generally imposes liability (regardless of fault) on a private operator responsible for harm in the first instance.<sup>53</sup> This sort of channelling the initial liability to a private operator has been the approach of existing international civil liability regimes.<sup>54</sup>

<sup>48</sup> Protocol of 2003 to the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1992 adoption 16 May 2003, entry into force 3 March 2005, IMO Doc. LEG/CONF.14/20. See also Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment, ETS No. 50, reprinted in 32 *I.L.M.* 1228 (1993).

<sup>49</sup> Annex VI to the Protocol on Environmental Protection to the Antarctic Treaty Liability Arising From Environmental Emergencies, June 17, 2005, ATCM XVIII, Measure I (17 June 2005) reprinted in 45 *I.L.M.* 5 (2006), Articles 8-10.

<sup>50</sup> *Ibid.*, Article 9(4).

<sup>51</sup> *Ibid.*, Article 10.

<sup>52</sup> See René Lefeber, *Transboundary Environmental Interference and the Origin of State Liability* (1996), at 237, n 18 and accompanying text. Lefeber collects extensive practice in support of the customary obligation to ensure prompt, adequate, and effective compensation.

<sup>53</sup> International Law Commission, *Survey on liability regimes relevant to the topic international liability for injurious consequences arising out of acts not prohibited by international law: study prepared by the Secretariat*, [1995] II(1) *Yearbook of the International Law Commission* 61-120 U.N. Doc., A/CN.4/SER.A/1995/Add.1 (Part 1).

<sup>54</sup> *Supra* note 48.

82. States, however, remain responsible for their own wrongful acts in international law. In the instant matter, this means that if a state fails to take the "necessary" and "appropriate" measures required by Articles 139(2), 153(4) and Annex III, Article 4(4) of the Convention (as elaborated below in Chapter 4 of this Statement), the responsibility and liability rest with the state in event of harm caused by a sponsored entity.
83. At least two important situations, however, remain unresolved. A question remains about liability in a situation where a state does take all necessary and/or appropriate measures required by international law and the actions of a private operator, like a sponsored entity under the Convention, nevertheless cause environmental harm. What party, if any, must bear the loss if the operator is also without blame for the harm? A similar question is posed for liability in a situation where a state takes the requisite necessary and/or appropriate measures and the private operator is blameworthy, but insolvent and unable to provide compensation. Again, what party, if any, must bear the loss in this circumstance? Both situations are a real potential under Articles 139(2) and Annex III, Article 4(4) of the Convention.
84. The emerging trend in response to these problems is reflected in the ILC's Principles on Allocation. In terms of legal status, the ILC Commentaries<sup>55</sup> to the Principles have been said by authority to "show that the Commission has made use of 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".<sup>56</sup>
85. The point of departure for the Principles on Allocation is the establishment by Principle 4(2) of principal liability for a private operator(s) in the first instance. However, the Principles recognize a situation may arise 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(5) "to ensure that additional financial resources are made available."
86. The cogent underlying premise for this residual liability is that in such a case it would be inequitable to leave damages unremedied merely because the source state has acted with all due diligence or the private operator is insolvent.<sup>57</sup> This

<sup>55</sup> As adopted by the International Law Commission at its fifty-eighth session, in 2006, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/61/10). [2006] II(2) *Yearbook of the International Law Commission* 110, 111-182 (forthcoming), available at: [http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9\\_10\\_2006.pdf](http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_10_2006.pdf)

<sup>56</sup> Patricia Birnie, Alan Boyle & Catherine Redgwell, *International Law and the Environment* (3rd ed., 2009), at 321

<sup>57</sup> See Second report on international liability for injurious consequences arising out of acts not prohibited by international law, by Mr Robert Q. Quentin-Baxter, Special Rapporteur, [1981] (II)(1) *Yearbook of the International Law Commission* 103, 112-118, U.N. Doc. A/CN.4/SER.A/1981/Add.1 (Part.1); Second report on international liability for injurious

argument has added force for the Area, which is the common heritage of all humanity. Why should a party deriving the principal benefit of exploitation of global public goods<sup>58</sup> in the Area be able to shift the loss occasioned by environmental harm to the world at large? It undermines long attempts by the international community to ensure that environmental externalities associated with public goods are accounted for and paid by the user benefiting from such goods.<sup>59</sup>

### III. The extent of liability under the applicable rules on responsibility and liability

87. In determining the extent of the liability of states in relation to acts or omissions of sponsored entities, it is important to bear in mind that the establishment of adequate safeguards and an effective liability regime for activities in the Area were important to the states negotiating UNCLOS.<sup>60</sup> Without safeguards and liability, the common heritage of all humanity in the Area established by Article 136 is significantly jeopardised.

#### A. Interpretive requirements

88. In reviewing Dossier No. 29 in the instant matter, it is apparent that the extent of state liability under what was to become Article 139 of the Convention and Article 4 of Annex III to the convention was initially strict liability. Article 11(4) of the 3 August 1970 Working Paper produced by the United States provided, without qualification, that states "shall be responsible for damages caused by activities which it authorizes or sponsors . . .".<sup>61</sup> It is not until the 1976 iteration of the Revised Single Negotiating Text that a limit on liability first appears and was

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consequences arising out of acts not prohibited by international law, by Mr. Julio Barboza, Special Rapporteur, [1986] (II)(1) *Yearbook of the International Law Commission* 145, 160

<sup>58</sup> It is true that benefits of exploitation (once exploitation begins) are internationally shared under Article 82(2) of the Convention, but the distribution is so small and widely dispersed as to be inconsequential to the argument

<sup>59</sup> See Convention on Transboundary Lakes and Watercourses, Art. 2(5)(b), available at <http://www.unece.org/env/water/pdf/watercon.pdf>, European Charter on the Environment and Health, Principles for Public Policy, Art. 11, WHO Doc. ICP/RUD 113/Conf.Doc/1, reprinted in (1990) 20 *Env't. Pol. & Law* 57 Principle 16, Rio Declaration on Environment and Development, U.N. Doc. A/CONF.151/28/Rev.1 (Vol. 1), Annex I, at 6; OECD Council Recommendation on the Implementation of the Polluter Pays Principle, Nov. 14, 1974, C (74)223 (1974).

<sup>60</sup> Dossier No. 29, Dossier submitted on behalf of the Secretary-General of the International Seabed Authority pursuant to Article 131 of the Rules of the Tribunal, [http://www.itlos.org/case-17/case17dossier\\_en.shtml](http://www.itlos.org/case-17/case17dossier_en.shtml).

<sup>61</sup> Committee on the Peaceful Uses of the Sea-bed and the Ocean Floor Beyond the Limits of National Jurisdiction, Draft United Nations Convention on the International Seabed Area, Working Paper, U.N. Doc. A/AC.138/25 (3 August 1970), at 3.

finally expressed in Article 139(2) of the Convention.<sup>62</sup> The reason for this change is not explained by or apparent in Dossier No. 29.

89. In examining the relevant articles in the Convention set out in section III above, it becomes apparent that locating the precise extent and limitations of responsibility and liability, if any, is problematic. First, an explanation is lacking as to why the Convention negotiators initially adopted a strict liability position and then moved to limited liability. Second, it is necessary to evaluate contemporary rules regarding responsibility and liability to determine if the general framework established by the Convention needs to be read in light of "further rules" of international law on responsibility and liability. Third, a number of eminent publicists have emphasised that "obscurity" and "confusion" created by Article 139 and Annex III, Article 4.<sup>63</sup> In all cases, it is apparent that interpretation of the relevant Convention provision is required in guiding their application.
90. As indicated in Chapter 2 above, the contemporary starting point for treaty interpretation is Articles 31 and 32 of the Vienna Convention on the Law of Treaties (VCLT).<sup>64</sup> The International Court of Justice has confirmed that these provisions reflect customary international law.<sup>65</sup>
91. Article 31 and 32 of the VCLT set out a holistic approach to interpretation that encapsulates (in a non-exclusive manner) textual, intentional and teleological methodologies for determining meaning.<sup>66</sup>

B. Liability for sponsored entities under Article 139 and Annex III, Article 4(4)

92. Before turning attention to the extent of state liability for sponsored entities, it is first necessary to understand how primary liability is channelled to the sponsored contractor under the Convention.
93. Under Article 139(1), the activities of sponsored entities must "be carried out in conformity with [Part XI]."
94. Under Annex III, Article 4(4), a sponsored entity must "carry out activities in the Area in conformity with the terms of its contract and its obligations under the Convention."

<sup>62</sup> Documents of the United Nations Conference on the Law of the Sea, U.N. Doc. A/CONF.62/WP.8/Rev.1/Part I (6 May 1978).

<sup>63</sup> VI *United Nations Convention on the Law of the Sea 1982 – A Commentary* (Satya N. Nandan, Michael Lodge & Shabtai Rosenne, eds., 2002), at 126.

<sup>64</sup> Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331.

<sup>65</sup> *Case Concerning Sovereignty over the Islands of Ligitan and Sipadan (Indonesia v. Malaysia)*, 2002 I.C.J. Reports 625, 645 (Judgment of 17 December 2002).

<sup>66</sup> For a classic application of interpretation as a "single combined operation" see, *Goldner v United Kingdom* (1979-80) 1 E.H.R.R. 524, 532-538.

95. A breach of any these obligations by a sponsored entity that results in environmental harm entails responsibility on the entity under Annex III, Article 22. Article 22 provides that a sponsored entity "shall have the responsibility or liability for any damage arising out of wrongful acts in the conduct of its operations . . ." that are not in conformity with its obligations under the Convention, including Part XI, and its contract.
96. In addition to the two uncertain situations surrounding state liability and responsibility identified in paragraph 83 above, it is apparent that a third uncertainty is contained in Annex III, Article 22, inasmuch as in order for a sponsored entity to be held liable its conduct must be "wrongful". Because liability will not attach without the predicate of wrongful conduct on the part of a sponsored entity, the possibility mentioned above in which neither sponsored entity nor sponsoring state can be held liable appears certain to arise at some point.
97. In particular, the limits to responsibility and liability established for both sponsored entities and sponsoring states in a literal reading of the Articles 139(2) and Annex III, Articles 4(4) and 22, seems to establish an aberrant *damnum absque injuria* when: i) no wrongfulness can be connected to damage arising out of the conduct of a sponsored entity's operations, and ii) the sponsoring state has taken all necessary and appropriate measures that may be required. In such a case, environmental harm would be left to fester unremediated.

### C. The extent of liability for a sponsoring state

98. Article 139(2) establishes liability for environmental harm occasioned by the failure of a state to carry out its responsibilities under Part XI. However it also provides an exemption from liability in the following terms: "A State Party shall not however 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."
99. Under Article 153(4) a state must assist the Authority "by taking all measures necessary to ensure . . . compliance [with the relevant provisions of Part XI] in accordance with Article 139."
100. Under Annex III, Article 4(4) a sponsoring state must ensure that it establishes a duty on a sponsored entity to observe the terms of its contract and the Convention and mechanisms to secure and compel compliance. It must also "adopt laws . . . regulations and . . . administrative measures which are . . . reasonably appropriate for securing compliance" by sponsored entities. However, like Article 139(2) it provides an exemption from liability: "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.”

101. Accordingly, a state that has failed to take “all necessary and appropriate measures” or “necessary measures” or fails to “adopt laws . . . regulations and . . . administrative measures which are . . . reasonably appropriate for securing compliance” is in breach of a primary obligation established by the Convention. It will be responsible for its breach under international law, with attendant liability.
102. The measure of its liability is well-established by international law: “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.”<sup>67</sup>
103. When a sponsored entity fails to comply with the provisions of the Convention and the 1994 Agreement, and the sponsoring state has failed to take all reasonable measures to prevent such non-compliance, the state will be liable for the consequences.
104. Under the terms of Article 139(2), a state that has taken such measures will limit its liability accordingly. Importantly, though, a state’s responsibility remains fully engaged with regard to the actions of its agents, organs, or individuals that it directs or controls.<sup>68</sup>
105. The question posed for this Chamber, then, is whether a clinical reading of the limits of Article 139(2), in isolation and without consideration of contemporary trends in the law of responsibility and liability, is appropriate.
106. It is submitted that under Articles 235(1), 139(2) and 304 of the Convention that this sort of narrow reading is to be avoided, if not prohibited. As highlighted above, these provisions direct attention to general international law outside the Convention in the context of responsibility and liability as it has developed since the Convention was adopted. These provisions indicate that the parties consider the Convention to be a “living” instrument that must be interpreted not only in light of its objects and purposes under Article 31(1) of the Vienna Convention on the Law of Treaties, but also in light of present day conditions and evolving normativity.
107. An evolutionary interpretative methodology for treaties has been recognized even absent the injunctions contained in Articles 235(1), 139(2) and 304. In *Loizidou v. Turkey*, the European Court of Human Rights observed that:

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<sup>67</sup> *Factory at Chorzów* [1928] P.C.I.J., Ser. A, No. 17 (Merits), p. 40.

<sup>68</sup> Chapter II, Responsibility of States for Internationally Wrongful Acts, G.A. Res. 56/83, Annex, U.N. Doc. A/RES/56/83 (28 January 2002).



"the Convention is a living instrument which must be interpreted in the light of present day conditions is firmly rooted in the Court's case-law . . . It follows that these provisions cannot be interpreted solely in accordance with the intentions of their authors as expressed more than forty years ago."<sup>69</sup>

108. Undertaking activities in the Area creates a unique relationship between the sponsoring state, the community of nations, the sponsored entity and the International Seabed Authority. A state's liability ought to be benchmarked to contemporary standards of responsibility and liability that accords with its role as a sponsor of an entity carrying out activities within the Area, which has the legal status of common heritage for all humanity.
109. This role and relationship of a sponsoring state makes it particularly appropriate for the Chamber to have regard to two significant aspects of international law that have developed outside of the Convention in determining the contemporary extent of sponsoring state liability for actions or omissions of sponsored entities that cause environmental damage to the Area.
110. First, the Chamber should be attuned to the fact that often the activities of sponsored entities will involve hazardous aspects. As such, it seems that application of the principle of strict state liability associated with hazardous activities as discussed above will be warranted in relevant circumstances.<sup>70</sup> When so applied, the principle of strict liability would render nugatory the limiting clauses in Articles 139 and Annex III, Article 4.
111. Second, the Chamber ought to make allowance for the advent of the principle of residual state liability embodied in Principle 4(5) of ILC Principles of Allocation. Principle 4(5) provides: "[I]n the event that the [necessary and appropriate] measures . . . are insufficient to provide adequate compensation, the State of origin should also ensure that additional financial resources are made available." Application of the principle of residual liability would prevent the occurrence of the two situations identified above in which no party is responsible for environmental harm.
112. As explained in Chapter 4 below, the application of the principle of residual responsibility could be furthered by reading it into the Convention provisions (Articles 139 (2), 153(4), and Annex III, Article 4(4)) that require states to take "all necessary and appropriate measures" or to take "necessary measures" or to "adopt laws . . . regulations and . . . administrative measures which are . . . reasonably appropriate for securing compliance".

<sup>69</sup> *Loizidou v Turkey*, 40/1993/435/514 (23 February 1995), at para. 71. See also the Inter-American Court of Human Rights, *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, Advisory Opinion OC-16/99 (1 October 1999), at para. 115. See also concurring opinion of A.A. Cançado in the same matter, at para. 10.

<sup>70</sup> See the discussion in Xue Hanqin, *Transboundary Damage in International Law* (2003), 299-300.

113. This would necessitate two requirements in addition to requirements already identified in Chapter 4 below: i) that states "take all necessary measures to ensure that prompt and adequate compensation is available for victims of transboundary damage caused by hazardous activities located within its territory or otherwise under its jurisdiction or control" (See Principle 4(1) of the Principles on Allocation), and ii) that states "provide their domestic judicial and administrative bodies with the necessary jurisdiction and competence and ensure that these bodies have prompt, adequate and effective remedies available in the event of transboundary damage caused by hazardous activities located within their territory or otherwise under their jurisdiction or control." (Principle 6(1) of the Principles on Allocation).

#### IV. Conclusion

114. One of the most important norms upon which the Convention rests that of 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 expression of the concept of common heritage through the work of the International Seabed Authority will mark another significant milestone for international law.
115. As the international community moves closer to exploring 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 lie 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 harm the environment. For example, it is still unknown how mining will impact benthic life and its food supply away from mining areas.
116. A significant defect currently exists in the liability framework concerning harm caused by a sponsored entity in the Area. It has the potential to render the liability regime inadequate and ineffective. The problem is the near certainty that significant, recurring environmental harm caused by sponsored entities will occur for which the text of the Convention seems to impose no liability. The Convention itself provides as solution for the possibility of gaps in liability by allowing international law outside the Convention to 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.

## CHAPTER 4

**QUESTION 3: WHAT ARE THE NECESSARY AND APPROPRIATE MEASURES THAT A SPONSORING STATE MUST TAKE IN ORDER TO FULFILL ITS RESPONSIBILITY UNDER THE CONVENTION?**

**I. The scope of the third question**

**A. Background**

117. At present, there are eight contracts with approved plans of work allowing exploration in the Area; another two are pending.<sup>71</sup> Of the eight contracts in force, at least one contractor appears to be a sponsored entity under Article 153(2)(b) of the Convention.<sup>72</sup> The pending applications for approval of plans by the Republic of Nauru and the Kingdom of Tonga both involve sponsored entities.<sup>73</sup>
118. All approved contracts and work plans contain Standard Clauses for Exploration Contract<sup>74</sup> ("Standard Clauses") as set out in Annex 4 of the RPEN. These standard clauses contain contractor obligations that include: environmental monitoring, environmental, technical and financial reporting, contingency and emergency planning and the commitment to comply with "the terms of this contract, the rules, regulations and procedure of the Authority, Part XI of the Convention, the Agreement and other rules of international law not incompatible with the Convention."<sup>75</sup> Contractors sponsored according to Article 153 (2) (b) of the Convention are hereafter referred to as "sponsored contractors".

<sup>71</sup> Report of the Secretary-General of the International Seabed Authority under Article 166, paragraph 4, of the United Nations Convention on the Law of the Sea, U.N. Doc. ISBA/16/A/2 (8 March 2010), 15-17.

<sup>72</sup> Contract for Exploration between the International Seabed Authority and Deep Ocean Resources Development Co., Ltd., Dossier 21, Dossier submitted on behalf of the Secretary-General of the International Seabed Authority pursuant to Article 131 of the Rules of the Tribunal, [http://www.itlos.org/case-17/case17dossier\\_en.shtml](http://www.itlos.org/case-17/case17dossier_en.shtml).

<sup>73</sup> See Report of the Secretary-General of the International Seabed Authority under Article 166, paragraph 4, of the United Nations Convention on the Law of the Sea, U.N. Doc. ISBA/15/A/2 (23 March 2009), 17; Report of the Secretary-General of the International Seabed Authority under Article 166, paragraph 4, of the United Nations Convention on the Law of the Sea, U.N. Doc. ISBA/16/A/2 (8 March 2010), 15-17.

<sup>74</sup> Annex 4, Standard Clauses for Exploration Contract, U.N. Doc. ISBA/4/LTC/NF/1/Add 2 (16 March 1998), online at <http://www.isa.org.jm/files/documents/EN/Regs/Code-Annex4.pdf>.

<sup>75</sup> *Ibid.*, Section 27.1.

**B. The scope of "necessary and appropriate measures"**

119. In its third question, the Council has asked the Chamber to render an advisory opinion on "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".<sup>76</sup>
120. The scope of the measures that must be taken by sponsoring States is governed by Part XI, other provisions in the Convention and relevant international law. As discussed in Chapter 2, Part XI requires sponsoring States to take measures and enact legislation to ensure compliance with the Convention. In particular, States must
- (a) take measures to ensure compliance with Part XI (Article 153(4)), and protection and preservation of the marine environment Part XII; and
  - (b) enact and enforce domestic legislation necessary to give effect to the obligations under the Convention (Annex III, Article 4(4) and Article 209(2)) and protect and preserve the marine environment (Article 192).
121. Accordingly, in order to fulfil their responsibilities under the Convention sponsoring States must take measures to ensure protection and preservation of the environment. These measures must in turn be given legislative effect (Annex III, Article 4(4)). States have a further obligation to ensure that such legislation is enforced through administrative measures.<sup>77</sup> The remainder of this statement considers the obligations to take measures and enact legislation in more detail. In particular
- (a) subheading II distils, from the analysis under Chapter 2, the general measures that sponsoring States must take;
  - (b) subheading III discusses how those general measures are more specifically addressed (in some instances) under the RPEN and other regulations, and
  - (c) subheading IV addresses the manner in which measures should be provided for and administered under a sponsoring States domestic legislation.

<sup>76</sup> International Seabed Authority, Decision of the Council of the International Seabed Authority requesting an advisory opinion pursuant to Article 181 of the United Nations Convention on the Law of the Sea, U.N. Doc. ISBA/16/C/13 (8 May 2010).

<sup>77</sup> 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." *Pulp Mills on the River Uruguay (Argentina v. Uruguay)* Merits, Judgment, I.C.J. Reports 2010, para. 197

## II. Necessary and appropriate measures sponsoring States must take

122. The measures that sponsoring States should take under Part XI and XII of the Convention can be summarised as including *inter alia*:

- (a) adherence to the following environmental principles:
  - i. protection and preservation (Articles 192 and 194(5)).
  - ii. best practice (Article 194(1));
  - iii. prevention of damage (Article 194(2)),<sup>78</sup>
  - iv. cooperation,<sup>79</sup> and
  - v. a precautionary approach (Article 31(2) of the RPEN).
- (b) implementation of the following environmental practices:
  - i. appropriate, transparent scientific data collection and research (art 200),<sup>80</sup>
  - ii. Environmental Impact Assessment;<sup>81</sup>
  - iii. notification (art 198);
  - iv. contingency planning (Article 199); and
  - v. monitoring (Article 32(6) of the RPEN).<sup>82</sup>

<sup>78</sup> It is "every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States". *Corfu Channel* (United Kingdom v. Albania) Merits, Judgment, I C J. Reports 1948, p 22. See also, *Pulp Mills on the River Uruguay* (Argentina v. Uruguay) Merits, Judgment, I.C.J. Reports 2010 at para. 197; and *Legality of the Threat or Use of Nuclear Weapons Advisory Opinion*, I.C.J. Reports 1996 (I), p.242, para. 29.

<sup>79</sup> This Tribunal has held "the duty to cooperate is a fundamental principle in the prevention of pollution of the marine environment under Part XII of the Convention and general international law and [that] rights arise therefrom which the Tribunal may consider appropriate to preserve under Article 290 of the Convention." *MOX Plant Case*, ITLOS Reports 2001, p. 95, para. 82

<sup>80</sup> Especially as needed to effectuate risk management, development of capacity to prevent and respond to incidents, and to assessment of liability in case of such incidents (see also art 204, 205).

<sup>81</sup> Environmental Impact Assessment, while not expressly required by the Convention, can be inferred from Article 206 of the Convention. In any case, Environmental Impact Assessment "has gained so much acceptance among States that it may 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." *Pulp Mills on the River Uruguay* (Argentina v. Uruguay) Merits, Judgment, I.C.J. Reports 2010, para. 204.

### III. Regulations and Standard Clauses

#### A. Polymetallic Nodules

123. The most comprehensive description to date of the obligations applicable to the contractor, the Authority and the sponsoring States in prospecting, exploration and exploitation of polymetallic nodules in the Area is set out in the RPEN. These include the Standard Clauses under Annex 4.<sup>63</sup>
124. The specific obligations on sponsoring States indicated in the Regulations are in addition to their general obligation to assist the Authority in ensuring compliance by the contractor with those regulations and the terms of the contract. They are examined sequentially

##### 1. *Monitoring and Environmental Impact Assessments*

125. Under Regulation 31 of the RPEN, sponsoring States, in collaboration with contractors, interested States or entities and the Authority, must establish and implement programmes for monitoring and evaluating the general impacts of deep seabed mining on the marine environment<sup>64</sup>. A sponsoring State must also contribute to the establishment and implementation of a programme to monitor and report the impact on the marine environment of a specific contractor's activities.<sup>65</sup>
126. Section 5 of the Standard Clauses further describes the obligation of the contractor in relation to environmental monitoring in order to prevent, reduce and control pollution and other hazards to the marine environment and provides that specifications for the baselines, monitoring program and reporting must be determined under the guidance and control of the Authority. Reviewed Recommendations for the guidance of contractors for the assessment of the possible environmental impacts arising from exploration for polymetallic nodules in the Area are close to completion<sup>66</sup>. A standard sampling protocol and a storage protocol for archiving data are designed to improve the establishment of baselines and thus the quality of environmental impact assessments carried out by contractors. It is noted that there is no mention of the sponsoring States in the detailed provisions of the Standard Clauses nor in the Recommendations. It can be inferred from this that it might only apply to sponsoring States through their obligation to ensure compliance by the contractor to these clauses.

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<sup>62</sup> '[O]nce operations have started and, where necessary, throughout the life of the project, continuous monitoring of its effects on the environment shall be undertaken.' *Pulp Mills on the River Uruguay (Argentina v. Uruguay)* Merits, Judgment, I.C.J. Reports 2010, para. 205

<sup>63</sup> *Supra* note 72.

<sup>64</sup> RPEN Regulation 31(6)

<sup>65</sup> RPEN Regulation 31(4)

<sup>66</sup> ISBA/18/C/7

## 2. *Training Programmes*

127. Cooperation with the Authority and the contractor in the establishment and follow-up of training programmes for the personnel of the Authority and of developing States is another obligation on the sponsoring States contained in Regulation 27 of the RPEN. The scope and the financing of these programmes are subject to negotiation between the contractor, the Authority and sponsoring States (Section 8 of the Standard Clauses).

## 3. *Contingency planning and emergency orders*

128. Section 6 of the Standard Clauses provides that contractors must submit a contingency plan to "respond effectively to incidents that are likely to cause serious harm to the marine environment". However, if these reveal insufficient or if an incident requires it, temporary measures and emergency orders<sup>87</sup> can be issued by the Authority to prevent, contain and minimize serious harm to the marine environment, following prior notification to sponsoring States and to all interested parties when the incident becomes known. Emergency orders "may include orders for the suspension or adjustment of operations."
129. To ensure compliance by the contractor with emergency orders, the RPEN provides that the contractor must supply a guarantee to that effect. However, if it does not, the sponsoring States have the obligation to take necessary measures to ensure that the contractor provides such a guarantee or shall take measures to ensure that assistance is provided to the Authority (Regulation 32 (1) and (5) of the RPEN).
130. In circumstances where a coastal State believes that activities in the Area "may cause serious harm to the marine environment under its jurisdiction or sovereignty", the contractor and sponsoring States must be given an opportunity to examine the evidence (Regulation 33 of the RPEN).
131. It is notable that the obligations of sponsoring States so far reviewed, where they concern activities carried out by their sponsored contractor, have been designed to assist the Authority in ensuring compliance with the contractor's obligations.

## 4. *Precaution*

132. The direct obligation on sponsoring States to take a precautionary approach, contained in Regulation 31 of the RPEN, is of a slightly different nature as it does not refer to cooperation with, or assistance to, the Authority or the contractor. This is confirmed by the general language of the RPEN in the wording of the obligation and the reference to Article 145 of the Convention and of Principle 15 of the Rio Declaration.

<sup>87</sup> Pursuant to Article 162 paragraph 2 (w) of the Convention

133. Further, this provision refers to the need for implementing regulations, which have not been adopted so far.<sup>88</sup> It is noted that the RPEN requires the establishment and implementation of monitoring programmes designed to inform environmental impact assessment. The provisions considered previously implement some of the steps necessary in a precautionary approach.
134. It follows from the provisions of the RPEN (including the Standard Clauses in Annex III) examined in this Chapter that the obligations of sponsoring States relate either to the protection of the environment (where the most direct obligations are provided for) and/or to the assistance of the Authority to ensure compliance by the contractor. With regards to assistance to the Authority, it is its duty to ensure compliance by the contractor. The measures needed may concern all aspects of the contract and the applicable regulation, including especially the technical and financial capabilities of the contractor<sup>89</sup>, its financial reporting<sup>90</sup> or the inspection of the contractor's vessels and installations.<sup>91</sup>

#### B. Other Minerals

135. There is to date no equivalent to the RPEN for the exploration and exploitation of minerals other than polymetallic nodules. However new regulations on prospecting and exploration for polymetallic sulphides are expected from 2011 for prospecting and exploration of cobalt-rich ferromanganese crusts. The current drafts are essentially based on the RPEN,<sup>92</sup> particularly with respect to sponsoring States' obligations. However, Regulations 33 and 34 contain more detailed specifications on measures to be taken for the protection and preservation of the marine environment, especially with regards to environmental impact assessment, and for international baselines and monitoring.<sup>93</sup> The RPEN therefore provide useful guidance on the measures sponsoring States must take under Part XI of the Convention. The standards set by in the Code for Environmental Management of Marine Mining ('the IMMS Mining Code'), adopted by the International Marine Minerals Society<sup>94</sup> can also be useful.
136. While Regulation 31 paragraph 2 of the RPEN provides for a precautionary approach to be applied by sponsoring States and the Authority in order to secure effective protection of the marine environment from harmful effects which may arise from activities in the area, this provision also calls for implementation, which to date has not been adopted. Difficulties in the application of this obligation in

<sup>88</sup> This is still mentioned in the Draft Regulations on Prospecting and Exploration for Polymetallic Sulphides in the Area in ISBA/18/C/L.5, Regulation 33 paragraph 2

<sup>89</sup> Regulation 12 of the RPEN

<sup>90</sup> Sections 10 and 11 of the Standard Clauses

<sup>91</sup> Section 14 of the Standard Clauses

<sup>92</sup> SB/16/1 23 April 2010 and SB/16/19 6 May 2010

<sup>93</sup> ISBA/18/C/L.5

<sup>94</sup> ISBA/18/LTC/2



the context of exploration and exploitation of minerals in the Area are often highlighted<sup>95</sup>. The attention given to the design of monitoring programs and impact assessment by the Authority is designed to better inform this obligation of a precautionary approach.

137. Section 4 (3) and section 17 (1) of the Standard Clauses refer to "good mining industry practices" as a minimum standard against which to assess the quality of the performance of a contractor. Although it is still a non-binding instrument, the IMMS Mining Code, which is being considered by the Authority, could provide regulatory predictability and minimization of risk in environmental matters. The IMMS Code sets a framework and benchmarks for the development and implementation of an environmental programme for marine minerals exploration and extraction by marine mining companies at their operations.<sup>96</sup> It includes the adoption of the precautionary principle. In addition to best practice procedures for environmental and resource protection, it also refers to applicable laws and policies which are to be observed. The commitment by the contractor to apply the provisions of this code would assist sponsoring States in fulfilling part of their obligations relating to the protection and preservation of the marine environment.

#### IV. Necessary laws, regulations and administrative measures

##### A. Jurisdictional power over the contractor and its activities

138. Annex III Article 4(4) provides that sponsoring States are deemed to have fulfilled their obligation to secure compliance by the contractor when they have adopted laws and regulation and taken administrative measures reasonably appropriate for securing compliance by persons under their jurisdiction. Regulation 11 of the RPEN provides that the certificate of sponsorship (issued by the sponsoring State) must contain a statement that the applicant contractor is subject to the effective control of the sponsoring State or its nationals
139. To mandate that a contractor comply with given obligations, a sponsoring State must have jurisdiction over this contractor when it carries out activities in the Area. By definition, the sponsored contractor is a national of the sponsoring State. This appears to simplify the issue of jurisdiction, but only to the extent that the contractor is not a "shell company" and the sponsoring State's jurisdiction can reach the responsible corporate officers and relevant corporate assets. Laws, regulations, and institutional arrangements to ensure adequate state control and enforcement jurisdiction are needed. Substantive laws and regulations allowing the sponsoring State to take such measures are also needed. This is particularly relevant in the context of emergency orders issued by the Authority if they require enforcement measures.

<sup>95</sup> See for instance, ISBA/6/C/INF.1

<sup>96</sup> ISBA/18/C/7

### B Standard needed for the laws, regulations and administrative measures

140. It follows from subheading III that the laws, regulations and administrative measures must address the obligations that sponsoring States are responsible for, namely the general obligation of ensuring compliance by the contractor with the applicable laws, and the many specific obligations provided for in the Regulations, many of which involve an obligation of cooperation with the Authority and the contractor.
141. The rule that a State's laws and regulations, to prevent, reduce and control pollution from activities in the Area, must be "no less effective than the international rules, regulations and procedures" established for this purpose<sup>97</sup> gives some useful guidance to determine that the laws and regulations adopted are of a standard that is sufficient to meet the threshold implied in Article 139 of the Convention.
142. The principle of best practice applied in Article 194(1) of the Convention is another useful source to inform the standard set in Articles 139 and 153. To be acceptable as "necessary and appropriate", laws and regulations of a sponsoring States have to first meet the minimum standard required by best practice in this matter

### C. Administrative measures

143. It is apparent that the applicable laws and regulations are very general with regards to sponsoring States obligations and that the specific situations and measures they will have to take to fulfil their responsibility will depend on a variety of factors including *inter alia*: (i) constraints faced by sponsoring States; (ii) operational constraints faced by the contractor; (iii) cooperation of the contractor; (iv) types of minerals explored or exploited and the technologies relied on; and (v) environmental impacts from the activity (as a result of the methods employed as well as the surrounding ecosystems).
144. It is submitted that in this regard, the Authority's directions, recommendations and measures play a critical role, especially where there is no implementation regulation. In that way, the Authority guides the necessary and appropriate administrative measures expected from sponsoring States.
145. As previously demonstrated, sponsoring States have, in addition to the obligation to ensure compliance by the contractor with its obligations, the obligation to cooperate in and contribute to the establishment of monitoring, reporting and training programmes. In addition to laws and regulations, this would require financial and human resources as well as adequate capacity. This offers an illustration of the diversity of administrative measures which might be needed.

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<sup>97</sup> Article 209 of the Convention

146. It is submitted that the provisions contained in the draft sponsorship agreement prepared by the Republic of Nauru, as an attempt to demonstrate that the State has taken 'all necessary and appropriate measures' in listing types of measures and powers required from the sponsoring State, is very useful but insufficient.<sup>85</sup>
147. To fulfil their responsibilities, sponsoring States need to demonstrate that the measures taken through the adoption of laws and regulation are those needed to meet their obligations. It is submitted that this can only be appreciated *a posteriori*. Even where laws and regulations appear to meet minimum international standards, they might prove to be ineffective when implemented. As mentioned in Annex III Article 4 (4), the laws and regulations adopted and the administrative measures taken by sponsoring States must be, "*within the framework of [their] legal system, reasonably appropriate for securing compliance*" (*emphasis added*). This requires a contextual interpretation.
148. Whether administrative measures fulfil the sponsoring State's responsibility also needs to be considered once the measures have been taken. This requires investigation of the circumstances in which they were taken, their efficiency and possibly the alternatives available. This can only be done *a posteriori*. It is submitted that sponsoring States cannot be deemed to have met their obligations on the basis of a written demonstration of the high environmental standards met by their laws and regulations. In such case, their potential responsibility would depend on the implementation of the laws and regulation and/or on the administrative effectively taken. Thus, a sponsoring State can only be sure to have fully fulfilled its responsibility after the activities sponsored and the related impacts have stopped and sponsored contractors are themselves released of their obligations.
149. It should be noted in that respect that prospecting and exploration is still a recent phenomenon in the Area. As implemented regulations and the Authority's guidance and practice develop, the standard of the 'necessary and appropriate measures' will inevitably become more and more specific and onerous.

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<sup>85</sup> It lists (a) Preventive measures; (b) Regulatory measures; (c) Deterrents (undertakings and indemnities); (d) Financial undertakings, insurance and guarantees; and, (e) enforcement measures. (ISBA/16/C/8)

**CHAPTER 5****CONCLUSION**

150. On 18 May 2010, the President of the Seabed Disputes Chamber adopted an Order on the conduct of the proceedings in Case No. 17. According to the Order, organizations invited as intergovernmental observers in the Assembly of the Seabed Authority were considered likely to be able to furnish information on the questions submitted to the Chamber in Case No. 17. The International Union for the Conservation of Nature and Natural Resources (IUCN) was identified by the Authority as such an observer and in the Order was invited to "present written statements" in Case No. 17.
151. The IUCN welcomes the opportunity it has had to provide the Chamber with information in Case No. 17, in its capacity as oldest and largest global environmental network, with a membership of more than 1,000 government and NGO member organizations, and almost 11,000 volunteer scientists and other experts in more than 160 countries.
152. The IUCN is not an advocacy organization, however, and the information provided stems from its overarching mission to influence the conservation and integrity and diversity of nature and to ensure that any use of natural resources is equitable and ecologically sustainable.
153. It is in the spirit of this mission that the Chamber is urged in this Statement to take a broad view of the legal obligations of states sponsoring activities in the Area in connection with Question 1. This mission also informs the Statement's legal position that the Chamber should narrowly interpret any limitation of liability for sponsoring states in relation to entities that states have sponsored to conduct activities in the Area in connection with Question 2. It also underlies the view that no complete legal list of exculpatory "necessary and appropriate measures" is possible to formulate except on a case by case basis, even though minimum requirements are possible to highlight in connection with Question 3.
154. The Order of 18 May 2010 of the President of the Chamber indicates that the IUCN may submit oral statements on the questions submitted to the Seabed Disputes Chamber in Case No. 17 and invites the IUCN to indicate by 3 September 2010 its intention in this regard.
155. It is the intention of the IUCN to have legal counsel responsible for the preparation of this Statement to present oral submissions in the matter and legal counsel responsible for this written statement will appear