

## (d) Written Statement of the Republic of Korea

**STATEMENT SUBMITTED BY  
THE GOVERNMENT OF THE REPUBLIC OF KOREA**  
with regard to the matters raised in the 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

The Government of the Republic of Korea considers the first and the third question of the Decision of the ISA Council (ISBA/16/C13) as closely related and thus better addressed together.<sup>1</sup> For the sake of brevity, the United Nations Convention on the Law of the Sea (UNCLOS) will be hereinafter referred to as the "Convention," and Part XI and Annex III of the Convention will be referred to as "Part XI" and "Annex III" respectively.

**Question 1 and Question 3: 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 the Convention? What are the necessary and appropriate measures that a sponsoring State must take in order to fulfill its responsibility under the Convention, in particular Article 139 and Annex III, and the 1994 Agreement?**

1. The questions raised above primarily concern the extent of States Parties' obligations with respect to the sponsorship of activities in the Area. Those obligations should be found, explicitly or when necessary implicitly, in the relevant provisions of the Convention and Annex III. Defining the scope of a sponsoring State's obligations thus amounts to interpreting the text of a treaty. As article 31 of the 1969 Vienna Convention on the Law of Treaties provides, such interpretation should be done "in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

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<sup>1</sup> Mindful of the background against which these questions were raised (ISBA/16/C6), it appears more efficient to focus on the 'specific' obligations of a sponsoring State (Question 3 of the ISA Council Decision) rather than its 'general' responsibilities and obligations (Question 1 of the ISA Council Decision). This submission of the Government of the Republic of Korea thus concentrates on what are all "the necessary and appropriate measures" the sponsoring State should take to be immune from any liability for the sponsored entity's non-compliance.

2. In this vein, the Government of the Republic of Korea wishes to stress the following points. First, the relevant articles in question, mainly articles 139 and 153 of the Convention and article 4 of Annex III, should be construed “in their context” with each other and the whole Convention. Article 139, for instance, cannot be meaningfully interpreted in isolation. Second, the “object and purpose” of the Convention must be borne in mind throughout this exercise of interpretation. The Convention has multiple objects and purposes. Relevant among them in this case are the protection and preservation of the marine environment,<sup>2</sup> the exploration and exploitation of the Area for the benefit of mankind as a whole,<sup>3</sup> and the governance of the Area pursuant to Part XI of the Convention.<sup>4</sup> From a more focused and specific perspective, State sponsorship of activities in the Area is aimed at securing compliance of the sponsored entity with the provisions of Part XI and Annex III. Therefore, the sponsoring State is expected to make rules and take measures to the effect that such entity under its jurisdiction shall observe the Convention in carrying out any activities in the Area.

*Relationship between Article 139 of the Convention and Article 4 of Annex III*

3. Article 139, paragraph 2 of the Convention addresses the issue of damage and liability arising from the failure of any State Party to carry out its responsibilities under Part XI. Its second part expressly relieves the sponsoring State of any liabilities (i) when damage was caused by the sponsored entity instead of that State itself, and (ii) if that State has “taken all necessary and appropriate measures to secure effective compliance” by its sponsored entity. As a result, the sponsoring State would not be held liable for the sponsored entity’s non-compliance as long as that State had “taken all necessary and appropriate measures” for effective compliance. Except for references to article 4 of Annex III and article 153 of the Convention, however, the provisions of article 139 do not elaborate upon the “necessary and appropriate measures” the sponsoring State is supposed to take.

4. Such an elaboration can be found in article 4, paragraph 4 of Annex III, the second part of which states as follows:

... 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

<sup>2</sup> Preamble of the Convention

<sup>3</sup> Preamble of the Convention

<sup>4</sup> Article 134 of the Convention

framework of its legal system, reasonably appropriate for securing compliance by persons under its jurisdiction.

When compared with each other, the following differences between article 139 of the Convention and article 4 of Annex III can be found:

	<b>ARTICLE 139, PARA. 2 (UNCLOS)</b>	<b>ARTICLE 4, PARA. 4 (Annex III)</b>
STATE	a State Party	a sponsoring State
ENTITY	a person whom it [a State Party] has sponsored...	a contractor sponsored by it [a sponsoring State]
RULES	to comply with this Part [Part XI of the Convention]	to comply with its [a contractor's] obligations
MEASURE	taken all necessary and appropriate measures	has adopted laws and regulations and taken administrative measures which are, within the framework of its legal system, reasonably appropriate
OBJECT	to secure effective compliance ...	for securing compliance by persons under its jurisdiction.

5. Although the two articles are slightly different in the usage of some terms, their intentions are identical. As is shown in the above comparison, the differences reflect more of the level of specification rather than a divergence in their meaning. "A State Party" and "a person..." of article 139 in the Convention are more precisely translated, respectively, into "a sponsoring State" and "a contractor..." in article 4 of Annex III, respectively.<sup>5</sup> Furthermore, if the two articles had been meant to differ in their scope, it would lead to a contradiction whereby a sponsoring State would be exempted from its liability under article 4 of Annex III on the one hand, but not exempted from its liability under article 139 of the Convention on the other hand. Therefore, it is submitted that the foregoing provision of article 4 of Annex III is merely an elaboration of article 139 of the Convention<sup>6</sup> and further that, once the sponsoring State has taken the measures

<sup>5</sup> In terms of rules to be complied with, "its[contractor's] obligations" in article 4 of Annex III appear more extensive than "this Part[Part XI of the Convention]" of article 139 of the Convention.

<sup>6</sup> At the fourth session of the Third United Nations Conference on the Law of the Sea (1976), in a proposal made by the Chairman of the First Committee, the limitation on a State Party's liability for the damage caused by entities sponsored by the State Party, which has taken "all necessary and appropriate measures" for securing effective compliance by the entities, was devised. Still, this proposal did not specify what measures should be taken for the State Party to be discharged from its liability under article 139. The UNCLOS commentary explains that Annex III, article 4, paragraph 4 gives "a more

under article 4 of Annex III, it has effectively taken "all necessary and appropriate measures" in order to be immune from any liability for the sponsored entity's non-compliance.

*Extent of the Sponsoring State's Obligations.*

6. In accordance with article 4 of Annex III, the sponsoring State's obligations to secure compliance on the part of its sponsored entities are composed of legislative and administrative actions. First, the sponsoring State must have laws and regulations in place. Such legislation should be effective enough to secure compliance by the sponsored entity; in other words, capable of compelling the sponsored entity to obey its obligations under the Convention or otherwise owed to the Authority. When necessary, an appropriate level of punitive or corrective measures must be prescribed in such laws and regulations so that a potential breach of Part XI would be effectively deterred.

7. In addition to legislative actions, the sponsoring State is required to take administrative measures. For any laws and regulations to be effective, their mere 'paper' adoption would not be sufficient. Monitoring and enforcement in a meaningful manner are required to properly 'secure' compliance on the part of the sponsored entity. "Administrative measures" referred to in article 4 of Annex III can mean either those measures envisaged in the said laws and regulations, or any other measures the sponsoring State is authorized to take.

8. Article 4 of Annex III leaves State Parties some flexibility in discharging their legislative and administrative duties. Each sponsoring State may take different measures tailored to its own legal system. Such flexibility, however, is allowed only to the extent that the measures taken are reasonably appropriate for securing compliance by the sponsored entity. At this juncture, it should be stressed that the word 'securing' is employed instead of such terms as 'facilitating,' 'encouraging' or 'urging' compliance. The test must then be that such measures, whether legislative or administrative, must be effective enough to 'secure' compliance by the sponsored entity with the applicable rules.

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meaningful elaboration of how States Parties are expected to fulfil the obligation contained in article 139, paragraph 1." See Myron H. Nordquist, Satya N. Nandan, Shabtai Rosenne & Michael W. Lodge, *United Nations Convention on the Law of the Sea 1982 Commentary*, Volume IV, pp. 124-126 (Center for Oceans Law and Policy, University of Virginia School of Law, Martinus Nijhoff Publishers), 1989.

9. Equally significant is the purpose and objective of the whole Convention and of the State sponsorship. The sponsored entity's compliance needs to be ensured, especially for the purpose of the protection and preservation of the environment in the Area. Those laws and regulations that the sponsoring State should adopt in accordance with article 4 of Annex III ought to reflect the provisions of the Convention. Particularly, for the purpose of protecting the environment, article 209 of the Convention stipulates that:

States shall adopt laws and regulations to prevent, reduce and control pollution of the marine environment from activities in the Area undertaken by vessels, installations, structures and other devices flying their flag or of their registry or operating under their authority, as the case may be. The requirements of such laws and regulations shall be no less effective than the international rules, regulations and procedures referred to in paragraph 1.

10. In the light of the foregoing, it is submitted that the mere conclusion of a sponsorship agreement between the State and the entity would not be enough to discharge the duties of the sponsoring State. In addition to the adoption of legislation, the sponsoring State should make reasonable and appropriate efforts to secure compliance on the part of the sponsored entity. Such efforts should comprise monitoring and enforcement in a meaningful manner and shall include preventive measures for the protection of the marine environment. If it learns of any breach by the sponsored entity, the sponsoring State must take corrective action. Furthermore, upon request of the Authority, the sponsoring State shall also provide assistance and, when necessary, take actions to compel the sponsored entity to comply with its obligations.

11. In this regard, the Government of the Republic of Korea would like to emphasize that, if the sponsored entity does not have the nationality of the sponsoring State, there should be truly 'effective' control by the sponsoring State over the sponsored entity. Otherwise, it would be difficult for the sponsoring State to secure compliance on the part of the sponsored entity.

**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?**

*Nature of the Sponsoring State's Obligations and Liability*

12. Prior to examining the extent of the sponsoring State's liability, it seems necessary to analyze the nature of the sponsoring State's obligations and place them in a proper perspective. To that end, the conceptual distinction between 'obligations of conduct' ('best efforts obligations')<sup>7</sup> and 'obligations of result' ('guarantees of outcome') helps to better understand the nature of the sponsoring State's responsibility. Pursuant to article 139, paragraph 1, "States Parties shall have the responsibility to *ensure* that activities in the Area [emphasis added]" by its subjects (natural and juridical persons and any entities under its effective control) are carried out in conformity with Part XI.

13. The onus of complying with Part XI is imposed upon those subjects, and the sponsoring State's duty is to "ensure" their compliance with the Convention. The word "ensure" here means 'make it happen' and more specifically 'make best efforts for the sponsored entities to comply with Part XI.' Any breach on the part of the sponsored entities does not necessarily entail the liability of the sponsoring State. For the sponsoring State's liability to be established, a failure by that State to make its best efforts to ensure such compliance needs to exist in the first place. It is thus the view of the Government of the Republic of Korea that the sponsoring State's obligations under article 139, paragraph 1 are in nature an 'obligation of conduct' as opposed to an 'obligation of result.' As such, the sponsoring State will not necessarily be liable for every non-compliance by its sponsored entity, and will be exempted from liability if that State has endeavored by means of legislative or administrative powers to ensure that its sponsored entity adheres to Part XI. The exculpatory language of article 139, paragraph

<sup>7</sup> Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (BOSNIA AND HERZEGOVINA v. SERBIA AND MONTENEGRO, ICJ, paragraph 430) "[...] it is clear that the obligation in question is one of conduct and not one of result, in the sense that a State cannot be under an obligation to succeed, whatever the circumstances, in preventing the commission of genocide: the obligation of States parties is rather to employ all means reasonably available to them, so as to prevent genocide so far as possible. A State does not incur responsibility simply because the desired result is not achieved; responsibility is however incurred if the State manifestly failed to take all measures to prevent genocide which were within its power, and which might have contributed to preventing the genocide. In this area the notion of 'due diligence', which calls for an assessment in concreto, is of critical importance."

2 (the second sentence) reflects an affirmation and extension of this nature of the sponsoring State's 'obligation of conduct.'

*State Sponsorship as Dual Supervision in tandem with the Authority's Primary Control*

14. In order to properly understand the sponsoring State's obligations, it is also to be remembered that there are three players involved, namely the sponsoring State, the Authority (both of which are subjects of international law in the full sense) and the sponsored entity (not a subject of international law in the proper sense). Among the three subjects, as the Convention unequivocally declares in article 153, paragraph 4, it is the Authority that "shall exercise such control over activities in the Area as is necessary for the purpose of securing compliance with the relevant provisions..." As a corollary, the primary control over activities by any subject in the Area, whether governmental or non-governmental, rests with the Authority. For instance, the Authority approves plans of work for activities in the Area (articles 3 and 6 of Annex II), has the right to inspect all installations in the Area (article 153, paragraph 5), and may impose upon the contractor monetary penalties (article 18 of Annex III).

15. On the other hand, "States Parties shall *assist* the Authority by taking all measures necessary to ensure...compliance [emphasis added]" on the part of its sponsored entity (article 153, paragraph 4 of the Convention). Put differently, so far as the State sponsorship is concerned, the duty of the State Party is that of assisting the Authority's primary control over any activities of the sponsored entity. Nonetheless, the sponsoring State's duty is not merely secondary because it is to be exercised simultaneously with the Authority's control, although on different dimensions. Both the Authority's primary control and the sponsoring State's assistant supervision share the common purpose of ensuring compliance on the part of any sponsored entity. While the Authority's control over the entity depends mainly on the basis of the contract as set forth in article 153, the sponsoring State's control hinges upon its nexus of either nationality or effective control. Such nexus may be stronger than any contractual control. The sponsoring State may exercise legislative, administrative and, when necessary, punitive measures against the sponsored entity, while the Authority's means of control over the entity are limited. In light of the forgoing, the sponsoring State's obligations may be characterized as a dual or parallel supervision in tandem with the Authority's primary control.

*Extent of a Sponsoring State's Liability*

16. Pursuant to article 139, paragraph 1, a States Party to the Convention has the 'general' responsibility to ensure that the entities under its jurisdiction shall carry out activities in the Area in conformity with Part XI. A State Party's failure to fulfill such 'general' responsibility shall entail liability. Nevertheless, the sponsoring State shall not be liable for any damage caused by the sponsored entity's non-compliance when the State has taken necessary measures to secure compliance (article 139, paragraph 2).

17. The outstanding question would be whether the sponsoring State is liable when the following two conditions are met: (i) a failure on the part of the sponsored entity (the contractor) to observe its obligations has caused damage, and, at the same time, (ii) the sponsoring State has not taken all the necessary and appropriate measures (legislative and administrative measures under article 4 of Annex III). If the State has failed to take such measures, such failure will constitute a State responsibility on its own. The State in question is obliged to take such measures pursuant to relevant articles of the Convention. The State responsibility in question will continue and remain until the State has discharged its obligations.<sup>8</sup> However, the liability for the damage caused by the contractor's non-compliance is a different issue. In the opinion of the Korean Government, there should be a causal link between the damage caused by the sponsored entity's non-compliance and the sponsoring State's failure to take necessary measures.

18. With regard to responsibility and liability for damage, article 139, paragraph 1 indicates that the rules of international law take precedence over the operative part of that paragraph, by stating "Without prejudice to the rules of international law..." This is again confirmed by article 304 of the Convention, which stipulates that the rules of international law regarding responsibility and liability shall prevail. The relevant rules of international law in this vein are those of State responsibility, which require such causal link in order to establish the responsibility of States.<sup>9</sup>

<sup>8</sup> Article 14 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts (adopted by the International Law Commission at its fifty-third session (2001)):

2. The breach of an international obligation by an act of a State having a continuing character extends over the entire period during which the act continues and remains not in conformity with the international obligation.
3. The breach of an international obligation requiring a State to prevent a given event occurs when the event occurs and extends over the entire period during which the event continues and remains not in conformity with that obligation.

<sup>9</sup> Article 31 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts (adopted by the International Law Commission at its fifty-third session (2001)):



19. The test would be whether the sponsoring State's omission has led to the contractor's non-compliance and thus the ensuing damage. There should be a 'sufficient' causal link which is not too remote.<sup>10</sup> Again, as article 22 of Annex III clearly sets forth, it is the contractor that bears principal liability for such damage in the first place. The Authority, as the primary control over activities in the Area, may be liable for its contributory acts or omissions. Subsequently or simultaneously, the liability of the sponsoring State would arise when (i) it has failed to take measures envisaged under article 4 of Annex III, and (ii) such failure has led to the contractor's non-compliance and the ensuing damage.

20. In summary, when the contractor has failed to comply with its obligations and thus caused damage, the sponsoring State should first show that it has taken such measures as stipulated in article 139 of the Convention and article 4 of Annex III. If so, the State shall not be liable for the damage. If not, the sponsoring State has to establish that its failure to take measures has not led to the contractor's non-compliance and the ensuing damage. When there is a sufficient causal link, the sponsoring State shall be also liable for its omission or contribution to such damage.

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1. The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.
  2. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State. [emphasis added]

<sup>10</sup> International Law Commission Report (2001) pp. 227-228, paragraph 10.