INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

RESPONSIBILITIES AND OBLIGATIONS OF STATES SPONSORING PERSONS AND ENTITIES WITH RESPECT TO ACTIVITIES IN THE AREA (REQUEST FOR ADVISORY OPINION SUBMITTED TO THE SEABED DISPUTES CHAMBER)

List of cases: No. 17

ADVISORY OPINION OF 1 FEBRUARY 2011

2011

TRIBUNAL INTERNATIONAL DU DROIT DE LA MER

RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

RESPONSABILITÉS ET OBLIGATIONS DES ETATS QUI PATRONNENT DES PERSONNES ET DES ENTITÉS DANS LE CADRE D'ACTIVITÉS MENÉES DANS LA ZONE (DEMANDE D'AVIS CONSULTATIF SOUMISE À LA CHAMBRE POUR LE RÈGLEMENT DES DIFFÉRENDS RELATIFS AUX FONDS MARINS)

Rôle des affaires : No. 17

AVIS CONSULTATIF DU 1ER FÉVRIER 2011

Official citation:

Responsibilities and obligations of States with respect to activities in the Area, Advisory Opinion, 1 February 2011, ITLOS Reports 2011, p. 10

Mode officiel de citation :

Responsabilités et obligations des Etats dans le cadre d'activités menées dans la Zone, avis consultatif, 1er février 2011, TIDM Recueil 2011, p. 10

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SEABED DISPUTES CHAMBER OF THE INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

YEAR 2011

1 February 2011

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No. 17

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

ADVISORY OPINION

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ADVISORY OPINION

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

On Responsibilities and Obligations of States sponsoring persons and entities with respect to activities in the Area,

THE SEABED DISPUTES CHAMBER,

composed as above,

gives the following Advisory Opinion:

Introduction

I. The Request

1. The questions on which the advisory opinion of the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea (hereinafter "the Chamber") has been requested are set forth in decision ISBA/16/C/13 adopted by the Council of the International Seabed Authority (hereinafter "the Council") on 6 May 2010 at its sixteenth session. By letter dated 11 May 2010, transmitted electronically to the Registry of the Tribunal on 14 May 2010, the Secretary-General of the International Seabed Authority (hereinafter "the Secretary-General") officially communicated to the Chamber the decision taken by the Council. The original of that letter was received in the Registry on 17 May 2010. Certified true copies of the English and French versions of the Council's decision were forwarded by the Legal Counsel of the International Seabed Authority (hereinafter "the Legal Counsel") on 8 June 2010 and received in the Registry on the same date. The decision of the Council reads:

The Council of the International Seabed Authority,

Considering the fact that developmental activities in the Area have already commenced,

Bearing in mind the exchange of views on legal questions arising within the scope of activities of the Council,

Decides, in accordance with Article 191 of the United Nations Convention on the Law of the Sea ("the Convention"), to request the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea, pursuant to Article 131 of the Rules of the Tribunal, to render an advisory opinion on the following questions:

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

2. The Request was entered in the List of cases as No. 17 and the case was named "Responsibilities and Obligations of States sponsoring persons and entities with respect to activities in the Area".

3. In his letter of 11 May 2010, the Secretary-General informed the Chamber of the appointment of the Legal Counsel as the representative of the International Seabed Authority (hereinafter "the Authority") for the proceedings.

II. Events leading to the Request

4. The Chamber considers it necessary to describe the events that led to the request for an advisory opinion:

- On 10 April 2008, the Authority received two applications for approval of a plan of work for exploration in the areas reserved for the conduct of activities by the Authority through the Enterprise or in association with developing States pursuant to Annex III, article 8, of the United Nations Convention on the Law of the Sea (hereinafter "the Convention"). These applications were submitted by Nauru Ocean Resources Inc. (sponsored by the Republic of Nauru) and Tonga Offshore Mining Ltd. (sponsored by the Kingdom of Tonga);
- These applications were submitted to the Legal and Technical Commission of the Authority. On 5 May 2009, the applicants submitted to the Authority a request that consideration of the applications should be postponed. At the fifteenth session of the Authority, held from 25 May to 5 June 2009, the Legal and Technical Commission decided to defer further consideration of the item;
- On 1 March 2010, the Republic of Nauru transmitted to the Secretary-General a proposal, set out in document ISBA/16/C/6, to seek an advisory opinion from the Chamber on a number of specific questions regarding the responsibility and liability of sponsoring States;
- In support of its proposal, Nauru submitted, inter alia, the following considerations:

> In 2008 the Republic of Nauru sponsored an application by Nauru Ocean Resources Inc. for a plan of work to explore for polymetallic nodules in the Area. Nauru, like many other developing States, does not yet possess the technical and financial capacity to undertake seafloor mining in international waters. To participate effectively in activities in the Area, these States must engage entities in the global private sector (in much the same way as some developing countries require foreign direct investment). Not only do some developing States lack the financial capacity to execute a seafloor mining project in international waters, but some also cannot afford exposure to the legal risks potentially associated with such a project. Recognizing this, Nauru's sponsorship of Nauru Ocean Resources Inc. was originally premised on the assumption that Nauru could effectively mitigate (with a high degree of certainty) the potential liabilities or costs arising from its sponsorship. This was important, as these liabilities or costs could, in some

> circumstances, far exceed the financial capacities of Nauru (as well as those of many other developing States). Unlike terrestrial mining, in which a State generally only risks losing that which it already has (for example, its natural environment), if a developing State can be held liable for activities in the Area, the State may potentially face losing more than it actually has. (ISBA/16/C/6, paragraph 1);
>
> Ultimately, if sponsoring States are exposed to potential significant liabilities, Nauru, as well as other developing States, may be precluded from effectively participating in activities in the Area, which is one of the purposes and principles of Part XI of the Convention, in particular as provided for in article 148; article 150, subparagraph (c); and article 152, paragraph 2. As a result, Nauru considers it crucial that guidance be provided on the interpretation of the relevant sections of Part XI pertaining to responsibility and liability, so that developing States can assess whether it is within their capabilities to effectively mitigate such risks and in turn make an informed decision on whether or not to participate in activities in the Area. (ISBA/16/C/6, paragraph 5);

– Nauru's proposal was included in the agenda for the sixteenth session of the Council of the Authority, during which intensive discussions on this agenda item were held at the 155th, 160th and 161st meetings;
– The Council decided not to adopt the proposal as formulated by Nauru. In view of the wishes of many participants in the debate, it decided to request an advisory opinion on three more abstract but concise questions;
– These questions were formulated in decision ISBA/16/C/13, adopted by the Council at its 161st meeting on 6 May 2010. As indicated by the Authority in its written statement and at the hearing, the decision adopted by the Council on 6 May 2010 was taken "without a vote" and "without objection" (written statement of the Authority, paragraph 2.4; ITLOS/PV.2010/1/Rev.1, p. 10, lines 16-21).

III. Chronology of the procedure

5. Pursuant to article 133, paragraph 1, of the Rules of the Tribunal (hereinafter "the Rules"), the Registrar, by Note Verbale dated 17 May 2010, notified all States Parties to the United Nations Convention on the Law of the Sea (hereinafter "States Parties") of the request for an advisory opinion.

6. By letter dated 18 May 2010, pursuant to article 4 of the Agreement on Cooperation and Relationship between the United Nations and the International Tribunal for the Law of the Sea of 18 December 1997, the Registrar notified the Secretary-General of the United Nations of the request for an advisory opinion.

7. By Order dated 18 May 2010, pursuant to article 133, paragraph 2, of the Rules, the President decided that the Authority and the organizations invited as intergovernmental organizations to participate as observers in the Assembly of the Authority (hereinafter "the Assembly") were considered likely to be able to furnish information on the questions submitted to the Chamber for an advisory opinion. Accordingly, the President invited the States Parties, the Authority and the aforementioned intergovernmental organizations to present written statements on those questions. By the same Order, in accordance with article 133, paragraph 3, of the Rules, the President fixed 9 August 2010 as the time-limit within which written statements on those questions might be submitted to the Chamber. In the Order, in accordance with article 133, paragraph 4, of the Rules, the President further decided that oral proceedings would be held and fixed 14 September 2010 as the date for the opening of the hearing. States Parties, the Authority and the aforementioned intergovernmental organizations were invited to participate in the hearing and to indicate to the Registrar, not later than 3 September 2010, their intention to make oral statements.

8. Article 191 of the Convention requires the Chamber to give advisory opinions "as a matter of urgency". In the present case, the time-limits for the submission of written statements and the date of the opening of the hearing, as set out in the Orders of the President, were fixed with a view to meeting this requirement.

9. By Order dated 28 July 2010, in light of a request submitted to the Chamber, the President extended the time-limit for the submission of written statements to 19 August 2010.

10. By letter dated 30 July 2010, pursuant to article 131 of the Rules, the Legal Counsel transmitted to the Chamber a dossier containing documents in support of the Request. The dossier was posted on the Tribunal's website.

11. Within the time-limit fixed by the President, written statements were submitted by the following 12 States Parties, which are listed in the order in which their statements were received: the United Kingdom, Nauru, the Republic of Korea, Romania, the Netherlands, the Russian Federation, Mexico, Germany, China, Australia, Chile, and the Philippines. Within the same time-limit, written statements were also submitted by the Authority and two organizations, namely, the Interoceanmetal Joint Organization and the International Union for Conservation of Nature and Natural Resources.

12. Upon receipt of those statements, in accordance with article 133, paragraph 3, of the Rules, the Registrar transmitted copies thereof to the States Parties, the Authority and the organizations that had submitted written statements. On 19 August 2010, pursuant to article 134 of the Rules, the written statements submitted to the Chamber were made accessible to the public on the Tribunal's website.

13. On 17 August 2010, the Registry received a statement submitted jointly by Stichting Greenpeace Council (Greenpeace International) and the World Wide Fund for Nature. The statement was accompanied by a petition from these two non-governmental organizations in which they requested permission to participate in the advisory proceedings as *amici curiae*. At the request of the President, by separate letters dated 27 August 2010, the Registrar informed those organizations that their statement would not be included in the case file since it had not been submitted under article 133 of the Rules; it would, however, be transmitted to the States Parties, the Authority and the intergovernmental organizations that had submitted written statements, which would be informed that the document was not part of the case file and that it would be posted on a separate section of the Tribunal's website. By communication dated 27 August 2010, the States Parties, the Authority and the intergovernmental organizations in question were so informed.

14. On 10 September 2010, the Chamber, having considered a petition from Stichting Greenpeace Council (Greenpeace International) and the World Wide Fund for Nature requesting permission to participate in the advisory proceedings as *amici curiae*, decided not to grant that request. The decision was communicated to the two organizations on the same day by a letter from the President.

15. By e-mail dated 26 August 2010, the Legal Counsel transmitted to the Registrar, at the latter's request, a note containing a summary of potential environmental impacts of seabed mining. This document was posted on the Tribunal's website.

16. By letter dated 1 September 2010, after the expiry of the time-limit for the submission of written statements, the United Nations Environment

Programme submitted a written statement that was received by the Registry on 2 September 2010. The President nevertheless decided that the statement should be included in the case file. Accordingly, on 3 September 2010, the Registrar transmitted an electronic copy of that document to the States Parties, the Authority and the intergovernmental organizations that had submitted written statements. The document was also posted on the Tribunal's website.

17. Within the time-limit fixed in the Order of the President of 18 May 2010, nine States Parties expressed their intention to participate in the oral proceedings, namely, Argentina, Chile, Fiji, Germany, Mexico, Nauru, the Netherlands, the Russian Federation and the United Kingdom. Within the same time-limit, the Authority and two organizations, namely, the Intergovernmental Oceanographic Commission (IOC) of the United Nations Educational, Scientific and Cultural Organization (UNESCO) and the International Union for Conservation of Nature and Natural Resources also expressed their intention to participate in the oral proceedings.

18. Prior to the opening of the oral proceedings, the Chamber held initial deliberations on 10, 13 and 14 September 2010.

19. At four public sittings held on 14, 15 and 16 September 2010, the Chamber heard oral statements, in the following order, by:

For the International Seabed Authority:	Mr Nii Odunton, Secretary-General, Mr Michael Lodge, Legal Counsel, Mr Kening Zhang, Senior Legal Officer, and Ms Gwenaëlle Le Gurun, Legal Officer;
For the Federal Republic of Germany:	Ms Susanne Wasum-Rainer, Legal Adviser, Director-General for Legal Affairs, Federal Foreign Office;
For the Kingdom of the Netherlands:	Ms Liesbeth Lijnzaad, Legal Adviser, Ministry of Foreign Affairs;
For the Argentine Republic:	Ms Susana Ruiz Cerutti, Ambassador, Legal Adviser, Ministry of Foreign Affairs International Trade and Worship;

For the Republic of Chile:	Mr Roberto Plaza, Minister Counsellor, Consul General of Chile in Hamburg;
For the Republic of Fiji:	Mr Pio Bosco Tikoisuva, High Commissioner of Fiji to the United Kingdom of Great Britain and Northern Ireland;
For the United Mexican States:	Mr Joel Hernández G., Ambassador, Legal Adviser, Ministry of Foreign Affairs;
For the Republic of Nauru:	Mr Peter Jacob, First Secretary, Nauru High Commission in Suva (Fiji), and Mr Robert Haydon, Advisor;
For the United Kingdom of Great Britain and Northern Ireland:	Sir Michael Wood KCMG, Member of the English Bar and Member of the International Law Commission;
For the Russian Federation:	Mr Vasiliy Titushkin, Deputy Director, Legal Department, Ministry of Foreign Affairs;
For the Intergovernmental Oceanographic Commission (IOC) of the United Nations Educational, Scientific and Cultural Organization (UNESCO):	Mr Ehrlich Desa, Deputy Executive Secretary;
For the International Union for Conservation of Nature and Natural Resources:	Ms Cymie R. Payne, Member of the Bar of the State of California, the Commonwealth of Massachusetts, and the Supreme Court of the United States of America, Counsel, Mr Robert A. Makgill, Barrister and Solicitor of the High Court of New Zealand, Counsel, and

Mr Donald K. Anton, Barrister and Solicitor of the Supreme Court of Victoria, the Supreme Court of New South Wales and the High Court of Australia; Member of the Bar of the State of Missouri, the State of Idaho, and the Supreme Court of he United States; and Senior Lecturer in International Law at the Australian National University College of Law, Counsel.

20. The hearing was broadcast over the internet as a webcast.

21. By letter dated 13 September 2010, pursuant to article 76, paragraph 1, of the Rules, the Registrar transmitted to the Authority, prior to the hearing, a list of the following points that the Chamber wished the Authority to address:

1. With reference to article 153, paragraph 4, of the Convention, how has the Authority been exercising control over activities in the Area for the purpose of securing compliance with the relevant provisions of the Convention and what experience has the Authority accumulated over the years in this regard?

2. In what form has assistance been provided so far to the Authority by sponsoring States, including the case of various States sponsoring one contractor, for the purpose of securing compliance with provisions referred to in article 153, paragraph 4, and what experience has the Authority accumulated over the years in this regard?

3. What are the activities in the Area, including activities associated with exploration and exploitation, which so far have been controlled by the Authority?

4. Would it be possible for the Authority to provide the certificates of sponsorship regarding the contracts it has concluded with contractors, as well as copies of the sponsorship agreements if available?

22. Responses to points 1 to 3 of this list were provided in the oral statements made on behalf of the Authority during the sitting held on 14 September 2010. By letter dated 17 September 2010, the Legal Counsel communicated information on point 4 of the list. This letter was posted on the Tribunal's website.

23. At the request of the President, by letter dated 13 October 2010, the Registrar asked the Legal Counsel to provide the Chamber with information

on the various phases of the process of exploration and exploitation of resources in the Area (collection, transportation to the surface, initial treatment, etc.), as well as information on the technology available. The Legal Counsel provided this information by letter dated 15 November 2010. The information was posted on the Tribunal's website.

24. As indicated by the President at the opening of the oral proceedings, one Member of the Chamber, Judge Chandrasekhara Rao, was prevented by illness from sitting on the bench during the hearing. However, with the approval of the Chamber, he participated in the subsequent deliberations on the advisory opinion.

IV. Role of the Chamber in advisory proceedings

25. The Chamber is a separate judicial body within the Tribunal entrusted, through its advisory and contentious jurisdiction, with the exclusive function of interpreting Part XI of the Convention and the relevant annexes and regulations that are the legal basis for the organization and management of activities in the Area.

26. The advisory jurisdiction is connected with the activities of the Assembly and the Council, the two principal organs of the Authority. The Authority is the international organization established by the Convention in order to "organize and control activities in the Area" (article 157, paragraph 1, of the Convention and section 1, paragraph 1, of the Annex to the 1994 Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea (hereinafter "the 1994 Agreement")). In order to exercise its functions properly in accordance with the Convention, the Authority may require the assistance of an independent and impartial judicial body. This is the underlying reason for the advisory jurisdiction of the Chamber. In the exercise of that jurisdiction, the Chamber is part of the system in which the Authority's organs operate, but its task within that system is to act as an independent and impartial body.

27. According to article 159, paragraph 10, and article 191 of the Convention, the advisory function of the Chamber concerns legal questions submitted by the Assembly and by the Council. Advisory opinions requested under article 159, paragraph 10, of the Convention serve to assist the Assembly during its decision-making process. The Chamber's advisory jurisdiction under article 191 of the Convention concerns "legal questions arising within the scope" of the activities of either the Assembly or the Council.

28. As provided in article 187 of the Convention, the Chamber also has contentious jurisdiction to settle different categories of disputes referred to in that article with respect to activities in the Area.

29. The functions of the Chamber, set out in Part XI of the Convention, are relevant for the good governance of the Area. The Secretary-General made this point at the hearing: "The Chamber has a high responsibility to ensure that the provisions of Part XI of the Convention and the 1994 Agreement are implemented properly and the regime for deep seabed mining as a whole is properly interpreted and applied" (ITLOS/PV.2010/1/Rev.1, p. 5, lines 16-19).

30. The Chamber is mindful of the fact that by answering the questions it will assist the Council in the performance of its activities and contribute to the implementation of the Convention's regime.

V. Jurisdiction

31. The Chamber will first determine whether it has jurisdiction to give the advisory opinion requested by the Council. The conditions to be met in order to establish the jurisdiction of the Chamber are set out in article 191 of the Convention which reads as follows:

> The Seabed Disputes Chamber shall give advisory opinions at the request of the Assembly or the Council on legal questions arising within the scope of their activities. Such opinions shall be given as a matter of urgency.

32. As regards the present proceedings, the conditions to be met are: (a) that there is a request from the Council; (b) that the request concerns legal questions; and (c) that these legal questions have arisen within the scope of the Council's activities.

33. As to the first condition, the Chamber observes that article 191 of the Convention confers on the Assembly and the Council the power to request advisory opinions from the Chamber. In the present case, the decision to request an advisory opinion from the Chamber was adopted by the Council.

34. Rule 56, paragraph 1, of the Rules of Procedure of the Council provides that, as a general rule, decision-making in the Council should be by consensus. Section 3, paragraph 2, of the Annex to the 1994 Agreement states that "[a]s a general rule, decision-making in the organs of the Authority should be by consensus". According to article 161, paragraph 8 (e), of the Convention and rule 59 of the Rules of Procedure of the Council, "consensus" means the absence of any formal objection.

35. In its written statement, the Authority declared that "[t]he decision of the Council to request the Chamber for an advisory opinion was taken without objection and can thus be regarded as having been taken by consensus". The information provided by the Authority also shows that the Council's decision was taken in accordance with the internal rules of procedure of the Authority.

36. The Chamber thus concludes that there is a valid request by the Council.

37. With respect to the second condition, the Chamber must satisfy itself that the advisory opinion requested by the Council concerns "legal questions" within the meaning of article 191 of the Convention.

38. In examining this requirement, the Chamber observes that the three questions before it relate, *inter alia*, to "the legal responsibilities and obligations of States Parties to the Convention with respect to the sponsorship of activities in the Area"; "the extent of liability of a State Party for any failure to comply with the provisions of the Convention . . . by an entity whom it has sponsored"; and the "measures that a sponsoring State must take in order to fulfil its responsibility under the Convention".

39. The questions put to the Chamber concern the interpretation of provisions of the Convention and raise issues of general international law. The Chamber recalls that the International Court of Justice (hereinafter "the ICJ") has stated that "questions 'framed in terms of law and rais[ing] problems of international law . . . are by their very nature susceptible of a reply based on law'" (*Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, *Advisory Opinion*, 22 July 2010, paragraph 25; *Western Sahara, Advisory Opinion, I.C.J. Report 1975*, p. 12, at paragraph 15).

40. For these reasons, the Chamber concludes that the questions raised by the Council are of a legal nature.

41. As to the third condition, article 191 of the Convention also requires that an advisory opinion must concern legal questions "arising within the scope of [the] activities" of the Assembly or the Council. In the present case, it is for the Chamber to determine whether the legal questions submitted to it arose within the scope of the activities of the Council. Therefore, it is pertinent to examine the provisions of the Convention and of the 1994 Agreement that define the Council's competence.

42. The powers and functions of the Council are set out in Part XI, section 4, of the Convention and, in particular, article 162 thereof, read together

with the 1994 Agreement. Article 162, paragraphs 1 and 2 (a), of the Convention reads as follows:

> 1. The Council is the executive organ of the Authority. The Council shall have the power to establish, in conformity with this Convention and the general policies established by the Assembly, the specific policies to be pursued by the Authority on any question or matter within the competence of the Authority.
> 2. In addition, the Council shall:
> (a) supervise and coordinate the implementation of the provisions of this Part on all questions and matters within the competence of the Authority and invite the attention of the Assembly to cases of non-compliance.

43. Section 3, paragraph 11 (a), read together with section 1, paragraphs 6 to 11, of the 1994 Agreement, entrusts the Council with the function of approving plans of work in accordance with Annex III, article 6, of the Convention. Article 162, paragraph 2 (l), of the Convention confers on the Council the power to "exercise control over activities in the Area in accordance with article 153, paragraph 4, and the rules, regulations and procedures of the Authority".

44. In light of these provisions, the Chamber concludes that the legal questions before it fall within the scope of the activities of the Council, since they relate to the exercise of its powers and functions, including its power to approve plans of work.

45. For the aforementioned reasons, the Chamber finds that it has jurisdiction to entertain the request for an advisory opinion submitted to it by the Council.

VI. Admissibility

46. The Chamber now turns to questions of admissibility.

47. Some of the participants in the proceedings have drawn attention to the wording of article 191 of the Convention, which states that the Chamber "shall give" advisory opinions, and have compared it to article 65, paragraph 1, of the Statute of the ICJ, which states that the Court "may give" an advisory opinion. In light of this difference, they have argued that, contrary to the discretionary powers of the ICJ, the Chamber, once it has established its jurisdiction, has no discretion to decline a request for an advisory opinion.

48. While noting the difference between the wording of article 191 of the Convention and article 65 of the Statute of the ICJ, the Chamber does not

consider it necessary to pronounce on the consequences of that difference with respect to admissibility in the present case.

49. The Chamber deems it appropriate to render the advisory opinion requested by the Council and will proceed accordingly.

VII. Applicable law and procedural rules

50. The Chamber will now proceed to indicate the applicable law.

51. Article 293, paragraph 1, of the Convention and article 38 of the Statute of the Tribunal (hereinafter "the Statute") set out the law to be applied by the Chamber.

52. Article 293, paragraph 1, of the Convention, reads:

> A court or tribunal having jurisdiction under this section [section II of Part XV of the Convention] shall apply this Convention and other rules of international law not incompatible with this Convention.

53. Article 38 of the Statute reads:

> In addition to the provisions of article 293, the Chamber shall apply:
>
> a) the rules, regulations and procedures of the Authority adopted in accordance with the Convention; and
> b) the terms of contracts concerning activities in the Area in matters relating to those contracts.

54. It should be noted that, in accordance with article 2, paragraph 1, of the 1994 Agreement, the provisions of that Agreement and Part XI of the Convention "shall be interpreted and applied together as a single instrument. In the event of any inconsistency between this Agreement and Part XI, the provisions of this Agreement shall prevail".

55. The procedural rules applicable during advisory proceedings before the Chamber are set out in article 40, paragraph 2, of the Statute and section H ("Advisory proceedings") of the Rules, in particular article 130, paragraph 1, thereof.

56. Article 40, paragraph 2, of the Statute reads:

> In the exercise of its functions relating to advisory opinions, the Chamber shall be guided by the provisions of this Annex relating to procedure before the Tribunal to the extent to which it recognizes them to be applicable.

Article 130, paragraph 1, of the Rules reads:

> In the exercise of its functions relating to advisory opinions, the Seabed Disputes Chamber shall apply this section and be guided, to the extent to which it recognizes them to be applicable, by the provisions of the Statute and of these Rules applicable in contentious cases.

VIII. Interpretation

In general

57. Among the rules of international law that the Chamber is bound to apply, those concerning the interpretation of treaties play a particularly important role. The applicable rules are set out in Part III, Section 3 entitled "Interpretation of Treaties" and comprising articles 31 to 33 of the 1969 Vienna Convention on the Law of Treaties (hereinafter "the Vienna Convention"). These rules are to be considered as reflecting customary international law. Although the Tribunal has never stated this view explicitly, it has done so implicitly by borrowing the terminology and approach of the Vienna Convention's articles on interpretation (see the Tribunal's Judgment of 23 December 2002 in the *"Volga" Case* (*ITLOS Reports 2002*, p. 10, at paragraph 77). The ICJ and other international courts and tribunals have stated this view on a number of occasions (see, for example, *Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, I.C.J. Reports 1994*, p. 6, at paragraph 41; *Oil Platforms (Islamic Republic of Iran v. United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996*, p. 803, at paragraph 23; *Avena and Other Mexican Nationals (Mexico v. United States of America), Judgment, I.C.J. Reports 2004*, p. 12, at paragraph 83; *Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment of 20 April 2010*, paragraphs 64-65*; Delimitation of the Maritime Boundary between Guinea and Guinea-Bissau, Arbitral Tribunal, Award of 14 February 1985, UNRIAA, vol. XIX,* pp. 149-196, 25 ILM (1986), p. 252, at paragraph 41; *United States-Standards for Reformulated and Conventional Gasoline, Report of the Appellate Body* (WT/DS2/AB/R), adopted by the Dispute Settlement Body of the World Trade Organization on 20 May 1996, *DSR 1996:I*, p. 3, at pp. 15-16).

58. In light of the foregoing, the rules of the Vienna Convention on the interpretation of treaties apply to the interpretation of provisions of the Convention and the 1994 Agreement.

59. The Chamber is also required to interpret instruments that are not treaties and, in particular, the Regulations adopted by the Authority, namely, the Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area of 2000 (hereinafter "the Nodules Regulations"), and the Regulations on Prospecting and Exploration for Polymetallic Sulphides in the Area of 2010 (hereinafter "the Sulphides Regulations").

60. The fact that these instruments are binding texts negotiated by States and adopted through a procedure similar to that used in multilateral conferences permits the Chamber to consider that the interpretation rules set out in the Vienna Convention may, by analogy, provide guidance as to their interpretation. In the specific case before the Chamber, the analogy is strengthened because of the close connection between these texts and the Convention. The ICJ seems to have adopted a similar approach when it states in its advisory opinion on *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, that the rules on interpretation of the Vienna Convention "may provide guidance" as regards the interpretation of resolutions of the United Nations Security Council (ICJ, 22 July 2010, paragraph 94).

Multilingual international instruments

61. In interpreting the provisions of the Convention, it should be borne in mind that it is a multilingual treaty: the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic (article 320 of the Convention). It should also be noted that these six languages are also official languages of the Council and that the Regulations of the Authority, as well as the decision of the Council containing the questions submitted to the Chamber, were adopted in those languages with the original in English.

62. The relevant provision to be considered in the present context is article 33, paragraph 4, of the Vienna Convention. According to this provision, where no particular text prevails according to the treaty and where "a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted".

63. An examination of the relevant provisions of the Convention reveals that the terminology used in the different language versions corresponds to the objective stated by the Drafting Committee of the Third United Nations

Conference on the Law of the Sea, namely, "to improve linguistic concordance, to the extent possible, and to achieve juridical concordance in all cases" (Report of the Chairman of the Drafting Committee, 2 March 1981, A/CONF.62/L.67/Rev.1, in Third United Nations Conference on the Law of the Sea, Official Records, vol. XV, p.145, at paragraph 8). There are certain inconsistencies in the terminology used within the same language version and as between language versions. In the view of the Chamber, there is, however, no difference of meaning between the authentic texts of the relevant provisions of the Convention. A comparison between the terms used in these provisions of the Convention is nonetheless useful in clarifying their meaning.

Meaning of key terms

64. The meaning of the term "responsibility" as used in the English text of article 139, paragraphs 1 and 2; article 235, paragraph 1; and Annex III, article 4, paragraph 4, of the Convention ("States Parties shall have the responsibility to ensure"; "States are responsible for the fulfilment"; "States shall . . . have the responsibility to ensure") does not correspond to the meaning of the same term in article 304 of the Convention ("responsibility and liability for damage") and Annex III, article 22, of the Convention ("responsibility or liability for any damage").

65. In article 139, article 235, paragraph 1, and Annex III, article 4, paragraph 4, of the Convention, the term "responsibility" means "obligation". This emerges not only from the context of the aforementioned articles, but also from a comparison with other linguistic versions. The Spanish text uses the expression "*estarán obligados*" and the French text uses the more indirect but equally explicit expression "*il incombe de*". Similarly, the Arabic text uses the expression "تكون ملزمة". The Chinese text uses the term "义务" and the Russian text the term "обязательство".

66. In the view of the Chamber, in the provisions cited in the previous paragraph, the term "responsibility" refers to the primary obligation whereas the term "liability" refers to the secondary obligation, namely, the consequences of a breach of the primary obligation. Notwithstanding their apparent similarity to the English term "responsibility", the French term "*responsabilité*" and the Spanish term "*responsabilidad*", respectively, indicate also the consequences of the breach of the primary obligation. The same applies to the Arabic term "مسؤولية", the Chinese term "责任" and the Russian term

"ответственность". The fact that the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts (hereinafter "the ILC Articles on State Responsibility"), adopted in 2001, give the term "responsibility" a meaning corresponding to "*responsabilité*", "*responsabilidad*", "مسؤولية", "责任" and "ответственность" may create confusion, which can be avoided by comparing the English text of article 139, article 235, and Annex III, article 4, paragraph 4, of the Convention with the other language versions.

67. It should be further observed that in article 235, paragraph 3, and Annex III, article 22, of the Convention, the English version of which uses the terms "responsibility and liability" together, the term "responsibility" has the same meaning as in the ILC Articles on State Responsibility. This is clear from a comparison of the English version with the French and Spanish versions, which use only the term "*responsabilité*" and "*responsabilidad*". Similarly, the Arabic, Chinese and Russian versions use the term "مسؤولية", "责任" and "ответственность", respectively.

68. This analysis of the terms used in the provisions of the Convention provides a basis for determining their meaning as used in the three Questions.

69. Thus, in Question 1, the expression "legal responsibilities and obligations" refers to primary obligations, that is, to what sponsoring States are obliged to do under the Convention.

70. In Question 2, the English term "liability" refers to the consequences of a breach of the sponsoring State's obligations.

71. In Question 3, as in Question 1, "responsibility" means "obligation". The terms "*responsabilité*" and "*responsabilidad*", used, respectively, in the French and Spanish versions of Question 3, are translations of the English term "responsibility" and were apparently introduced for the sake of uniformity. However, in light of the English version and of the terminology used in the French and Spanish versions of article 139 of the Convention, the meaning intended is that of "obligation". Similarly, the Arabic, Chinese and Russian versions of Question 3 use the term "مسؤولية", "义务" and "обязательство", respectively.

Question 1

72. The first question submitted to the Chamber is as follows:

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?

73. This question concerns the obligations of sponsoring States. Before examining the provisions of the Convention, the 1994 Agreement as well as the Nodules Regulations and the Sulphides Regulations (hereinafter "the Convention and related instruments"), the Chamber must determine the meaning of two of the terms used in the Question, namely: "sponsorship" and "activities in the Area".

I. Sponsorship

74. The notion of "sponsorship" is a key element in the system for the exploration and exploitation of the resources of the Area set out in the Convention. Article 153, paragraph 2, of the Convention describes the "parallel system" of exploration and exploitation activities indicating that such activities shall be carried out by the Enterprise, and, in association with the Authority, by States Parties or state enterprises or natural or juridical persons. It further states that, in order to be eligible to carry out such activities, natural and juridical persons must satisfy two requirements. First, they must be either nationals of a State Party or effectively controlled by it or its nationals. Second, they must be "sponsored by such States". Article 153, paragraph 2(b), of the Convention makes the requirement of sponsorship applicable also to state enterprises.

75. The purpose of requiring the sponsorship of applicants for contracts for the exploration and exploitation of the resources of the Area is to achieve the result that the obligations set out in the Convention, a treaty under international law which binds only States Parties thereto, are complied with by entities that are subjects of domestic legal systems. This result is obtained through the provisions of the Authority's Regulations that apply to such entities and through the implementation by the sponsoring States of their obligations under the Convention and related instruments.

76. The role of the sponsoring State, as set out in the Convention, contributes to the realization of the common interest of all States in the proper application of the principle of the common heritage of mankind which requires faithful compliance with the obligations set out in Part XI. The common-interest role of the sponsoring State is further confirmed by its obligation, set out in article 153, paragraph 4, of the Convention, to "assist" the Authority, which, as stated in article 137, paragraph 2, of the Convention, acts on behalf of mankind.

77. The connection between States Parties and domestic law entities required by the Convention is twofold, namely, that of nationality and that of effective control. All contractors and applicants for contracts must secure and maintain the sponsorship of the State or States of which they are nationals. If another State or its nationals exercises effective control, the sponsorship of that State is also necessary. This is provided for in Annex III, article 4, paragraph 3, of the Convention and confirmed in regulation 11, paragraph 2, of the Nodules Regulations and of the Sulphides Regulations.

78. No provision of the Convention imposes an obligation on a State Party to sponsor an entity that holds its nationality or is controlled by it or by its nationals. As the Convention does not consider the links of nationality and effective control sufficient to obtain the result that the contractor conforms with the Convention and related instruments, it requires a specific act emanating from the will of the State or States of nationality and of effective control. Such act consists in the decision to sponsor.

79. As subjects of international law, States Parties engaged in deep seabed mining under the Convention are directly bound by the obligations set out therein. Consequently, there is no reason to apply to them the requirement of sponsorship. Article 153, paragraph 2(b), of the Convention as well as the identical regulation 11, paragraph 1, of the Nodules Regulations and the Sulphides Regulations confirm that the requirement of sponsorship does not apply to States. This point is further supported by Annex III, article 4, paragraph 5, of the Convention which reads as follows: "The procedures for assessing the qualifications of States Parties which are applicants shall take into account their character as States".

80. The practice of the Authority, however, indicates that at least two contractor States, when applying for a contract, considered it necessary to submit to the Authority documents of sponsorship.

81. It may also be noted that all but one of the existing contractors, as "registered pioneer investors" under the provisional system set out in Resolution II of the Third United Nations Conference on the Law of the Sea,

obtained their contracts for exploration through the simplified procedure set out in section 1, paragraph 6(a)(ii) of the Annex to the 1994 Agreement. As "certifying States" under paragraph 1(c) of Resolution II, they stand in the same relationship to a pioneer investor as would a sponsoring State stand to a contractor pursuant to Annex III, article 4, of the Convention.

II. "Activities in the Area"

82. Question 1 concerns the responsibilities and obligations of sponsoring States in respect of "activities in the Area". This expression is defined in article 1, paragraph 1 (3), of the Convention as "all activities of exploration for, and exploitation of, the resources of the Area". According to article 133 (a) of the Convention, for the purposes of Part XI, the term "resources" means "all solid, liquid or gaseous mineral resources *in situ* in the Area at or beneath the seabed, including polymetallic nodules". The two definitions, however, do not indicate what is meant by "exploration" and "exploitation". It is important to note that according to article 133 (b), "resources, when recovered from the Area, are referred to as 'minerals'".

83. Some indication of the meaning of the term "activities in the Area" may be found in Annex IV, article 1, paragraph 1, of the Convention. It reads as follows:

> The Enterprise is the organ of the Authority which shall carry out activities in the Area directly, pursuant to article 153, paragraph 2(a), as well as the transporting, processing and marketing of minerals recovered from the Area.

84. This provision distinguishes "activities in the Area" which the Enterprise carries out directly pursuant to article 153, paragraph 2(a), of the Convention, from other activities with which the Enterprise is entrusted, namely, the transporting, processing and marketing of minerals recovered from the Area. Consequently, the latter activities are not included in the notion of "activities in the Area" referred to in Annex IV, article 1, paragraph 1, of the Convention.

85. Article 145 of the Convention, which prescribes the taking of "[n]ecessary measures . . . with respect to activities in the Area to ensure

effective protection for the marine environment from harmful effects which may arise from such activities", indicates the activities in respect of which the Authority should adopt rules, regulations and procedures. These activities include: "drilling, dredging, excavation, disposal of waste, construction and operation or maintenance of installations, pipelines and other devices related to such activities". In the view of the Chamber, these activities are included in the notion of "activities in the Area".

86. Annex III, article 17, paragraph 2(f), of the Convention, which sets out the criteria for the rules, regulations and procedures concerning protection of the marine environment to be drawn up by the Authority gives further useful indications of what is included in the notion of "activities in the Area". The provision reads as follows:

> Rules, regulations and procedures shall be drawn up in order to secure effective protection of the marine environment from harmful effects directly resulting from activities in the Area or from shipboard processing immediately above a mine site of minerals derived from that mine site, taking into account the extent to which such harmful effects may directly result from drilling, dredging, coring and excavation and from disposal, dumping and discharge into the marine environment of sediment, wastes or other effluents.

87. The provisions considered in the preceding paragraphs confirm that processing and transporting as mentioned in Annex IV, article 1, paragraph 1, of the Convention are excluded from the notion of "activities in the Area". They set out lists of activities whose harmful effects are indicated as directly resulting from such activities. These lists may be seen as an indication of what the Convention considers as included in the notion of "activities in the Area". These activities include: drilling, dredging, coring, and excavation; disposal, dumping and discharge into the marine environment of sediment, wastes or other effluents; and construction and operation or maintenance of installations, pipelines and other devices related to such activities.

88. Under Annex III, article 17, paragraph 2(f), of the Convention, "shipboard processing immediately above a mine site of minerals derived from that mine site" is to be considered as included in "activities in the Area". As the aforementioned list of activities refers without distinction to the harmful effects resulting directly from "activities in the Area" and from "shipboard processing", the two are to be seen as part of the same kind of activities.

89. The Nodules Regulations and the Sulphides Regulations define "exploration" and "exploitation" in the context of polymetallic nodules and polymetallic sulphides, respectively. According to regulation 1, paragraph 3(b) and (a), of the Nodules Regulations:

> "Exploration" means searching for deposits of polymetallic nodules in the Area with exclusive rights, the analysis of such deposits, the testing of collecting systems and equipment, processing facilities and transportation systems, and the carrying out of studies of the environmental, technical, economic, commercial and other appropriate factors that must be taken into account in exploitation.
>
> "Exploitation" means the recovery for commercial purposes of polymetallic nodules in the Area and the extraction of minerals therefrom, including the construction and operation of mining, processing and transportation systems for the production and marketing of metals.

90. The same definitions are set out in regulation 1, paragraph 3(b) and (a), of the Sulphides Regulations.

91. These provisions of the Nodules Regulations and the Sulphides Regulations include in the notion of exploration the testing of processing facilities and transportation systems and in that of exploitation the construction and operation of processing and transportation systems.

92. The scope of "exploration" and "exploitation" as defined in the Regulations seems broader than the "activities in the Area" envisaged in Annex IV, article 1, paragraph 1, and in article 145 and Annex III, article 17, paragraph 2 (f), of the Convention. Processing and transportation are included in the notion of exploration and exploitation of the Regulations, but not in that of "activities in the Area" in the provision of Annex IV of the Convention, which has just been cited.

93. The difference in scope of "activities in the Area" in the provisions of the Convention and in the Nodules Regulations and the Sulphides Regulations makes it necessary to examine the relevant provisions within the broader framework of the Convention. It would seem preferable to consider that the meaning of "activities in the Area" in articles 139 and Annex III, article 4, paragraph 4, of the Convention is consistent with that of article 145 and Annex III, article 17, paragraph 2(f), and Annex IV, article 1, paragraph 1, rather than with that of "exploration" and "exploitation" in the two Regulations. The aforementioned articles of the Convention and of Annexes III and IV, all

belong to the same legal instrument. They were negotiated by the same parties and adopted at the same time. It therefore seems reasonable to assume that the meaning of an expression (or the exclusion of certain activities from the scope of that expression) in one provision also applies to the others. The Regulations are instruments subordinate to the Convention, which, if not in conformity with it, should be interpreted so as to ensure consistency with its provisions. They may, nevertheless be used to clarify and supplement certain aspects of the relevant provisions of the Convention.

94. In light of the above, the expression "activities in the Area", in the context of both exploration and exploitation, includes, first of all, the recovery of minerals from the seabed and their lifting to the water surface.

95. Activities directly connected with those mentioned in the previous paragraph such as the evacuation of water from the minerals and the preliminary separation of materials of no commercial interest, including their disposal at sea, are deemed to be covered by the expression "activities in the Area". "Processing", namely, the process through which metals are extracted from the minerals and which is normally conducted at a plant situated on land, is excluded from the expression "activities in the Area". This is confirmed by the wording of Annex IV, article 1, paragraph 1, of the Convention as well as by information provided by the Authority at the request of the Chamber.

96. Transportation to points on land from the part of the high seas superjacent to the part of the Area in which the contractor operates cannot be included in the notion of "activities in the Area", as it would be incompatible with the exclusion of transportation from "activities in the Area" in Annex IV, article 1, paragraph 1, of the Convention. However, transportation within that part of the high seas, when directly connected with extraction and lifting, should be included in activities in the Area. In the case of polymetallic nodules, this applies, for instance, to transportation between the ship or installation where the lifting process ends and another ship or installation where the evacuation of water and the preliminary separation and disposal of material to be discarded take place. The inclusion of transportation to points on land could create an unnecessary conflict with provisions of the Convention such as those that concern navigation on the high seas.

97. One consequence of the exclusion of water evacuation and disposal of material from "activities in the Area" would be that the activities conducted by the contractor which are among the most hazardous to the environment would be excluded from those to which the responsibilities of the sponsoring State apply. This would be contrary to the general obligation of States Parties, under article 192 of the Convention, "to protect and preserve the marine environment".

III. Prospecting

98. "Prospecting", although mentioned in Annex III, article 2, of the Convention and in the Nodules Regulations and the Sulphides Regulations, is not included in the Convention's definition of "activities in the Area" because the Convention and the two Regulations distinguish it from "exploration" and from "exploitation". Moreover, under the Convention and related instruments, prospecting does not require sponsorship. In conformity with the questions submitted to it, which relate to "activities in the Area" and to sponsoring States, the Chamber will not address prospecting activities. However, considering that prospecting is often treated as the preliminary phase of exploration in mining practice and legislation, the Chamber considers it appropriate to observe that some aspects of the present Advisory Opinion may also apply to prospecting.

IV. Responsibilities and obligations

Key provisions

99. The key provisions concerning the obligations of the sponsoring States are: article 139, paragraph 1; article 153, paragraph 4 (especially the last sentence); and Annex III, article 4, paragraph 4, of the Convention (especially the first sentence).

100. These provisions read:

> Article 139, paragraph 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. The same responsibility applies to international organizations for activities in the Area carried out by such organizations.

Article 153, paragraph 4
The Authority shall exercise such control over activities in the Area as is necessary for the purpose of securing compliance with the relevant provisions of this Part and the Annexes relating thereto, and the rules, regulations and procedures of the Authority, and the plans of work approved in accordance with paragraph 3. States Parties shall assist the Authority by taking all measures necessary to ensure such compliance in accordance with article 139.

Annex III, article 4, paragraph 4
The sponsoring State or States shall, pursuant to article 139, have the responsibility to ensure, within their legal systems, that a contractor so sponsored shall carry out activities in the Area in conformity with the terms of its contract and its obligations under this Convention. 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. A perusal of these three provisions reveals that article 139 plays a central role, as it is referred to both in article 153, paragraph 4, and in Annex III, article 4, paragraph 4, of the Convention. While Annex III, article 4, paragraph 4, of the Convention refers to sponsoring States, articles 139, paragraph 1, and 153, paragraph 4, of the Convention do not do so explicitly. However, since the entities which conduct activities in the Area mentioned in article 139, paragraph 1, of the Convention can do so only when there is a State Party sponsoring them, all three provisions must be read as referring to sponsoring States.

102. It is important to note that the last sentence of article 153, paragraph 4, of the Convention places the obligation of the sponsoring State in relationship with the obligations of the Authority by stating that the former has the obligation to "assist" the latter. As will be seen in the reply to Question 2, the subordinate role of the sponsoring State is reflected in Annex III, article 22, of the Convention, in which the liability of the contractor and of the Authority is mentioned while that of the sponsoring State is not (see paragraph 199).

Obligations of the contractor whose compliance the sponsoring State must ensure

103. The three provisions mentioned in paragraph 100 specify that the obligation (responsibility) of the sponsoring State is "to ensure" that the "activities in the Area" conducted by the sponsored contractor are "in conformity" or in "compliance" with the rules to which they refer.

104. These rules are referred to as "this Part" (Part XI) in article 139 of the Convention, as "the relevant provisions of this Part and the Annexes relating thereto, and the rules, regulations and procedures of the Authority, and the plans of work approved in accordance with paragraph 3" in article 153, paragraph 4, of the Convention, and as "the terms of its contract and its obligations under this Convention" in Annex III, article 4, paragraph 4, of the Convention.

105. The difference between the references contained in articles 139 and 153 of the Convention, cited in the previous paragraphs, is only one of drafting. The reference to Part XI in article 139 of the Convention includes Annexes III and IV. In the view of the Chamber, this reference also includes the rules, regulations and procedures of the Authority and the contracts (or plans of work) for exploration and exploitation, which are based on Part XI and the relevant Annexes thereto.

106. The reference to the contractor's "obligations under this Convention" in Annex III, article 4, paragraph 4, would seem to be broader than the references in articles 139 and 153 of the Convention. This difference would be relevant if there were obligations of sponsored contractors set out in parts of the Convention other than Part XI and the annexes thereto, the rules, regulations and procedures of the Authority, or the relevant contracts. As this is not the case, it would appear that the scope of the obligations of sponsored contractors, although indicated differently in the three key provisions of the Convention referred to in paragraph 100, is in fact substantially the same.

"Responsibility to ensure"

107. The central issue in relation to Question 1 concerns the meaning of the expression "responsibility to ensure" in article 139, paragraph 1, and Annex III, article 4, paragraph 4, of the Convention.

108. "Responsibility to ensure" points to an obligation of the sponsoring State under international law. It establishes a mechanism through which the rules of the Convention concerning activities in the Area, although being treaty

law and thus binding only on the subjects of international law that have accepted them, become effective for sponsored contractors which find their legal basis in domestic law. This mechanism consists in the creation of obligations which States Parties must fulfil by exercising their power over entities of their nationality and under their control.

109. As will be seen in greater detail in the reply to Question 2, a violation of this obligation entails "liability". However, not every violation of an obligation by a sponsored contractor automatically gives rise to the liability of the sponsoring State. Such liability is limited to the State's failure to meet its obligation to "ensure" compliance by the sponsored contractor.

110. The sponsoring State's obligation "to ensure" is not an obligation to achieve, in each and every case, the result that the sponsored contractor complies with the aforementioned obligations. Rather, it is an obligation to deploy adequate means, to exercise best possible efforts, to do the utmost, to obtain this result. To utilize the terminology current in international law, this obligation may be characterized as an obligation "of conduct" and not "of result", and as an obligation of "due diligence".

111. The notions of obligations "of due diligence" and obligations "of conduct" are connected. This emerges clearly from the Judgment of the ICJ in the *Pulp Mills on the River Uruguay: "*An obligation to adopt regulatory or administrative measures . . . and to enforce them is an obligation of conduct. Both parties are therefore called upon, under article 36 [of the Statute of the River Uruguay], to exercise due diligence in acting through the [Uruguay River] Commission for the necessary measures to preserve the ecological balance of the river" (paragraph 187 of the Judgment).

112. The expression "to ensure" is often used in international legal instruments to refer to obligations in respect of which, while it is not considered reasonable to make a State liable for each and every violation committed by persons under its jurisdiction, it is equally not considered satisfactory to rely on mere application of the principle that the conduct of private persons or entities is not attributable to the State under international law (see ILC Articles on State Responsibility, Commentary to article 8, paragraph 1).

113. An example may be found in article 194, paragraph 2, of the Convention which reads: "States shall take all measures necessary to ensure that activities under their jurisdiction or control are so conducted as not to cause damage by pollution to other States and their environment . . .".

114. The nature of the obligation to "ensure" in article 139 of the Convention and in the other provisions mentioned in paragraph 100 appears even more clearly in light of the French and Spanish texts of article 139 of the Convention. They use respectively the expression "il incombe aux Etats Parties de veiller à . . ." and "los Estados Partes estarán obligados a velar". "Veiller à" and "velar" point out, even more clearly than "ensure", the idea of exercising diligence. The Arabic text uses the expression "بضمان تكون الدول الأطراف ملزمة", the Chinese text uses the expression "缔约国应有责任确保" and the Russian text uses the expression "Государства-участники обязуются обеспечивать", which point in the same direction.

115. In its Judgment in the *Pulp Mills on the River Uruguay case*, the ICJ illustrates the meaning of a specific treaty obligation that it had qualified as "an obligation to act with due diligence" as follows:

> It is an obligation which entails not only the adoption of appropriate rules and measures, but also a certain level of vigilance in their enforcement and the exercise of administrative control applicable to public and private operators, such as the monitoring of activities undertaken by such operators . . . (Paragraph 197)

116. Similar indications are given by the International Law Commission in its Commentary to article 3 of its Articles on Prevention of Transboundary Harm from Hazardous Activities, adopted in 2001. According to article 3, the State of origin of the activities involving a risk of causing transboundary harm "shall take all appropriate measures to prevent significant transboundary harm or at any event to minimize the risk thereof". The Commentary states:

> The obligation of the State of origin to take preventive or minimization measures is one of due diligence. It is the conduct of the State of origin that will determine whether the State has complied with its obligation under the present articles. The duty of due diligence involved, however, is not intended to guarantee that significant harm be totally prevented, if it is not

possible to do so. In that eventuality, the State of origin is required . . . to exert its best possible efforts to minimize the risk. In this sense, it does not guarantee that the harm would not occur. (Paragraph 7)

The content of the "due diligence" obligation to ensure

117. The content of "due diligence" obligations may not easily be described in precise terms. Among the factors that make such a description difficult is the fact that "due diligence" is a variable concept. It may change over time as measures considered sufficiently diligent at a certain moment may become not diligent enough in light, for instance, of new scientific or technological knowledge. It may also change in relation to the risks involved in the activity. As regards activities in the Area, it seems reasonable to state that prospecting is, generally speaking, less risky than exploration activities which, in turn, entail less risk than exploitation. Moreover, activities in the Area concerning different kinds of minerals, for example, polymetallic nodules on the one hand and polymetallic sulphides or cobalt rich ferromanganese crusts on the other, may require different standards of diligence. The standard of due diligence has to be more severe for the riskier activities.

118. Article 153, paragraph 4, last sentence, of the Convention states that the obligation of the sponsoring State in accordance with article 139 of the Convention entails "taking all measures necessary to ensure" compliance by the sponsored contractor. Annex III, article 4, paragraph 4, of the Convention makes it clear that sponsoring States' "responsibility to ensure" applies "within their legal systems". With these indications the Convention provides some elements concerning the content of the "due diligence" obligation to ensure. Necessary measures are required and these must be adopted within the legal system of the sponsoring State.

119. Further light on the expression "measures necessary to ensure" is shed by the Convention if one considers article 139, paragraph 2, last sentence, and Annex III, article 4, paragraph 4, last sentence, of the Convention. The main purpose of these provisions is to exempt sponsoring States that have taken certain measures from liability for damage. The description of the measures to be taken by that State may also be used to clarify its "due diligence" obligation. This description remains in general terms in article 139, paragraph 2, of the Convention which mentions "all necessary and appropriate measures to secure effective compliance under article 153, paragraph 4, and Annex III, article 4, paragraph 4". The latter provision is more specific as it requires the sponsoring State to adopt "laws and regulations" and to take "administrative

measures which are, within the framework of its legal system, reasonably appropriate for securing compliance by persons under its jurisdiction".

120. More specific indications concerning the content of these measures, including aspects relating to their enforcement, with respect to the contents of these measures will be provided in the reply to Question 3. As regards Question 1, it has been established that the "due diligence" obligation "to ensure" requires the sponsoring State to take measures within its legal system and that the measures must be "reasonably appropriate".

V. Direct obligations of sponsoring States

121. The obligations of sponsoring States are not limited to the due diligence "obligation to ensure". Under the Convention and related instruments, sponsoring States also have obligations with which they have to comply independently of their obligation to ensure a certain behaviour by the sponsored contractor. These obligations may be characterized as "direct obligations".

122. Among the most important of these direct obligations incumbent on sponsoring States are: the obligation to assist the Authority in the exercise of control over activities in the Area; the obligation to apply a precautionary approach; the obligation to apply best environmental practices; the obligation to take measures to ensure the provision of guarantees in the event of an emergency order by the Authority for protection of the marine environment; the obligation to ensure the availability of recourse for compensation in respect of damage caused by pollution; and the obligation to conduct environmental impact assessments. These obligations will be examined in paragraphs 124-150.

123. It must nevertheless be stated, at the outset, that compliance with these obligations can also be seen as a relevant factor in meeting the due diligence "obligation to ensure" and that the said obligations are in most cases couched as obligations to ensure compliance with a specific rule.

The obligation to assist the Authority

124. Pursuant to the last sentence of article 153, paragraph 4, of the Convention, sponsoring States have the obligation to assist the Authority in its task of controlling activities in the Area for the purpose of ensuring compliance with the relevant provisions of Part XI of the Convention and related instruments. This obligation is to be met "by taking all measures necessary to ensure such compliance in accordance with article 139". The obligation of the sponsoring States is a direct one, but it is to be met through compliance with the "due diligence obligation" set out in article 139 of the Convention.

Precautionary approach

125. The Nodules Regulations and the Sulphides Regulations contain provisions that establish a direct obligation for sponsoring States. This obligation is relevant for implementing the "responsibility to ensure" that sponsored contractors meet the obligations set out in Part XI of the Convention and related instruments. These are regulation 31, paragraph 2, of the Nodules Regulations and regulation 33, paragraph 2, of the Sulphides Regulations, both of which state that sponsoring States (as well as the Authority) "shall apply a precautionary approach, as reflected in Principle 15 of the Rio Declaration" in order "to ensure effective protection for the marine environment from harmful effects which may arise from activities in the Area".

126. Principle 15 of the 1992 Rio Declaration on Environment and Development (hereinafter "the Rio Declaration") reads:

> In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.

127. The provisions of the aforementioned Regulations transform this non-binding statement of the precautionary approach in the Rio Declaration into a binding obligation. The implementation of the precautionary approach as defined in these Regulations is one of the obligations of sponsoring States.

128. It should be noted that while the first sentence of Principle 15 seems to refer in general terms to the "precautionary approach", the second sentence limits its scope to threats of "serious or irreversible damage" and to "cost-effective" measures adopted in order to prevent "environmental degradation".

129. Moreover, by stating that the precautionary approach shall be applied by States "according to their capabilities", the first sentence of Principle 15 introduces the possibility of differences in application of the precautionary approach in light of the different capabilities of each State (see paragraphs 151-163).

130. The reference to the precautionary approach as set out in the two Regulations applies specifically to the activities envisaged therein, namely, prospecting and exploration for polymetallic nodules and polymetallic sulphides. It is to be expected that the Authority will either repeat or further develop this approach when it regulates exploitation activities and activities concerning other types of minerals.

131. Having established that under the Nodules Regulations and the Sulphides Regulations, both sponsoring States and the Authority are under an obligation to apply the precautionary approach in respect of activities in the Area, it is appropriate to point out that the precautionary approach is also an integral part of the general obligation of due diligence of sponsoring States, which is applicable even outside the scope of the Regulations. The due diligence obligation of the sponsoring States requires them to take all appropriate measures to prevent damage that might result from the activities of contractors that they sponsor. This obligation applies in situations where scientific evidence concerning the scope and potential negative impact of the activity in question is insufficient but where there are plausible indications of potential risks. A sponsoring State would not meet its obligation of due diligence if it disregarded those risks. Such disregard would amount to a failure to comply with the precautionary approach.

132. The link between an obligation of due diligence and the precautionary approach is implicit in the Tribunal's Order of 27 August 1999 in the *Southern Bluefin Tuna Cases (New Zealand* v. *Japan; Australia* v. *Japan*). This emerges from the declaration of the Tribunal that the parties "should in the circumstances act with prudence and caution to ensure that conservation measures are taken . . ." (*ITLOS Reports 1999*, p. 274, at paragraph 77), and is confirmed by the further statements that "there is scientific uncertainty regarding measures to be taken to conserve the stock of southern bluefin tuna"

(paragraph 79) and that "although the Tribunal cannot conclusively assess the scientific evidence presented by the parties, it finds that measures should be taken as a matter of urgency" (paragraph 80).

133. It should be further noted that the Sulphides Regulations, Annex 4, section 5.1, in setting out a "standard clause" for exploration contracts, provides that:

> The Contractor shall take necessary measures to prevent, reduce and control pollution and other hazards to the marine environment arising from its activities in the Area as far as reasonably possible applying a precautionary approach and best environmental practices.

Thus, the precautionary approach (called "principle" in the French text of the standard clause just mentioned) is a contractual obligation of the sponsored contractors whose compliance the sponsoring State has the responsibility to ensure.

134. In the parallel provision of the corresponding standard clauses for exploration contracts in the Nodules Regulations, Annex 4, section 5.1, no reference is made to the precautionary approach. However, under the general obligation illustrated in paragraph 131, the sponsoring State has to take measures within the framework of its own legal system in order to oblige sponsored entities to adopt such an approach.

135. The Chamber observes that the precautionary approach has been incorporated into a growing number of international treaties and other instruments, many of which reflect the formulation of Principle 15 of the Rio Declaration. In the view of the Chamber, this has initiated a trend towards making this approach part of customary international law. This trend is clearly reinforced by the inclusion of the precautionary approach in the Regulations and in the "standard clause" contained in Annex 4, section 5.1, of the Sulphides Regulations. So does the following statement in paragraph 164 of the ICJ Judgment in *Pulp Mills on the River Uruguay* that "a precautionary approach may be relevant in the interpretation and application of the provisions of the Statute" (i.e., the environmental bilateral treaty whose interpretation was the main bone of contention between the parties). This statement may be read in light of article 31, paragraph 3(c), of the Vienna Convention, according to which the interpretation of a treaty should take into account not only the context but "any relevant rules of international law applicable in the relations between the parties".

Best environmental practices

136. Moreover, regulation 33, paragraph 2, of the Sulphides Regulations supplements the sponsoring State's obligation to apply the precautionary approach with an obligation to apply "best environmental practices". The same obligation is established as a contractual obligation in section 5.1 of Annex 4 (Standard Clauses for exploration contracts) of the Sulphides Regulations. There is no reference to "best environmental practices" in the Nodules Regulations; their standard contract clause (Annex 4, section 5.1), merely refers to the "best technology" available to the contractor. The adoption of higher standards in the more recent Sulphides Regulations would seem to indicate that, in light of the advancement in scientific knowledge, member States of the Authority have become convinced of the need for sponsoring States to apply "best environmental practices" in general terms so that they may be seen to have become enshrined in the sponsoring States' obligation of due diligence.

137. In the absence of a specific reason to the contrary, it may be held that the Nodules Regulations should be interpreted in light of the development of the law, as evidenced by the subsequent adoption of the Sulphides Regulations.

Guarantees in the event of an emergency order by the Authority for protection of the marine environment

138. Another obligation which is directly incumbent on the sponsoring State is set out in regulation 32, paragraph 7, of the Nodules Regulations and in regulation 35, paragraph 8, of the Sulphides Regulations. This obligation arises where the contractor has not provided the Council "with a guarantee of its financial and technical capability to comply promptly with emergency orders or to assure that the Council can take such emergency measures". In such a case, under regulation 32, paragraph 7, of the Nodules Regulations:

> the sponsoring State or States shall, in response to a request by the Secretary-General and pursuant to articles 139 and 235 of the Convention, 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 in the discharge of its responsibilities under paragraph 6.

Regulation 35, paragraph 8, of the Sulphides Regulations contains an identical provision.

Availability of recourse for compensation

139. Another direct obligation that gives substance to the sponsoring State's obligation to adopt laws and regulations within the framework of its legal system is set out in article 235, paragraph 2, of the Convention. This provision reads as follows:

> 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.

140. This provision applies to the sponsoring State as the State with jurisdiction over the persons that caused the damage. By requiring the sponsoring State to establish procedures, and, if necessary, substantive rules governing claims for damages before its domestic courts, this provision serves the purpose of ensuring that the sponsored contractor meets its obligation under Annex III, article 22, of the Convention to provide reparation for damages caused by wrongful acts committed in the course of its activities in the Area.

VI. Environmental impact assessment

141. The obligation of the contractor to conduct an environmental impact assessment is explicitly set out in section 1, paragraph 7, of the Annex to the 1994 Agreement as follows: "An application for approval of a plan of work shall be accompanied by an assessment of the potential environmental impacts of the proposed activities . . . ". The sponsoring State is under a due diligence obligation to ensure compliance by the sponsored contractor with this obligation.

142. Regulation 31, paragraph 6, of the Nodules Regulations and regulation 33, paragraph 6, of the Sulphides Regulations establish a direct obligation of the sponsoring State concerning environmental impact assessment, which can also be read as a relevant factor for meeting the sponsoring State's due diligence obligation. This obligation is linked to the direct obligation of assisting the Authority considered at paragraph 124. The abovementioned provisions of the two Regulations read as follows: "[c]ontractors, sponsoring States and other interested States or entities shall cooperate with the Authority in the

establishment and implementation of programmes for monitoring and evaluating the impacts of deep seabed mining on the marine environment". This provision is designed to clarify and ensure compliance with the sponsoring State's obligation to cooperate with the Authority in the exercise of the latter's control over activities in the Area under article 153, paragraph 4, of the Convention, and of its general obligation of due diligence under article 139 thereof. The sponsoring State is obliged not only to cooperate with the Authority in the establishment and implementation of impact assessments, but also to use appropriate means to ensure that the contractor complies with its obligation to conduct an environmental impact assessment.

143. Contractors and sponsoring States must cooperate with the Authority in the establishment of monitoring programmes to evaluate the impact of deep seabed mining on the marine environment, particularly through the creation of "impact reference zones" and "preservation reference zones" (regulation 31, paragraphs 6 and 7, of the Nodules Regulations and regulation 33, paragraph 6, of the Sulphides Regulations). A comparison between environmental conditions in the "impact reference zone" and in the "preservation reference zone" makes it possible to assess the impact of activities in the Area.

144. As clarified in paragraph 10 of the Recommendations for the Guidance of the Contractors for the Assessment of the Possible Environmental Impacts Arising from Exploration for Polymetallic Nodules in the Area, issued by the Authority's Legal and Technical Commission in 2002 pursuant to regulation 38 of the Nodules Regulations (ISBA/7/LTC/1/Rev.1 of 13 February 2002), certain activities require "prior environmental impact assessment, as well as an environmental monitoring programme". These activities are listed in paragraph 10 (a) to (c) of the Recommendations.

145. It should be stressed that the obligation to conduct an environmental impact assessment is a direct obligation under the Convention and a general obligation under customary international law.

146. As regards the Convention, article 206 states the following:

> When States have reasonable grounds for believing that planned activities under their jurisdiction or control may cause substantial pollution of or significant and harmful changes to the marine environment, they shall, as far as practicable, assess the potential effects of such activities on the

> marine environment and shall communicate reports of the results of such assessments in the manner provided in article 205.
> [Article 205 refers to an obligation to publish reports.]

147. With respect to customary international law, the ICJ, in its Judgment in *Pulp Mills on the River Uruguay*, speaks of:

> a practice, which in recent years has gained so much acceptance among States that it may now be considered a requirement under general international law to undertake an environmental impact assessment where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context, in particular, on a shared resource. Moreover, due diligence, and the duty of vigilance and prevention which it implies, would not be considered to have been exercised, if a party planning works liable to affect the régime of the river or the quality of its waters did not undertake an environmental impact assessment on the potential effects of such works. (Paragraph 204)

148. Although aimed at the specific situation under discussion by the Court, the language used seems broad enough to cover activities in the Area even beyond the scope of the Regulations. The Court's reasoning in a transboundary context may also apply to activities with an impact on the environment in an area beyond the limits of national jurisdiction; and the Court's references to "shared resources" may also apply to resources that are the common heritage of mankind. Thus, in light of the customary rule mentioned by the ICJ, it may be considered that environmental impact assessments should be included in the system of consultations and prior notifications set out in article 142 of the Convention with respect to "resource deposits in the Area which lie across limits of national jurisdiction".

149. It must, however, be observed that, in the view of the ICJ, general international law does not "specify the scope and content of an environmental impact assessment" (paragraph 205 of the Judgment in *Pulp Mills on the River Uruguay*). While article 206 of the Convention gives only few indications of this scope and content, the indications in the Regulations, and especially in the Recommendations referred to in paragraph 144, add precision and specificity to the obligation as it applies in the context of activities in the Area.

150. In light of the above, the Chamber is of the view that the obligations of the contractors and of the sponsoring States concerning environmental impact assessments extend beyond the scope of application of specific provisions of the Regulations.

VII. Interests and needs of developing States

151. With respect to activities in the Area, the fifth preambular paragraph of the Convention states that the achievement of the goals set out in previous preambular paragraphs:

> will contribute to the realization of a just and equitable international economic order which takes into account the interests and needs of mankind as a whole and, in particular, the special interests and needs of developing countries, whether coastal or land-locked.

152. Accordingly, it is necessary to examine whether developing sponsoring States enjoy preferential treatment as compared with that granted to developed sponsoring States under the Convention and related instruments.

153. Under article 140, paragraph 1, of the Convention:

> Activities in the Area shall, as specifically provided for in this Part, be carried out for the benefit of mankind as a whole, irrespective of the geographical location of States, whether coastal or land-locked, and taking into particular consideration the interests and needs of developing States . . .

154. According to article 148 of the Convention:

> The effective participation of developing States in activities in the Area shall be promoted as specifically provided for in this Part, having due regard to their special interests and needs, and in particular to the special needs of the land-locked and geographically disadvantaged among them to overcome obstacles arising from their disadvantaged location, including remoteness from the Area and difficulty of access to and from it.

155. These provisions develop, with respect to activities in the Area, the statement in the fifth preambular paragraph of the Convention.

156. For the purposes of the present Advisory Opinion, and in particular of Question 1, it is important to determine the meaning of article 148 of the Convention. According to this provision, the general purpose of promoting the participation of developing States in activities in the Area taking into account their special interests and needs is to be achieved "as specifically provided for" in Part XI (an expression also found in article 140 of the Convention). This means that there is no general clause for the consideration of such interests and needs beyond what is provided for in specific provisions of Part XI of the Convention. A perusal of Part XI shows immediately that there are several provisions designed to ensure the participation of developing States in activities in the Area and to take into particular consideration their interests and needs.

157. The approach of the Convention to this is particularly evident in the provisions granting a preference to developing States that wish to engage in mining in areas of the deep seabed reserved for the Authority (Annex III, articles 8 and 9, of the Convention); in the obligation of States to promote international cooperation in marine scientific research in the Area in order to ensure that programmes are developed "for the benefit of developing States" (article 143, paragraph 3, of the Convention); and in the obligation of the Authority and of States Parties to promote the transfer of technology to developing States (article 144, paragraph 1, of the Convention and section 5 of the Annex to the 1994 Agreement), and to provide training opportunities for personnel from developing States (article 144, paragraph 2, of the Convention and section 5 of the Annex to the 1994 Agreement); in the permission granted to the Authority in the exercise of its powers and functions to give special consideration to developing States, notwithstanding the rule against discrimination (article 152 of the Convention); and in the obligation of the Council to take "into particular consideration the interests and needs of developing States" in recommending, and approving, respectively, rules regulations and procedures on the equitable sharing of financial and other benefits derived from activities in the Area (articles 160, paragraph 2(f)(i), and 162, paragraph 2(o)(i), of the Convention).

158. However, none of the general provisions of the Convention concerning the responsibilities (or the liability) of the sponsoring State "specifically provides" for according preferential treatment to sponsoring States that are developing States. As observed above, there is no provision requiring the consideration of such interests and needs beyond what is specifically stated in Part

XI. It may therefore be concluded that the general provisions concerning the responsibilities and liability of the sponsoring State apply equally to all sponsoring States, whether developing or developed.

159. Equality of treatment between developing and developed sponsoring States is consistent with the need to prevent commercial enterprises based in developed States from setting up companies in developing States, acquiring their nationality and obtaining their sponsorship in the hope of being subjected to less burdensome regulations and controls. The spread of sponsoring States "of convenience" would jeopardize uniform application of the highest standards of protection of the marine environment, the safe development of activities in the Area and protection of the common heritage of mankind.

160. These observations do not exclude that rules setting out direct obligations of the sponsoring State could provide for different treatment for developed and developing sponsoring States.

161. As pointed out in paragraph 125, the provisions of the Nodules Regulations and the Sulphides Regulations that set out the obligation for the sponsoring State to apply a precautionary approach in ensuring effective protection of the marine environment refer to Principle 15 of the Rio Declaration. As mentioned earlier, Principle 15 provides that the precautionary approach shall be applied by States "according to their capabilities". It follows that the requirements for complying with the obligation to apply the precautionary approach may be stricter for the developed than for the developing sponsoring States. The reference to different capabilities in the Rio Declaration does not, however, apply to the obligation to follow "best environmental practices" set out, as mentioned above, in regulation 33, paragraph 2, of the Sulphides Regulations.

162. Furthermore, the reference to "capabilities" is only a broad and imprecise reference to the differences in developed and developing States. What counts in a specific situation is the level of scientific knowledge and technical capability available to a given State in the relevant scientific and technical fields.

163. It should be pointed out that the fifth preambular paragraph of the Convention emphasizes that the achievement of the goals of the Convention will "contribute to the realization of a just and equitable international economic order which takes into account the interests and needs of mankind as a whole and, in particular, the special interests and needs of developing countries, whether coastal or landlocked". As noted above, article 148 of the Convention speaks about the promotion of the effective participation of developing States in activities in the Area. What is more important is that Annex III,

article 9, paragraph 4, of the Convention specifically refers to the right of a developing State or any natural or juridical person sponsored by it and effectively controlled by it, to inform the Authority that it wishes to submit a plan of work with respect to a reserved area. These provisions have the effect of reserving half of the proposed contract areas in favour of the Authority and developing States. Together with those provisions mentioned in paragraph 157, they require effective implementation with a view to enabling the developing States to participate in deep seabed mining on an equal footing with developed States. Developing States should receive necessary assistance including training.

Question 2

164. The second question submitted to the Chamber is as follows:

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. Applicable provisions

165. In replying to this question, the Chamber will proceed from article 139, paragraph 2, of the Convention, read in conjunction with the second sentence of Annex III, article 4, paragraph 4, of the Convention.

166. Article 139, paragraph 2, of the Convention reads:

> 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.

167. Annex III, article 4, paragraph 4, second sentence, of the Convention states:

> 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.

168. The Chamber will further take into account articles 235 and 304 as well as Annex III, article 22, of the Convention. Lastly, it will consider, as appropriate, the relevant rules on liability set out in the Nodules Regulations and the Sulphides Regulations. In this context, the Chamber notes that the Regulations issued to date by the Authority deal only with prospecting and exploration. Considering that the potential for damage, particularly to the marine environment, may increase during the exploitation phase, it is to be expected that member States of the Authority will further deal with the issue of liability in future regulations on exploitation. The Chamber would like to emphasize that it does not consider itself to be called upon to lay down such future rules on liability. The member States of the Authority may, however, take some guidance from the interpretation in this Advisory Opinion of the pertinent rules on the liability of sponsoring States in the Convention.

169. Since article 139, paragraph 2, and article 304 of the Convention refer, respectively, to the "rules of international law" and to "the application of existing rules and the development of further rules regarding responsibility and liability under international law", account will have to be taken of such rules under customary law, especially in light of the ILC Articles on State Responsibility. Several of these articles are considered to reflect customary international law. Some of them, even in earlier versions, have been invoked as such by the Tribunal *(The M/V "SAIGA" (No. 2) Case (Saint Vincent and the Grenadines* v. *Guinea), Judgment, ITLOS Reports 1999*, p. 10, at paragraph 171) as well as by the ICJ (for example, *Armed Activities on the Territory of the Congo (Democratic Republic of Congo* v. *Uganda), Judgment, I.C.J. Reports 2005*, p. 168, at paragraph 160).

II. Liability in general

170. At the outset, the Chamber would like to state its understanding of the system of liability in regard to sponsoring States as set out in the Convention and related instruments.

171. Article 139, paragraph 2, of the Convention and the related provisions referred to above, prescribe or refer to different sources of liability, namely, rules concerning the liability of States Parties (article 139, paragraph 2, first sentence, of the Convention), rules concerning sponsoring State liability (article 139, paragraph 2, second sentence, of the Convention), and rules concerning the liability of the contractor and the Authority (referred to in Annex III, article 22, of the Convention). The "without prejudice" clause in the first sentence of article 139, paragraph 2, of the Convention refers to the rules of international law concerning the liability of States Parties and international organizations. A reference to the international law rules on liability is also contained in article 304 of the Convention. The Chamber considers that these rules supplement the rules concerning the liability of the sponsoring State set out in the Convention.

172. From the wording of article 139, paragraph 2, of the Convention, it is evident that liability arises from the failure of the sponsoring State to carry out its own responsibilities. The sponsoring State is not, however, liable for the failure of the sponsored contractor to meet its obligations (see paragraph 182).

173. There is, however, a link between the liability of the sponsoring State and the failure of the sponsored contractor to comply with its obligations, thereby causing damage. An examination of article 139 of the Convention and Annex III, article 4, paragraph 4, second sentence, of the Convention will establish more precisely the link between the damage caused by the contractor and the sponsoring State's liability (see paragraph 181).

174. Whereas the first sentence of article 139, paragraph 2, of the Convention covers the failure of States Parties, including sponsoring States, to carry out their responsibilities in general, the second sentence deals only with the liability of sponsoring States.

III. Failure to carry out responsibilities

175. The Chamber will now turn to the interpretation of the elements constituting liability as set out in article 139, paragraph 2, of the Convention, read in conjunction with Annex III, article 4, paragraph 4, of the Convention.

176. The wording of article 139, paragraph 2, of the Convention clearly establishes two conditions for liability to arise: the failure of the sponsoring State to carry out its responsibilities (see paragraphs 64 to 71 on the meaning of key terms); and the occurrence of damage.

177. The failure of a sponsoring State to carry out its responsibilities, referred to in article 139, paragraph 2, of the Convention, may consist in an act or an omission that is contrary to that State's responsibilities under the deep seabed mining regime. Whether a sponsoring State has carried out its responsibilities depends primarily on the requirements of the obligation which the sponsoring State is said to have breached. As stated above in the reply to Question 1 (see paragraph 121), sponsoring States have both direct obligations of their own and obligations in relation to the activities carried out by sponsored contractors. The nature of these obligations also determines the scope of liability. Whereas the liability of the sponsoring State for failure to meet its direct obligations is governed exclusively by the first sentence of article 139, paragraph 2, of the Convention, its liability for failure to meet its obligations in relation to damage caused by a sponsored contractor is covered by both the first and second sentences of the same paragraph.

IV. Damage

178. As stated above, according to the first sentence of article 139, paragraph 2, of the Convention, the failure of a sponsoring State to carry out its responsibilities entails liability only if there is damage. This provision covers neither the situation in which the sponsoring State has failed to carry out its responsibilities but there has been no damage, nor the situation in which there has been damage but the sponsoring State has met its obligations. This constitutes an exception to the customary international law rule on liability since, as stated in the *Rainbow Warrior Arbitration (Case concerning the difference between New Zealand and France concerning the interpretation or application of two agreements, concluded on 9 July 1986 between the two States and which related to the problems arising from the Rainbow Warrior Affair, UNRIAA, 1990, vol. XX*, p. 215, at paragraph 110), and in paragraph 9 of the Commentary to article 2 of the ILC Articles on State Responsibility, a State may be held liable under customary international law even if no material damage results from its failure to meet its international obligations.

179. Neither the Convention nor the relevant Regulations (regulation 30 of the Nodules Regulations and regulation 32 of the Sulphides Regulations) specifies what constitutes compensable damage, or which subjects may be entitled to claim compensation. It may be envisaged that the damage in question would include damage to the Area and its resources constituting the common heritage of mankind, and damage to the marine environment. Subjects entitled to claim compensation may include the Authority, entities engaged in deep seabed mining, other users of the sea, and coastal States.

180. No provision of the Convention can be read as explicitly entitling the Authority to make such a claim. It may, however, be argued that such entitlement is implicit in article 137, paragraph 2, of the Convention, which states that the Authority shall act "on behalf" of mankind. Each State Party may also be entitled to claim compensation in light of the *erga omnes* character of the obligations relating to preservation of the environment of the high seas and in the Area. In support of this view, reference may be made to article 48 of the ILC Articles on State Responsibility, which provides:

> Any State other than an injured State is entitled to invoke the responsibility of another State . . . if: (a) the obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest of the group; or (b) the obligation breached is owed to the international community as a whole.

Causal link between failure and damage

181. Article 139, paragraph 2, first sentence, of the Convention refers to "damage caused", which clearly indicates the necessity of a causal link between the damage and the failure of the sponsoring State to meet its responsibilities. The second sentence of article 139, paragraph 2, of the Convention does not mention this causal link. It refers only to a causal link between the activity of the sponsored contractor and the consequent damage. Nevertheless, the Chamber is of the view that, in order for the sponsoring State's liability to arise, there must be a causal link between the failure of that State and the damage caused by the sponsored contractor.

182. Article 139, paragraph 2, of the Convention establishes that sponsoring States are responsible for ensuring that activities in the Area are carried out in conformity with Part XI of the Convention (see paragraph 108). This means

that the sponsoring State's liability arises not from a failure of a private entity but rather from its own failure to carry out its own responsibilities. In order for the sponsoring State's liability to arise, it is necessary to establish that there is damage and that the damage was a result of the sponsoring State's failure to carry out its responsibilities. Such a causal link cannot be presumed and must be proven. The rules on the liability of sponsoring States set out in article 139, paragraph 2, of the Convention and in the related instruments are in line with the rules of customary international law on this issue. Under international law, the acts of private entities are not directly attributable to States except where the entity in question is empowered to act as a State organ (article 5 of the ILC Articles on State Responsibility) or where its conduct is acknowledged and adopted by a State as its own (article 11 of the ILC Articles on State Responsibility). As explained in the present paragraph, the liability regime established in Annex III to the Convention and related instruments does not provide for the attribution of activities of sponsored contractors to sponsoring States.

183. In the event that no causal link pertaining to the failure of the sponsoring States to carry out their responsibilities and the damage caused can be established, the question arises whether they may nevertheless be held liable under the customary international law rules on State responsibility. This issue is dealt with in paragraphs 208 to 211.

184. For these reasons, the Chamber concludes that the liability of sponsoring States arises from their failure to carry out their own responsibilities and is triggered by the damage caused by sponsored contractors. There must be a causal link between the sponsoring State's failure and the damage, and such a link cannot be presumed.

V. Exemption from liability

185. The Chamber will now direct its attention to the meaning of the clause "shall not however be liable for damage" in article 139, paragraph 2, second sentence, and in Annex III, article 4, paragraph 4, second sentence, of the Convention.

186. This clause provides for the exemption of the sponsoring State from liability. Its effect is that, in the event that the sponsored contractor fails to comply with the Convention, the Regulations or its contract, and such failure results in damage, the sponsoring State cannot be held liable. The condition for exemption of the sponsoring State from liability is that, as specified in article 139, paragraph 2, of the Convention, it has taken "all necessary and appropriate

measures to secure effective compliance" under article 153, paragraph 4, and Annex III, article 4, paragraph 4, of the Convention.

187. It may be pointed out that Annex III, article 4, paragraph 4, of the Convention does not give sponsoring States unlimited discretionary powers concerning the measures to be taken in order to avoid liability. This matter is dealt with in detail in the reply to Question 3.

VI. Scope of liability under the Convention

188. The Chamber will now deal with the scope of liability under article 139, paragraph 2, second sentence, of the Convention. This requires addressing several issues, namely, the standard of liability, multiple sponsorship, the amount and form of compensation and the relationship between the liability of the contractor and of the sponsoring State.

Standard of liability

189. With regard to the standard of liability, it was argued in the proceedings that the sponsoring State has strict liability, i.e., liability without fault. The Chamber, however, would like to point out that liability for damage of the sponsoring State arises only from its failure to meet its obligation of due diligence. This rules out the application of strict liability.

Multiple sponsorship

190. According to Annex III, article 4, paragraph 3, of the Convention, in certain situations, applicants for contracts of exploration or exploitation may require the sponsorship of more than one State Party. This occurs when the applicant holds more than one nationality or where it holds the nationality of one State and is controlled by another State or by nationals of another State.

191. Neither article 139, paragraph 2, nor Annex III, article 4, paragraph 4, of the Convention, indicates how sponsoring States are to share their liability. The Nodules Regulations and the Sulphides Regulations also do not provide guidance in this respect, with an exception as far as the certification of financial viability of the contractor is concerned. Such certification as required under regulation 12, paragraph 5(c), of the Nodules Regulations and under

regulation 13, paragraph 4(c), of the Sulphides Regulations must be provided by the State that controls the applicant. Consequently, in this case, a failure of that State to comply with its obligations entails liability.

192. Apart from the exception mentioned in paragraph 191, the provisions of article 139, paragraph 2, of the Convention and related instruments dealing with sponsorship do not differentiate between single and multiple sponsorship. Accordingly, the Chamber takes the position that, in the event of multiple sponsorship, liability is joint and several unless otherwise provided in the Regulations issued by the Authority.

Amount and form of compensation

193. As regards the amount of compensation payable, it is pertinent to refer again to Annex III, article 22, of the Convention, which states, with respect to the Authority and the sponsored contractor, that "[l]iability in every case shall be for the actual amount of damage." In this context, note should be taken of regulation 30 of the Nodules Regulations, the identical regulation 32 of the Sulphides Regulations, and the identical section 16.1 of the Standard Clauses for exploration contracts (Annex 4 to the said Regulations).

194. The obligation for a State to provide for a full compensation or *restituto in integrum* is currently part of customary international law. This conclusion was first reached by the Permanent Court of International Justice in the *Factory of Chorzów* case (*P.C.I.J. Series A, No. 17*, p. 47). This obligation was further reiterated by the International Law Commission. According to article 31, paragraph 1, of the ILC Articles on State Responsibility: "The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act". The Chamber notes in this context that treaties on specific topics, such as nuclear energy or oil pollution, provide for limitations on liability together with strict liability.

195. In the light of the foregoing, it is the view of the Chamber that the provisions concerning liability of the contractor for the actual amount of damage, referred to in paragraph 193, are equally valid with regard to the liability of the sponsoring State.

196. As far as the form of the reparation is concerned, the Chamber wishes to refer to article 34 of the ILC Articles on State Responsibility. It reads:

> Full reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either

singly or in combination, in accordance with the provisions of this chapter.

197. It is the view of the Chamber that the form of reparation will depend on both the actual damage and the technical feasibility of restoring the situation to the *status quo ante*.

198. It should be noted that, according to regulation 30 of the Nodules Regulations and regulation 32 of the Sulphides Regulations, the contractor remains liable for damage even after the completion of the exploration phase. In the view of the Chamber, this is equally valid for the liability of the sponsoring State.

Relationship between the liability of the contractor and of the sponsoring State

199. Concerning the relationship between the contractor's liability and that of the sponsoring State, attention may be drawn to Annex III, article 22, of the Convention. This provision reads as follows:

> The contractor shall have responsibility or liability for any *damage arising out of wrongful acts* in the conduct of its operations, *account being taken of contributory acts or omissions by the Authority*. Similarly, the Authority shall have responsibility or liability for any *damage arising out of wrongful acts in the exercise of its powers and functions*, including violations under article 168, paragraph 2, *account being taken of contributory acts or omissions by the contractor*. Liability in every case shall be for the actual amount of damage. (Emphasis added)

200. No reference is made in this provision to the liability of sponsoring States. It may therefore be deduced that the main liability for a wrongful act committed in the conduct of the contractor's operations or in the exercise of the Authority's powers and functions rests with the contractor and the Authority, respectively, rather than with the sponsoring State. In the view of the Chamber, this reflects the distribution of responsibilities for deep seabed mining activities between the contractor, the Authority and the sponsoring State.

201. In this context, the question of whether the contractor and the sponsoring State bear joint and several liability was raised in the proceedings. Nothing in the Convention and related instruments indicates that this is the case. Joint and several liability arises where different entities have contributed

to the same damage so that full reparation can be claimed from all or any of them. This is not the case under the liability regime established in article 139, paragraph 2, of the Convention. As noted above, the liability of the sponsoring State arises from its own failure to carry out its responsibilities, whereas the contractor's liability arises from its own non-compliance. Both forms of liability exist in parallel. There is only one point of connection, namely, that the liability of the sponsoring State depends upon the damage resulting from activities or omissions of the sponsored contractor (see paragraph 181). But, in the view of the Chamber, this is merely a trigger mechanism. Such damage is not, however, automatically attributable to the sponsoring State.

202. If the contractor has paid the actual amount of damage, as required under Annex III, article 22, of the Convention, in the view of the Chamber, there is no room for reparation by the sponsoring State.

203. The situation becomes more complex if the contractor has not covered the damage fully. It was pointed out in the proceedings that a gap in liability may occur if, notwithstanding the fact that the sponsoring State has taken all necessary and appropriate measures, the sponsored contractor has caused damage and is unable to meet its liability in full. It was further pointed out that a gap in liability may also occur if the sponsoring State failed to meet its obligations but that failure is not causally linked to the damage. In their written and oral statements, States Parties have expressed different views on this issue. Some have argued that the sponsoring State has a residual liability, that is, the liability to cover the damage not covered by the sponsored contractor although the conditions for a liability of the sponsoring State under article 139, paragraph 2, of the Convention are not met. Other States Parties have taken the opposite position.

204. In the view of the Chamber, the liability regime established by article 139 of the Convention and in related instruments leaves no room for residual liability. As outlined in paragraph 201, the liability of the sponsoring State and the liability of the sponsored contractor exist in parallel. The liability of the sponsoring State arises from its own failure to comply with its responsibilities under the Convention and related instruments. The liability of the sponsored contractor arises from its failure to comply with its obligations under its contract and its undertakings thereunder. As has been established, the liability of the sponsoring State depends on the occurrence of damage resulting from the

failure of the sponsored contractor. However, as noted in paragraph 182, this does not make the sponsoring State responsible for the damage caused by the sponsored contractor.

205. Taking into account that, as shown above in paragraph 203, situations may arise where a contractor does not meet its liability in full while the sponsoring State is not liable under article 139, paragraph 2, of the Convention, the Authority may wish to consider the establishment of a trust fund to compensate for the damage not covered. The Chamber draws attention to article 235, paragraph 3, of the Convention which refers to such possibility.

VII. Liability of sponsoring States for violation of their direct obligations

206. As stated in paragraph 121, the Convention and related instruments provide for direct obligations of sponsoring States. Liability for violation of such obligations is covered by article 139, paragraph 2, first sentence, of the Convention.

207. In the event of failure to comply with direct obligations, it is not possible for the sponsoring State to claim exemption from liability as article 139, paragraph 2, second sentence, of the Convention does not apply.

VIII. "Without prejudice" clause

208. The Chamber will now consider the impact of international law on the deep seabed liability regime. Articles 139, paragraph 2, first sentence, and 304 of the Convention, state that their provisions are "without prejudice" to the rules of international law (see paragraph 169). It remains to be considered whether such statement may be used to fill a gap in the liability regime established in Part XI of the Convention and related instruments.

209. As already indicated, if the sponsoring State has not failed to meet its obligations, there is no room for its liability under article 139, paragraph 2, of the Convention even if activities of the sponsored contractor have resulted in damage. A gap in liability which might occur in such a situation cannot be

closed by having recourse to liability of the sponsoring State under customary international law. The Chamber is aware of the efforts made by the International Law Commission to address the issue of damages resulting from acts not prohibited under international law. However, such efforts have not yet resulted in provisions entailing State liability for lawful acts. Here again (see paragraph 205) the Chamber draws the attention of the Authority to the option of establishing a trust fund to cover such damages not covered otherwise.

210. The failure by a sponsoring State to meet its obligations not resulting in material damage is covered by customary international law which does not make damage a requirement for the liability of States. As already stated in paragraph 178, this is confirmed by the ILC Articles on State Responsibility.

211. Lastly, the Chamber would like to point out that article 304 of the Convention refers not only to existing international law rules on responsibility and liability, but also to the development of further rules. The regime of international law on responsibility and liability is not considered to be static. Article 304 of the Convention thus opens the liability regime for deep seabed mining to new developments in international law. Such rules may either be developed in the context of the deep seabed mining regime or in conventional or customary international law.

Question 3

212. The third question submitted to the Chamber is as follows:

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

I. General aspects

213. The focus of Question 3, as of Questions 1 and 2, is on sponsoring States. The Question seeks to find out the "necessary and appropriate measures" that the sponsoring State "must" take in order to fulfil its responsibility

under the Convention, in particular article 139 and Annex III, and the 1994 Agreement. The starting point for this inquiry is article 153 of the Convention, since it introduces for the first time the concept of the sponsoring State and the measures that it must take. Article 153 does not specify the measures to be taken by the sponsoring State. It makes a cross-reference to article 139 of the Convention for guidance in the matter.

214. Article 139, paragraph 2, of the Convention provides that the sponsoring State shall not be liable for damage caused by any failure to comply with Part XI of the Convention by an entity sponsored by it under article 153, paragraph 2(b), of the Convention, "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".

215. Article 139, paragraph 2, of the Convention does not specify the measures that are "necessary and appropriate". It simply draws attention to article 153, paragraph 4, and Annex III, article 4, paragraph 4, of the Convention. The relevant part of Annex III, article 4, paragraph 4, reads 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 framework of its legal system, reasonably appropriate for securing compliance by persons under its jurisdiction.

216. Although the terminology used in these provisions varies slightly, they deal in essence with the same subject matter and convey the same meaning. Annex III, article 4, paragraph 4, of the Convention contains an explanation of the words "necessary and appropriate measures" in article 139, paragraph 2, of the Convention.

217. Under these provisions, in the system of the responsibilities and liability of the sponsoring State, the "necessary and appropriate measures" have two distinct, although interconnected, functions as set out in the Convention. On the one hand, these measures have the function of ensuring compliance by the contractor with its obligations under the Convention and related instruments as well as under the relevant contract. On the other hand, they also have the function of exempting the sponsoring State from liability for damage caused by the sponsored contractor, as provided in article 139, paragraph 2, as well as in Annex III, article 4, paragraph 4, of the Convention. The first of these functions has been illustrated in the reply to Question 1, in

connection with the due diligence obligation of the sponsoring State to ensure compliance by the sponsored contractor, while the second has been partially addressed in the reply to Question 2 and will be further addressed in the following paragraphs.

II. Laws and regulations and administrative measures

218. Annex III, article 4, paragraph 4, of the Convention requires the sponsoring State to adopt laws and regulations and to take administrative measures. Thus, there is here a stipulation that the adoption of laws and regulations and the taking of administrative measures are necessary. The scope and extent of the laws and regulations and administrative measures required depend upon the legal system of the sponsoring State. The adoption of laws and regulations is prescribed because not all the obligations of a contractor may be enforced through administrative measures or contractual arrangements alone, as specified in paragraphs 223 to 226. Support for the enforcement of contractor's obligations under the domestic law of the sponsoring State is an essential requirement in a number of national jurisdictions. But laws and regulations by themselves may not provide a complete answer in this regard. Administrative measures aimed at securing compliance with them may also be needed. Laws, regulations and administrative measures may include the establishment of enforcement mechanisms for active supervision of the activities of the sponsored contractor. They may also provide for the co-ordination between the various activities of the sponsoring State and those of the Authority with a view to eliminating avoidable duplication of work.

219. Since the sponsoring State is responsible for ensuring that the contractor acts in accordance with the terms of the contract and with its obligations under the Convention, that State's laws, regulations and administrative measures should be in force at all times that a contract with the Authority is in force. While the existence of such laws, regulations and administrative measures is not a condition precedent for concluding a contract with the Authority, it is a necessary requirement for compliance with the obligation of due diligence of the sponsoring State and for its exemption from liability.

220. It may be observed in this regard that the Nodules Regulations were approved after the pioneer investors had been registered. In view

of this, certifying States are required, if necessary, to bring their laws, regulations and administrative measures in keeping with the provisions of the Regulations.

221. The national measures to be taken by the sponsoring State should also cover the obligations of the contractor even after the completion of the exploration phase, as provided for in regulation 30 of the Nodules Regulations and regulation 32 of the Sulphides Regulations.

222. As already indicated, the national measures, once adopted, may not be appropriate in perpetuity. It is the view of the Chamber that such measures should be kept under review so as to ensure that they meet current standards and that the contractor meets its obligations effectively without detriment to the common heritage of mankind.

III. Compliance by means of a contract?

223. It is the requirement in Annex III, article 4, paragraph 4, of the Convention, that the measures to be taken by the sponsoring State should be in the form of laws and regulations and administrative measures. This means that a sponsoring State could not be considered as complying with its obligations only by entering into a contractual arrangement, such as a sponsoring agreement, with the contractor. Not only would this be incompatible with the provision referred to above but also with the Convention in general and Part XI thereof in particular.

224. Mere contractual obligations between the sponsoring State and the sponsored contractor may not serve as an effective substitute for the laws and regulations and administrative measures referred to in Annex III, article 4, paragraph 4, of the Convention. Nor would they establish legal obligations that could be invoked against the sponsoring State by entities other than the sponsored contractor.

225. The "contractual" approach would, moreover, lack transparency. It will be difficult to verify, through publicly available measures, that the sponsoring State had met its obligations. A sponsorship agreement may not be publicly available and, in fact, may not be required at all. Annex III of the Convention, and the Nodules Regulations and the Sulphides Regulations contain no requirement that a sponsorship agreement, if any, between the sponsoring States and the contractor should be submitted to the Authority or made publicly available. The only requirement is the submission of a certificate of sponsorship issued by the sponsoring State (regulation 11, paragraph 3(f), of the Nodules Regulations and of the Sulphides Regulations), in which the

sponsoring State declares that it "assumes responsibility in accordance with article 139, article 153, paragraph 4, and Annex III, article 4, paragraph 4, of the Convention".

226. As stated above, the role of the sponsoring State is to contribute to the common interest of all States in the proper implementation of the principle of the common heritage of mankind by assisting the Authority and by acting on its own with a view to ensuring that entities under its jurisdiction conform to the rules on deep seabed mining. Contractual arrangements alone cannot satisfy the obligation undertaken by the sponsoring State. The sponsoring State could not claim to be assisting the Authority under article 153, paragraph 4, of the Convention by the mere fact that it had concluded a contract under its domestic law.

IV. Content of the measures

227. The Convention leaves it to the sponsoring State to determine what measures will enable it to discharge its responsibilities. Policy choices on such matters must be made by the sponsoring State. In view of this, the Chamber considers that it is not called upon to render specific advice as to the necessary and appropriate measures that the sponsoring State must take in order to fulfil its responsibilities under the Convention. Judicial bodies may not perform functions that are not in keeping with their judicial character. Nevertheless, without encroaching on the policy choices a sponsoring State may make, the Chamber deems it appropriate to indicate some general considerations that a sponsoring State may find useful in its choice of measures under articles 139, paragraph 2, 153, paragraph 4, and Annex III, article 4, paragraph 4, of the Convention.

228. What is expected with regard to the responsibility of the sponsoring State in terms of Annex III, article 4, paragraph 4, of the Convention is made clear in the second sentence of the same paragraph. It requires the sponsoring State to adopt laws and regulations and to take administrative measures which are, within the framework of its legal system, "reasonably appropriate" for securing compliance by persons under its jurisdiction. The standard for determining what is appropriate is not open-ended. The measures taken must be "reasonably appropriate". The appropriateness of the measures taken may be justified only if they are agreeable to reason and not arbitrary.

229. The measures to be taken by the sponsoring State must be determined by that State itself within the framework of its legal system. This

determination is, therefore, left to the discretion of the sponsoring State. Annex III, article 4, paragraph 4, of the Convention requires the sponsoring State to put in place laws and regulations and to take administrative measures that are "reasonably appropriate" so that it may be absolved from liability for damage caused by any failure of a contractor sponsored by it to comply with its obligations. The obligation is to act within its own legal system, taking into account, among other things, the particular characteristics of that system.

230. In view of the above, it may be relevant to deal with some general considerations pertaining to the measures to be taken by the sponsoring State. The sponsoring State does not have an absolute discretion with respect to the action it is required to take under Annex III, article 4, paragraph 4, of the Convention. In the sphere of the obligation to assist the Authority acting on behalf of mankind as a whole, while deciding what measures are reasonably appropriate, the sponsoring State must take into account, objectively, the relevant options in a manner that is reasonable, relevant and conducive to the benefit of mankind as a whole. It must act in good faith, especially when its action is likely to affect prejudicially the interests of mankind as a whole. The need to act in good faith is also underlined in articles 157, paragraph 4, and 300 of the Convention. Reasonableness and non-arbitrariness must remain the hallmarks of any action taken by the sponsoring State. Any failure on the part of the sponsoring State to act reasonably may be challenged before this Chamber under article 187 (b) (i) of the Convention.

231. It may be pertinent to inquire whether there are any restrictions on what a sponsoring State may provide for in its laws and regulations applicable in this regard. Attention may be drawn to Annex III, article 21, paragraph 3, of the Convention. This paragraph reads as follows:

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

232. This provision imposes a general obligation on the sponsoring State not to impose on a contractor conditions that are "inconsistent" with Part XI of the Convention. At the same time, however, it establishes an exception thereto. The exception provides the sponsoring State with the option to apply to contractors sponsored by it, or to ships flying its flag, environmental or other laws

and regulations more stringent than those in the rules, regulations and procedures of the Authority adopted pursuant to Annex III, article 17, paragraph 2(f), of the Convention (dealing with protection of the marine environment).

233. While dealing with the obligation of the sponsoring State contained in Annex III, article 21, paragraph 3, of the Convention, account has to be taken of the obligation of the contractor under the legal regime for deep seabed mining and the corresponding obligations of the sponsoring State. According to Annex III, article 4, paragraph 4, of the Convention the contractor shall carry out its activities in the Area "in conformity with" the terms of its contract with the Authority and its obligations under the Convention. The same provision states that it is the responsibility of the sponsoring State to ensure that the contractor carries out this obligation (see paragraph 75).

234. The sponsoring State may find it necessary, depending upon its legal system, to include in its domestic law provisions that are necessary for implementing its obligations under the Convention. These provisions may concern, *inter alia*, financial viability and technical capacity of sponsored contractors, conditions for issuing a certificate of sponsorship and penalties for non-compliance by such contractors.

235. Additionally, the Convention itself specifies in various provisions the issues that should be covered by the sponsoring State's laws and regulations. In particular, article 39 of the Statute dealing with enforcement of decisions of the Chamber provides:

> The decisions of the Chamber shall be enforceable in the territories of the States Parties in the same manner as judgments or orders of the highest court of the State Party in whose territory the enforcement is sought.

Reference may also be made to Annex III, article 21, paragraph 2, of the Convention which provides: "Any final decision rendered by a court or tribunal having jurisdiction under this Convention relating to the rights and obligations of the Authority and of the contractor shall be enforceable in the territory of each State Party". In a number of national jurisdictions, these provisions may require specific legislation for implementation.

236. Other indications may be found in the provisions that establish direct obligations of the sponsoring States (see paragraph 121). These include: the obligations to assist the Authority in the exercise of control over activities in the Area; the obligation to apply a precautionary approach; the obligation to apply best environmental practices; the obligation to take measures to ensure the provision of guarantees in the event of an emergency order by the Authority for protection of the marine environment; the obligation to ensure the availability of recourse for compensation in respect of damage caused by pollution; and the obligation to conduct environmental impact assessments. It is important to stress that these obligations are mentioned only as examples.

237. In this context, the Chamber takes note of the Deep Seabed Mining Law adopted by Germany and of similar legislation adopted by the Czech Republic.

238. While the applicable contract is a contract between the Authority and the contractor only and as such does not bind the sponsoring State, the sponsoring State is nevertheless under an obligation to ensure that the contractor complies with its contract. This means that the sponsoring State must adopt laws and regulations and take administrative measures which do not hinder the contractor in the effective fulfilment of its contractual obligations but rather assist the contractor in that respect.

239. It is inherent in the "due diligence" obligation of the sponsoring State to ensure that the obligations of a sponsored contractor are made enforceable.

240. Under Annex III, article 21, paragraph 3, of the Convention, the rules, regulations and procedures concerning environmental protection adopted by the Authority are used as a minimum standard of stringency for the environmental or other laws and regulations that the sponsoring State may apply to the sponsored contractor. It is implicit in this provision that sponsoring States may apply to the contractors they sponsor more stringent standards as far as the protection of the marine environment is concerned.

241. Article 209, paragraph 2, of the Convention is based on the same approach. According to this provision, the requirements contained in the laws and regulations that States adopt concerning 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 . . . shall be no less effective than the international rules, regulations, and procedures" established under Part XI, which consist primarily of the international rules, regulations and procedures adopted by the Authority.

242. For these reasons,

THE CHAMBER,

1. Unanimously,

Decides **that it has jurisdiction to give the advisory opinion requested.**

2. Unanimously,

Decides **to respond to the request for an advisory opinion.**

3. Unanimously,

Replies **to Question 1 submitted by the Council as follows:**

Sponsoring States have two kinds of obligations under the Convention and related instruments:

A. The obligation to ensure compliance by sponsored contractors with the terms of the contract and the obligations set out in the Convention and related instruments.

This is an obligation of "due diligence". The sponsoring State is bound to make best possible efforts to secure compliance by the sponsored contractors.

The standard of due diligence may vary over time and depends on the level of risk and on the activities involved.

This "due diligence" obligation requires the sponsoring State to take measures within its legal system. These measures must consist of laws and regulations and administrative measures. The applicable standard is that the measures must be "reasonably appropriate".

B. Direct obligations with which sponsoring States must comply independently of their obligation to ensure a certain conduct on the part of the sponsored contractors.

Compliance with these obligations may also be seen as a relevant factor in meeting the "due diligence" obligation of the sponsoring State.

The most important direct obligations of the sponsoring State are:

(a) the obligation to assist the Authority set out in article 153, paragraph 4, of the Convention;
(b) the obligation to apply a precautionary approach as reflected in Principle 15 of the Rio Declaration and set out in the Nodules Regulations and the Sulphides Regulations; this obligation is also to be considered an integral part of the "due diligence" obligation of the sponsoring State and applicable beyond the scope of the two Regulations;
(c) the obligation to apply the "best environmental practices" set out in the Sulphides Regulations but equally applicable in the context of the Nodules Regulations;
(d) the obligation to adopt measures to ensure the provision of guarantees in the event of an emergency order by the Authority for protection of the marine environment; and
(e) the obligation to provide recourse for compensation.

The sponsoring State is under a due diligence obligation to ensure compliance by the sponsored contractor with its obligation to conduct an environmental impact assessment set out in section 1, paragraph 7, of the Annex to the 1994 Agreement. The obligation to conduct an environmental impact assessment is also a general obligation under customary law and is set out as a direct obligation for all States in article 206 of the Convention and as an aspect of the sponsoring State's obligation to assist the Authority under article 153, paragraph 4, of the Convention.

Obligations of both kinds apply equally to developed and developing States, unless specifically provided otherwise in the applicable provisions, such as Principle 15 of the Rio Declaration, referred to in the Nodules Regulations and the Sulphides Regulations, according to which States shall apply the precautionary approach "according to their capabilities".

The provisions of the Convention which take into consideration the special interests and needs of developing States should be effectively implemented with a view to enabling the developing States to participate in deep seabed mining on an equal footing with developed States.

4. Unanimously,

***Replies* to Question 2 submitted by the Council as follows:**

The liability of the sponsoring State arises from its failure to fulfil its obligations under the Convention and related instruments. Failure of the sponsored contractor to comply with its obligations does not in itself give rise to liability on the part of the sponsoring State.

The conditions for the liability of the sponsoring State to arise are:

(a) failure to carry out its responsibilities under the Convention; and
(b) occurrence of damage.

The liability of the sponsoring State for failure to comply with its due diligence obligations requires that a causal link be established between such failure and damage. Such liability is triggered by a damage caused by a failure of the sponsored contractor to comply with its obligations.

The existence of a causal link between the sponsoring State's failure and the damage is required and cannot be presumed.

The sponsoring State is absolved from liability if it has taken "all necessary and appropriate measures to secure effective compliance" by the sponsored contractor with its obligations. This exemption from liability does not apply to the failure of the sponsoring State to carry out its direct obligations.

The liability of the sponsoring State and that of the sponsored contractor exist in parallel and are not joint and several. The sponsoring State has no residual liability.

Multiple sponsors incur joint and several liability, unless otherwise provided in the Regulations of the Authority.

The liability of the sponsoring State shall be for the actual amount of the damage.

Under the Nodules Regulations and the Sulphides Regulations, the contractor remains liable for damage even after the completion of the exploration phase. This is equally valid for the liability of the sponsoring State.

The rules on liability set out in the Convention and related instruments are without prejudice to the rules of international law. Where the

sponsoring State has met its obligations, damage caused by the sponsored contractor does not give rise to the sponsoring State's liability. If the sponsoring State has failed to fulfil its obligation but no damage has occurred, the consequences of such wrongful act are determined by customary international law.

The establishment of a trust fund to cover the damage not covered under the Convention could be considered.

5. Unanimously,

***Replies* to Question 3 submitted by the Council as follows:**

The Convention requires the sponsoring State to adopt, within its legal system, laws and regulations and to take administrative measures that have two distinct functions, namely, to ensure compliance by the contractor with its obligations and to exempt the sponsoring State from liability.

The scope and extent of these laws and regulations and administrative measures depends on the legal system of the sponsoring State.

Such laws and regulations and administrative measures may include the establishment of enforcement mechanisms for active supervision of the activities of the sponsored contractor and for co-ordination between the activities of the sponsoring State and those of the Authority.

Laws and regulations and administrative measures should be in force at all times that a contract with the Authority is in force. The existence of such laws and regulations, and administrative measures is not a condition for concluding the contract with the Authority; it is, however, a necessary requirement for carrying out the obligation of due diligence of the sponsoring State and for seeking exemption from liability.

These national measures should also cover the obligations of the contractor after the completion of the exploration phase, as provided for in regulation 30 of the Nodules Regulations and regulation 32 of the Sulphides Regulations.

In light of the requirement that measures by the sponsoring States must consist of laws and regulations and administrative measures, the sponsoring State cannot be considered as complying with its obligations only by entering into a contractual arrangement with the contractor.

The sponsoring State does not have absolute discretion with respect to the adoption of laws and regulations and the taking of administrative

measures. It must act in good faith, taking the various options into account in a manner that is reasonable, relevant and conducive to the benefit of mankind as a whole.

As regards the protection of the marine environment, the laws and regulations and administrative measures of the sponsoring State cannot be less stringent than those adopted by the Authority, or less effective than international rules, regulations and procedures.

The provisions that the sponsoring State may find necessary to include in its national laws may concern, *inter alia*, financial viability and technical capacity of sponsored contractors, conditions for issuing a certificate of sponsorship and penalties for non-compliance by such contractors.

It is inherent in the "due diligence" obligation of the sponsoring State to ensure that the obligations of a sponsored contractor are made enforceable.

Specific indications as to the contents of the domestic measures to be taken by the sponsoring State are given in various provisions of the Convention and related instruments. This applies, in particular, to the provision in article 39 of the Statute prescribing that decisions of the Chamber shall be enforceable in the territories of the States Parties, in the same manner as judgments and orders of the highest court of the State Party in whose territory the enforcement is sought.

Done in English and French, both texts being authoritative, in the Free and Hanseatic City of Hamburg, this first day of February, two thousand and eleven, in three copies, one of which will be placed in the archives of the Tribunal and the others will be sent to the Secretary-General of the International Seabed Authority and to the Secretary-General of the United Nations.

(signed) Tullio Treves
President

(signed) Philippe Gautier
Registrar