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TRIBUNAL INTERNATIONAL DU DROIT DE LA MER**



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Public sitting

held on Wednesday, 15 September 2010, at 10 a.m.

at the International Tribunal for the Law of the Sea, Hamburg,

President of the Seabed Disputes Chamber, Judge Tullio Treves, presiding

*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)

Verbatim Record

Seabed Disputes Chamber
of the International Tribunal for the Law of the Sea

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International Seabed Authority

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Mr Michael W. Lodge, Legal Counsel
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1 **THE PRESIDENT:** Good morning. Today we will continue the hearing in Case
2 No. 17 concerning the Request for an advisory opinion on Responsibilities and
3 obligations of States sponsoring persons and entities with respect to activities in the
4 Area.

5
6 This morning we will hear statements from Germany, the Netherlands, Argentina,
7 Chile, Fiji and Mexico.

8
9 I now give the floor to the representative of Germany, Dr Wasum-Rainer.

10

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

17

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

25

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

32

33 For these reasons, among others, the Federal Government of Germany attributes
34 great importance to the present procedure. Moreover, being among those States

1 which have sponsored an entity undertaking exploration activities, Germany wishes
2 to present its views on some aspects of the case. The German Government has an
3 interest in helping shed more light on the complex relationship between sponsoring
4 States, contractors and the Authority.

5

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

13

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

21

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

26

27 These elements are:

28

29 (1) the paramount importance of the protection of the environment of the Area;

30

31 (2) the absence of subsidiary or secondary liability for the sponsoring State;

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33 (3) the maintenance of high due diligence standards;

34

1 (4) the need to retain a non-differentiated regime of due diligence standards.

2

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

11

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

16

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

24

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

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

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

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

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

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

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

5

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

13

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

22

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

27

28 Thank you very much.

29

30 **THE PRESIDENT:** Thank you very much indeed, Dr Wasum-Rainer. I now give the
31 floor to the representative of the Netherlands, Dr Lijnzaad.

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33 **MS LIJNZAAD:** Good morning, Mr President, Members of the Seabed Disputes
34 Chamber, Excellencies.

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

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

Scientific research in the deep sea in recent years has brought to light the deep discoveries of biological diversity that have held many people in awe: exotic deep sea fish; serene cold-water coral reefs; and spectacular other life forms on deep seamounts and around hydrothermal vents. The existence of such rich deep sea life could not be imagined at the time of the conclusion of the Convention in 1982. I therefore feel particularly privileged to address this Chamber in the International Year of Biodiversity. The answers to the questions before the Chamber will contribute to the protection of life in the deep by setting a standard for the appropriate supervision of human activities.

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

Mr President, I now turn to the first issue, the sponsorship of activities in the Area. To answer the questions before us, there is merit in first considering the reasons for the introduction of the concept of sponsorship with respect to activities in the Area in the Convention. Activities in the Area are subject to a special legal regime that allows for

1 the sustainable development of the mineral resources of the deep seabed. This
2 regime enables States and their nationals to carry out activities in the Area but
3 introduces a number of safeguards to protect the interests of mankind as a whole.
4 One of those safeguards is the requirement of sponsorship. This requirement was
5 introduced in the Convention for the following reasons: to prevent States not party to
6 the Convention, and persons within their jurisdiction or control, from using the
7 provisions of the Convention and the Agreement relating to the implementation of
8 Part XI to obtain access to the mineral resources of the Area; to prevent States
9 Parties to the Convention from becoming a jurisdiction of convenience through which
10 access could be obtained to the mineral resources of the Area without the
11 acceptance of international obligations to secure that the relevant provisions of the
12 Convention and the Agreement will be complied with; and, finally, to assist the
13 Authority in exercising control over activities in the Area in order to secure that the
14 relevant provisions under the Convention and the Agreement will be complied with.

15

16 In our written statement, the legal responsibilities and obligations of States Parties to
17 the Convention with respect to sponsorship and activities in the Area were
18 categorized into four groups: the carrying out of activities in the Area by a sponsored
19 entity; the transfer of technology and scientific knowledge to the Authority and
20 developing States; the protection and preservation of the marine environment; and
21 the termination of sponsorship.

22

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

30

31 Mr President, I will now address the second question – the extent of liability.
32 Sponsored entities are not parties to the Convention and the Agreement – hence
33 they are not as such bound by the provision of these instruments. The Convention
34 and the Agreement foresee that obligations must be imposed on such entities

1 through the conclusion of a contract with the Authority and the implementation of the
2 Convention and the Agreement by the sponsoring State in its domestic law.

3

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

10

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

18

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

31

32 A due diligence obligation requires States to adopt, implement, supervise and
33 enforce measures of a legislative, administrative or juridical nature to prevent legally
34 protected interests from being harmed by the acts of State and non-State actors. In

1 order to establish a breach of a due diligence obligation, it is necessary to determine
2 the degree of diligence which must be observed by States. The case concerning
3 *British Claims in the Spanish Zone of Morocco* provides some general guidance in
4 this respect: States should act with *diligentia quam in suis*, that is the degree of
5 diligence with which national interests are protected and the degree actually
6 exercised may not be significantly less than the degree that other States may
7 reasonably expect to be exercised.

8

9 Whether an obligation is a due diligence obligation can usually be inferred from its
10 content, context, object and purpose. In general, obligations which focus on the
11 action to be taken rather than on the result of such action, such as obligations which
12 require States to take measures – and irrespective of whether such measures must
13 be appropriate, necessary or effective – can be characterized as due diligence
14 obligations. The ultimate objective of such an obligation may be to achieve a certain
15 result, for example, the prevention of damage, but the obligation itself is oriented
16 towards the action to be taken, that is the adoption of measures. It is an obligation of
17 conduct, as has indeed been concluded in several written statements before you.

18

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

32

33 Mr President, Members of the Seabed Disputes Chamber, the liability of the
34 sponsoring State is without prejudice to the liability of the sponsored entity under

1 article 22 of Annex III of the Convention. The sponsored entity incurs responsibility
2 and liability for any damage arising out of wrongful acts in the conduct of its
3 operations. This liability is in every case for the actual amount of the damage.
4 Liability for damage arising out of acts of the sponsored entity that are not wrongful is
5 not provided for in the Convention or the Agreement.

6
7 As has been pointed out in several written statements, the liability system of the
8 Convention and the Agreement imposes primary liability on the sponsored entity for
9 damage arising out of wrongful acts in the conduct of its operations. Accordingly,
10 a sponsoring State incurs liability only if it has failed to carry out its own
11 responsibilities and the entity sponsored by it has not redressed the damage. This
12 system channels liability and prevents double recovery of damage.

13
14 No liability arises under the Convention or the Agreement if neither the sponsored
15 entity nor the sponsoring State has committed a wrongful act. If a sponsored entity
16 does not provide redress for damage for which it is liable under the Convention and
17 the Agreement – for instance, in the case of exonerations, time-limits or insolvability
18 – neither the Convention nor the Agreement provide for residual liability of the
19 sponsoring State, provided that the State has carried out its responsibilities.

20
21 Mr President, Members of the Chamber, the liability of the sponsoring State is also
22 without prejudice to the rules of international law. The relevant rules of international
23 law are those related to the responsibility of States for internationally wrongful acts
24 and the liability of States for acts not prohibited by international law. Pursuant to
25 article 304 of the Convention, the provisions of the Convention and the Agreement
26 regarding responsibility and liability are without prejudice to the application of
27 existing rules and the development of further rules regarding responsibility and
28 liability. Since the adoption of the Convention and the Agreement, international law
29 regarding responsibility and liability has been codified and further developed. These
30 developments, however, do not affect the above analysis of the relevant provisions
31 of the Convention and the Agreement.

32
33 Under the general rules of international law related to the responsibility of States for
34 internationally wrongful acts, conduct is only attributable to a State under specific

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

8

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

20

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

26

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

33

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

4
5 My Government was recently confronted with a comparable challenge after a
6 company operating communications satellites in outer space had established itself in
7 the Netherlands. Being a State Party to the Treaty on Principles Governing Activities
8 of States in the Exploration and Use of Outer Space including the Moon and Other
9 Celestial Bodies – that is a lengthy title —, my Government was required to ensure
10 that national activities in outer space are carried out in conformity with its provisions.
11 Various approaches were considered, but ultimately it was concluded that a public
12 domestic regulatory framework was necessary. In the Explanatory Note to the Space
13 Activities Act it was set out that establishing such legislation was also desirable for
14 various policy considerations:

15
16 By clarifying the way in which the Netherlands fulfils its international
17 obligations, we shall help to promote a climate in which private-sector
18 bodies can conduct ... space activities in a stable environment ... The
19 proposed statutory regulations must guarantee the legal security of all of
20 the parties involved. Not only will this serve to attract experienced and
21 recognized space-travel companies that stand to benefit from a
22 transparent and equitable regulatory environment, it also makes
23 somewhat unreliable companies aware of a legal system with a stringent
24 implementation and enforcement mechanism.

25
26 A public regulatory framework for the sponsorship of activities in the Area provides
27 legal certainty for all stakeholders. It protects companies that would like to enter the
28 market by setting non-discriminatory standards; it protects persons who suffer
29 damage by setting public safety, health and environmental standards; and it protects
30 governments against lobbies from companies for preferential treatment.
31 Furthermore, a public regulatory framework enhances the legitimacy of sponsorship
32 by providing a statutory basis adopted in accordance with applicable constitutional
33 procedures.

34
35 We have taken note of the suggestion in one of the written statements that the
36 development of national legislation may be cumbersome to developing States. It
37 would appear to us that the development of elaborate deep seabed mining contracts,

1 such as the contract underlying the relationship between Nauru and Nauru Oceans
2 Resources Inc. in itself requires extensive legal work and implies a comparable
3 assessment of potential risks, as the development of a public domestic regulatory
4 framework would.

5
6 It may be that the International Seabed Authority could have a role in supporting the
7 development of such required and necessary national legislation, given its
8 knowledge and expertise of the international regulatory framework. I would venture
9 to suggest through you, Mr President, that the International Seabed Authority is
10 excellently qualified to assist States in building and understanding their technical
11 capacity to regulate deep seabed mining, for instance by collecting and
12 disseminating national legislation relevant to deep seabed mining and the
13 relationship between the contractor and the sponsoring State. For now, I would
14 congratulate Germany on distributing its legislation, as this may inform our
15 discussions on ways of shaping the relationship between the contractor and the
16 sponsoring State. I would call on other States to distribute their legislation widely to
17 the Seabed Authority. This, we believe, will be a source of knowledge from which
18 sponsoring and potential sponsoring States, whether developing States or developed
19 States, may benefit when developing the required public domestic regulatory
20 framework. I would add that I am heartened to have heard Ms Le Gurun's statement
21 yesterday indicating that there is already quite a lot of knowledge available within the
22 Seabed Authority on the specific issue of domestic regulatory frameworks.

23
24 As adequate as the substantive provisions of a contractual arrangement may be, it
25 cannot provide for supervisory or enforcement powers that are equivalent to those of
26 a State within its own jurisdiction. If the sponsored entity does not comply with the
27 provisions of the contract, the sponsoring State may ultimately be permitted to
28 terminate the sponsorship; however, the sponsoring State will not be able to use
29 force to secure the exercise of its supervisory and enforcement powers, such as
30 access to sites, inspection of documents, inspection of equipment, taking of
31 samples, and the implementation of coercive measures, should that be necessary. If
32 such measures are provided for under a contract, the sponsoring State would need a
33 court order, and even such a court order may not permit calling in the use of force to
34 implement it. Under the sponsorship agreement submitted by Nauru, it would even

1 require a court order of a third State, and hence the submission of the sponsoring
2 State, namely Nauru, to the jurisdiction of that third State, namely Canada, in fact
3 British Columbia. This is a jurisdictional arrangement that the Netherlands would
4 consider ill advised and quite unusual from the point of view of general international
5 law.

6
7 It must have been policy considerations, such as these, that underlie the choice of
8 words by the drafters of the Convention for the relevant provisions of the Convention.
9 Article 4, paragraph 4 of Annex III, requires sponsoring States to adopt “laws and
10 regulations” and to take “administrative measures”. This wording does not allow for
11 the implementation by means of a contractual arrangement; quite the contrary, it
12 requires the establishment of a public domestic regulatory framework. On this point,
13 the ordinary meaning of the text of the Convention is clear and there is no need to
14 resort to another method of interpretation.

15
16 Mr President, Members of the Seabed Disputes Chamber, the laws, regulations and
17 administrative measures of a sponsoring State must be “reasonably appropriate” for
18 securing compliance by entities sponsored by it “within the framework of its legal
19 system”. Accordingly, the text of the Convention allows for flexibility and the form and
20 content of the laws, regulations and administrative measures of sponsoring States
21 do not therefore have to be identical. Yet, compliance with a due diligence obligation
22 requires the adoption, implementation, supervision and enforcement of measures.
23 The flexibility relates to the substance of the measures and the methods of
24 implementation, supervision and enforcement of such measures. This would imply
25 factoring in aspects such as the type of mining activity, whether it is prospecting,
26 exploration or exploitation, the nature of the resource and the area, the terrain, that is
27 being mined. Accordingly, a sponsoring State has, for example, discretion to decide
28 whether an authorization is required for activities in the Area by an entity sponsored
29 by it, and whether such authorization attaches to an activity or an entity. This margin
30 of discretion notwithstanding, the laws, regulations and administrative measures of a
31 sponsoring State, as well as their implementation, supervision and enforcement, are
32 not exempt from judicial review to assess whether they may be expected to secure
33 compliance by entities sponsored by it. Irrespective whether damage has occurred,
34 an assessment may reveal that the laws, regulations and administrative measures

1 fall short of the required degree for due diligence and entail a State's responsibility
2 for an internationally wrongful act.

3

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

19

20 On this point too, it appears that the drafters of the Convention have chosen their
21 words carefully. They recognized the special needs and interests of developing
22 countries in the context of their effective participation in activities in the Area in article
23 148 of the Convention, and the exercise of powers and functions by the Authority in
24 article 152 of the Convention. However, as has been pointed out in several written
25 statements, the text of the Convention limits the promotion of such participation and
26 the special consideration to be given by the Authority to the extent specifically
27 provided for in Part XI of the convention relating to the Area. Neither the Convention
28 nor the Agreement contains specific provisions on the special needs and interests of
29 developing countries with respect to their sponsorship of activities in the Area.
30 Accepting divergent standards of diligence may produce perverse effects,
31 undermining the general aim of ensuring that public-safety, health and environmental
32 standards are met.

33

1 Mr President, Members of the Seabed Disputes Chamber, I come to the conclusion
2 of my presentation. As I said at the beginning of my statement, answering the
3 questions before this Chamber is about nothing less than the protection of life in the
4 deep sea by setting a standard for the appropriate supervision of human activities.
5 Such protection must be based on a correct and consistent interpretation of the legal
6 regime for the deep seabed so as to contribute, in accordance with the Convention's
7 preamble, to "the peaceful uses of the seas and oceans, the equitable and efficient
8 utilization of their resources, the consideration of their living resources, and the
9 study, protection and preservation of the marine environment". We believe that the
10 submissions made in our written statement contribute to this objective, and we
11 reaffirm them.

12

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

14

15 **THE PRESIDENT:** Thank you very much, Ms Lijnzaad, for your statement. I now
16 give the floor to Ambassador Cerutti, representative of Argentina.

17

18 **MRS CERUTTI:** Mr. President, distinguished Members of the [Chamber],

19

20 I am extremely privileged to appear before you representing the Government of
21 Argentina.

22

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

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

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

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

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

¹ Adopted on 10 December 1982 (hereafter 'UNCLOS' or 'the Convention').
² Written statement of the International Seabed Authority, 19 August 2010, paras. 2.1 to 2.8.
³ UNGA Resolution 2749 (XXV), 19 December 1970: "Declaration of Principles Governing the Sea-Bed and the Ocean Floor, and the Subsoil Thereof, beyond the Limits of National Jurisdiction".
⁴ Art. 140, UNCLOS; Paragraph 7, UNGA Resolution 2749 (XXV).

1 Authority acts. The minerals recovered from the Area may only be alienated in
2 accordance with the relevant rules of the Convention, the 1994 Agreement⁵ and the
3 regulations and procedures adopted by the Authority.⁶

4
5 To secure the common heritage of mankind, the Convention provides for an
6 international mechanism where activities in the Area are organized and controlled
7 exclusively by the International Seabed Authority⁷, together with a system of “public
8 order” based upon State responsibility.⁸ According to article 139, paragraph 1,
9 States Parties shall have the responsibility to ensure that activities in the Area by
10 entities which possess their nationality or are effectively controlled by them or their
11 nationals are carried out in conformity with the Convention.

12
13 The international obligations of sponsoring States stem from the Convention (*pacta*
14 *sunt servanda*) and are to be performed in good faith. As the International Court of
15 Justice recalled in the cases concerning *Nuclear Tests (Australia v. France)* and
16 *Nuclear Tests (New Zealand v. France)*, “[o]ne of the basic principles governing the
17 creation and performance of legal obligations, whatever their source, is the principle
18 of good faith. Trust and confidence are inherent in international cooperation”.⁹ The
19 Convention expressly stipulates that States Parties shall exercise the rights,
20 jurisdiction and freedoms recognized in the Convention in a manner which will not
21 constitute an abuse of rights, and fulfil in good faith the obligations assumed by them
22 in order to ensure to all members of the Authority the rights and benefits resulting
23 from membership.¹⁰

24
25 Nowhere does the Convention differentiate between the “obligations” of developing
26 States and of other States regarding sponsorship. Argentina, being itself a
27 developing country, does not decline its responsibility in the event of failing to ensure
28 compliance regarding activities in the Area, having accepted in good faith its

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

⁶ Arts. 137 and 133, UNCLOS.

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

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

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

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

1 obligations under the Convention. Because the obligation of the sponsoring State is
2 one of “due diligence”, the burden appears to be equally onerous on developed and
3 developing States.

4

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

7

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

10

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

18

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

¹¹ Art. 153, para. 4, UNCLOS.

¹² Art. 139, para. 1, UNCLOS.

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

¹⁴ Annex III, Art. 4, para. 1, UNCLOS; Regulation 29 and Annex 4, Section 20, Regulations for Prospecting and Exploration of Polymetallic Nodules, adopted by the Assembly of the International Seabed Authority on 13 July 2000 (ISBA/6/A/18); Regulation 31 and Annex 4, Section 20, Regulations for Prospecting and Exploration of Polymetallic Sulphides, adopted by the ISA Assembly on 7 May 2010 (ISBA/6/C/L5).

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

1
2 When an emergency order is issued by the Council of the Authority to prevent
3 serious harm to the marine environment, if the contractor does not provide
4 a guarantee of its financial and technical capacity to comply promptly with the order
5 or to assure that the Council can take itself the practical measures necessary to that
6 end, the sponsoring State or States must, in response to a request by the Secretary
7 General and according to articles 139 and 235 of the Convention, take the necessary
8 measures to ensure that the contractor provides such a guarantee or takes
9 measures to ensure that assistance is provided to the Authority in the discharge of
10 its responsibilities.¹⁶

11
12 These, among other stipulations of the Convention, convey a sense of the
13 importance attributed to State sponsorship and the responsibilities that derive from it.

14
15 To discharge its duties and avoid responsibility properly, the State Party must take
16 “all necessary and appropriate measures to secure effective compliance” with the
17 terms of its contract and the relevant obligations under the Convention.¹⁷ These
18 measures comprise both the exercise of the State’s “regulatory power”, by securing
19 that appropriate laws and regulations are in place, and of its “enforcement power”, by
20 taking preventive and corrective measures and securing compensation.

21
22 In either case, the applicable standard is one of “due diligence”¹⁸, which may be
23 defined as “[t]he diligence reasonably expected from, and ordinarily exercised by,
24 a person who seeks to satisfy a legal requirement or to discharge an obligation”.¹⁹
25 Indeed, it may be submitted that in view of the status and the importance of the Area
26 as *res communis humanitatis*, “great”, “high” or “special” diligence must be exercised
27 by the State to be legally protected.

28
29 Argentina concurs with other States Parties that the legal responsibilities and
30 obligations of States to regulate and to enforce extend to ensuring that sponsored

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

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

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

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

1 entities provide effective protection for the marine environment from harmful effects
2 which may arise from deep sea mining.²⁰

3

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

7

8 an obligation to act with due diligence in respect of all activities which
9 take place under the jurisdiction and control of each party. It is an
10 obligation which entails not only the adoption of appropriate rules and
11 measures, but also a certain level of vigilance in their enforcement and
12 the exercise of administrative control applicable to public and private
13 operators, such as the monitoring of activities undertaken by such
14 operators ...²¹

15

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

23

24 The second question submitted to the Seabed Disputes Chamber by the Council of
25 the International Seabed Authority refers to the extent of liability of States Parties to
26 the Convention for failure to comply with the provisions of the Convention and the
27 1994 Agreement by a sponsored entity.

28

29 Under article 139, paragraph 2, of the Convention, damage caused by the failure of
30 a State Party to carry out its responsibilities under Part XI of the Convention and the
31 1994 Agreement entails liability. Article 139 is to be read together with article 304
32 which provides that “[t]he provisions of [the] Convention regarding responsibility and
33 liability for damages are without prejudice to the application of existing rules and the

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

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

²² Regulation 31.2 on Polymetallic Nodules; Regulation 33.2 on Polymetallic Sulphides.

1 development of further rules regarding responsibility and liability under international
2 law”.²³

3

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

8

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

18

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

27

28 The ability of the sponsoring State to exert effective control over the sponsored entity
29 is paramount if a lacuna in responsibility and liability for damage caused by
30 operations in the Area is to be avoided. To this end, the existence of an “effective

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

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

²⁵ Art. 263, paras. 2 and 3, UNCLOS.

1 link” between the sponsoring State and the sponsored entity must be taken into
2 account by the Authority’s organs, the Legal and Technical Commission and the
3 Council for this matter when assessing the qualifications of applicants. The principle
4 of the substantial connection affirmed by the International Court of Justice in the
5 *Nottebohm* case²⁶ applies equally here.

6
7 As to the extent of the liability, it shall be determined, in Argentina’s view, by
8 reference to the customary law of State responsibility. The basic rule remains
9 *restitutio in integrum* and, if this is not possible, restitution in kind, as asserted by the
10 Permanent Court of International Justice in the Judgment on the *Factory at Chorzów*
11 (Merits)²⁷ and reaffirmed by the International Court of Justice in a number of cases
12 thereafter²⁸, as well as in the International Law Commission Articles on
13 Responsibility of States for Internationally Wrongful Acts.²⁹

14
15 Given the legal status of the Area as common heritage of mankind, on whose behalf
16 the International Seabed Authority acts, it appears that financial compensation
17 including interest, when due, shall be payable to the Authority³⁰, without prejudice to
18 the right to compensation of any injured State or entity.

19
20 The last question concerns the measures that a sponsoring State must take in order
21 to fulfil its responsibilities under the Convention, in particular article 139 and
22 Annex III, and the 1994 Agreement.

23
24 The specific regulatory and enforcement measures that the sponsoring State must
25 take to fulfil their responsibility under the Convention are in principle a matter for the

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

²⁷ *1928, P.C.I.J., Series A, N° 17*, p. 47.

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

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

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

1 State concerned. Such measures must secure compliance with all their obligations
2 under the Convention.³¹ The means should be compatible to the end.

3

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

11

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

14

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

21

22 It is affirmed that the obligation to request and to secure that an environmental
23 impact assessment is conducted is justified at the international level “as an
24 expression of the precautionary principle given the lack of full scientific certainty and
25 knowledge as to the scale and magnitude of impacts on the ecosystem of the deep
26 ocean”.³⁴

27

28 I would like to end this presentation, Mr President, by respectfully recalling that the
29 advisory opinion requested from the Seabed Disputes Chamber by the Council of the
30 International Seabed Authority, although triggered by a proposal of the Government
31 of Nauru, is and shall be considered unrelated to the applications for approval of
32 a plan of work for exploration in reserved areas made by Nauru Ocean Resources
33 Inc. (sponsored by the Republic of Nauru) and Tonga Offshore Mining Ltd.

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

³² Art. 142, UNCLOS.

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

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

1 (sponsored by the Kingdom of Tonga) in 2008, whose consideration by the Legal
2 and Technical Commission of the Authority was postponed at the request of the very
3 applicants “due to the current global economic circumstances and other concerns”.³⁵
4

5 Mr. President, Members of the [Chamber], this concludes Argentina’s presentation.
6 I thank you for your attention.
7

8 **THE PRESIDENT:** Thank you very much, Ambassador Cerutti.
9

10 This an appropriate time for the Chamber to withdraw for a break of 30 minutes. The
11 meeting is now suspended.
12

13 (*The sitting adjourned at 11.30 a.m.*)
14

15 **THE PRESIDENT:** May I advise you that the present sitting might be a little longer
16 than anticipated because, with the consent of the interpreters, we will hear the three
17 speakers even if we have to go beyond one o’clock, but let us hope not much
18 beyond, so that we can avoid having a short, separate sitting in the afternoon.
19 On behalf of the interpreters, may I also ask the speakers not to speak too quickly?
20 This creates some pressure which is not welcome.
21

22 May I add another remark? Yesterday I said that this proceeding contained two
23 *première*. In fact, I should have said “three” but I did not dare; now I dare. It is also
24 the first time that our hearings have been transmitted direct through the web all over
25 the world. Yesterday I did not dare mention that because, being a *première*, we did
26 not know whether it would work, but now I have news from many parts of the world
27 that it does indeed work. Therefore, when you speak you should think that the public
28 is not all here.
29

30 I now have the pleasure of giving the floor to the distinguished representative of
31 Chile. Mr Plaza, you have the floor.
32

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

1 **MR PLAZA:** Mr President and Members of the Seabed Disputes Chamber, it is my
2 great honour to appear before you today on behalf of the Government of Chile.
3 The Government of Chile has welcomed the invitation by the President of the
4 Seabed Disputes Chamber of the International Tribunal for the Law of the Sea to the
5 States Parties to the United Nations Convention on the Law of the Sea to present
6 views on questions posed by the Council of the International Seabed Authority on
7 6 May 2010, within the context of article 191 of the Convention.

8

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

13

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

17

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

24

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

31

32 There is no controversy in the assertion that States Parties are obliged to cooperate
33 with the Authority in the performance of its function of controlling activities in the
34 Area. The Authority is to secure compliance by States Parties and other entities with

1 Part XI of the Convention, its relevant Annexes, the rules, regulations and
2 procedures of the Authority and the terms of approved plans of work.

3

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

9

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

19

20 Provisions of the Convention constitute a comprehensive legal system to be
21 interpreted in conjunction with the general principles of international responsibility of
22 the States. Together, they constitute the fundamental framework to address issues
23 such as the status of the sponsorship by States Parties of activities in the Area, the
24 extent of liability of a State Party for any failure to comply with the provisions of the
25 Convention by an entity whom it has sponsored under article 153, paragraph 2(b), of
26 the Convention, and the scope and meaning of the necessary and appropriate
27 measures that a sponsoring State must take in order to fulfil its responsibility. This
28 assertion is particularly valid when activities are not conducted by the States
29 themselves but by entities sponsored by States Parties.

30

31 The questions before us are:

32

33 1. What are the legal responsibilities and obligations of States Parties to the
34 Convention with respect to the sponsorship of activities in the Area in accordance

1 with the Convention, in particular Part XI, and the 1994 Agreement relating to the
2 implementation of Part XI of the United Nations Convention on the Law of the Sea of
3 10 December 1982?

4
5 2. What is the extent of liability of a State Party for any failure to comply with the
6 provisions of the Convention, in particular Part XI, and the 1994 Agreement, by an
7 entity whom it has sponsored under article 153, paragraph 2 (b), of the Convention?

8
9 3. What are the necessary and appropriate measures that a sponsoring State
10 must take in order to fulfil its responsibility under the Convention, in particular
11 article 139 and Annex III, and the 1994 Agreement?

12
13 These questions should be answered in the light of the general responsibilities of the
14 States Parties with respect to activities in the Area.

15
16 We will refer first to the general obligations of States Parties to the Convention and
17 then to the particularities that may be applicable to Part XI and the seabed regime. In
18 this respect, it is reasonable to sustain that according to the 1969 Vienna Convention
19 on the Law of Treaties, the United Nations Convention for the Law of the Sea
20 provides the general systemic framework to deal with the obligations upon States
21 Parties in the seabed area that comprise, among other obligations, those accrued to
22 them as sponsoring States of contractors.

23
24 In this respect, we should also bear in mind article 304 on responsibility and liability
25 for damage, which provides: “The provisions of this Convention regarding
26 responsibility and liability for damage are without prejudice to the application of
27 existing rules and the development of further rules regarding responsibility and
28 liability under international law”.

29
30 Provisions envisaged in article 235 of the Convention on Responsibility and Liability
31 within the context of protection and preservation of the marine environment are also
32 relevant to answer the questions submitted to the Chamber. It is clear that the
33 assertion that “States are responsible and liable for the fulfilment of their international
34 obligations concerning the protection and preservation of the marine environment”,

1 and their possible liability in accordance with international law, is a general principle
2 that applies to activities in the Area.

3
4 Consequences arising from this general principle will comprise the adoption of
5 measures so as to assure the existence of procedures and effective remedies for
6 damage caused by pollution of the marine environment by natural or juridical
7 persons under their jurisdiction. Hence, that is the relevance of dispute settlement
8 procedures to deal with these issues.

9
10 As a general norm applicable to activities in the Area or that may have an impact on
11 the Area, article 138 of the Convention sets out a common legal ground for all States
12 Parties as follows:

13
14 The general conduct of States in relation to the Area shall be in
15 accordance with the provisions of this Part, the principles embodied in the
16 Charter of the United Nations and other rules of international law in the
17 interests of maintaining peace and security and promoting international
18 cooperation and mutual understanding.

20 ***Answers to the Questions***

21
22 Question 1: In compliance with the general rules, article 139 provides for basic
23 obligations and standards of responsibility for States carrying out activities in the
24 seabed area, first and foremost, the responsibility to ensure compliance and, after
25 that, conditions and requirements for the liability for damage.

26
27 This is spelled out as follows: States Parties shall have the responsibility to ensure
28 that activities in the Area, whether carried out by States Parties or State enterprises
29 or natural or juridical persons which possess the nationality of States Parties or are
30 effectively controlled by them or their nationals, shall be carried out in conformity with
31 this Part. The same responsibility applies to international organizations for activities
32 in the Area carried out by such organizations. This is a general obligation for all
33 States Parties towards persons or entities subject to their jurisdiction due to the
34 nationality or according to the effective control rule.

35

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

8

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

14

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

21

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

23

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

30

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

36

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

7
8 Thence, the Convention adopts the pattern of other internationally negotiated
9 instruments in relation to damage - including damage to the environment - which
10 would not have occurred or continued if the sponsoring State had carried out its
11 obligations under the Convention with respect to its operator. This poses the
12 question of the status and scope of the applicability of the concept of residual liability
13 of the sponsoring State according to the Convention.

14
15 It is thus expected that the sponsoring State adopts laws and regulations as well as
16 administrative measures which are necessary and reasonably appropriate to secure
17 compliance by the sponsored contractors of the obligations set out in the
18 Convention. The assessment of what is necessary and reasonably appropriate for
19 securing compliance may have to take into account the specific circumstances of the
20 case, as there are no absolute obligations arising from these provisions.

21
22 Nevertheless, there must be a level of certitude of what is expected from a
23 sponsoring State in order to assess whether the agreed standards of due diligence
24 have been satisfied by the sponsoring State and by the operator. The Opinion of this
25 Honourable Chamber will provide guidance to render these notions more accurate.

26
27 According to what has been said, the Convention attributes an important role to the
28 internal legal system of each State Party desiring to participate in activities in the
29 Area and to sponsor an entity subject to its jurisdiction.

30
31 Question 2 on State liability for a failure to comply with the provisions of the
32 Convention and the 1994 Agreement by an entity it has sponsored raises two
33 important legal questions: the existence of the elements conducive to State liability

1 and the distinction between obligations accrued to a State from the obligations of the
2 contractors.

3

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

13

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

22

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

30

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

34

1 Environmental occurrences attributable to a breach of obligations by the contractor
2 and the role of the sponsoring State regarding prevention and the status of the
3 precautionary approach for such States pose more specific questions. For this
4 purpose, the provision contained in the Regulations on Prospecting and Exploration
5 adopted by the Seabed Authority aiming at the sponsoring State obligation to
6 cooperate with the contractor in the establishment and implementation of monitoring
7 programs regarding protection and preservation of the marine environment should
8 be read together with the duty for a sponsoring State to apply the precautionary
9 approach as reflected in the Rio Declaration (Principle 15) in order to ensure
10 effective protection for the marine environment from harmful effects.

11

12 Question 3: While these questions may have to be decided by tribunals in the future,
13 the third question posed to the Seabed [Disputes] Chamber encompasses elements
14 which are more related to the definition of the substantive obligations of the
15 sponsoring State in order to fulfil its responsibilities under the Convention and the
16 1994 Agreement.

17

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

23

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

28

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

32

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

3

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

5

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

13

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

18

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

23

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

28

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

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32 **THE PRESIDENT:** Thank you very much, Mr Plaza.

33

34 I now come to the representative of Fiji. Mr Tikoisuva, you now have the floor.

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

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

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

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

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

4
5 The three questions for this Honorable Chamber's consideration and determination
6 are clearly set out in the Council's decision ISBA/16/C/13 of 6 May 2010. We will
7 address them in turn in the course of this statement.

8
9 State Responsibilities and Obligations:

10

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

16

17 In our view, the United Nations Convention on the Law of the Sea of 10 December
18 1982 ("the Convention") provides a comprehensive framework regarding the
19 responsibilities and obligations of States Parties who sponsor individuals and
20 enterprises that undertake activities in the Area. While Part XI of the Convention,
21 together with the Agreement to implement Part XI ("the Agreement"), provides the
22 legal framework governing activities in the Area, it is submitted that this Part cannot
23 be read in isolation but has to be read and interpreted in conjunction with the other
24 parts of the Convention and the Agreement to fully address this question.

25

26 The provisions of the Vienna Convention on the Law of Treaties (VCLT) also make it
27 clear that the terms of a treaty, such as the Convention, have to be interpreted in
28 their context and in light of the treaty's object and purpose. The VCLT, under Article
29 31(3), clarifies that "any relevant rules of international law applicable in the relations
30 between the parties" also need to be taken into account.

31

32 Indeed, the authoritative commentary on the Convention by Nandan, Lodge and
33 Rosenne, *United Nations Convention on the Law of the Sea 1982: A Commentary*,
34 Volume VI, published by Martinus Nijhoff Publishers of New York

1 ("the Commentary"), observes at p.119 that "the provisions of the Convention
2 regarding responsibility and liability are without prejudice to the "application of
3 existing rules and the development of further rules' regarding responsibility and
4 liability under international law". That observation was made with reference to
5 article 139 of the Convention, which should be read together with article 304.

6

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

11

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

14

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

18

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

23

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

29

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

34

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

6
7 (f) Article 235, paragraph 3 - in respect of damage caused by pollution of the
8 marine environment, States are required to establish, where appropriate, an
9 adequate compulsory insurance or compensation fund.

10

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

18

19 Question two is with regard to the extent of a sponsoring State’s liability.

20

21 The second question before this Chamber is: “What is the extent of liability of a State
22 Party for any failure to comply with the provisions of the Convention, in particular
23 Part XI and the 1994 Agreement, by an entity that it has sponsored under Article
24 153, paragraph 2(b) of the Convention?”

25

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

31

32 In addition, Annex III, article 4, paragraph 4, makes it clear that the contractor is
33 *prima facie* liable for any damage that it causes. As noted in the *Commentary* (at
34 page 127), “this principle is restated in the Regulations on Prospecting and

1 Exploration for Polymetallic Nodules in the Area, which contain a provision [set out in
2 Annex 4, section 16] relating to responsibility and liability as part of the Standard
3 Clauses for Exploration Contracts".

4
5 The second limb of article 139, paragraph 2, also clarifies that:

6
7 A *State Party* shall not ...be liable for damage caused by any failure to
8 comply with this Part by a person whom it has sponsored under
9 Article 153, paragraph 2(b), if the State Party has taken all necessary and
10 appropriate measures to secure effective compliance under Article 153,
11 paragraph 4, and Annex III, article 4, paragraph 4.
12

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

26
27 adopt laws and regulations to prevent, reduce and control pollution of the
28 marine environment from activities in the Area undertaken by vessels,
29 installations, structures and other devices flying their flag or their registry
30 or operation under their authority, as the case may be.
31

32 In view of the clear language of the Convention, Fiji contends that so long as
33 a sponsoring State enacts domestic legislation that properly regulates activities in
34 the Area, seeks to protect the marine environment from pollution, establishes an
35 adequate and compulsory insurance or compensation scheme, and undertakes other
36 relevant administrative measures in respect of such activities in the Area, the
37 sponsoring State will not be liable for damage caused by any failure of a contractor
38 sponsored by it to comply with its obligations. In other words, there is no residual

1 responsibility or liability on the part of the sponsoring State should the contractor fail
2 to observe the standards established in the domestic legislation enacted in
3 accordance with Part XI of the Convention and general international law.

4
5 Question three is with regard to the necessary and appropriate measures a State
6 must take.

7
8 The final question referred to this honourable Chamber for an opinion asks: "What
9 are the necessary and appropriate measures that a sponsoring State must take in
10 order to fulfill its responsibility under the Convention, in particular Article 139 of the
11 Convention and Annex III, and the 1994 Agreement?"

12
13 From a developing State point of view, Fiji submits that the requirements and
14 standards established under Part XI of the Convention apply equally to all States
15 without regard to economic status or financial and other resources capability. In the
16 absence of clear language or express provisions to the contrary, it can be inferred
17 that the adoption of legislative frameworks and the implementation of administrative
18 measures (Annex III, article 4, paragraph 4), as well as their enforcement by States,
19 must be consistent with the standards established under the Convention.

20
21 Fiji holds the view that appropriate legislation which a State might adopt in respect of
22 activities in the Area must be sufficient, effective and in accordance with international
23 standards. That will ensure there is some element of uniformity across jurisdictions.
24 To that end, Fiji submits that the Authority should consider assembling a model
25 legislation that will assist State Parties in maintaining international standards in their
26 domestic legislations. The Authority could ensure that such model legislation
27 includes insurance provisions that cover the sponsoring State as a beneficiary and
28 provides minimum insurance protection for each stage of the operation. For instance,
29 article 235, paragraph 3, mandates that:

30
31 With the objective of assuring prompt and adequate compensation in
32 respect of all damage caused by pollution of the marine environment,
33 States shall cooperate in the implementation of existing international law
34 and the further development of international law relating to responsibility
35 and liability for the assessment of and compensation for damage and the
36 settlement of related disputes, as well as, where appropriate,

1 development of criteria and procedures for payment of adequate
2 compensation, such as compulsory insurance or compensation funds.
3

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

7
8 all measures ... that are necessary to prevent, reduce and control
9 pollution of the marine environment from any source, using for this
10 purpose the best practicable means at their disposal and in accordance
11 with their capabilities, and they shall endeavour to harmonize their
12 policies in this connection.
13

14 Whilst it is accepted that this imports the element of due diligence in the discharge of
15 a State's responsibilities under the Convention, what is actually meant by due
16 diligence is unclear and varies in practice under different treaties. Malcolm Shaw
17 QC, in his book on *International Law*, published by Cambridge University Press in
18 2003, observed at page 764 that:

19
20 The test of due diligence undoubtedly imports an element of flexibility into
21 the equation and must be tested in the light of the circumstances of the
22 case in question. States will be required, for example, to take all
23 necessary steps to prevent substantial pollution and to demonstrate the
24 kind of behavior expected of good government, while such behavior will
25 probably require the establishment of systems of consultation and
26 notification.
27

28 As a first step and in the absence of a model legislation, Fiji considers that the
29 Convention already provides key requirements and standards that set the minimum
30 threshold for the discharge of a sponsoring State's responsibility. Although certain
31 aspects of the standards contained within some of the provisions, such as
32 articles 139, 153 and Annex III, article 4, paragraph 4, are yet to be clarified, as
33 already pointed out in this statement, enough indications are nevertheless presented
34 by those and other provisions of the Convention that will guide sponsoring States in
35 the discharge of their responsibilities under it.
36

37 This view accords with the basic duty of States that they are not to act in a manner
38 that will adversely affect the rights of other States.
39

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

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- (i) Part XI of the Convention provides a clear benchmark and framework setting out the responsibilities and obligations of a State that sponsors a contractor conducting activities in the Area.
- (ii) The extent of a sponsoring State's liability is confined to a failure on its part to secure compliance by a contractor with the terms and conditions of its contract. The contractor bears the primary responsibility for any damage caused.
- (iii) The types of measures, whether legislative or administrative, that a sponsoring State adopts in respect of activities in the Area must be sufficient, effective and in accordance with international standards.

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

THE PRESIDENT: Thank you very much, Mr Tikoisuva, representative of Fiji.

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

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

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

1 on a question of utmost importance for the exploration and exploitation of the deep
2 seabed and will enrich international jurisprudence.

3

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

6

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

16

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

24

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

31

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

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

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

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

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

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

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

1 contain a variety of obligations to that effect.

2

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

8

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

11

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

16

17 That includes the breach of the general obligation of States to ensure that activities
18 within their jurisdiction and control do not harm the environment or areas beyond
19 national jurisdiction. The existence of the principle of prevention as a customary rule
20 was confirmed by the International Court of Justice in the *Legality or Use of Nuclear*
21 *Weapons* case, and also most recently in the *Pulp Mills on the Uruguay River* case.
22 In the context of the first sentence of article 139, paragraph 2, of the Convention,
23 damage caused by the failure of a State Party to carry out its responsibilities under
24 Part XI and the 1994 Agreement entails its liability. Such failure constitutes a breach
25 of the obligations of the State Party under the Convention and thus engages the
26 liability of the State for internationally wrongful acts.

27

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

34

1 However, according to the second sentence of article 139, paragraph 2, the State
2 will, *prima facie*, be absolved from being liable if it has taken all necessary and
3 appropriate measures to secure effective compliance with the provisions of the
4 Convention and related Annexes, as well as the rules, regulations and procedures of
5 the Authority, including the approved plans of work, as reflected in article 153,
6 paragraph 4. All “necessary and appropriate” measures are further elaborated in
7 Annex III, article 4, paragraph 4. They refer to the adoption of legislative and
8 administrative measures within the framework of the legal system of the sponsoring
9 State.

10

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

19

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

27

28 However, channelling primary liability to the sponsored entity does not absolve
29 entirely in every case the sponsoring State from being held subsidiarily liable. For
30 instance, that situation might arise if the sponsored entity lacks sufficient financial
31 resources to fully cover the amount of the damage or is no longer available. This
32 subsidiary liability might be a reflection that the State has failed to take all necessary
33 measures to secure compliance for not providing the appropriate recourse within its
34 legal system to ensure prompt and adequate compensation, or that it has not

1 introduced the obligation of the operator to maintain an adequate financial security
2 as envisaged in article 235, paragraph 2, of the Convention.

3

4 As in many other liability regimes, the Convention also attempts to emphasize the
5 reparative function of liability. By attaching primary liability to the sponsored entity,
6 the obligation to repair is shifted to the entity which caused the damage. This is in
7 line not only with the “polluter-pays” principle but is also a matter of equity and
8 fairness to allocate the burden to those who benefit from the activities in the
9 international seabed area; otherwise, they would have been unjustly enriched.

10 However, in addition to the sponsored entity, as I already explained, the sponsoring
11 State may also be liable if certain conditions are met, including when the sponsored
12 entity has insufficient financial resources to fully repair. To argue otherwise would be
13 tantamount to accepting irremediably that a key provision in the system of the
14 exploration and exploitation of the resources of the Area contains a gap.

15

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

18

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

30

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

34

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

11

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

22

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

27

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

34

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

6
7 In that connection, such legislative and administrative measures require adequate
8 and rigorous monitoring, supervision and enforcement. The International Court of
9 Justice recently stated in the *Pulp Mills on the River Uruguay* case:

10
11 [the obligation to prevent pollution] entails not only the adoption of
12 appropriate rules and measures, but also a certain level of vigilance in
13 their enforcement and the exercise of administrative control applicable to
14 public and private operators, such as the monitoring activities undertaken
15 by such operators ...
16

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

21
22 Mr President, I now turn to deal with three aspects which, in our view, the sponsoring
23 State shall include in the legislative and administrative measures within its legal
24 system to conform to it to a high degree of due diligence. By no means will it be an
25 exhaustive list, since many of the relevant issues were outlined in the context of our
26 written observations concerning Question 1.

27
28 First, the obligation to carry out environmental impact assessments. In the recent
29 judgment concerning the *Pulp Mills on the River Uruguay* case, the
30 International Court of Justice recognized that an environmental impact assessment
31 “may be now considered a requirement under general international law where there
32 is a risk that a proposed industrial activity may have significant adverse impact in a
33 transboundary context.” It also added that “an environmental impact assessment
34 must be conducted prior to the implementation of a project.”

35
36 Although article 206 of the Convention does not, strictly speaking, contain an

1 express reference to an obligation to undertake an environmental impact
2 assessment, it does, however, prescribe that States shall assess the potential effects
3 on the marine environment of certain activities under their jurisdiction and control.
4 Seabed mining seems to be an activity within the meaning of article 206. More
5 specific references to this obligation are found in section 1, paragraph 7, of the x of
6 the 1994 Agreement, which provides that any application for approval of a plan of
7 work shall be accompanied by an assessment of the potential environmental impacts
8 of the proposed activities. This provision is given effect in Regulation 18(c) and
9 Annex 4, section 5.5, of the Regulations on Polymetallic Nodules, as well as in
10 Regulation 20, paragraph 1(c), and Annex 4, Section 5.2(a), of the Regulations on
11 Polymetallic Sulphides.

12

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

19

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

26

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

29

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

33

34 Third, the obligation to monitor implementation and enforcement of laws, regulations
35 and administrative measures, within the framework of the sponsoring State legal
36 system. In the already mentioned *Pulp Mills on the River Uruguay* case, the

1 International Court of Justice held that “[...] once operations have started and, where
2 necessary, through the life of the project, continuous monitoring of its effects on the
3 environment shall be undertaken.”

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

12
13 The same applies to enforcement measures. These may include the termination of
14 the sponsorship itself, as well as civil and criminal sanctions for non-compliance on
15 the part of the sponsored entity. In addition to those measures, we are of the view
16 that setting up a strict liability regime, within the legal system of the sponsored State,
17 for damage caused by the sponsored entity in tandem with an appropriate scheme to
18 ensure prompt and adequate compensation, is consistent with the need to discharge
19 a high threshold of due diligence so as to fulfil the responsibility envisaged in
20 article 139 of the Convention.

21
22 I now turn to the final point of my intervention. I will now address the issue as to
23 whether the establishment of a strict liability regime, including the need to ensure
24 prompt and adequate compensation could be construed as part of the “necessary
25 and appropriate measures” taken within the legal system of the sponsoring State.

26
27 Mr. President, a strict liability regime is justified for the following reasons:

28
29 (i) Such a regime should fulfil the reparative and preventive functions of liability
30 ensuring adequate compensation and inducing the operator to act with extreme
31 caution and care in order to avoid liability.

32
33 (ii) In light of the scientific uncertainties of the impacts to the marine eco-systems,
34 including to the benthic biodiversity, from activities in the Area, it calls for the

1 application of the Principle 15 of the Rio Declaration. This Principle is in turn
2 embodied in various provisions of both sets of Regulations on Polymetallic Nodules
3 and on Sulphides.

4
5 (iii) Article 304 of the Convention is without prejudice the application of existing
6 rules and the development of further rules regarding responsibility and liability under
7 international law. Article 235, paragraph 3, calls for similar developments “with the
8 objective of assuring prompt and adequate compensation in respect of all damage
9 caused by pollution of the environment.” Channelling strict liability to the operator
10 has been done at the national and international level, wherever the activities “carry
11 with them certain inherent risks of causing significant harm.” This is also consistent
12 with Principle 13 of the Rio Declaration of 1992.

13
14 (iv) Having mentioned that, it seems appropriate to express that, without prejudice
15 to Annex III, article 22, the Convention itself does not prohibit developing further
16 rules on liability. Moreover, this does not seem to be precluded by the somehow
17 ambiguous formulation of Regulation 32 of the Regulations on Sulphides.

18
19 (v) Even if the latter was not the case, it seems that the application of a strict
20 liability regime targeted to contractors sponsored by a State Party in order to ensure
21 the protection and preservation of the marine environment of the Area, is possible.
22 The Convention provides for the application of more stringent environmental rules or
23 regulations in conformity with Annex III, article 21, paragraph 3. Indeed, such
24 approach shall not be deemed inconsistent with Part XI.

25
26 (vi) Finally, article 235, paragraph 2, obliges States to ensure that recourse is
27 available in accordance with their legal systems for prompt and adequate
28 compensation or other relief in respect of damage caused by pollution of the marine
29 environment by persons under their jurisdiction.

30
31 Mr President, it may be of assistance to sponsoring States, when designing an
32 appropriate strict liability regime, that they take due account of the International Law
33 Commission (ILC) Principles on the allocation of loss in the case of transboundary
34 harm arising out of hazardous activities developed under the rubric of the topic
35 “International Liability for Injurious Consequences arising of Acts not Prohibited by

1 International Law.” In particular, Principle 4 provides that, in imposing strict liability
2 to ensure prompt and adequate compensation, States should consider the following
3 three measures:

4
5 (a) The requirement on the operator to establish and maintain financial security,
6 such as insurance, bonds or other financial guarantees.

7
8 (b) In case that proves to be insufficient to provide adequate compensation,
9 industry-wide funds at the national level may also be considered. As the International
10 Seabed Authority moves closer to the exploitation phase of the resources of the
11 Area, it may be appropriate to think also in the future of the possible establishment of
12 a compensation fund at the international level within the ambit of the Authority,
13 inspired, perhaps, by the existing International Oil Pollution Compensation Fund.

14
15 (c) If those measures still remain insufficient, States should also ensure that
16 additional financial resources are made available.

17
18 Now, Mr President and Members of the Chamber, if you allow me, I will present to
19 you our concluding submissions:

20
21 The Area and its resources are the common heritage of mankind. However, there
22 are scientific uncertainties concerning the impacts of seabed mining of the
23 ecosystems and biodiversity of the deep sea. In the light of that, we respectfully
24 request that the questions addressed to the Seabed Disputes Chamber of the
25 Tribunal can be answered as follows.

26
27 On Question 1, a broad approach should be considered in identifying the
28 responsibilities and obligations of the sponsoring State in conformity with the
29 Convention and the 1994 Agreement. Those responsibilities and obligations include
30 prominently the need to prevent monopolization of activities in the Area, as well as
31 the obligations to protect and preserve the marine environment as envisaged in the
32 Convention, including its Part XII;

33
34 On Question 2, primary liability should be attached to the sponsored entity. However,
35 under certain circumstances, the sponsored State may also be liable in case the
36 compensation of the operator proves to be insufficient or unavailable. In this

1 connection, the Chamber may wish to consider that fact as a possible reflection of
2 the sponsoring State's failure to provide the necessary and appropriate legislative
3 and administrative measures to ensure adequate compensation. Consequently, the
4 State would not be exercising the necessary due diligence in order to secure
5 effective compliance under the Convention and the 1994 Agreement.

6
7 Finally, on Question 3, Mexico submits that the necessary laws, regulations and
8 administrative measures, adopted by the sponsoring State, shall conform to a high
9 degree of due diligence in order to fulfil its responsibility under the Convention. In
10 that context, we also ask the Chamber to find that the establishment of a strict
11 liability regime, including the need to ensure prompt and adequate compensation, is
12 to be construed as part of the "necessary and appropriate measures" within the legal
13 system of the sponsoring State in order to fulfil its responsibility under the
14 Convention.

15
16 Mr President, distinguished Members of the Chamber, this concludes Mexico's oral
17 arguments. I thank you for your attention.

18
19 **THE PRESIDENT:** Thank you very much, Ambassador Hernández. This brings us
20 to the end of today's proceedings. As indicated yesterday, the Chamber may see a
21 need to address questions to delegations. Such questions would be sent by the
22 Chamber to delegations indicating a time-limit for a response.

23
24 The Chamber will sit again tomorrow at ten o'clock in the morning. At that sitting the
25 Representatives of Nauru, the United Kingdom, the Russian Federation, the
26 Intergovernmental Oceanographic Commission of the United Nations Educational,
27 Scientific and Cultural Organization and the International Union for the Conservation
28 of Nature will address the Chamber to present their oral statements.

29
30 It is possible that tomorrow's sitting will extend into the afternoon. The Chamber's
31 sitting of today is now closed.

32

33 *(The sitting closed at 1.15 p.m.)*