

(I) Written Statement of Australia

INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

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

WRITTEN STATEMENT OF AUSTRALIA

19 AUGUST 2010

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CHAPTER I

REQUEST FOR AN ADVISORY OPINION

1. On 6 May 2010, the Council of the International Seabed Authority (the Council) decided, in accordance with Article 191 of the 1982 *United Nations Convention on the Law of the Sea* (the Convention), to request the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea (ITLOS) to render an advisory opinion on the following questions:

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

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

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

2. On 18 May 2010, the President of the Seabed Disputes Chamber invited the States Parties to the Convention and relevant intergovernmental organisations to present written statements on the questions submitted to the Seabed Disputes Chamber for an advisory opinion and fixed 9 August 2010 as the date by which written statements on the questions may be submitted to the Chamber.² This date was subsequently changed to 19 August 2010.³

3. This statement by Australia addresses the jurisdiction of the Chamber to give an advisory opinion in response to the request by the Council and the questions put by the Council in that request.

¹ Decision ISBA/16/C/13.

² Order 2010/3.

³ Order 2010/4.

CHAPTER 2

JURISDICTION

4. Article 191 of the Convention provides:

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

5. If a question falls within the jurisdiction of the Seabed Disputes Chamber, the Chamber is obliged to give an advisory opinion. This much follows from the use of the word "shall". This contrasts with the discretionary power conferred on the International Court of Justice (ICJ) under Article 65 of the Statute of the ICJ, which provides that "[t]he Court may give an advisory opinion".

6. In this matter, three elements must be satisfied in order to establish jurisdiction of the Chamber under Article 191 of the Convention:

- (a) a valid request from the Council;
- (b) on a legal question; and
- (c) the legal question must arise within the scope of "their" activities.

Elements (a) and (b) are undoubtedly established in this matter.

7. In relation to element (c), two questions arise. First, by reason of the use of the word "their", is it sufficient that the questions fall within the scope of the activities of either the Assembly or the Council notwithstanding that the request has come from the Council?⁴ The better reading of Article 191 is that the legal question asked by the Council must fall within the scope of its own activities.⁵

8. The second issue is whether the legal questions asked by the Council arise within the scope of the activities of the Council. Each of the three questions on which an advisory opinion is sought from the Seabed Disputes Chamber in their terms relate more to the obligations and responsibilities of States Parties to the Convention rather than to the Council itself. However, the question is whether those questions, although not dealing with the Council *per se*, fall within the "scope of the activities" of the Council.

9. The ICJ considered the meaning of the same phrase "legal questions arising within the scope of their activities" as used in Article 96, paragraph 2 of the Charter of the

⁴ This raises the issue as to whether the Council could ask a legal question that falls within the scope of the activities of the Assembly but not the Council.

⁵ Satya N Nandan, Michael W Lodge, Shabtai Rosenne (Eds), *United Nations Convention on the Law of the Sea, A Commentary* (Virginia Commentary), Vol VI, Martinus Nijhoff Publishers, The Hague, 2002 at p. 644.

United Nations in its advisory opinion *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*.⁶ The ICJ held:

The Court need hardly point out that international organisations are subjects of international law which do not, unlike States, possess a general competence. International organisations are governed by the “principle of speciality”, that is to say, they are invested by the States which create them with powers, the limits of which are a function of the common interests whose promotion those States entrust to them.

...

The powers conferred on international organisations are normally the subject of an express statement in their constituent instruments. Nevertheless, the necessities of international life may point to the need for organisations, in order to achieve their objectives, to possess subsidiary powers which are not expressly provided for in the basic instruments which govern their activities. It is generally accepted that international organisations can exercise such powers, known as “implied” powers. As far as the United Nations is concerned, the Court has expressed itself in the following terms in this respect:

“Under international law, the Organisation must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties”.⁷

10. Under Article 162(2)(j) of the Convention and Section 3, paragraph 11(a) of the 1994 Agreement,⁸ one function of the Council is to approve plans of work submitted by entities in accordance with Annex III, Article 6 of the Convention. Annex III, Article 6 requires that the applicant must have complied with the procedures established in Annex III, Article 4. Article 4 in turn refers to the requirement of sponsorship by a State Party and the responsibilities of that State Party, including matters relating to the liability of that State Party. This, in itself, provides a sufficient link between the responsibilities and liabilities of a State Party as raised in the questions put by the Council and the powers and functions of the Council.

11. The questions also fall within the more general powers of the Council under Articles 162(1) and 162(2)(a) of the Convention to establish specific policies on any question within the competence of the Authority and to “supervise and co-ordinate the implementation of the provisions of [Part XI] on all questions and matters within the competence of the Authority”.⁹ More generally, assuming that it is necessary to ensure there is no lacuna or gap in responsibility and liability under Part XI of the Convention, it is useful for the Council to know the extent of the liability and responsibility of one of the major players, being the sponsoring State.

⁶ ICJ Reports, 1996 at p. 66.

⁷ *Ibid* at pp. 78-79, para. 25

⁸ 1994 Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982 – see also, the Convention, Article 153(3).

⁹ The functions of the Legal and Technical Commission, one of the organs of the Council established under Article 163 of the Convention, are also relevant – see Convention, Article 165.

12. The principles in the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict (Advisory Opinion)* referred to in paragraph 9 of this Statement are also supportive of the jurisdiction exercised by the Seabed Disputes Chamber in response to the request of the Council.

13. Australia concludes that the request made by the Council falls within the jurisdiction of the Seabed Disputes Chamber under Article 191 of the Convention.

CHAPTER 3**APPLICABLE LAW**

14. The Convention, Annex VI, Article 38 sets out the law that the Chamber is to apply:

In addition to the provisions of Article 293, the Chamber shall apply:

- (a) the rules, regulations and procedures of the Authority adopted in accordance with this Convention; and
- (b) the terms of contracts concerning activities in the Area in matters relating to those contracts.

15. Article 293(1) of the Convention provides that:

A court or tribunal having jurisdiction under this section shall apply this Convention and other rules of international law not incompatible with this Convention.

The relevance of other rules of international law in the field of responsibility and liability for damage is reinforced by Article 304 of the Convention.

16. The “other rules of international law” referred to in Article 293(1) include also those concerning the interpretation of treaties contained in Articles 31 and 32 of the Vienna Convention on the Law of Treaties.¹⁰ Articles 31 and 32 reflect customary international law¹¹ and should be applied by the Chamber in its interpretation of the relevant provisions of the Convention.

¹⁰ U.N.T.S., Vol. 155, p. 331.

¹¹ *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia v Serbia)* ICJ Reports 2007, p. 60, para. 160; *Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory, Advisory Opinion*, ICJ Reports 2004, p. 174, para. 94; *Avena and Other Mexican Nationals (Mexico v USA)* ICJ Reports 2004, p. 48, para. 43; *Japan - Taxes on Alcoholic Beverages*, Report of the Appellate Body, WT/DS8/AB/R, 1996, p. 10.

CHAPTER 4

RELEVANT PROVISIONS OF THE CONVENTION

17. The provisions of the Convention of primary relevance to the questions put by the Council are as follows:

*Article 139**Responsibility to ensure compliance and liability for damage*

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

2. Without prejudice to the rules of international law and Annex III, article 22, damage caused by the failure of a State Party or international organization to carry out its responsibilities under this Part shall entail liability; States Parties or international organizations acting together shall bear joint and several liability. A State Party shall not however be liable for damage caused by any failure to comply with this Part by a person whom it has sponsored under article 153, paragraph 2(b), if the State Party has taken all necessary and appropriate measures to secure effective compliance under article 153, paragraph 4, and Annex III, article 4, paragraph 4.

3. States Parties that are members of international organizations shall take appropriate measures to ensure the implementation of this article with respect to such organizations.

*Article 153**System of exploration and exploitation*

1. Activities in the Area shall be organized, carried out and controlled by the Authority on behalf of mankind as a whole in accordance with this article as well as other relevant provisions of this Part and the relevant Annexes, and the rules, regulations and procedures of the Authority.

2. Activities in the Area shall be carried out as prescribed in paragraph 3:

(a) by the Enterprise, and

(b) in association with the Authority by States Parties, or state enterprises or natural or juridical persons which possess the nationality of States Parties or are effectively controlled by them or their nationals, when sponsored by such States, or any group of the foregoing which meets the requirements provided in this Part and in Annex III.

3. Activities in the Area shall be carried out in accordance with a formal written plan of work drawn up in accordance with Annex III and approved by the Council after review by the Legal and Technical Commission. In the case of activities in the Area carried out as authorized by the Authority by the entities specified in paragraph 2(b), the plan of work shall, in accordance with Annex III, article 3, be in the form of a

contract. Such contracts may provide for joint arrangements in accordance with Annex III, article 11.

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

...

Article 209

Pollution from activities in the Area

1. International rules, regulations and procedures shall be established in accordance with Part XI to prevent, reduce and control pollution of the marine environment from activities in the Area. Such rules, regulations and procedures shall be re-examined from time to time as necessary.

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

Article 235

Responsibility and liability

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

2. States shall ensure that recourse is available in accordance with their legal systems for prompt and adequate compensation or other relief in respect of damage caused by pollution of the marine environment by natural or juridical persons under their jurisdiction.

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

Article 304

Responsibility and liability for damage

The provisions of this Convention regarding responsibility and liability for damage are without prejudice to the application of existing rules and the development of further rules regarding responsibility and liability under international law.

ANNEX III. BASIC CONDITIONS OF PROSPECTING, EXPLORATION AND EXPLOITATION

...

Article 4
Qualifications of applicants

...

4. The sponsoring State or States shall, pursuant to article 139, have the responsibility to ensure, within their legal systems, that a contractor so sponsored shall carry out activities in the Area in conformity with the terms of its contract and its obligations under this Convention. A sponsoring State shall not, however, be liable for damage caused by any failure of a contractor sponsored by it to comply with its obligations if that State Party has adopted laws and regulations and taken administrative measures which are, within the framework of its legal system, reasonably appropriate for securing compliance by persons under its jurisdiction.

...

Article 22
Responsibility

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

18. Regulation 29(4) of the *Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area* (the Regulations)¹² provides that a sponsoring State shall not be discharged of any obligations accrued while it was a sponsoring State, nor shall any legal rights and obligations accrued while it was a sponsoring State be affected, by reason of the termination of its sponsorship. In addition, Regulation 11(3)(f) of the Regulations requires a sponsoring State to issue a certificate of sponsorship to a qualified applicant. The certificate must include a declaration by the sponsoring State that it assumes responsibility in accordance with Article 139, Article 153.4 and Article 4.4 of Annex III of the Convention.

¹² The Regulations were adopted by the Assembly on 13 July 2000 and are annexed to ISBA/6/n/18, Dossier No. 16.

CHAPTER 5

OBSERVATIONS ON THE QUESTIONS

General Comments

19. Before addressing the three questions to be considered by the Chamber, Australia makes a number of general observations.
20. First, as a matter of general principle, it is Australia's view that there should be no lacuna in responsibility and liability for damage caused by operations in the Area. If damage is caused by activities undertaken pursuant to Part XI, particularly to the environment, there should always be an entity which bears responsibility and liability for that damage. That entity could be the Authority, the contractor and/or the sponsoring State Party.
21. Secondly, the provisions of the Convention concerning responsibility and liability for damage caused by activities in the Area apply equally to all States Parties. The degree of protection to the Area, forming as it does part of the common heritage of mankind,¹³ does not vary according to the status of the State Party sponsoring an activity. The relevant provisions of the Convention set out in Chapter 4 of this Statement and considered below make no such differentiation on matters of responsibility, liability and protection of the marine environment. Obviously, a link exists between the existence and level of responsibility and liability and the protection of the marine environment of the Area. In this respect, it cannot have been envisaged by those drafting the Convention that the level of environmental protection required of a contractor by a sponsoring State Party would vary according to the status of that State Party.
22. Thirdly, it is the province of State Parties to decide the means of fulfilling the relevant obligations within its own legal system.¹⁴ Given this factor and the general nature of the questions asked, the Panel, in giving its advisory opinion, should avoid suggesting detailed and prescriptive measures to be applied by States Parties in relation to activities they sponsor.

Question 1

Legal responsibilities and obligations of State Parties to the Convention with respect to sponsorship of activities in the Area

23. The type of responsibility referred to in Question 1 is to be distinguished from the responsibility of a State for a wrongful act. The latter form of responsibility will be dealt with under Question 2.
24. The principal responsibility of a sponsoring State is to ensure that the activities of a sponsored entity (being State enterprises, or persons which possess the nationality of States Parties or are effectively controlled by the State or its nationals) are carried out in conformity

¹³ Convention, Article 136.

¹⁴ This is recognised in the reference in the Convention, Annex III, Article 4, para. 4 to "within the framework of its legal system" see paragraph 46 below.

with Part XI of the Convention.¹⁵ To this end, the State Party must adopt laws and regulations and take administrative measures for securing compliance of a sponsored contractor with the terms of its contract and relevant obligations under the Convention. In Australia's view, those obligations and responsibilities extend also to ensuring that sponsored entities provide effective protection to the marine environment from the harmful effects which might arise from their activities, including through the means elaborated in the Convention, Article 145, paragraphs (a) and (b).

25. Sponsoring States are also required to adopt laws and regulations to prevent, reduce and control pollution of the marine environment from activities in the Area undertaken by vessels, installations and structures or other devices used by the sponsoring entity.¹⁶ Activities of sponsored entities in the Area must have reasonable regard for other activities taking place in the maritime space and, in particular, that those activities do not interfere with recognised sea lanes or "areas of intense fishing activity".¹⁷

26. Also, irrespective of whether a country is formally a sponsoring State, it will have many of the obligations and responsibilities referred to above if the entity carrying out seabed mining has the nationality of that State or is effectively controlled by that State or its nationals.

Question 2

Extent of the liability of a State Party for any failure to comply with the provisions of the Convention and the 1994 Agreement by an entity whom it has sponsored

27. A number of key principles in relation to the extent of the liability of a State Party can be drawn from the relevant provisions of the Convention and supported by its negotiating history.

28. First, Article 139 provides that the damage which entails a direct liability on the part of the sponsoring State Party must be caused "by the failure of [the] State Party ... to carry out its responsibilities under this Part". The fact that a sponsored contractor has caused damage will not, of itself, suffice to make the sponsoring State Party liable. The damage for which a sponsoring State Party bears responsibility must be caused by that State Party's failure to carry out its responsibilities under Part XI. This conclusion is supported by reference to the *travaux préparatoires*.

29. The original draft Convention on the International Seabed Area prepared by the United States of America and considered at the 1970 Session of the Sea-Bed Committee provides in paragraph 4:

Each Contracting Party shall be responsible for damages caused by activities which it authorizes or sponsors to any other Contracting Party or its nationals.¹⁸

¹⁵ Convention, Articles 139(1) and 153(2) and Annex III, Article 4.

¹⁶ Convention, Article 209(2).

¹⁷ Convention, Article 147.

¹⁸ A/AC.138/25, Article 11 reproduced in Virginia Commentary, Vol. VI at p. 120.

This provision was retained in the draft produced by the First Committee for the Second Session of the Conference in 1974.¹⁹

30. This form of direct liability for damage caused by a sponsored entity appears to have been watered down in the Informal Single Negotiating Text adopted at the Third Session of the United Nations Conference on the Law of the Sea in 1975.²⁰ The Revised Single Negotiating Text resulting from the Fourth Session of the Conference removed that direct link and instead linked liability to "failure of a State Party to carry out its responsibilities under this Part of the Convention ...".²¹ By reason of this progressive shift from express State liability for the acts of a sponsored entity to liability based upon the failure of the State Party itself, the *travaux préparatoires* confirm the conclusion that the fact that damage is caused by a sponsored entity does not *per se* give rise to liability on the part of the sponsoring State.

31. The Convention, Annex III, Article 22 provides that "the contractor shall have responsibility or liability for any damage arising out of wrongful acts in the conduct of its operations, account being taken of contributory acts or omissions by the Authority". Article 139(2) of the Convention provides that a sponsoring State Party will not be liable for damage caused by any failure to comply with Part XI by a person (including a contractor) whom it has sponsored if the State Party "has taken all necessary and appropriate measures to secure effective compliance under Article 153, paragraph 4, and Annex III, Article 4, paragraph 4". Further, the qualification in Article 4(4) of Annex III precludes liability of a sponsoring State Party for damage caused by a failure of the contractor "if that State Party has adopted laws and regulations and taken administrative measures which are ... reasonably appropriate for securing compliance by persons under its jurisdiction". The compliance refers to compliance with relevant provisions of Part XI, the related Annexes, and the rules, regulations and procedures of the Authority and approved plans of work.²²

32. It may well be that a given instance of damage to the Area which is the direct result of the actions of the sponsored contractor may also be the result of a failure of the State Party to carry out its responsibility to ensure that the activities of that sponsored contractor are conducted in conformity with Part XI. In those circumstances, a State party will be liable unless it has taken all the "necessary and appropriate measures to secure effective compliance ..." under Article 139(2).

33. The analysis in the Virginia Commentary appears to suggest that a State Party will avoid all liability under Article 139 if it has taken the "necessary and appropriate" measures referred to in the second sentence of paragraph 2 of Article 139:

State responsibility under Article 139 would only arise if the State party had failed to take all "necessary and appropriate measures" to secure effective compliance.²³

¹⁹ A/CONF.62/C.1/L.3 (1974), Article 18 reproduced in Virginia Commentary, Vol. VI at p. 122.

²⁰ A/CONF.62/WP.8/Part 1 (ISNT, 1975), Article 17 reproduced in Virginia Commentary, Vol. VI at p. 123.

²¹ A/CONF.62/WP.8/Rev. 1/Part 1 (RSNT, 1976), Article 17 reproduced in RSNT/Part 1 (Source 10), Article 17, Virginia Commentary, Vol. VI at p. 124.

²² Article 153(4).

²³ Virginia Commentary, Vol. VI at p. 127.

In Australia's view, this conclusion overstates the breadth of application of the express exception to State Party liability in Article 139(2) and is not consistent with the wording of the Convention.

34. As noted above, the liability of a State Party as defined in the first sentence of paragraph 2 of Article 139 arises out of its failure to "carry out its responsibilities under" Part XI. However, the liability to which an exemption is given in the second sentence of paragraph 2 is that which arises from a failure of a person sponsored by the State Party to comply with Part XI. The two forms of liability are not necessarily co-extensive.

35. It is true as a matter of fact that the likelihood of a State's liability arising under the first sentence of paragraph 2 of Article 139 would be substantially reduced if the State Party took the "necessary and appropriate measures" referred to in the second sentence of the same paragraph. However, taking those measures does not, as a matter of law, preclude all possible liability of a sponsoring State Party under the first sentence. The opposite conclusion could lead to a circumstance in which there is a gap in liability coverage for damage caused to the Area.

36. As noted above, Article 139(2) of the Convention states that its provisions concerning liability and responsibility are without prejudice to the rules of international law. In addition, Article 304 of the Convention provides that the provisions of the Convention regarding responsibility and liability for damage are without prejudice to the application of existing rules and the development of further rules regarding responsibility and liability under international law.

37. There may well be potential sources of liability of a sponsoring State under general international law. However, the questions directed by the Council to the Chamber relate to "failure to comply with the provisions of the Convention" and do not cover those other potential sources of liability under international law. Furthermore, the purposes of the "without prejudice" provisions in Articles 139(2) and 304 of the Convention do not include a potential reduction of responsibilities and liabilities under the Convention itself.

38. The matter of the extent of the liability of a State Party covers not only the conditions under which such a liability arises but also the content of the liability that arises. Article 139 of the Convention refers to "damage caused by failure of a State Party ... to carry out its responsibilities under this Part shall entail liability". The Article itself does not detail the content of the liability for damage so caused.²⁴

²⁴ Annex III, Article 22 deals with the responsibility and liability of the contractor and Authority for damage. The Article provides that: "Liability in every case shall be for the actual amount of the damage". In Australia's view, the terms "damage" and "actual damage" as used in the Convention are intended to have the same content. The counter-view is that the liability of the State under Article 139, referring as it does to "damage" as opposed to "actual damage", is a broader liability than that of the contractor and Authority under Article 22.

39. Some assistance on the extent of the liability for damage may be gleaned from general international law. Article 34 of the International Law Commission's (ILC) Articles on State Responsibility dealing with "forms of reparation" is relevant.²⁵ It provides:

Full reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination, in accordance with the provisions of this Chapter.

40. In Australia's view, the content of the obligation of reparation is that referred to by the Permanent Court of International Justice in *Factory at Chorzów, Merits*:²⁶

The essential principle contained in the actual notion of an illegal act ... is that reparation must, so far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it

41. Also, as noted earlier, the damage is limited to that caused by a failure of the State Party to carry out its responsibilities under Part XI. Damage unrelated to a failure of the State Party does not give rise to liability under Article 139.

42. Similar to the requirement under Article 235(2) in respect of pollution of the marine environment, the States referred to in Article 139(2) should ensure that recourse is available in accordance with their legal systems for prompt and adequate compensation or other relief in respect of the damage for which liability arises.

Question 3

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

43. To the extent that Question 3 goes beyond Article 139 and Annex III of the Convention and the 1994 Agreement, the State Party must have measures in place to ensure compliance with all of its obligations under the Convention.²⁷

44. Article 139(2) requires a sponsoring State to take all necessary and appropriate measures to ensure that sponsored entities comply with the provisions of Part XI of the Convention. Article 4(4) of Annex III elaborates on this obligation by providing that sponsoring States have the responsibility to ensure that a sponsored contractor shall carry out activities in conformity with the terms of its contract and its obligations under the Convention. A sponsoring State will not be liable for damage caused by a sponsored

²⁵ ILC *Articles on Responsibility of States for Internationally Wrongful Acts*, adopted by the ILC in 2001 and submitted to the United Nations General Assembly in the same year. The text of the Articles is in Dossier No. 64.

²⁶ 1928, P.C.I.J., Series A, No. 17, p. 47.

²⁷ An element of the obligation of *pacta sunt servanda* see *Vienna Convention on the Law of Treaties*, Article 26.

contractor if it has adopted laws and regulations and taken administrative measures which are, within the framework of its legal system, reasonably appropriate for securing compliance by persons under its jurisdiction.

45. Determining what laws, regulations and administrative measures are “reasonably appropriate” requires consideration of two elements:

- (a) what is appropriate within the legal framework of a particular State Party; and
- (b) the obligations in the Convention relating to contractors undertaking deep seabed mining activities in the Area.

46. The reference to “... which are within the framework of its legal system, reasonably appropriate” recognises that the differing legal systems of States Parties to the Convention will have differing methods of securing compliance. However, the references to measures being “reasonably appropriate” and “within the framework of its legal system” do not provide a means of avoiding the fundamental requirement to have laws and regulations in place that secure effective compliance. Those criteria are relevant to differentiation in the method of securing such effective compliance, rather than a reduction in that effectiveness. Also, securing “effective compliance” is more than just the adoption of the relevant laws and regulations. The reference to “administrative measures” includes a requirement that mechanisms are in place to enforce the laws and regulations.

47. The content of the second element would need to take into account the particular circumstances of the contractor being sponsored as well as the activity being undertaken by the contractor. In that sense, it is not possible to provide a prescriptive list of all matters to be covered by the domestic legislation, regulations and administrative action in advance. Nevertheless, they would likely include:

- (a) ensuring that a sponsored contractor is financially viable;²⁸
- (b) ensuring that a sponsored contractor has the technical capacity to undertake the proposed deep seabed mining activities in the Area;²⁹
- (c) requiring a sponsored contractor as a matter of domestic law to comply with its contract with the Authority and its obligations under the Convention;
- (d) enacting and enforcing criminal or civil penalties for failure to comply with the terms of its contract with the Authority or its obligations under the Convention; and

²⁸ Convention, Annex III, Article 4(2).

²⁹ *Ibid.*

- (e) requiring a sponsored contractor to maintain adequate insurance or financial guarantees to cover any potential liability for damage to the marine environment³⁰ and damage caused to other persons undertaking deep seabed mining activities in the Area or other activities on the high seas.³¹



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³⁰ Convention, Articles 145, 209(2), 215 and 235.

³¹ Convention, Article 147.