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Statement of Stichting Greenpeace Council (Greenpeace International) and the World Wide Fund for Nature

GREENPEACE

WWF

In the International Tribunal for the Law of the Sea

Case No. 17

Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the International Seabed Area

(Request for Advisory Opinion Submitted to the Seabed Disputes Chamber)

MEMORIAL FILED ON BEHALF OF

STICHTING GREENPEACE COUNCIL (GREENPEACE INTERNATIONAL)

AND

THE WORLD WIDE FUND FOR NATURE

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I. Introduction

This Honorable Chamber has been asked in this request for an Advisory Opinion to address the following three 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?

This request for an Advisory Opinion raises important issues, because (as recognized in Article 235 of the United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 3, 397, 21 I.L.M. 1261 (1982)) an effective liability regime is an essential safeguard to ensure that activities in the Area are indeed carried out for the benefit of all of humanity, as mandated under Article 140 of the Convention. Exploitation of the resources of the deep seabed is a high-risk activity because of the difficulty of working at great depths and because so much remains unknown about this region. The deep seabed harbors unusual and diverse ecosystems which are of great interest to science, and whose genetic resources may have medical or other applications. Hydrothermal vents, which are seen as likely areas for mining, play host to a particularly rich diversity of species, with a high degree of endemism. Some theories hold that life on earth originated here (William Martin, John Baross, Deborah Kelley & Michael J.

Russell, *Hydrothermal Vents and the Origin of Life*, 6 NATURE REVIEWS MICROBIOLOGY 805 (2008)).

Under the No-Harm Rule and the Polluter-Pays Principle (explained below in Sections IV and VI), these risks must be taken into account and internalized when deciding to undertake new activities in poorly understood areas of the marine environment. An appropriate liability regime, as laid out by the International Law Commission in its 2006 Principles on the Allocation of Loss in the Case of Transboundary Harm Arising Out of Hazardous Activities, Int'l Law Comm'n, 58th Sess., U.N. Doc. A/61/10 (2006) (explained below in Section V), requires that the true costs of new activities are internalized, so that irresponsible risk-taking is discouraged, and it is not humanity as a whole and our shared environment that will foot the bill if devastating damages result.

The three questions posed to this Chamber require an interpretation of three provisions of the Law of the Sea Convention -- Article 139(2), Article 153(4), and Annex III, Article 4(4). The authoritative UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 1982: A COMMENTARY (Satya N. Nandan, Michael Lodge & Shabtai Rosenne eds., 2002) (hereafter cited as COMMENTARY) states that:

> Article 139 addresses the responsibility and liability of State Parties and international organizations with respect to activities in the Area. However, it does so in *somewhat obscure terms* which not only add little to article 304 and other relevant provisions of the Convention, in particular Annex III, articles 4 and 22, but also *creates unnecessary confusion*.

Id., Vol.VI, at 126 (emphasis added). This Chamber is thus requested to interpret "obscure terms" that "create[] unnecessary confusion," but its task is guided by the COMMENTARY, which advises that:

> Article 139 should be read together with article 304, which provides that the provisions of the Convention regarding responsibility and liability are without prejudice to "the application of existing rules and the development of further rules" regarding responsibility and liability under international law.

Id., Vol. VI, at 119. Article 304 is explicit in saying that as "further rules regarding responsibility and liability under international law" emerge, they will be applicable to claims for compensation based on injuries and environmental degradation. The COMMENTARY explains that the rules regarding responsibility and liability are being developed by the International Law Commission. *Id.* at 128 n. 10. In clarifying the responsibilities and obligations of States Parties with regard to their sponsorship of activities in the Area, the Chamber is thus instructed to examine general international law on State responsibility, and the principles listed by the International Law Commission, provide an authoritative guide.

This Memorial begins by noting that no provision of the Law of the Sea Convention can be interpreted in isolation and that each provision must be interpreted in the context of the entire Convention. The Memorial then addresses the three questions presented to the Chamber, providing answers to Question 1 first, followed by Question 3, and then finally by Question 2. This order has been chosen because Question 1 covers the general obligations a State has with regard to sponsorship of activities in the Area, including the duty to consult and cooperate with other States, to prepare an environmental impact assessment (EIA), to apply the precautionary approach, and so on. Question 3 deals with the specific responsibility of a State to control the activities of the operators it sponsors, including the duty of the sponsoring State to implement a legal framework that ensures prompt and effective relief against an operator whose activities cause damage to

another State, to private parties, or to the shared environment. Question 2 deals with the residual or underlying responsibility a sponsoring State retains for damages resulting from the operator's activities, even if the State has established an effective legal regime that would have been appropriate and sufficient in normal circumstances. As this Memorial explains in Section V below, Principle 4(5) of the International Law Commission's 2006 Principles on the Allocation of Loss in the Case of Transboundary Harm Arising Out of Hazardous Activities makes it clear that the sponsoring State must assure that "additional financial resources are made available" in such cases. Although the "additional financial resources" may come from an industry-wide fund, or from the International Seabed Authority, the obligation to assure the availability of such additional resources remains with the sponsoring State.

II. The Relevant Language in the Convention

The texts of the three sections of the Law of the Sea Convention directly relevant to the questions presented to the Chamber are as follows:

> **Article 139(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.

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

> **Annex III, Article 4(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.

With specific reference to Article 139, the COMMENTARY observes that this language contains "obscure terms" that "create[] unnecessary confusion," and says further that "[n]either article 153 nor article 139 are of assistance in determining what such measures [to ensure compliance] might be." Vol. VI, at 126.

Article 139(2) says that a State Party sponsoring activity in the Area will meet its responsibilities "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." Article 153(4) requires the sponsoring State Party to "assist the Authority by taking all measures necessary to ensure such compliance [with the Authority's rules, regulations, and procedures] in accordance with article 139." And Article 4(4) of Annex III says that a sponsoring State Party will have met 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."

Taken together, these provisions are indeed circular and confusing. Among the questions left unresolved are whether the sponsoring State Party has responsibilities related to activities on the seafloor only, or whether its responsibilities also extend to damage caused by transportation and processing in aid of such activities, as well as

mining: what steps a sponsoring State must take to establish that it has adopted laws and regulations that "are, within the framework of its legal system, reasonably appropriate for securing compliance by persons under its jurisdiction"; who decides whether the "reasonably appropriate" standard has been met -- the sponsoring country, the International Seabed Authority, or a tribunal; and in what circumstances a country can be held liable for its omissions.

The obligations imposed on sponsoring States Parties under Articles 139, 153, and 4(4) of Annex III must be understood and interpreted in light of the obligations imposed by Article 194, which includes the following strong language in 194(2):

> States shall take *all measures necessary* to ensure that activities under their jurisdiction or control *are so conducted as not to cause damage by pollution* to other States and their environment, and that pollution arising from incidents or activities under their jurisdiction or control does not spread beyond the areas where they exercise sovereign rights in accordance with this Convention. (Emphasis added.)

Article 194(3) contains even stronger language, requiring States Parties to take measures:

> *designed to minimize to the fullest possible extent*...(c) *pollution from installations and devices used in exploration or exploitation of the natural resource of the sea-bed and subsoil*, in particular measures for preventing accidents and dealing with emergencies, ensuring the safety of operations at sea, and regulating the design, construction, equipment, operation and manning of such installations or devices... (Emphasis added.)

The COMMENTARY states that "the responsibility of States Parties in this regard [*i.e.*, sponsoring activities in the Area] will be discharged by taking the measures set out in Annex III, article 4, paragraph 4, which requires sponsoring States to ensure, within their legal systems, that contractors carry out activities in the Area in conformity with the terms of the contract with the Authority *and their obligations under the Convention*." Vol. VI, at 311-12 (emphasis added). This observation means that requirements imposed

upon sponsoring States in Article 4(4) of Annex III ("measures which are, within the framework of its legal system, reasonably appropriate for securing compliance by persons under its jurisdiction") must be interpreted to incorporate the more specific language in Article 194(3) -- "designed to minimize *to the fullest possible extent ... pollution from installations and devices used in exploration or exploitation of the natural resources of the sea-bed and subsoil*."

In addition, Article 304 makes it clear that the words in Articles 139, 153, and 4(4) of Annex III must be interpreted in light of evolving international law. The determination of the obligations imposed upon sponsoring States by these provisions thus requires an examination of the principles of State responsibility, as codified by the International Law Commission and reflected in other authoritative sources.

III. Treaties Must Be Interpreted as a Whole, and Each Part of the Convention Must Be Recognized as Having Meaning.

Article 31(1) of the Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, states that the terms of a treaty "shall be interpreted...in their context and in the light of its object and purpose," and Article 31(2) makes clear that the "context" includes the entire text of the treaty "including its preamble and annexes." In *Diversion of Water from the Meuse (Neth. v. Belg.)*, 1937 P.C.I.J. (ser A/B) No. 70 (June 28), the Permanent Court of International Justice explained that a contentious provision of a treaty had "to be interpreted in conjunction with the other articles, with which it forms a complete whole." 4 WORLD COURT REPORTS 178, 194 (Washington: Carnegie Endowment for International Peace, Manley O. Hudson ed. 1943). *See also* Alex Glashausser, *What We Must Never Forget When It Is a Treaty We Are Expounding*, 73

UNIVERSITY OF CINCINNATI LAW REVIEW 1243, 1323 (2005) ("At the very least, interpreters [of treaties] should look not only at the specific clause at issue, but at the whole treaty, and at parallel documents, namely, other treaties."). This approach is certainly applicable to the Law of the Sea Convention, which was negotiated as a "package deal," and which (in Article 309) does not allow States to make any "reservations or exceptions" upon ratification or accession. In answering the three posed questions, therefore, this Honorable Chamber must be guided by the strong language in Article 194 as well as the language in Article 304, which states explicitly that the provisions in the Convention are subject to "the development of further rules regarding responsibility and liability under international law."

IV. Question 1: What are the Legal Responsibilities and Obligations of States with Respect to Sponsorship of Activities in the Area?

In addition to the explicit responsibilities listed in the Law of the Sea Convention, these obligations stem from principles of international law and customary international law, as codified by the International Law Commission. Among the responsibilities and obligations that without question apply to sponsoring States Parties are the following:

* **The "No-Harm Rule"** (*sic utere tuo ut alienum non laedas*, reflected in Principle 21 of the Declaration of the United Nations Conference on the Human Environment, Stockholm, June 16, 1972 (Stockholm Declaration) and Principle 2 of the 1992 Rio Declaration on Environment and Development). This rule holds that a State should not use its territory, or allow its territory to be used, in a manner detrimental to the rights of other States. The no-harm rule has been accepted as a central component of international law. The International Court of Justice (ICJ) stated clearly in its recent opinion in the *Case Concerning Pulp Mills on the River Uruguay (Argentina v.*

Uruguay), 2010 I.C.J. __, ¶ 193 that this rule applies to damage to shared spaces as well as to national territory:

> The existence of the general obligation of States *to ensure* that activities within their jurisdiction and control respect the environment of other States or of *areas beyond national control* is now part of the corpus of international law relating to the environment. (Emphasis added; *citing Legality of Nuclear Weapons, Advisory Opinion*, 1996 I.C.J. 226, 241-42, ¶ 29.)

The rule is also reflected in Articles 194(2) and 235(1) of the Law of the Sea Convention, which states that States Parties "shall be liable in accordance with international law" if they fail to fulfill "their international obligations concerning the protection and preservation of the marine environment." This obligation is confirmed again in Article 263(3) with regard to damages caused by marine scientific research.

*** The duty to consult and cooperate.** Countries engaging in activities impacting shared spaces have procedural obligations to consult and cooperate with other affected countries, as was made clear in the *Case Concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, 2010 I.C.J. __, ¶ 158, where the ICJ ruled that "Uruguay breached its procedural obligations to inform, notify and negotiate..." *See also* Article 4 of the 2001 International Law Commission (ILC) Articles on the Prevention of Transboundary Harm from Hazardous Activities, Int'l Law Comm'n, 53d Sess., U.N. Doc. A/56/10 (2001), requiring States to "cooperate in good faith"; Article 8, requiring States to notify other States of anticipated risks; and Article 12, requiring the exchange of information.

*** The duty to prepare an environmental impact assessment.** In the *Case Concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, 2010 I.C.J.__, ¶

204, the ICJ held that the requirement to undertake an environmental impact assessment "where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context" "may now be considered a requirement under general international law." The obligation to prepare environmental impact assessments is also found in Articles 204-06 of the Law of the Sea Convention, Regulation 18(c) of the International Seabed Authority's Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area (July 13, 2000) (hereafter cited as Seabed Authority Regulations), Principle 17 of the 1992 Rio Declaration, and Article 7 of the 2001 ILC Articles on the Prevention of Transboundary Harm from Hazardous Activities.

* **The duty to ensure operator compliance.** The requirement in Article 4(4) of Annex III of the Law of the Sea Convention that States Parties "adopt[] laws and regulations and take[] administrative measures which are, within the framework of its legal system, reasonably appropriate for securing compliance by persons under its jurisdiction" obligates the State to enact legislation appropriate to regulate the activities it sponsors in the Area, including by ensuring that its legal system -- or some other legal system that victims can utilize to seek compensation -- is adequate to provide prompt and adequate compensation for injuries. This requirement is also found in Article 209(2) of the Law of the Sea Convention, which requires States parties to "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," and further requires that these laws and regulations "shall be no less effective than the international rules" applicable to activities in the Area. The requirement that a legal system be

available to provide prompt and adequate compensation is confirmed in Article 235(2) of the Convention, which requires States Parties to "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." Article 235(3) further suggests that States Parties should establish "compulsory insurance or compensation funds" where appropriate. Principle 6(2) of the International Law Commission's 2006 Principles on the Allocation of Loss in the Case of Transboundary Harm Arising Out of Hazardous Activities requires that States ensure that "[v]ictims of transboundary damage should have access to remedies in the State of origin that are no less prompt, adequate and effective than those available to victims that suffer damage, from the same incident, within the territory of that State" and Principle 6(4) says further that "States may provide for recourse to international claims settlement procedures that are expeditious and involve minimal expenses."

* **The duty to plan for contingencies.** Article 199 of the Law of the Sea Convention requires States Parties to "jointly develop and promote contingency plans for responding to pollution incidents in the marine environment," and this obligation certainly applies to States Parties sponsoring activities in the Area. *See also* Article 16 of the 2001 ILC Articles on the Prevention of Transboundary Harm from Hazardous Activities, requiring the State of origin to "develop contingency plans for responding to emergencies."

* **The duty to apply a precautionary approach.** Regulation 31(2) of the Seabed Authority Regulations requires States Parties sponsoring activities in the Area to

"apply a precautionary approach, as reflected in Principle 15 of the Rio Declaration to such activities" "[i]n order to ensure effective protection for the marine environment from harmful effects." Principle 15 states that:

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

The precautionary approach takes on particular importance in the context of the deep seabed, some of whose ecosystems are known to be highly vulnerable to long-lasting or irreversible damage.

* **The duty to monitor and evaluate impacts.** Regulation 31(6) of the Seabed Authority Regulations requires States Parties sponsoring activities in the Area to "cooperate with the Authority in the establishment and implementation of programmes for monitoring and evaluating the impacts of deep seabed mining on the marine environment." This should include the designation of no-take zones to be able to compare the impact of the activity against a representative baseline.

V. Question 3: What Are the "Necessary and Appropriate Measures" a Sponsoring State Must Take Under Article 139(2)?

A. The Duty of Prevention

The primary obligation of a State with regard to activities under its jurisdiction or control is the duty to prevent harm to others and to the shared environment. This responsibility is explained by the International Law Commission in its 2001 Articles on Prevention of Transboundary Harm from Hazardous Activities, and it is supported by Principle 2 of the Rio Declaration on Environment and Development as well as the ICJ's

advisory opinion in *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, 1996 I.C.J. 226, 241-42, ¶ 29.

Articles 1, 2(d), and 3 of the 2001 International Law Commission's Articles on Prevention of Transboundary Harm from Hazardous Activities make it clear that each State is obligated to "take all appropriate measures to prevent significant transboundary harm or at any event to minimize the risk thereof" (Art. 3) with regard to all activities "under the jurisdiction or control" (Art. 2(d)) of the State that are "not prohibited by international law which involve a risk of causing significant transboundary harm through their physical consequences" (Art. 1). Thus, even if the acts of a private party cannot be "attributed" to the State under Article 8 of the State Responsibility Articles, the State is still obliged under Article 3 of the Hazardous Activities Articles to take "all appropriate measures" to minimize the risks of harms to neighboring States.

Which measures are necessary and appropriate will vary over time and according to the circumstances of each case, thus an answer to the question posed must necessarily remain at a general level. Exercising sufficient control requires an ongoing effort on the part of the sponsoring State to regularly monitor the factual and legal situation and respond appropriately, as underlined by the International Law Commission. "The obligation of the State of origin to take preventive or minimization measures is one of due diligence," 2001 ILC YEARBOOK, Vol. II, Pt. II, at 154, which "is the degree of care...that is expected of a good Government," *id.* at 155, and "is manifested in reasonable efforts by a State to inform itself of factual and legal components that relate foreseeably to a contemplated procedure and to take appropriate measures, in timely fashion, to address them." *Id.* at 154. To be able do to so, the State "should possess a

legal system and sufficient resources to maintain an adequate administrative apparatus to control and monitor the activities." *Id.* at 155.

The obligation of due diligence "requires the introduction of legislation and administrative controls applicable to public and private conduct *which are capable of effectively protecting other States and the global environment*, and it can be expressed as the standard to be expected of a good government." PATRICIA W. BIRNIE & ALAN E. BOYLE, INTERNATIONAL LAW & THE ENVIRONMENT 112 (2d ed. 2002) (emphasis added). Xue Hanqin has written that due diligence "has been defined to mean what a responsible government should do under normal conditions in a situation with its best practicable and available means, with a view to fulfilling its international obligation," emphasizing that "[w]hen an activity bears a significant risk of transboundary damage the government *must take all necessary measures* to prevent such damage." XUE HANQIN, TRANSBOUNDARY DAMAGE IN INTERNATIONAL LAW 163 (2003) (emphasis added).

The standard of care incorporated into the duty of due diligence is "proportional to the degree of risk of transboundary harm in the particular instance," and will be much higher for "activities which may be considered ultrahazardous." 2001 ILC YEARBOOK, Vol. II, Pt. II, at 154. "[D]ue diligence in ensuring safety requires a State to keep abreast of technological changes and scientific developments." *Id.* "An efficient implementation of the duty of prevention may well require upgrading the input of technology in the activity as well as the allocation of adequate financial and manpower resources with necessary training for the management and monitoring of the activity." *Id.* at 155.

Exercising ongoing close oversight and control over technologically complex operations is likely to be costly. Although a State's economic level "is one of the factors

to be taken into account in determining whether a State has complied with its obligation of due diligence[,]…a State's economic level cannot be used to dispense the State from its obligation under the present articles." *Id.* at 155. Developing countries will not be expected to exercise the same degree of care as a developed country, but "vigilance, employment of infrastructure and monitoring of hazardous activities…are expected." *Id.* The primary mechanism to facilitate participation of developing States in activities in the Area should thus not be a lowering of safety standards. Rather, developed States and the Authority should cooperate as necessary to ensure that developing States can fulfill their due diligence obligations, through measures such as the transfer of technology as contemplated by Article 144 of the Convention.

B. The Need for a Civil Liability Framework

The 2006 ILC Principles on the Allocation of Loss in the Case of Transboundary Harm Arising Out of Hazardous Activities address the situation where the "duties of due diligence under the obligations of prevention have been fulfilled." Commentary (8) to Principle 1, 2006 Yearbook of the International Law Commission, Vol. II, Pt. 2, at 120. They note that a sponsoring State will still be responsible for damages resulting from activities under its jurisdiction and explain how responsibility for damages should be allocated in such circumstances. The goals of these Principles are "(a) to ensure prompt and adequate compensation to victims of transboundary damage; and (b) to preserve and protect the environment in the event of transboundary damage…" *Id.*, Principle 3. These goals are based on the No-Harm Principle (Principle 21 of the Stockholm Declaration and Principle 2 of the Rio Declaration) as well as the Polluter-Pays Principle. "[E]quity, as well as the polluter-pays principle, demands that the operator should not be allowed to

seek out safe-havens to engage in risk-bearing hazardous activities without expecting to pay for damage caused..." 2006 ILC YEARBOOK, Vol. II, Part 2, at 149.

"Damage" should be given a broad meaning in this context. Under Principle 2(a) of the International Law Commission's Principles on the Allocation of Loss in the Case of Transboundary Harm Arising Out of Hazardous Activities, the term covers "significant damage caused to persons, property or the environment; and includes ... loss or damage by impairment of the environment," "the costs of reasonable measures of reinstatement of the property, or environment, including natural resources," and "the costs of reasonable response measures." The aim in the case of damage to the environment is stated in Principle 3(b) to be "to preserve and protect the environment in the event of transboundary damage, especially with respect to mitigation of damage to the environment and its restoration or reinstatement."

To avoid becoming a safe-haven for high risk activities, and to ensure the risks of operations in the Area are properly internalized, a sponsoring State must put in place an effective regime of civil liability. This implies the implementation of a claims system based on strict or absolute liability of the operator, in which victims can obtain prompt and adequate compensation and in which damage to the environment can be mitigated, and its integrity can be restored or reinstated. These requirements are based on the importance of internalizing the real cost of any economic activity, as reflected in the Polluter-Pays Principle:

> [T]he principle of ensuring "prompt and adequate" compensation by the operator should be perceived from the perspective of achieving "cost internalization", which constituted the core, in its origins of the "polluter-pays" principle. It is a principle that argues for internalizing the true economic costs of pollution control, clean-up, and protection measures within the costs of the operation of the activity itself. It thus attempted to

> ensure that Governments did not distort the costs of international trade and investment by subsidizing these environmental costs.

2006 ILC YEARBOOK, Vol. II, Pt. 2, at 144-45.

Pursuant to Article 235(3) of the Convention, this claims system must be linked to funds that will ensure financial security, "such as compulsory insurance or compensation funds," or bonds or other financial guarantees to cover claims of compensation. This is a critical safeguard, as is residual State liability, since an operator may be thinly capitalized, or the damage may exceed the capitalization and resources of the responsible operator – even if it is not thinly capitalized.

VI. Question 2: What Is the Extent of the Sponsoring State's Liability?

A. Legal Framework: the Work of the International Law Commission on Accountability for Transboundary Environmental Harms

The International Law Commission (ILC) has been dealing with accountability for transboundary harms since 1955. In 2001, the Commission adopted Articles on Responsibility of States for International Wrongful Acts, Int'l Law Comm'n, 53d Sess., U.N.Doc. A/56/10 (2001), as well as Articles on Prevention of Transboundary Harm from Hazardous Activities, and in 2006 the Commission issued Principles on the Allocation of Loss in the Case of Transboundary Harm Arising Out of Hazardous Activities. Together these articles and principles provide a comprehensive approach defining the responsibilities of States. The 2001 Articles on State Responsibility deal with injuries resulting from activities that violate international law norms, while the 2006 Principles address responsibilities and liabilities attributable to a State from injuries that result from hazardous activities that do not violate international law. The rules flowing

from the 2001 Articles on State Responsibility will be relevant if a sponsoring State Party fails to meet its duties, discussed above, related to control and monitoring and fails to provide an appropriate legal regime, but even if a sponsoring State Party complies with these obligations it may still be liable for injuries under the 2006 Principles if hazardous activities under its jurisdiction cause injuries to other States or to shared environmental resources.

B. Residual Liability of the Sponsoring State

The sponsoring State retains the residual or underlying liability for damage to victims who suffer injury as well as for damage to the environment, including the duty to ensure that additional financial resources are made available as necessary. The provisions of the Law of the Sea Convention are designed to impose primary responsibility and liability on the operator, but the sponsoring State retains residual strict liability in cases of devastating damages that the operator is not able to cover, and which is not covered by an industry-wide mechanism. Although developing countries are encouraged to participate in activities in the Area, they must participate in establishing industry-wide schemes to deal with catastrophic incidents, and also retain this residual liability, regardless of their economic status.

Articles 4(4) and 22 of Annex III "make it clear that the contractor is, *prima facie*, liable for damage." COMMENTARY, Vol. VI, at 127. This approach is consistent with many recent environmental conventions, which put the primary responsibility on the polluter, rather than on the State. "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." *Id.* "This implies some flexibility in the type of measures, and

does not necessarily require sponsoring States to take enforcement action against contractors, *but it does clearly require some action to be taken by the sponsoring State.*" *Id.* (emphasis added).

The International Law Commission addressed the relationship between the State and the operator in its 2006 Principles on the Allocation of Loss in the Case of Transboundary Harm Arising Out of Hazardous Activities, seeking to ensure that victims would receive compensation for injuries from hazardous activities and that damage to the environment is mitigated, and also that environmental values are restored or reinstated, even if "fault" or "wrong" cannot be established. Principle 4(1) states that "[e]ach State should take *all necessary measures* to ensure that prompt and adequate compensation is available for victims of transboundary damage caused by hazardous activities located within its territory or otherwise under its jurisdiction or control" (emphasis added). This language is similar to the language in Article 139(2) which requires "*all necessary and appropriate measures* to secure effective compliance" (emphasis added).

Although Principle 4 bases compensation on operator-based civil liability, it recognizes a continuing role for the sponsoring State to make sure that the operator will in fact be able to compensate victims, or to mitigate, restore or reinstate damage to the environment. Principle 4(1) confirms that the State has the primary responsibility to ensure that victims receive prompt and adequate compensation, and 4(2) states that these measures should include the imposition of liability on the operator or, where appropriate, other persons or entities, and says that they should not be required to establish "proof of fault." Principle 4(3) mandates that the State must require the operator and other relevant entities "to establish and maintain financial security such as insurance, bonds or other

financial guarantees to cover claims of compensation" and 4(4) adds that "[i]n appropriate cases, these measures should include the requirement for the establishment of industry-wide funds at the national level." Critically, Principle 4(5) confirms that the State remains ultimately responsible, stating that "[i]n the event that the measures under the preceding paragraphs are insufficient to provide adequate compensation, *the State of origin should also ensure that additional financial resources are made available*" (emphasis added). This provision makes it clear that even if the State has taken all necessary and appropriate to secure operator compliance, the responsibility for damage does not end with the operator, but ultimately lies with the sponsoring State.

Attributing strict liability to States for hazardous activities under their control which cause damage to other States or the common heritage is not a new concept, but is one firmly rooted in international law treaties and decisions. Xue Hanqin (recently nominated by China to be a judge on the International Court of Justice) has explained that "strict liability is not a recent legal development for tortious injury, nor is it uncommon…[S]trict liability in one form or another is imposed in many legal systems for damage caused by [hazardous] activity." XUE HANQIN, TRANSBOUNDARY DAMAGE IN INTERNATIONAL LAW 299-300 (2003). Among the treaties that impose absolute or strict liability on States for injuries resulting from hazardous activities, without regard to fault or wrongful intent, are the Convention on International Liability for Damage Caused by Space Objects, art. II, March 29, 1972, 961 U.N.T.S. 187 ("A launching State shall be absolutely liable to pay compensation caused by its space object…"); the 1969 International Convention on Civil Liability for Oil Pollution Damage (CLC), as amended by its Protocol of 1992 (strict liability); the Paris Convention on Third Party Liability in

the Field of Nuclear Energy, July 29, 1960, 956 U.N.T.S. 263; the Vienna Convention on Civil Liability for Nuclear Damage, May 21, 1963, 1063 U.N.T.S. 265, 2 I.L.M. 727; and the Convention Relating to Civil Liability in the Field of Maritime Carriage of Nuclear Materials, Dec. 17, 1971, 974 U.N.T.S. 255.

The importance of the residual liability of the sponsoring State, as well as the potential for damage to the environment from activities in the deep ocean, has been underlined by the BP/Deepwater-Horizon Gulf Oil explosion on April 20, 2010, which led to a devastating oil spill causing damages estimated to exceed US$37 billion. This incident has reconfirmed that activities in the deep ocean can have enormous consequences, stretching the ability of even the world's fourth-largest company to pay.

The meaning of the language in Article 139(2) that "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" must therefore be determined by understanding this context and recalling Article 235(1) of the Convention, which unequivocally provides that:

> 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.

The "necessary and appropriate measures to secure effective compliance" required by the second sentence of Article 139(2) thus requires the sponsoring State to have established through its legal system a liability regime that meets the standards of Principle 4 of the ILC's 2006 Principles on the Allocation of Loss in the Case of Transboundary Harm Arising Out of Hazardous Activities, and that includes the obligation in 4(5) to "ensure

that additional financial resources are made available" to cover all environmental damage. As the 2010 Gulf Oil Spill has reminded us so dramatically, catastrophic events and devastating damage can and do occur, and may occur whether or not efforts are taken to follow best practices. Article 139(2) cannot be read to eliminate the applicability of Article 194(2)-(3) and Article 235(1) of the Convention. The duty of sponsoring States under Article 4(4) of Annex III to adopt "administrative measures…reasonably appropriate for securing compliance by persons within its jurisdiction" must include (under Principle 4(5) of the International Law Commission's 2006 Principles on the Allocation of Loss in the Case of Transboundary Harm Arising Out of Hazardous Activities) measures to ensure that "additional financial resources are made available" if a catastrophic accident causing devastating damage does occur.

Principle 4(5) thus makes it clear that residual liability is not capped for States, even developing States. Such a limit would merely shift the burden from one disadvantaged group to another (the victims of the harm or the shared marine environment). Because of the importance of internalizing the real cost of activities in the Area under the Polluter Pays Principle, States sponsoring activities in the Area must participate in the establishment of funding mechanisms to deal with all possible harmful effects, as suggested in Article 235(3), either through an industry-wide financial program or through the establishment of a fund by the International Seabed Authority.

C. Liability Covers All Harm Connected to Activities in the Area (Including Transportation and Processing)

The provisions of Part XII of the Law of the Sea Convention, particularly the language in Article 194, make it clear that the sponsoring State would have responsibility

and residual liability for injuries suffered by victims as well as for damage to the marine environment itself resulting not only from the extraction of minerals from the Area, but also from transportation and processing associated with the same operation.

VII. Conclusions

By examining the recent work of the International Law Commission, as we are instructed to do by Article 304 of the Law of the Sea Convention and by the COMMENTARY, additional principles emerge, which together with those listed in Section IV above, allow this honorable Chamber to provide a comprehensive interpretation of the obligations on States Parties sponsoring activities in the Area:

* A State Party sponsoring activities in the Area is required to exercise due diligence over the activities by enacting detailed legislation and regulations to govern the activities, by monitoring the activities vigilantly, and by providing a claims system in which victims can seek compensation without establishing fault, either through the courts of the State Party or through an international tribunal. The legislative enactments of the sponsoring State Party must incorporate international standards and must include requirements that the operator maintain adequate financial security to compensate potential victims. These requirements apply to developing as well as to developed States.

* Victims of hazardous activities conducted in the Area are entitled to prompt and adequate compensation, and damage to the environment must be mitigated, or the environment must be restored or reinstated without regard to whether any violations of international law occurred.

* Responsibility for damage does not end with the operator, but ultimately lies with the sponsoring State. The sponsoring State Party has the duty to ensure that victims

indeed receive compensation and that loss or damage to the environment is responded to. If the legislative scheme and the resources of the operator prove to be inadequate, the sponsoring State must provide "additional financial resources". State Parties can take steps to meet this obligation by participating in the establishment of a comprehensive and adequately-funded industry-wide mechanism (possibly through the International Seabed Authority) that ensures complete payments to victims and for harms to the marine environment, but if such a mechanism fails to provide adequate compensation the sponsoring State retains the underlying responsibility to ensure that victims are compensated for the damages they suffer or that damage to the environment is remedied, or that the environment is restored or reinstated, and that other reasonable response measures are carried out. Thin capitalization or damage exceeding the resources of the sponsored entity or backup insurance or fund should not leave the victims or the environment to shoulder the consequences of activities in the Area.

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