

**(o) Written Statement of the International Seabed Authority**

**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 DISPUTE CHAMBER)**

**WRITTEN STATEMENT OF THE INTERNATIONAL SEABED AUTHORITY**

**19 AUGUST 2010**

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\* *Note by the Registry*: Page 2 (blank page) omitted.

### Introduction

1. On 6 May 2010, the Council of the International Seabed Authority (hereafter 'the Council' and 'the Authority'), decided, in accordance with Article 191 of the United Nations Convention on the Law of the Sea (hereafter 'the Convention'), to request the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea (hereafter 'the Chamber' and 'the Tribunal') to render an advisory opinion on certain legal questions arising within the scope of its activities. The full text of the decision is contained in document ISBA/16/C/13 and is also reproduced in Chapter I of the present written statement. The questions raised in the decision are the following:

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 Convention?*
2. *What is the extent of liability of a State Party for any failure to comply with the provisions of the Convention, in particular Part XI, and the 1994 Agreement, by an entity whom it has sponsored under Article 153, paragraph 2 (b), of the Convention?*
3. *What are the necessary and appropriate measures that a sponsoring State must take in order to fulfil its responsibility under the Convention, in particular Article 139 and Annex III, and the 1994 Agreement?*

2. By Order 2010/3 of 18 May 2010, the President of the Chamber invited the States Parties to the Convention, the Authority and the intergovernmental organizations invited to participate as observers in the Assembly of the Authority to present written statements on the questions submitted to the Chamber. By the same Order the President of the Chamber fixed 9 August 2010 as the time-limit within which written statements on these questions might be presented to the Chamber in accordance with Article 133, paragraph 3, of the Rules of the Tribunal. Subsequently, the time-limit was extended to 19 August 2010.

3. This Written Statement is intended to assist the Chamber in rendering its advisory opinion on the three questions addressed to it by the Council of the Authority by providing necessary background information on the request itself, as well as on the regulatory regime governing activities of prospecting, exploration and exploitation in the Area (defined in article 1 of the Convention as 'the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction'). The Statement contains the following chapters:

**Chapter I** sets out the Council's decision requesting an advisory opinion and describes the background to the decision.

**Chapter II** reviews the Chamber's jurisdiction, issues as to admissibility and the applicable law.

Chapter III describes the content of the dossier submitted on behalf of the Secretary-General of the Authority pursuant to Article 131 of the Rules of the Tribunal containing documents, decisions and other material likely to throw light on the questions on which the advisory opinion is sought.

Chapter IV provides an outline of the regulatory regime relating to activities in the Area, as reflected in the Convention, the 1994 Agreement for the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982 (hereafter 'the 1994 Agreement') and the rules, regulations and procedures of the Authority.

Chapter V presents concluding comments.

## Chapter I

### The Request for an Advisory Opinion

1.1 On 1 March 2010, the Permanent Mission of the Republic of Nauru to the United Nations, on behalf of the Government of Nauru (hereafter 'Nauru') submitted to the Secretary-General of the Authority a proposal to seek an advisory opinion from the Chamber on matters relating to sponsoring State responsibility and liability. The proposal submitted by Nauru was circulated to all members of the Authority as an official document under symbol ISBA/16/C/6.

1.2 In its paper Nauru stated that

*In 2008 the Republic of Nauru sponsored an application by Nauru Ocean Resources Inc. for a plan of work to explore for polymetallic nodules in the Area. Nauru, like many other developing States, does not yet possess the technical and financial capacity to undertake seafloor mining in international waters. To participate effectively in activities in the Area, these States must engage entities in the global private sector (in much the same way as some developing countries require foreign direct investment). Not only do some developing States lack the financial capacity to execute a seafloor mining project in international waters, but some also cannot afford exposure to the legal risks potentially associated with such a project. Recognizing this, Nauru's sponsorship of Nauru Ocean Resources Inc. was originally premised on the assumption that Nauru could effectively mitigate (with a high degree of certainty) the potential liabilities or costs arising from its sponsorship. This was important, as these liabilities or costs could, in some circumstances, far exceed the financial capacities of Nauru (as well as those of many other developing States). Unlike terrestrial mining, in which a State generally only risks losing that which it already has (for example, its natural environment), if a developing State can be held liable for activities in the Area, the State may potentially face losing more than it actually has."*

Nauru further stated in the paper that

*... if sponsoring States are exposed to potential significant liabilities, Nauru, as well as other developing States, may be precluded from effectively participating in activities in the Area, which is one of the purposes and principles of Part XI of the Convention, in particular as provided for in article 148; article 150, subparagraph (c); and article 152, paragraph 2. As a result, Nauru considers it crucial that guidance be provided on the interpretation of the relevant sections of Part XI pertaining to responsibility and liability, so that developing States can assess whether it is within their capabilities to effectively mitigate such risks and in turn make an informed decision on whether or not to participate in activities in the Area.*

Nauru then requested the Council to seek clarification from the Chamber with regard to a series of specific questions.

1.3 The request by Nauru was incorporated as Item 7 of the Agenda of the Council, as adopted at its 150th meeting on 27 April 2010 (ISBA/16/C/1, Dossier No. 1)<sup>1</sup>. The Council discussed agenda item 7 at its 155th, 160th and 161st meetings. Thirty-two delegations (members and observers) took the floor to express their views on the topic. Different views were expressed on the issues raised in the paper submitted by Nauru. Rather than attempt to summarize those views in the present statement, reference is made to the list of speakers and unofficial account of the records of the discussions at those meetings compiled by the secretariat and included in the dossier submitted on behalf of the Secretary-General as Dossier No. 3 as well as to the written statements circulated by Nauru on 3 May 2010 and Fiji on 3 and 6 May 2010 (Dossier No. 4).

1.4 The eventual decision of the Council, taken at its 161st meeting on 6 May 2010, was not to adopt the proposal as formulated by Nauru, but to request the Chamber to render an advisory opinion on three more general questions. The full text of the decision is contained in document ISBA/16/C/13 (Dossier No. 7) and reads as follows:

*The Council of the International Seabed Authority,*

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

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

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

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

<sup>1</sup> References to Dossier numbers in this written statement are references to the Dossier submitted to the Chamber on behalf of the Secretary-General of the Authority pursuant to article 131 of the Rules of the Tribunal (See Chapter III).

1.5 By way of background to the request by Nauru for an advisory opinion, it may be informative to recall that, on 31 March 2008, two companies, Nauru Ocean Resources Inc. and Tonga Offshore Mining Ltd., formally notified the Secretary-General of their intention to make an application for approval of a plan of work for exploration in the areas reserved for the conduct of activities by the Authority through the Enterprise or in association with developing States pursuant to the Convention, Annex III, Article 8 (hereafter 'reserved areas').<sup>2</sup> Thereafter, in accordance with regulation 17(1) of the Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area (hereafter 'the Regulations')<sup>3</sup>, the Secretary-General on 11 April 2008 forwarded such notification to the Enterprise (represented by its Interim Director-General), whereupon the Interim Director-General informed the Secretary-General in writing that the Enterprise has no current intention of carrying out activities in the areas under application.

1.6 Thereafter, on 10 April 2008 the Authority received two applications for approval of a plan of work for exploration in reserved areas. These applications were submitted by Nauru Ocean Resources Inc. (sponsored by the Republic of Nauru) and Tonga Offshore Mining Ltd. (sponsored by the Kingdom of Tonga). These represented the first application made for approval of plans of work in reserved areas. In the case of Nauru Ocean Resources Inc., the application covers a total surface area of 74,830 square kilometres in the Clanon-Clipperton Zone of the Pacific Ocean. The area lies within the reserved areas and is divided into four regions, 1A, 1B, 1C and 1D covering areas of the seabed from within reserved blocks 13, 15, 22 and 25.

1.7 Pursuant to the Convention<sup>4</sup> and the Regulations, the applications were placed before the Legal and Technical Commission of the Authority at its meetings during the fourteenth session of the Authority in 2008. The Commission met to consider the applications on 21, 22, 26 and 27 May 2008. However, the Commission did not reach consensus with respect to a recommendation to the Council in relation to the applications and therefore decided to continue consideration of the applications at the next possible opportunity.<sup>5</sup>

1.8 At the fifteenth session of the Authority in 2009, consideration of the applications was also included as an item on the agenda of the Commission. However, the Commission was informed that, in a letter dated 5 May 2009 and addressed to the Legal Counsel of the Authority, the applicants had requested that consideration of their applications be postponed for a number of reasons set out in the letter. The Commission took due note of the request and decided to defer further consideration of the item until further notice.<sup>6</sup>

<sup>2</sup> The system of 'reserved areas' and the status of the Enterprise is explained further in Chapter IV.

<sup>3</sup> ISBA/6/A/18, Dossier No. 17. See also Chapter IV.

<sup>4</sup> Throughout this Written Statement, unless otherwise noted, references to the Convention should be understood as references to the single regime established by the Convention and the 1994 Agreement.

<sup>5</sup> Summary report of the Chairman of the Legal and Technical Commission on the work of the Commission during the fourteenth session (ISBA/14/C/11\*), paragraphs 6 to 8.

<sup>6</sup> Summary report of the Chairman of the Legal and Technical Commission on the work of the Commission during the fifteenth session (ISBA/15/C/5), paragraph 6.

19 In its request to the Council, Nauru referred to differences of opinion among members of the Commission. However, there is no record of such differences. In his report to the Council on the work of the Commission in 2010, the Chairman of the Commission explained as follows:

20. *The Commission also took note of the proposal before the Council to seek an advisory opinion from the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea on matters regarding sponsoring State responsibility and liability (ISBA/16/C/6).*

21. *The Commission noted that in paragraph 4 of this document, submitted by the delegation of Nauru, it is stated that while the application process was being finalized, "differing opinions arose from members of the Legal and Technical Commission regarding the interpretation of the provisions in the Convention and the 1994 Agreement relating to the implementation of Part XI of the Convention (General Assembly resolution 48/263) that pertain to the responsibility and liability of sponsoring States, and that it became apparent that clarification would need to be sought regarding those provisions before moving forward".*

22. *The Commission wishes to state that these "differing opinions" that are referred to as being of the Commission's members are not stated in the Commission's reports or in any other official document. In addition, it is well stated that the applicants were the ones requesting the consideration of their applications to be postponed due to the current global economic circumstances and other concerns.*

23. *Effectively, the Commission had received in 2008 two applications for approval of a plan of work for exploration in reserved areas; one from Nauru Ocean Resources Inc. (sponsored by Nauru) and another from Tonga Offshore Mining Limited (sponsored by Tonga). As the Commission had been unable to complete consideration of the applications during the fourteenth session, the matter had been placed on the agenda for the fifteenth session. At that time, the representatives of Nauru and Tonga, the sponsoring States of the applicants, expressed their gratitude to the Commission for its work in relation to the consideration of the applications and emphasized the importance of the applications to their Governments (ISBA/14/C/8).*

24. *On 5 May 2009, the Secretariat was informed by Nauru Ocean Resources Inc. and Tonga Offshore Mining Ltd. (the applicant companies) that, in the light of current global economic circumstances and other concerns, they had decided to request that consideration of their applications for approval of plans of work for exploration for polymetallic nodules be postponed (ISBA/15/LTC/6). Consequently, the Commission took due note of the request and decided to defer further consideration of the item until further notice (ISBA/15/LTC/C/5)."*

1.10 The present status of the applications, therefore, is that they remain pending further consideration by the Legal and Technical Commission.

## Chapter II

### Jurisdiction, Admissibility and Applicable Law

2.1 This is the first occasion on which the Chamber has been requested to render an advisory opinion. The Chamber may therefore wish to examine the questions of jurisdiction and admissibility that may arise as well as give consideration to the applicable law.

2.2 The jurisdiction of the Chamber to give advisory opinions derives from Article 191 of the Convention, which reads:

*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.*

2.3 As may be seen from the language of Article 191, the Chamber must be satisfied that (a) there is a valid request of the Council, (b) the questions asked are 'legal questions' and, (c) the questions arise 'within the scope of [the] activities [of the Assembly or the Council]'.

2.4 Regarding the first element, namely the validity of the request by the Council, it is noted that the decision-making procedures in the Council are set out in Article 161, paragraph 8, of the Convention (as read with Section 3, paragraphs 2, 5, 6, 7 and 8, of the 1994 Agreement) and Part X of the Rules of Procedure of the Council. In accordance with the 1994 Agreement, Annex, Section 3, paragraph 2, and the Rules of Procedure of the Council, Part X, rule 56, paragraph 1, 'as a general rule, decision-making in the organs of the Authority should be by consensus.' The term 'consensus' is defined under Article 161, paragraph 8(e)) of the Convention and rule 59 of the Rules of Procedure of the Council as 'the absence of any formal objection'. The decision of the Council to request the Chamber for an advisory opinion was taken without objection and can thus be regarded as having been taken by consensus (Press Release SB/16/19, Dossier No. 13). The Chamber may therefore wish to conclude that there was a valid request by the Council in terms of Article 191.

2.5 With regard to the second element mentioned in paragraph 2.3, that is, whether the questions addressed to the Chamber are 'legal questions', it is submitted that the questions put to the Chamber are clearly legal questions. The first two questions request the Chamber to advise on the 'legal responsibilities and obligations' of States Parties to the Convention, and 'the extent of liability' of a State Party for failure to comply with the Convention and the 1994 Agreement by an entity sponsored by it. They are clearly legal questions addressed to the Chamber to assess the scope of the possible conduct of States with regard to obligations imposed upon them by International law. The third question requests the Chamber to elaborate on the scope of 'the necessary and appropriate measures that a sponsoring State must take' in the context of the treaty obligation of that State 'to fulfil its responsibilities under the Convention, in particular Article 139 and Annex III, and the 1994 Agreement'. It is also anticipated that clarification by the Chamber of these 'necessary and appropriate measures' will guide a State Party which sponsored an entity under Article 153, paragraph 2(b), towards limiting the liability of that State Party for damage caused by any failure to comply with the Convention by such entity, on the condition

that these measures have been taken by that State Party. Therefore the third question should also be considered a legal question. Furthermore, all three questions can be seen as relating to the Council's general function of approving plans of work for exploration in accordance with paragraph 11(a) of Section 3 of the Annex to the 1994 Agreement, read with Article 6 of Annex III to the Convention, and with paragraphs 6 to 11 of Section 1 of the Annex to the 1994 Agreement.

2.6 With respect to the possible question of admissibility, it may be noted that the wording of Article 191 of the Convention is different to the language found in Article 63 of the Statute of the International Court of Justice. Whilst the latter provides that the Court *may* give an advisory opinion, thus suggesting that the Court's power is discretionary, Article 191 of the Convention provides that the Chamber *shall* give an opinion (on the matters referred to above). This suggests that, once the Chamber has established its jurisdiction, the duty to render an advisory opinion is absolute.<sup>7</sup>

2.7 Although the questions themselves are abstract, they are formulated in the form of precise statements as required by Article 131, paragraph 1, of the Rules of the Tribunal. It may also be noted that, notwithstanding the differences in the language of the provisions referred to in paragraph 2.6, the International Court of Justice has recently affirmed that it is in principle for the organ requesting the opinion to decide that it needs it for the proper performance of its functions (see paragraph 34 of the Advisory Opinion of 22 July 2010 on the *Accordance with International Law of the Declaration of Independence in Respect of Kosovo*). Unlike contentious cases, the current Case No. 17 is not to request the Chamber to settle any dispute, but to 'offer legal advice to the organs and Institutions requesting the opinion', as noted by the International Court of Justice in the *Legality of the Threat or Use of Nuclear Weapons* case (ICJ Reports, 1996, pp. 226, 236), and the 'advisory opinions have the purpose of furnishing to the requesting organs the elements of law necessary for them in their action', as further noted by the Court in the case on *Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory* (ICJ Reports, 2004, pp. 136, 162-3).

2.8 In the light of these considerations, the Chamber may come to the conclusion that there are no grounds on which it should decline to provide the advisory opinion requested by the Council.

2.9 The applicable law is that set out in Annex VI, Article 38, of the Convention (the Statute of the International Tribunal for the Law of the Sea), which reads:

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

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

<sup>7</sup> See United Nations Convention on the Law of the Sea 1982: A Commentary, Vol. VI (Myron Nordquist, Satya Nandan, Shabtai Rosenne, Michael W. Lodge ed.), p.641, paragraphs 191.1.; 191.7(a).

2.10 Annex VI, Article 38, makes it clear that Article 293 of the Convention also applies, paragraph 1 of which reads:

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

### Chapter III

#### Content of the Dossier Submitted on Behalf of the Secretary-General

3.1 Pursuant to the Order of 18 May 2010 issued by the President of the Chamber and Article 131 of the Rules of the Tribunal, the Secretary-General of the Authority has transmitted a dossier to the Chamber containing material likely to throw light upon the questions on which the advisory opinion is requested. The dossier, which is divided into 67 tabs, contains the relevant rules, regulations and procedures of the Authority as well as other documents, decisions and material likely to throw light upon the three legal questions on which the advisory opinion of the Chamber is requested. The documents are numbered sequentially and identified by title and, where appropriate, by official International Seabed Authority symbol.

3.2 The approach taken to the preparation of the dossier is 'comprehensive but relevant'. The Dossier provides an overview of all aspects of the responsibilities and obligations of States sponsoring activities in the Area as defined in the Convention and the 1994 Agreement.

3.3 The Dossier is divided into five Parts. Part I includes material relating to the decisions made by the Council at the sixteenth session of the Authority to request the Seabed Disputes Chamber of the Tribunal for an advisory opinion. Part II contains relevant material relating to the legal regime governing activities with respect to polymetallic nodules in the Area.

3.4 Part III recalls the negotiating history of Article 139, Article 153 and Annex III of the Convention, to which the request for an advisory opinion refers, during the Third United Nations Conference on the Law of the Sea (UNCLOS III). In particular, Part III incorporates all the relevant documents of the Seabed Committee and UNCLOS III which may facilitate the Chamber in revisiting the negotiating history of the provisions of the Convention that are referred to in the request of the Council, that is, Article 139, Article 153, paragraph 4, and Annex III, Article 4, paragraph 4, of the Convention. The provision to the Chamber of such documents as 'supplementary means of interpretation' of the above provisions under the Convention, pursuant to Article 32 of the 1969 Vienna Convention on the Law of Treaties, may be useful for the interpretation of the above key provisions by the Chamber.

3.5 Part IV recalls the *travaux préparatoires* of the Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area, including draft texts, proposals and statements, statements of the President of the Council, statements of the President of the Assembly, working papers and background documents, and annual reports of the Secretary-General of the Authority submitted to the Assembly pursuant to Article 166, paragraph 4, of the Convention.

3.6 In light of the views expressed during the consideration by the Council of the Authority of item 7 of its agenda during the sixteenth session, Part V refers not to the specific regime of responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area as *lex specialis*, but refers to the work of the International Law Commission on the Articles on the Responsibility of States for Internationally Wrongful Acts, and the Draft Articles on the Responsibility of International Organizations.

#### Chapter IV

##### Outline of the Regulatory Regime Governing Activities in the Area

4.1 This section of the written statement provides an outline of the regulatory regime governing activities in the Area. 'Activities in the Area' in this context refers to 'all activities of exploration for and exploitation of, the resources of the Area' (Convention, Article 1(3)). 'Resources' are defined as 'all solid, liquid or gaseous mineral resources in situ in the Area at or beneath the seabed, including polymetallic nodules' (Convention, Article 133(b)). The regime for the Area is a conventional regime, the basis for which is found in Part XI and Annex III of the Convention and in the 1994 Agreement. In accordance with Article 2 of the 1994 Agreement, the provisions of the 1994 Agreement and Part XI of the Convention 'shall be interpreted as a single instrument.' In the event of any inconsistency between the 1994 Agreement and Part XI of the Convention, the provisions of the 1994 Agreement shall prevail. Annex IV of the Convention (which contains the Statute of the Enterprise) and resolutions I and II appended to the Final Act of UNCLOS III are also relevant. The general principles set out in the Convention and the 1994 Agreement are given practical effect through rules, regulations and procedures established by relevant organs of the Authority pursuant to specific powers and functions set out in the Convention and the 1994 Agreement.

4.2 Section 2 of Part XI of the Convention (Articles 136 to 149) establishes the basic principles governing the Area. The Area and its resources are the common heritage of mankind (Article 136). For States Parties to the Convention there shall be no amendments to this basic principle nor shall they be party to any agreement in derogation thereof (Article 311, paragraph 6). All rights in the resources of the Area are vested in mankind as a whole, on whose behalf the Authority shall act (Article 137, paragraph 2). Further, no claim or exercise of sovereignty or sovereign rights over any part of the Area or its resources shall be recognized (Article 137, paragraph 1). The Area shall be open to use exclusively for peaceful purposes by all States, whether coastal or land-locked (Article 141). The general conduct of States in relation to the Area shall be in accordance with the provisions of Part XI, the principles embodied in the Charter of the United Nations and other rules of international law in the interests of maintaining peace and security (Article 138). Activities in the Area shall be carried out for the benefit of mankind as a whole, as specifically provided for in Part XI, irrespective of the geographical location of States, whether coastal or land-locked, and taking into particular consideration the interests and needs of developing States and of peoples who have not attained full independence or other self governing status recognized by the United Nations (Article 140, paragraph 1). The minerals recovered from the Area may only be alienated in accordance with Part XI of the Convention, as implemented by the 1994 Agreement, and the rules, regulations and procedures of the Authority (Article 137, paragraph 2).

4.3 The system for exploration and exploitation of the resources of the Area is based on the scheme known as the 'parallel system', under which the Area may be exploited simultaneously by the Enterprise (a proposed commercial arm of the Authority) and by commercial operators in the form of States, state enterprises or corporate entities. The basis of the system is summarized in Article 153, which determines the right of access of States and their nationals to seabed resources and the role of the Authority in that regard. The 'parallel system' was an essential element of the package approach

developed during UNCLOS III, as a means of reconciling the widely divergent positions of the Group of 77 on the one hand and industrialized States on the other hand concerning the fundamental nature of the system of access to the seabed resources and the question as to whether exploitation of the Area should be carried out by the Authority directly or by States and other entities under the fiscal and administrative supervision of the Authority.

4.4 Article 153 provides that activities in the Area may be carried out by the Enterprise, or in association with the Authority by States Parties, or state enterprises or natural or judicial persons which possess the nationality of States Parties or are effectively controlled by them or their nationals, when sponsored by such States, or by any group of the foregoing which meets the requirements provided in Part XI and Annex III of the Convention and the 1994 Agreement (Article 153, paragraph 2). The requisite qualifications of such applicants are specified in Annex III, Article 4, which refers to the need to establish the financial and technical capabilities of applicants and the requirement of sponsorship. The practical implementation of these provisions is elaborated in the Regulations. 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 (Article 153, paragraph 3). Such a plan of work shall be in the form of a contract which shall provide for security of tenure over the area allocated for such purpose (Article 153, paragraph 6).

4.5 The Authority shall exercise such control over activities in the Area as is necessary for the purposes of securing compliance with the relevant provisions of Part XI and Annex III of the Convention, the 1994 Agreement, and the rules, regulations and procedures of the Authority (Article 153, paragraph 4). States Parties are to assist the Authority by taking all measures necessary to ensure such compliance in accordance with Article 139 (Article 153, paragraph 4). The responsibility of States Parties in this regard may 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 contract with the Authority and their obligations under the Convention.

4.6 The basic conditions of prospecting, exploration and exploitation, which are applicable to all contractors with the Authority, are set out in Annex III of the Convention. Annex III elaborates upon the provisions of Article 153 by describing the procedures by which States, state enterprises and other qualified entities may apply for prospecting, exploration and exploitation in the Area, the procedures for approval of plans of work for exploration and exploitation and the basic legal and contractual conditions attached to such plans of work. Many of the provisions of Annex III were affected by the 1994 Agreement, which elaborates on their implementation. The provisions of Annex III, as implemented by the 1994 Agreement, are reflected in and given practical effect by the Regulations.

4.7 The Regulations were adopted by the Council of the Authority on 13 July 2000 and approved by the Assembly on the same day without further amendment (ISBA/6/C/12, ISBA/6/A/18, Dossier nos. 16 and 17). In adopting the Regulations, the Council was giving effect to the provisions of Article 162, paragraph 2(o)(i) of the Convention, which states that in carrying out its legislative functions, the Council should give priority to the adoption of rules, regulations and procedures for the exploration for and

exploitation of polymetallic nodules. This provision is qualified by the 1994 Agreement, which provides that, between the entry into force of the Convention and the approval of the first plan of work for exploitation, the Authority shall concentrate on the 'adoption of rules, regulations and procedures necessary for the conduct of activities in the Area as they progress'. Such rules, regulations and procedures shall 'take into account the terms of the Agreement, the prolonged delay in commercial deep seabed mining and the likely pace of activities in the Area' (1994 Agreement, annex, Section 1, paragraph 5(f)). In adopting such rules, regulations and procedures the Authority was also required to incorporate 'applicable standards for the protection and preservation of the marine environment' (1994 Agreement, annex, Section 1, paragraph 5(g)).

4.8 Taking these provisions into account, the Regulations deal with prospecting for polymetallic nodules, application for and approval of a plan of work for exploration for polymetallic nodules leading to a contract. They also set out the basic terms and conditions of such contract. Certain basic principles and procedures relating to the protection of the marine environment are incorporated. Special provisions relating to the treatment of registered pioneer investors are also included in accordance with the provisions of the 1994 Agreement. The Regulations consist of 40 regulations, and are organized into nine parts and four annexes. Part I consists of introductory material and definitions. Part II addresses prospecting. Part III deals with the process of applying for approval of a plan of work for exploration, including the content of the plan of work, the form of the application and the procedure for consideration of application by the Legal and Technical Commission and the Council. Part IV describes the form and content of the contract for exploration. Parts I to IV are essentially an elaboration of Annex III of the Convention, which sets out the basic conditions of prospecting, exploration and exploitation.

4.9 Part V of the Regulations deals with protection and preservation of the marine environment, including the procedure for the application of emergency orders pursuant to Article 162, paragraph 2(w), of the Convention. Part VI deals with confidentiality of data and information. Part VII contains general procedures necessary for the implementation of the Regulations. Part VIII deals with settlement of disputes and Part IX sets out the procedure to be followed should the prospector or contractor locate resources other than polymetallic nodules in the area allocated to it. Annexes 1 and 2 are the forms used to notify the Authority of the intention to engage in prospecting and apply for approval for a plan of work for exploration. Annex 3 is the form of contract for exploration and Annex 4 contains the standard clauses of the contract for exploration.

4.10 The following paragraphs explain in more detail some of the key elements of the regulatory regime that are relevant to the present case.

#### **Procedures to apply for approval of plans of work for exploration in the form of contracts**

4.11 The procedures for making applications for approval of plans of work for exploration in the form of contracts are dealt with under Part III (regulations 9 through 19) and Annex 2 of the Regulations. In accordance with Article 153 of the Convention, the following may apply to the Authority for approval of plans of work for exploration:

(a) The Enterprise, on its own behalf or in a joint arrangement (regulation 9 (a));

(b) A State Party to the 1982 Convention, or a state enterprise sponsored by a State Party, or a natural or judicial person possessing the nationality of a State Party and sponsored by a State Party, or any combination thereof (regulation 9(b)).

4.11 Regulation 10 prescribes the form and content of applications by reference to Annex 2 of the Regulations.

4.12 Regulation 11 deals with the form and content of the certificate of sponsorship. In this respect, it gives effect to Annex III, Article 4, paragraph 3, of the Convention, which provides that the criteria and procedures for sponsorship are to be elaborated in the rules, regulations and procedures of the Authority. In accordance with Annex III, Article 4, paragraph 4, the responsibility of the sponsoring State or States, pursuant to Article 139 of the Convention, is to ensure, within their legal systems, that the contractor carries out activities in the Area in conformity with the terms of the contract and its obligations under the Convention. Regulation 11 contains the following specific provisions:

(a) Each application by a State enterprise or one of the entities referred to in regulation 9(b) shall be accompanied by a certificate of sponsorship issued by the State of which it is a national or by which or by whose nationals it is effectively controlled. If the applicant has more than one nationality, as in the case of a partnership or consortium of entities from more than one State, each State involved shall issue a certificate of sponsorship.

(b) Where the applicant has the nationality of one State but is effectively controlled by another State or its nationals, each State involved shall issue a certificate of sponsorship.

(c) Each certificate of sponsorship shall contain, *inter alia*, a declaration that the sponsoring State assumes responsibility in accordance with Articles 139, Article 153, paragraph 4 and Annex III, Article 4, paragraph 4, of the Convention (regulation 11, paragraph 3(f)).

4.13 In accordance with Annex 2 of the Regulations, each application for approval of a plan of work shall include the following information:

- (a) Information on financial capability;
- (b) Information on technical capability;
- (c) Proposed 15-year exploration programme;
- (d) Detailed five-year plan showing anticipated annual actual and direct expenditure on exploration;
- (e) Proposal for oceanographic and environmental baseline studies and preliminary environmental impact assessment;
- (f) Proposed measures to prevent pollution (contingency plan);
- (g) Undertaking of good faith;
- (h) Fee (US\$ 250,000 per application);

- (i) Details of previous contracts (if any); and
- (j) A list of coordinates and chart of the area in respect of which the application is made.

4.14 The content of these informational requirements is specified in the Regulations. Regulation 12 sets out in detail the financial and technical information that must be included with the application. These are referred to in Annex III, Article 4, as the 'qualification standards' of applicants. Regulations 13 and 14 respectively require the disclosure of any prior contracts with the Authority and the provision of written undertakings in accordance with Annex III, Article 4, paragraph 6, of the Convention. In accordance with regulation 14, each applicant, including the Enterprise, shall, as part of its application for approval of a plan of work, provide a written undertaking to the Authority that it will (a) accept as enforceable and comply with the applicable obligations created by the provisions of the Convention and the rules, regulations and procedures of the Authority, the decisions of the relevant organs of the Authority and the terms of contract with the Authority; (b) accept control by the Authority of activities in the Area, as authorized by the Convention; and (c) provide the Authority with a written assurance that its obligations under the contract will be fulfilled in good faith.

4.15 Regulations 15 through 18 deal with the size of the area covered by the application and the data and information to be submitted relating to such area. The Regulations are designed to give effect to the so-called 'site-banking' system, enshrined in Annex III, Article 8, of the Convention. Under Annex III, Article 8, each application must cover an area large enough to accommodate two mining operations. The applicant must therefore divide the area into two parts of 'equal estimated commercial value'. The application must also contain sufficient data and information, which shall 'consist of data available to the applicant with respect to both parts of the area under application, including the data used to determine their commercial value' to enable the Council to designate a reserved area based on the estimated commercial value of each part. It should be noted that this procedure was not applicable to the present application by Nauru Ocean Resources Inc., since the application was made in respect of a reserved area.

4.16 Regulation 17 sets out procedures for applications for approval of a plan of work for exploration in respect of a 'reserved area', more properly referred to as 'areas reserved for the conduct of activities by the Authority through the Enterprise or in association with developing States pursuant to the Convention, Annex III, Article 8'. This regulation is an attempt to combine the provisions of Annex III, Article 9, of the Convention with the provisions of the 1994 Agreement, annex, Section 2, which has the effect of modifying the implementation of Annex III, Article 9. While Annex III, Article 9 gives the Enterprise the right of first refusal to make use of a reserved area, regulation 17 provides a mechanism whereby a developing State, or an entity sponsored by such a State, may notify the Authority that it wishes to submit a plan of work with respect to a reserved area. In such a case, the Enterprise must decide within six months whether it wishes to use the area concerned. If it does wish to do so, the 1994 Agreement, annex, Section 2, paragraph 2, provides that until such time as the Enterprise begins to function independently of the secretariat of the Authority, it may do so only through joint-venture operations. If it decides not to use the reserved area, the prospective applicant may submit its application for approval of a plan of work in the reserved area.

4.17 It may be recalled in this regard that the Enterprise has not yet begun to function independently of the secretariat of the Authority and that, by reason of Article 170 of the Convention and the annex, section 2, paragraph 2, of the 1994 Agreement the Council would only take up the issue of the functioning of the Enterprise independently of the secretariat of the Authority either (a) upon the approval of a plan of work for exploitation by an entity other than the Enterprise, or (b) upon receipt by the Council of an application for a joint-venture operation with the Enterprise. Until such time as either of these eventualities take place the secretariat of the Authority shall perform the functions of the Enterprise, which shall be as set out in section 2, paragraph 1 of the annex to the 1994 Agreement.

4.18 Regulation 18 specifies the data and information that must be submitted for approval of a plan of work for exploration. The Regulation contains a number of critical requirements that are not found in the Convention, but reflect the emphasis placed on the environmental impact assessment in the 1994 Agreement, annex, Section 1, paragraph 7. These include.

(a) a general description and a schedule of the proposed exploration programme, including the programme of activities for the immediate five-year period, such as studies to be undertaken in respect of the environmental, technical, economic and other appropriate factors that must be taken into account in exploration;

(b) a description of the programme for oceanographic and environmental baseline studies in accordance with these Regulations and any environmental rules, regulations and procedures established by the Authority that would enable an assessment of the potential environmental impact of the proposed exploration activities, taking into account any recommendations issued by the LTC;

(c) a preliminary assessment of the possible impact of the proposed exploration activities on the marine environment; and

(d) a description of proposed measures for the prevention, reduction and control of pollution and other hazards, as well as possible impacts, to the marine environment. In addition, the applicant is to submit a schedule of anticipated yearly expenditures in respect of the programme of activities for the immediate five-year period.

4.19 Regulation 19 specifies the level of the fee for each application at an amount of US\$250,000. This is subject to review by the Council from time to time to ensure that it covers the administrative costs incurred by the Authority in processing the application.

#### **Processing of applications**

4.20 Part 4 of the Regulations (regulations 20 to 22) deals with processing of applications. Regulation 21 specifies the matter on which the Legal and Technical Commission must determine before it recommends approval of a plan of work for exploration to the Council, outlines the circumstances in which the Commission shall not recommend approval of a plan of work for exploration and the procedure that must be followed if the Commission finds that an application does not comply with the Regulations. It also describes the general considerations and principles to which the Commission shall

have regard when considering applications. In general and in keeping with the provisions of the 1994 Agreement, specifically annex, Section 1, paragraph 6, the Commission has limited power to reject an application and its main function is to make a series of objective determinations as to whether the mandatory provisions of the Regulations have been complied with. Once the Commission has recommended approval of the application, the matter is to be taken up by the Council.

4.21 Regulation 22 provides that the Council shall consider the reports and recommendations of the Commission relating to approval of plans of work for exploration in accordance with paragraphs 11 and 12 of Section 3 of the annex to the 1994 Agreement. Section 3, paragraph 11(a), provides that the Council shall approve a recommendation by the Commission for approval of a plan of work unless by a two-thirds majority of the members present and voting, including a majority of members present and voting in each of the chambers of the Council, the Council decides to disapprove a plan of work. If the Council fails to take a decision on a recommendation for approval of a plan of work within a prescribed period (normally 60 days unless the Council decides to provide for a longer period), it is deemed to have approved the recommendation at the end of that period. If the Commission recommends disapproval of a plan of work or does not make a recommendation, the Council may nevertheless approve the plan of work in accordance with its rules of procedure for decision-making on questions of substance. Section 3, paragraph 11(b), of the annex to the 1994 Agreement provides that the provisions of Article 162, paragraph 2(j), of the Convention (which set out an objection, conciliation and three-fourths majority voting procedure in the Council) shall not apply. Section 3, paragraph 12, of the annex to the 1994 Agreement requires submission of a dispute relating to the disapproval of a plan of work to the dispute settlement procedures set out in the Convention (specifically Articles 187 to 189).

#### **The contract for exploration**

4.22 Part IV of the Regulations (regulations 23 to 30) sets out the basic parameters of the contract for exploration. These provisions are elaborated further in Annex 4 to the Regulations, which contain the standard clauses for exploration contracts. These standard clauses are common to all contractors and thus remove the need for the Authority to negotiate with each potential contractor individually. In this regard, the use of standard clauses reflects common practice in the national legislation of a number of countries in the case of offshore oil and gas licensing. Many of the standard clauses elaborate upon or in some cases repeat matter that is contained in the body of the Regulations. For instance, Section 2 of Annex 4 on security of tenure should be read with regulation 24; Section 3 on the duration of contracts should be read with regulation 26; Section 20 on termination of sponsorship should be read with regulation 11. There are also general contractual provisions which are, for the most part, a direct transposition from Annex III of the Convention. These include Section 22 of Annex 4 on transfer of rights and obligations (Convention, Annex III, Article 20); Section 24 on revision (Convention, annex III, Article 19); Section 27 on applicable law (Convention, annex III, Article 21); and Section 16 on responsibility and liability (Convention, Annex III, Article 22). Other provisions are similar to those generally found in mining contracts and include Section 17 on force majeure, Section 18 on disclaimer, Section 19 on renunciation of rights, Section 26 on notice and Section 28 on interpretation.

4.23 The essential parameters of the contract can be summed up as follows:

(1) The contract shall confer upon the contractor exclusive rights to explore the area under contract in respect of polymetallic nodules. The Authority shall ensure that no other entity operates in the same area for resources other than polymetallic nodules in a manner that might interfere with the operations of the contractor (regulation 24, paragraph 1, giving effect to Article 153, paragraph 6, and Annex III, Article 3, paragraph 4(c), and Article 16 of the Convention).

(2) The total area allocated to the contractor under a contract for exploration for polymetallic nodules shall not exceed 150,000 square kilometres, of which fifty per cent shall be relinquished over eight years beginning from the date of the contract. The Council may, however, at the request of the contractor, and on the recommendation of the Legal and Technical Commission, in exceptional circumstances, defer the schedule of relinquishment (regulation 25).

(3) Pursuant to Article 15 of Annex III to the Convention, each contract shall include as a schedule a practical programme for the training of personnel of the Authority and developing States and drawn up by the contractor in cooperation with the Authority and the sponsoring States or States. Such training programme shall focus on training in the conduct of exploration, provide for full participation by such personnel in all activities covered by the contract, and may be revised and developed from time to time as necessary by mutual agreement (regulation 27).

(4) The duration of the contract shall be 15 years, which may be extended by the Council, on the recommendation of the Legal and Technical Commission, for periods of not more than five years each, if the contractor has made efforts in good faith to comply with the requirements of the plan of work but for reasons beyond the contractor's control has been unable to complete the necessary preparatory work for proceeding to the exploitation stage or if the prevailing economic circumstances do not justify proceeding to the exploitation stage.

(5) There shall be a periodic review of the implementation of the plan of work for exploration at intervals of five years, jointly undertaken by the contractor and the Secretary-General. In the light of the review, the contractor shall indicate its programme of activities for the following five-year period, making such adjustments to its programme of activities as are necessary (regulation 28).

(6) Each contractor shall have the required sponsorship throughout the period of the contract. If a State terminates its sponsorship it shall promptly notify the Secretary-General in writing, including the reason for terminating its sponsorship. The Secretary-General shall notify the members of the Authority of the termination or change of sponsorship. Termination of sponsorship shall take effect six months after the date of receipt of the notification by the Secretary-General unless the notification specifies a later date. In the event of termination of sponsorship the contractor shall, within the aforementioned period of six months, obtain another sponsor. Such sponsor shall submit a certificate of sponsorship in accordance with regulation 11 of the Regulations. Failure to obtain a sponsor within the required period shall result in the termination of the contract. Furthermore, a sponsoring State shall not be discharged by reason of the termination of its sponsorship from any obligations accrued while it was a sponsoring State, nor shall such termination affect any legal rights and obligations created during such sponsorship (regulation 29).

(7) Responsibility and liability of the contractor and of the Authority shall be in accordance with the Convention. The contractor shall continue to have responsibility for any damage arising out of wrongful acts in the conduct of its operations, in particular damage to the marine environment, after the completion of the exploration phase (regulation 30. Here the relevant provisions of the Convention are largely Article 139 on States Parties' responsibility and liability and Annex III, Article 22 of the Convention. Section 16 of Annex 4 to the Regulations details the provisions of the Convention on responsibility and liability of the contractor and the Authority).

#### **Protection and preservation of the marine environment**

4.24 Protection and preservation of the marine environment are dealt with under Part V (Regulations 31 to 34) of the Regulations. Although Part XII of the Convention deals in general terms with the obligations of States to protect and preserve the marine environment, there is no specific provision in Part XI beyond the general requirement in Article 145 that 'necessary measures shall be taken in accordance with this 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.' However, Article 145 goes on to require the Authority to adopt rules, regulations and procedures for, inter alia, (a) the prevention, reduction and control of pollution and other hazards to the marine environment, including the coastline, and of interference with the ecological balance of the marine environment, particular attention being paid to the need for protection from harmful effects of such activities as drilling, dredging, excavation, disposal of waste, construction, and operation or maintenance of installations, pipelines and other devices related to such activities; and (b) 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.

4.25 A similar enabling provision appears in Annex III, Article 17, paragraph (1)(b)(xii) of the Convention which obliges the Authority to adopt rules, regulations and procedures on 'mining standards and practices, including those relating to operational safety, conservation of the resources and the protection of the marine environment'. The 1994 Agreement also gives priority to the adoption of rules, regulations and procedures incorporating applicable standards for the protection and preservation of the marine environment (1994 Agreement, annex, Section 1, paragraph 5(g)), and requires that an application for approval of a plan of work for exploration is accompanied by an assessment of the potential environmental impacts of the proposed exploration activities and a description of a programme for oceanographic and baseline environmental studies (1994 Agreement, annex, Section 1, paragraph 7). All these provisions are given substance in the Regulations.

4.26 First, the Authority is under a duty to establish and keep under review environmental rules, regulations and procedures to ensure effective protection for the marine environment from harmful effects which may arise from activities in the Area (regulation 31, paragraph 1). Second, the Authority and sponsoring States are required to apply a precautionary approach, as reflected in Principle 15 of the Rio Declaration, to activities in the Area. Third, the Regulations impose a duty on each contractor to 'take necessary measures to prevent, reduce and control pollution and other hazards to the marine environment arising from its activities in the Area as far as reasonably possible using the best technology

available to it.' (regulation 31, paragraph 3). The specific content of this duty on contractors is elaborated in the Regulations and in the standard clauses, as well as in the recommendations for the guidance of the contractors for the assessment of possible environmental impacts arising from exploration for polymetallic nodules in the Area issued by the Legal and Technical Commission in 2001 (LSBA/7/LTC/1/Rev.1 and Corr.1). Therefore, the contractor is required to gather environmental baseline data as exploration activities progress and to establish environmental baselines against which to assess the likely effects of its activities on the marine environment (regulation 31, paragraph 4; Annex 4, Section 5.2 of the Regulations). The contractor is also required to establish and implement a programme to monitor and report on such effects.

4.27 The Regulations also contain detailed procedures for the exercise by the Council of its power to issue emergency order to prevent serious harm to the marine environment arising out of activities in the Area, pursuant to Article 162, paragraph 2(w) of the Convention (regulation 32).

#### **Other provisions of the Regulations**

4.28 In addition to the above, the Regulations also contain provisions relating to the treatment of confidential data and information, the giving and receiving of notices and formal communications, and other provisions of a general nature. Part VIII of the Regulations (regulation 39) deals with the settlement of disputes and provides that disputes concerning the interpretation or application of the Regulations shall be settled in accordance with Part XI, section 5 of the Convention.<sup>8</sup> Annex 1 to the Regulations contains a list of required data and information to be submitted for notification of intention to engage in prospecting and format of the notification. Annex 2 provides a list of required data and information to be submitted in the application for approval of a plan of work for exploration to obtain a contract, and the required format of the application. Annex 3 to the Regulations, which is the standard form of contract for exploration, is a short document which merely sets out the names of the parties to the contract, describes the subject matter of the contract, its duration and date of commencement and states that the standard clauses set out in Annex 4 to the Regulations shall be incorporated in the contract and shall have effect as if set out at length. In order to reflect the differences among individual contractors, the contract contains 3 Schedules, with Schedule 1 to define the exploration area allocated to the contractor, Schedule 2 to cover the contractor's programme of activities, and Schedule 3 for the contractor's training programme, as required under Article 144 and Annex III, Article 15, of the Convention, and when approved by the Authority in accordance with section 8 of the standard clauses contained in Annex 4 to the Nodule Regulations.

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<sup>8</sup> Part XI, section 5 (Articles 186 to 191), of the Convention deals with the jurisdiction of the Chamber of the Tribunal and the submission of disputes to special or *ad hoc* chambers of the Tribunal or to binding commercial arbitration.

## Section V

## Concluding Comments

- 5.1 Although the secretariat wishes to express no opinion on the three questions before the Chamber, it is suggested that a few tentative conclusions may be drawn from the above elaboration of the legal regime governing activities in the Area.
- 5.2 It would appear that the overriding intent of the Convention and the 1994 Agreement, and the Regulations, is that the purpose of State sponsorship is to ensure that a State Party takes responsibility in accordance with article 139, article 153, paragraph 4, and Annex III, article 4, paragraph 4, of the Convention.
- 5.3 Under Article 153, paragraph (2)(b), of the Convention, activities in the Area shall be carried out *... 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.* [emphasis added]
- 5.4 Annex III, article 4(3) states that
- 3. Each applicant shall be sponsored by the State Party of which it is a national unless the applicant has more than one nationality, as in the case of a partnership or consortium of entities from several States, in which event all States Parties involved shall sponsor the application, or unless the applicant is effectively controlled by another State Party or its nationals, in which event both States Parties shall sponsor the application. The criteria and procedures for implementation of the sponsorship requirements shall be set forth in the rules, regulations and procedures of the Authority.* [emphasis added]
- 5.5 This is further elaborated in Regulation 11, which requires that:
- 1. Each application by a state enterprise or one of the entities referred to in subparagraph (b) of regulation 9 shall be accompanied by a certificate of sponsorship issued by the State of which it is a national or by which or by whose nationals it is effectively controlled. If the applicant has more than one nationality, as in the case of a partnership or consortium of entities from more than one State, each State involved shall issue a certificate of sponsorship.*
- 2. Where the applicant has the nationality of one State but is effectively controlled by another State or its nationals, each State involved shall issue a certificate of sponsorship.*
- 5.6 Thus, where an applicant has only one nationality, and there is no partnership or consortium involved, the first limb of Article 4(3), and regulation 11(1), do not apply. However, if the applicant or

applicants are 'effectively controlled by another State Party or its nationals', then it would be necessary for each State involved to issue a certificate of sponsorship. It would also clearly be necessary to identify 'each State involved', which in itself may not be an easy matter. The link, therefore, that gives rise to the requirement of sponsorship may be either nationality or 'effective control'.

5.7 In either case, the key provision relating to the obligations of sponsoring States is found in Annex III, Article 4, paragraph 4, of the Convention, which provides that

*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.*

5.8 It is suggested that the logical way to approach this provision is first to determine what are the relevant terms of the contract and obligations of contractors under the Convention and the 1994 Agreement (which are elaborated in Chapter IV), second to determine what degree of certainty or obligation is conveyed by the term 'ensure' within the context of the Convention and the 1994 Agreement, and third to consider how the words 'within their legal systems' qualify such obligation. In this respect, the attention of the Chamber is drawn to the second sentence of Article 4, paragraph 4, which reads

*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.*

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