(e) Written Statement of Romania

INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the International Seabed Area (Request for Advisory Opinion submitted to the Seabed Disputes Chamber), Case no. 17

WRITTEN STATEMENT OF ROMANIA

13 AUGUST 2010

I. Introduction

1. On 6 May 2010, the Council of the International Seabed Authority decided to request the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea 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 fulfill its responsibility under the Convention, in particular Article 139 and Annex III, and the 1994 Agreement?

2. The request was made following a proposal submitted by the delegation of Nauru during the 16th Council of the International Seabed Authority (ISBA/16/C/6).

3. Romania considers that questions 1 and 3 both deal with responsibility of States for sponsoring activities in the Area and will consider them together in section IV of this Written Statement. Question 2, which concerns liability, will be examined in section V. The preliminary issues of jurisdiction of the Chamber and applicable law are dealt with in sections II and III.

II. Jurisdiction of the Seabed Disputes Chamber

4 The jurisdiction of the Seabed Disputes Chamber in this case is founded on the provisions of article 191 of the United Nations Convention on the Law of the Sea (further referred to as "the Convention"), which states as follows:

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

5. The matter at hand, which concerns responsibility and liability of States for sponsoring activities in the area of seabed and ocean floor and subsoil thereof beyond the limits of national jurisdiction (further referred to as "the Area") clearly falls within the scope of the activity of the Council. Thus, the Council, as the executive body of the International Seabed Authority, establishes policies in respect to activities in the Area and controls the

implementation of the regime for seabed mining. The Council is empowered, in particular, to "exercise control over activities in the Area in accordance with article 153, paragraph 4, and the rules, regulations and procedures of the Authority" and to "institute proceedings on behalf of the Authority before the Seabed Disputes Chamber in cases of non-compliance" (article 162 of the Convention). It follows that the Chamber has jurisdiction to render the advisory opinion.

III. Applicable Law

6. In accordance with article 134 paragraph 2 and article 138 of the Convention, the conduct of States in relation to the Area is governed by the provisions of Part XI of the Convention, the principles embodied in the Charter of the United Nations and other rules of international law in the interest of maintaining peace and security and promoting international co-operation.

7. Also, account should be taken of article 304 of the Convention, dealing specifically with "responsibility and liability for damage", which states that

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

8. Consequently, the rules that fall to be applied are those set forth in the Convention, in particular in part XI thereof, as well as in the Annexes to the Convention, and of the 1994 Agreement relating to the Implementation of Part XI of the Convention (further referred to as "the 1994 Agreement"). In accordance with article 304 of the Convention, these norms are to be read in conjunction with the provisions of international law concerning State responsibility, a body of law which has been recently codified by the International Law Commission.

IV. Responsibility of States with Respect to Sponsoring Activities

9. The rules concerning responsibility and liability of States with respect to sponsoring activities are set forth in articles 139 and 153 of the Convention and in article 4 of Annex III thereof.

Article 139 reads in its relevant parts:

> 1. States Parties shall have the responsibility to ensure that activities in the Area, whether carried out by States Parties, or State enterprises or natural or juridical persons which possess the nationality of States Parties or are effectively controlled by them or their nationals, shall be carried out in conformity with this Part. (...)
>
> 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 (...). 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 paragraph 4 of the Convention reads as follows:

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

Article 4, paragraph 4 of Annex III to the Convention reads as follows:

> 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.

10. In short, the Convention establishes for the sponsoring States the obligation to ensure compliance by the entities that it sponsors with the provisions of the Convention, the rules, regulations and procedures established by the Authority, the plan of work and the terms of the contract concluded by such an entity with the Authority. There is a very important limitation to this obligation, namely that States can discharge their responsibility by taking the necessary measures to attain the prescribed end.

11. The above quoted provisions give little guidance in respect of the precise modalities by which States are supposed to fulfill this obligation. In particular, it is not immediately clear from the wording employed by these provisions whether States have only the duty to enact legislation which requires the sponsored entity to comply with the Convention and the rules, regulations and procedures of the Authority or if they are also under an obligation to actively oversee the activity of the sponsored entity and to enforce these norms.

12. Romania believes that in order to assess the extent of responsibilities of sponsoring States it is necessary to take into account the particularities of the legal regime established for seabed mining.

13. In accordance with the Convention, sovereignty over the Area is vested in mankind as a whole. The International Seabed Authority was set up in accordance with the provisions

of the Convention in order to act on behalf of mankind. Activities in the Area shall be "organized, carried out and controlled" by the Authority (article 153 paragraph 1 of the Convention). Also, article 157 of the Convention describes the Authority as the organization through which State Parties shall, in accordance with part XI, "organize and control activities in the Area".

14. Any natural or legal person sponsored by a State Party has to enter into legal arrangements with the Authority in order to conduct activities into the Area. Every applicant must undertake to accept as enforceable and comply with the applicable obligations created by the provisions of Part XI, to accept control by the Authority of activities in the Area, and to provide the Authority with a written assurance that his obligations under the contract will be fulfilled in good faith.

15. The Convention confers upon the Authority extensive regulatory powers. Thus, it is entitled to adopt rules, regulations and procedures concerning matters such as the prevention, reduction and control of pollution and other hazards to the marine environment (art. 145 of the Convention), protection of human life with respect to activities in the Area (art. 146 of the Convention) the erection, emplacement and removal of installations (art. 147 of the Convention) the implementation of the provisions of the Convention and of the 1994 Agreement concerning production policy in the Area (articles 150 and 151 of the Convention and section 6 of the 1994 Agreement)

16. The Authority has the power to enforce its own rules, regulations and procedures and the provisions of the Convention. Article 153 enables the Authority to take measures provided under Part XI of the Convention to ensure compliance with its provisions. In particular, the Authority is entitled under article 153 to inspect all installation in the area used in connection with activities in the Area.

17. The enforcement jurisdiction of the Authority is detailed in article 18 of Annex III to the Convention. The Authority is entitled to suspend or terminate the rights under the contract or impose upon the contractor monetary penalties proportionate to the seriousness of the violation. The contractor may seek judicial remedy before such penalties are imposed.

18. Under article 162 paragraph 2 (w) the Council of the Authority may issue emergency orders which may include orders for the suspension or adjustment of operations, to prevent serious harm to the marine environment arising out of activities in the Area. It is also entitled to establish appropriate mechanisms for directing and supervising a staff of inspectors who shall inspect activities in the Area to determine whether part XI, the rules regulations and procedures of the Authority, and the terms and conditions of any contract with the Authority are being complied with. Also, the Council is to institute proceedings on behalf of the Authority before the Seabed Disputes Chamber in cases of non-compliance.

19. Thus, any activities undertaken in the Area by the sponsored entity are under a tight control of the Authority and of its executive arm, the Council, which have the means to

ensure that such an entity complies with the provisions of the Convention and of its own rules, regulations and procedures.

20. The measures that the sponsoring State is required to take in order to discharge its obligations under articles 139 and 153 of the Convention and article 4 of Annex 3 are to be assessed against these provisions.

21. Account should be taken of the fact that a dual system of control (exercised both by the Authority and the sponsoring State) will necessarily increase the administrative costs of the sponsored entity. Control by the sponsoring State should not be such as to impose too burdensome obligations on the sponsored entity and to impair the economic viability of the activity. Also, any measures taken by the sponsoring State should be limited as not to encroach on the powers of the Authority.

22. As shown above, the responsibility to ensure that activities undertaken by the entities sponsored by States comply with the provisions of the Convention and the other applicable rules rests primarily with the Authority. Nevertheless, States Parties have the duty to "assist" the Authority in discharging its duties, in accordance with article 153 paragraph 4 of the Convention. States are thus required to adopt measures to ensure the effectiveness of the provisions of the Convention. The existence of monitoring and enforcement role of the Authority does not constitute an obstacle for the sponsoring State to take its own monitoring and enforcement measures.

23. This view seems to be supported by the authoritative Center for Oceans Law and Policy, University of Virginia School of Law Commentary Project ("Virginia Commentary") which provides the following commentary on the duties imposed on States by article 139 of the Convention.

> This implies some flexibility in the type of measures, and does not necessarily requires sponsoring States to take enforcement action against contractors, but it does clearly require some action to be taken by the sponsoring State. (Center for Oceans Law and Policy, University of Virginia School of Law, *United Nations Convention on the Law of the Sea 1982. A Commentary*, vol. VI, p. 127)

24. Also, the specific rules of the Convention regarding pollution from activities in the Area have incidence on this matter, taking into account in particular that damages resulting from activities in the Area are most likely to occur to the marine environment. Article 209 of the Convention, dealing with pollution from activities in the Area, has the following content:

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

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

25. The Convention envisages thus a double-tier system of protection of the marine environment in the Area against pollution: the international rules, regulations and procedures developed by the Authority doubled by laws and regulations at national level.

26. Further, under general international law, States are required to ensure that activities under their jurisdiction and control do not harm the environment, including in areas beyond national jurisdiction.

27. This norm is reflected in the 1972 Declaration of the United Nations Conference on the Human Environment (the Stockholm Declaration) principle 21 of which reads:

> States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction

28. This principle was confirmed by the International Court of Justice as being a part of the corpus of international law:

> 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. (*Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, pp. 241-242, para. 29.)

29. Consequently, States have the duty to exert their best efforts to minimize the risks to the environment from activities under their jurisdiction and control

30. A further difficulty has been stressed by Nauru in the background paper prepared in support of its proposal for the request of an advisory opinion, which reads:

> (...) in reality, no amount of measures taken by a sponsoring State could ever fully ensure or guarantee that a Contractor carries out its activities in accordance with the Convention (ISBA/16/C/6, paragraph 6)

31. According to the text of articles 139 and 153 of the Convention and of article 4 of Annex 3, the Convention establishes for the sponsoring State an obligation of due

diligence in respect of the prevention of noncompliance by the sponsored entity. This means that the sponsoring State is not required to totally prevent the occurrence of a breach of the Convention or of the other applicable norms by the sponsored entity, but to do its utmost to minimize the possibility of such a breach.

32. It is possible to discern from the conduct of a State whether it is has complied with this obligation. The standard against which the conduct of the sponsoring State is assessed is what measures are reasonably apt to prevent the breach. This varies in relation to the nature of the concerned activity: for example, exploration activities are less intrusive and less dangerous for the environment than exploitation activities, so in their case measures to ensure compliance by the sponsored entity may be more flexible.

33. In order to discharge its obligation, the sponsoring States has to take a combination of measures aimed at deterring the sponsored entity to breach its obligations Thus, the sponsoring State should:

- inform itself of the financial and technological capabilities of the sponsored entity in order to ascertain that it is in a position to comply with the provisions of the Convention;
- adopt national legislation on activities in the Area incorporating standards no less stringent that the rules established by the International Seabed Authority;
- impose on the sponsored entity the requirement to establish financial securities in order to be able to offer compensation for possible claims for damages in case of breach;
- put in place suitable monitoring mechanisms, account being taken of the prerogatives of the Authority;
- establish procedures destined to bring to a stop the conduct that it's contrary to the provisions of the Convention and to the other applicable norms and to prevent the repetition of such conduct.

V. Extent of Liability of Sponsoring States in Case of Failure to Comply with Its Obligations

34. Sponsoring States are responsible under the Convention for the infringement of their obligation to ensure compliance by the sponsored entity.

35. This rule is embodied in article 139 paragraph II of the Convention which indicates that, unless a State complies with its duty and takes the necessary measures, it is liable for damages inflicted by the failure to comply with its duties. Article 139 reflects the rule of international law in accordance to which a breach of international law from a State entails its international responsibility.

36. However, liability for the damages provoked by wrongful conduct of the sponsored entity attaches primarily to this entity.

37. This is clearly borne out by article 22 of Annex III to the Convention which provides that

> The contractor shall have responsibility or liability for any damage arising out of wrongful acts in the conduct of its operations, account being taken of contributory acts and omissions of the Authority (...). Liability in every case shall be for the actual amount of the damage.

38. This basic provision is further refined by the Regulation on Prospecting (ISBA/6/A/18) which provides in section 16, titled "Responsibility and Liability" of Annex 4 (Standard Clauses for Exploration Contract) that:

> 16.1 The Contractor shall be liable for the actual amount of any damage, including damage to the maritime environment, arising out of its wrongful acts or omissions, and those of its employees, subcontractors, agents and all persons engaged in working or acting for them in the conduct of its operation under this contract, including the costs of reasonable measures to prevent or limit damage to the environment, account being taken of any contributory acts or omissions of the Authority.
> 16.2 The Contractor shall indemnify the Authority, its employees, subcontractors and agents against all claims and liabilities of any third party arising out of any wrongful acts or omissions of the Contractor and its employees, agents and subcontractors, and all persons engaged in working or acting for them in conduct of its operations under this contract.

39. In accordance with these articles, the sponsored entity is *prima facie* liable for all costs of the prevention and mitigation measures as well as for the costs of restoration.

40. It is justified that the sponsored entity, which does not act on behalf of the sponsoring State but independently, and which exercises direct control over the activity and benefits from it should bear primary liability.

41. The sponsoring State is in principle liable for the remainder of the loss, taking into account the possible contribution of the Authority, as the degree of control of the State over an activity is of relevance in assessing its liability. This obligation of the sponsoring State to make reparations arises of the breach of its obligation to ensure compliance by the sponsored entity, which amounts to an internationally wrongful act. It is equitable that the sponsoring States participate to the allocation of the loss, considering also that under sponsorship arrangements they derive certain benefits from the activity of the sponsored entity.

VI. Conclusions

Having in mind all the above mentioned reasons, Romania has arrived to the following conclusions:

a) The Seabed Disputes Chamber of the International Tribunal for the Law of the Sea has jurisdiction to render the advisory opinion requested by the Council of the International Seabed Authority;

b) The Convention imposes upon a State which sponsors activities in the Area a due diligence obligation to take the necessary measures in order to ensure that sponsored entities do not breach the Convention and the other applicable norms; the sponsoring State is relieved of the responsibility if it takes the necessary measures against the occurrence of such a breach.

c) The specific measures required from the sponsoring State are not determined by the Convention; in order to establish which measures are suitable, the role of the Authority, which has extensive rights and powers to regulate and monitor the activities of the sponsored entity and the means to ensure compliance with the Convention and the other applicable norms, must be taken into account, however, the sponsoring State retains a degree of control over the conduct of the sponsored entity and must assist the Authority in discharging its duty; therefore the sponsoring State should take meaningful monitoring and enforcement measures as regards the sponsored entity; these measures should not affect the powers of the Authority or impose too burdensome obligations on the entity which could unduly impact the respective activity or impair its economic viability;

d) Non-performance by the sponsoring State of the duty to take all the necessary measures in order to prevent breaches amounts to a wrongful act which entails liability to compensate for damages; while the sponsored entity bears the primary liability for the damages inflicted by its wrongful conduct, the sponsoring State is liable for the remainder of the loss.

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