

**(b) Written Statement of the United Kingdom of Great Britain and Northern Ireland, with annexes A to I (annexes not reproduced):**

**A: ISBA/16/C/6 (Proposal to seek an advisory opinion from the Seabed Disputes Chamber on matters regarding sponsoring State responsibility and liability, submitted by the delegation of Nauru)**

**B: *United Nations Convention on the Law of the Sea 1982: A Commentary*, Vol. VI**

- p. 119-120: article 139.1 - 139.2

- p. 126-128: article 139.9(a) - (c)

- p. 224: article 148.10 - 148.11(a)

- p. 291-292: article 152.11(b)

- p. 641-644, paragraphs 191.1 - 191.7(b)

**C: *New Zealand/France (1990) 82 International Law Reports*, p. 547-551**

**D: *Ireland v. United Kingdom (2003) 126 International Law Reports*, p. 372-380**

**E: *Responsibility of States for Internationally Wrongful Acts*, 2001**

**F: Vaisey J. in *Reliance Permanent Building Society v. Harwood-Stamper [1944] Chancery Division*, p. 362-363, p. 373-374**

**G: *Handyside v. United Kingdom (1976)*, *Publications of the European Court of Human Rights, Series A, Volume 24*, paragraph 48**

**H: Report of the International Law Commission on the work of its fifty-third session, p. 98-105 (commentary on article 36)**

**I: *International Law and the Environment*, 3<sup>rd</sup> ed., p. 228-232**

**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)**

**WRITTEN STATEMENT  
OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND**

**29 JULY 2010**

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**Introduction**

1 On 6 May 2010, the Council of the International Seabed Authority requested the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea (hereafter 'Seabed Disputes Chamber' or 'Chamber') 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>*

2. By Order 2010/3 of 18 May 2010, the President of the Seabed Disputes Chamber invited the States Parties to the United Nations Convention on the Law of the Sea (hereafter ‘Convention’), the International Seabed Authority and the organizations invited as intergovernmental organizations 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

3. This Written Statement is intended to assist the Chamber in responding to the three questions addressed to it by the Council of the International Seabed Authority (hereafter ‘Council’ and ‘Authority’). The Statement is arranged as follows:

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

**Chapter II** then considers briefly the Chambers jurisdiction to give the opinion, possible questions of admissibility and the applicable law.

**Chapter III** then addresses in turn each of the three questions put to the Chamber in the light of the relevant legal provisions and other rules of international law.

Finally, the Written Statement sets out the Conclusions which the United Kingdom invites the Chamber to reach.

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<sup>1</sup> ISBA/16/C/13.

## Chapter I

### The Request for an Advisory Opinion

1.1 The Council's decision of 6 May 2010, requesting the Chamber to render an advisory opinion, 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>2</sup>

1.2 The delegation of the Republic of Nauru (hereafter 'Nauru') initially proposed that the Council seek an advisory opinion<sup>3</sup>. Its paper, dated 1 March 2010, among other things, set out

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<sup>2</sup> ISBA/16/C/13 [Dossier No. 7].

the terms of a 'draft sponsorship agreement' between Nauru and National Ocean Resources Inc. (hereafter 'NORI'), a company incorporated in Nauru which Nauru had sponsored in 2008 for a plan of work to explore for polymetallic nodules in the Area. Nauru's proposal for an advisory proposal, after stating "that some developing States... cannot afford exposure to the legal risks potentially associated with [a seafloor mining] project"; continued:

"Recognizing this, Nauru's sponsorship of NORI 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."<sup>4</sup>

Further in its proposal, Nauru said that:

"it was suggested that a sponsoring State might be able to fulfil its sponsorship obligations and avoid liability if it entered into a contractual arrangement with a contractor under which:

- (a) the State was given the powers to inspect and verify the Contractor's programme of work and carry out an environmental auditing programme;
- (b) the Contractor undertook to comply with all terms and requirements of the ISA regulations and the exploration contract."<sup>5</sup>

1.3 Many States intervened in the Council's debate on the proposal for an advisory opinion during the sixteenth session of the Authority in May 2010. A range of views was expressed on this proposal. The eventual decision of the Council issue was to not to adopt the proposal as formulated by Nauru, which was very specific, but instead to ask for an opinion on three more general question<sup>6</sup>.

1.4 Nauru's request for an advisory opinion followed consideration by the Legal and Technical Commission (hereafter 'LTC') of two applications for plans of work, sponsored by

<sup>3</sup> Proposal 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, Submitted by the delegation of Nauru, ISBA/16/C/6 (flag A).

<sup>4</sup> *Ibid.*, paragraph 1.

<sup>5</sup> *Ibid.*, paragraph 2.

<sup>6</sup> List of speakers and summary records of the 155<sup>th</sup>, 160<sup>th</sup> and 161<sup>st</sup> meetings of the Council prepared by the Secretariat [Dossier No. 7 NOT YET AVAILABLE]; Press releases SB/16/12, SB/16/13, SB/16/18, SB/16/19 [Dossier Nos. 10-13]; statements by Nauru on 3 May 2010 and by Fiji of 3 and 6 May 2010 [Dossier No. 4].

Nauru and Tonga respectively, which consideration had been postponed, at the request of the sponsoring States, by the LTC during the fifteenth session of the Authority in 2009<sup>7</sup>. In his request Nauru referred to differences of opinion among members of the LTC. 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 LTC said:

“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

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<sup>7</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/3), paragraph 6.

Report of the Secretary-General, ISBA/16/A/2, paragraphs 58 and 64

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)."<sup>3</sup>

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<sup>3</sup> Summary report of the Chairman of the Legal and Technical Commission on the work of the Commission during the sixteenth session (ISBA/16/C/7) [Dossier n° 6], paragraphs 20-24.



## Chapter II

### Jurisdiction, Admissibility and Applicable Law

2.1 As this is the first occasion on which the Chamber has been requested to render an advisory opinion, it may wish to examine the questions of jurisdiction and admissibility that may arise in the exercise of this important function. The present chapter deals first with the jurisdiction of the Chamber to give the advisory opinion requested (section I), second with possible issues of admissibility (section II), and third with the applicable law (section III).

#### I. Jurisdiction

2.2 The jurisdiction of the Chamber to give advisory opinions is set out in 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 The Government will briefly consider three issues arising from this provision; these are:

1. Whether there was a valid “request of .. the Council”;
2. Whether the questions asked are “legal questions”; and
3. Whether the questions arise “within the scope of [the Council’s] activities”.

2.4 Under Section 3, paragraph 2, of the 1994 Agreement, “as a general rule, decision-making in the organs of the Authority should be by consensus”; this is therefore the key stipulation applicable to the validity of decisions made by the Council. This provision is supplemented by Section 3, paragraphs 5, 6 and 7, of the 1994 Agreement, as well as by Article 161, paragraph 8, of the Convention, as amended by Section 3, paragraph 8, of the 1994 Agreement. The decision of the Council to request an advisory opinion was taken without

objection<sup>9</sup> and can thus be regarded as having been taken by consensus (see also the first sentence of Article 161, paragraph 8(e)). It is submitted therefore that the Tribunal should answer issue 1 in paragraph 2.3 in the affirmative.

2.5 As to issue 2 in paragraph 2.3, the first two questions put to the Chamber are clearly legal questions. They concern respectively the 'legal responsibilities and obligations' of States Parties to the Convention, and 'the extent of liability' of a State Party in certain circumstances. The third question can also be construed as a legal question, if it is understood as requesting the Chamber to indicate what measures a sponsoring State is legally required to take in order to fulfil its responsibility under the Convention

2.6 Finally, as regards issue 3 in paragraph 2.3, the general powers and functions of the Council are set out in Article 162 of the Convention, and include "establish[ing] .. the specific policies to be pursued by the Authority on any question or matter within the competence of the Authority" (paragraph 1), and "supervis[ing] and coordinat[ing] the implementation of the provisions of .. Part [XI] on all questions and matters within the competence of the Authority" (paragraph 2(a)). These two general provisions seem to be worded widely enough to justify one taking the view that the three questions on which an opinion is requested fall within the scope of the Council's activities. More specifically, the three questions can be said to relate to the Council's function of approving plans of work. This is a function of the Council by virtue of paragraph 11(a) of Section 3 of the 1994 Agreement, read with Article 6 of Annex III to the Convention, and with paragraphs 6 to 11 of Section I of the 1994 Agreement. The Government therefore consider that the three questions arise within the scope of the Council's activities.

## II. Possible questions of admissibility

2.7 The International Court of Justice (and its predecessor, the Permanent Court of International Justice) has always stressed that, even where it has jurisdiction to give an advisory opinion, it will consider the propriety of doing so (admissibility). In doing so, it has pointed to the wording of article 63 of the Statute of the Court, which provides that the Court *may* give an

<sup>9</sup> Press Release SB/16/19 [Dossier No. 13]

advisory opinion (see paragraph 44 of the Advisory Opinion of 9 July 2004 on *Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory*, and paragraph 29 of the Advisory Opinion of 22 July 2010 on the *Accordance with International Law of the Declaration of Independence in respect of Kosovo*). The wording of article 191 is different since it provides that the Chamber *shall* give an opinion, suggesting, perhaps, that if the Chamber has established its jurisdiction, the duty to render an advisory opinion is absolute<sup>10</sup>.

2.8 All three questions are formulated in abstract terms; the Government do not suggest that this should be a ground for the Chamber to refuse to provide an advisory opinion; and in this respect they note the comments of the International Court of Justice in paragraph 40 of its Advisory Opinion of 9 July 2004 cited above. It would not, however, be for the Chamber to recommend to individual sponsoring States what policy choices they should make as to how to fulfil their responsibility within their own legal system, since in doing so it would be stepping outside its judicial role. As the PCIJ said in the *Eastern Carelia* case, "The Court, being a Court of Justice, cannot, even in giving advisory opinions, depart from the essential rules guiding their activity as a Court."<sup>11</sup> While the request has arisen as a result of the consideration of two applications for plans of work, there is nothing in the documentation before the Chamber to assist the Chamber in understanding the specific differences of view on legal issues which lies behind the request. While this may not in itself lead the Chamber to decline to respond the request, it may nevertheless consider that it should approach the questions with some caution. And the abstract formulation of the three questions will inevitably impact upon the responses to the questions which the Chamber can provide.

2.9 The Government are also conscious of the point made by the International Court of Justice in paragraph 34 of the Advisory Opinion of 22 July 2010 cited above, namely that it is in principle for the organ seeking the opinion to decide if it needs it for the proper performance of its functions. In the light of these considerations, the Government do not wish to suggest that

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<sup>10</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 and 191.7(a) (flg B).

<sup>11</sup> (1923) PCIJ Series B, No. 5, p. 29, cited with approval by the International Court of Justice in paragraph 29 of its Advisory Opinion of 22 July 2010.

there are any grounds on which the Chamber should decline to provide the advisory opinion requested by the Council.

### III. Applicable Law

2.10 The applicable law is that set out in Annex VI, Article 38, 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.”

It is thus to be noted that Annex VI, Article 38, makes it clear that Article 293 applies, and in particular paragraph 1 of that Article 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

#### Response to the questions in the request for an Advisory Opinion

3.1. By way of general, preliminary comments, the Government wish to make the following points. First, it is important to note that any obligations for States in relation to the matters which are the subject matter of this request for an advisory opinion arise because they are parties to the Convention (in which expression the Government cover also the 1994 Agreement). In other words, any obligations derive from a treaty and have their force because of the principle of *pacta sunt servanda*, i.e. that treaty obligations must be performed in good faith, as set out in Article 26 of the Vienna Convention on the Law of Treaties.

3.2. Second, it follows from the first point that the relevant provisions of the Convention should be interpreted in accordance with usual rules of international law, which can now be taken to be those set out in Article 31 and 32 of the Vienna Convention on the Law of Treaties, as endorsed by the International Court of Justice in the case of *Avena and other Mexican Nationals*<sup>12</sup>.

3.3. Third, any breach by a State Party of its obligations under the Convention involves an internationally wrongful act and therefore leads to State responsibility on the part of that State. This principle was reiterated by the Arbitral Tribunal in the *Rainbow Warrior case*<sup>13</sup>. Thus, any breach by a State of its obligations under the Convention will give rise to the consequences attributable under international law to an internationally wrongful act.

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<sup>12</sup> *Mexico v. The United States of America* [2004] ICJ Reports 37-38, paragraph 83.

<sup>13</sup> *New Zealand/France (1990)* 82 *International Law Reports* 499, at 547, paragraph 75 (flag C).

3.4. Fourth, it is important that in interpreting the Convention the Tribunal should take account of the different manner in which the various obligations in the relevant Articles are expressed; the Government wish to draw attention to the assiduous manner in which the tribunal in the *OSPAR Arbitration*<sup>14</sup> analysed the various obligations in the OSPAR Convention. The Articles of the Convention considered below delimit in a careful and precise manner the obligations undertaken by the States Parties, and it is only if a State Party breaches an Article or Articles of the Convention, as properly interpreted, that there is an internationally wrongful act and State responsibility arises. It is clear therefore that, for example, there is no room for a consideration of any general principles of State responsibility.

3.5. Fifth, it would seem that the acts of any entity that a State Party sponsors in accordance with the Convention are not as such to be regarded as attributable to the State concerned in accordance with the rules of international law. This is clear from paragraph 1 of Article 139: if the acts of the entity were to be regarded as attributable to the State Party, then that paragraph would not be necessary. Instead, that paragraph sets out precisely the obligations upon a sponsoring State Party. Furthermore, if the sponsored entity were a commercial enterprise (as was the case with the entity which Nauru was seeking to sponsor), its acts would not in any event meet the criteria for attribution of conduct to a state in accordance with customary international law; for the purpose of this statement, the Government are prepared to accept that Chapter II of the International Law Commission's Articles on State Responsibility<sup>15</sup> can be taken as reflecting the rules of customary international law; since the sponsored entity would neither be an organ of a State, for the purposes of Article 4 of those Articles, nor be exercising "governmental

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<sup>14</sup> *Ireland v. United Kingdom (2003) 126 International Law Reports 334 at 374, paragraphs 126-131 (Flag D).*

<sup>15</sup> *Flag E.*

authority", for the purposes of Article 5, the acts of such a sponsored entity could not be regarded as applicable to the sponsoring State.

3.6 Sixth, there is some suggestion in the paper submitted by Nauru to the Council of the International Seabed Authority<sup>16</sup> that there might be a differentiation in obligations between developing countries and other states (see paragraph 1.2 above). The United Kingdom notes that certain Articles in Part XI of the Convention do provide for special consideration for developing States. For example, Article 152, paragraph 2, relating to the exercise of the powers and functions of the Authority, stipulates that "special consideration for developing States... specifically provided for in this Part, shall be permitted", while Article 148 states that. "The effective participation of developing States in the activities in the Area shall be promoted as specifically provided for in this Part, having due regard to their special interests and needs".<sup>17</sup> However, it is to be noted that both of these provisions refer to special consideration being given to developing States only where "specifically provided for in this Part", ie Part XI. None of the provisions of Part XI of the Convention which are referred to below "specifically provide for" any special position for developing States, and it is therefore submitted that these provisions should be applied equally as between developing States and other States. This follows as a matter of principle in any event, as the obligations assumed under the relevant Articles of the Convention are equal as between all States. And it would obviously be inappropriate if the level of protection of the Area, which is after all "the common heritage of mankind" under Article 136 of the Convention, should depend upon which group of States the sponsoring State belongs to.

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<sup>16</sup> Cited at footnote 3 (flag A).

<sup>17</sup> See paragraphs 148.11(a) and 152.11(b) of the Commentary cited at footnote 10 (flag B).

Question 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 Law of the Sea of 10 December 1982?*

3.7 In view of the Government, the key provisions are as follows:-

Article 139.

Under this Article, 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" (paragraph 1). Paragraph 2 then provides that "damage caused by the failure of a State Party to carry out its responsibilities under this Part shall entail liability"; however, the State Party will not be liable if it 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

This paragraph primarily places an obligation upon the Authority, but also requires States Parties to "assist the Authority by taking all measures necessary to ensure ..... compliance in accordance with article 139".



Annex III, Article 4, paragraph 4

This paragraph provides for States Parties to 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”. However, that paragraph goes on to absolve the sponsoring State from liability where damage is “caused by the failure of a contractor sponsored by it to comply with its obligations if that State Party has applied 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”.

3.8 It is necessary to analyse carefully the extent of the obligations imposed by these provisions. It is submitted that the following conclusions can be reached:—

(a) Article 139 is a complex provision<sup>18</sup>. Paragraph 1 refers to States Parties having a “responsibility to ensure”. The word “ensure” can connote a high level of certainty as to the achievement of a particular outcome (see the discussion in the *OSPAR Arbitration*<sup>19</sup>). However, in the English language it can also be used in a less strict sense. Thus, in one case in England, the judge said that the word “ensure” was “an equivalent to ascertaining or satisfying oneself, and does not mean anything in the nature of warranty or guarantee”<sup>20</sup>.

(b) Most importantly, however, the words in Article 139, paragraph 1, must be read in the light of paragraph 2 of that Article which absolves the State Party from liability if it has taken “all necessary and appropriate measures to secure effective compliance”. In other words, the

<sup>18</sup> See paragraphs 139.1 and 139.9 (a) to (c) of the Commentary cited at footnote 10 (flag B).

<sup>19</sup> Cited at footnote 14, paragraphs 132-138 (flag D).

<sup>20</sup> *Vaisey J in Reliance Permanent Building Society v. Harwood-Stamper [1944] Chancery Division 362 at 373 (flag F).*

obligation in paragraph 1 of Article 139 cannot be read in isolation from the more specific provisions in paragraph 2 of that Article.

(c) What are the “necessary and appropriate measure to secure effective compliance” for the purposes of paragraph 2 of Article 139 will, of course, depend on all the circumstances, including the particular characteristics of the legal system of the State in question. Thus, no hard and fast rules can be laid down in advance because it will be a matter for the State concerned to ensure that it meets this obligation within the parameters of its own legal system.

(d) However, it is submitted that the word “necessary” is not synonymous with the word “indispensable”. Even in the context of the European Convention on Human Rights, where one might expect a strict interpretation to be taken, the word “necessary” has not been so treated<sup>21</sup>.

(e) As regards Article 153, paragraph 4, this places an obligation upon States Parties to assist the Authority, but then makes a cross-reference to Article 139. It follows therefore that, whilst this is an important obligation upon States Parties, it is in the end an obligation to assist the Authority with the compliance with Article 139, the interpretation of which has been discussed above.

(f) Annex III, Article 4, paragraph 4, again uses the phrase “the responsibility to ensure” – in relation to which, it is submitted, the same considerations apply as in Article 139, paragraph 1 – although it is qualified by a reference to this being “within their legal systems”. In other words, the first sentence of this paragraph places an obligation upon States to take the necessary action within their legal system for the purpose specified.

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<sup>21</sup> *Handyside v. United Kingdom* (1976) Series A, Volume 24, paragraph 48 (flwg G).

(g) However, again one must read the words "responsibility to ensure" in the light of the next sentence of paragraph 4 which absolves the State Party from liability "if [it] has adopted laws and regulations and taken administrative measures which are, within the framework of its legal system, reasonably appropriate for securing compliance by persons under its jurisdiction". In other words, the key obligation upon States is to put in place provisions within their legal systems so that they can be absolved from liability under the second sentence of paragraph 4.

(h) Two particular points need to be made about the obligation in Annex III, Article 4, paragraph 4. First, it is only to do what is "reasonably appropriate", and that is obviously a long way from being an absolute obligation. And second, the obligation is to act within its own legal system, and therefore it is submitted that general statements about what national legal provisions are required would not be apposite, given that all national legal systems have their own characteristics and that States will to take action within the parameters of their own particular legal system.

39 It is submitted therefore that the answer to this question is that the relevant "legal responsibilities and obligations" are to be found in the Convention and the 1994 Agreement, but that particular emphasis should be placed upon Articles 139 and 153 and Annex III, Article 4, paragraph 4.

Question 2

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

3.10 As indicated above, any breach by a State Party of the Convention is an internationally wrongful act, and in accordance with the ordinary rules of international law, as set out in the *Chorzaw Factory (Indemnity) case*<sup>22</sup>, and as reflected in Article 31 of the International Law Commission's Article on State Responsibility<sup>23</sup>, the State would be under an obligation to make reparation for the injury caused by the internationally wrongful act.

3.11 It is also important to note that the first sentence of Article 139, paragraph 2, specifically places liability upon States Parties where damage has been caused by their failure; whilst this provision needs to be read in the light of the rest of Article 139, it nevertheless makes clear that States are in principle liable for any damage caused by their failure in this respect.

3.12 Nevertheless, it must also be emphasised that any liability of the State will be for its failure to fulfil its obligations under the Convention and 1994 Agreement and not for the acts of the sponsored entity as such. Thus, there may be a causal link between the damage caused by the entity and the State's failure to fulfil its obligations under the Convention; in such cases, that will impact upon the "extent of liability" of the State, and it may be that the State will be liable for the full amount of the damage caused by the entity. In other cases, however, it may be

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<sup>22</sup> (1928) PCIJ Series A, No. 17, page 29.

<sup>23</sup> *Flag E*.

demonstrated that all or part of any damage caused by the entity was not a consequence of the State's failure to fulfil its obligations under the Convention, and in that event the State may not be liable in full or even at all for the damage caused by the entity.

3.13 Furthermore, even once it had been established that the State had not fulfilled its obligations under the Convention, it would still have to be shown that any damage had indeed been caused by the sponsored entity and that that damage was not too remote or too speculative.

3.14 Particular problems may arise from pollution incidents. In this connection, it should be noted that Article 36(2) of the International Law Commission's Articles on State Responsibility state that "compensation shall cover any financially accessible damage including loss of profits insofar as it is established". It is unclear how far this is intended to relate to damage to the environment. The International Law Commission's commentary on this provision<sup>24</sup> relates to the issue of compensation for loss of profits and where this might be appropriate, whereas the commentary on pollution damage is related to paragraph 1 of Article 36 which sets out the general obligation on States to compensate for damage caused by an internationally wrongful act. Paragraphs 13-15 of that commentary give a brief, but helpful, exposition of some of the relevant principles. The Government wish also to draw attention to the valuable discussion in Birnie, Boyle and Redgwell, *International Law and the Environment*<sup>25</sup>.

3.15 Ultimately it would be for an international tribunal adjudicating the matter to decide precisely what is the "extent of liability" of a State Party for a breach of the Convention. The answer to this question will depend upon the evidence presented to the tribunal and its

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<sup>24</sup> *Flag H*

<sup>25</sup> 3<sup>rd</sup> Edition, pages 228-232 (*flag I*).

appreciation thereof, as well as upon the relevant legal factors, some of which have been discussed above.

### Question 3

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

3.16 The responsibility of a State to take the necessary and appropriate measures is one of a positive nature, requiring a State to take action to ensure compliance by entities that it has sponsored. The various provisions of the Convention need to be read together and in their appropriate context. In particular, one needs to note the provisions of the second sentence of Article 139, paragraph 2, and of the second sentence of Annex III, Article 4, paragraph 4, of the Convention. Under the former provision a State Party is absolved from liability where it "has taken all necessary and appropriate measures to secure effective compliance", and under the latter provision where it "has adopted laws and regulations and taken administrative measures which are, within the framework of its legal system, reasonably appropriate for securing compliance".

3.17 The question is what measures will be "necessary and appropriate" for the purposes of Article 139, paragraph 2, and what laws and regulations and administrative measures are

“reasonably appropriate” for the purposes of Annex III, Article 4, paragraph 4. Put another way, the enquiry will be whether the action taken by the State Party within its national law meets the standard specified in these two provisions. But it is important to emphasise that it will not be enough for a State Party to have enacted laws and regulations if those laws and regulations are not adequately policed and enforced. In other words, it is not just a question of enacting legislation, but the necessary administrative and enforcement back-up is also required. The effect of Article 139, paragraph 2, and Annex III, Article 4, paragraph 4, is that the State will be under a continuing obligation.

3.18 In this connection, the Government stress the great importance, which it – and indeed the whole international community – attach to the prevention of pollution of the marine environment. In particular, the deep seabed contains many fragile and sensitive ecosystems, which, if subjected to serious pollution, could take many years, even decades, to regenerate. In these circumstances, it is essential that States Parties and sponsored entities ensure that they do have the necessary measures in place for the purpose of preventing pollution.

3.19 Thus, to answer the question whether a State had fulfilled its responsibility under the Convention and the 1994 Agreement, and especially Article 139 and Annex III, an international tribunal would have to take into account all of the circumstances, including the points made above. In practice, this decision can only be made *ex post facto*, by evaluating the legislation enacted in, and the measures taken by, the State concerned, so that a conclusion can be reached whether they met the standard set by these two provisions; therefore, the question cannot be answered *ex ante*.

#### **IV. Conclusions**

In conclusion, for the reasons set out in this Written Statement, the United Kingdom suggests that the Seabed Dispute Chamber of the International Tribunal of the Law of the Sea respond to the three questions contained in the request on the lines set out in paragraphs 3.9, 3.15 and 3.19 above.

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