

Statement received after the expiry of the time-limit fixed by Order 2010/4 of 28 July 2010 – Exposé reçu après l'expiration du délai fixé par l'Ordonnance 2010/4 du 28 juillet 2010

Written Statement of the United Nations Environment Programme



UNITED NATIONS ENVIRONMENT PROGRAMME

Programme des Nations Unies pour l'Environnement Programme de la Naciones Unidas para el Medio Ambiente
 برنامج الأمم المتحدة للبيئة

聯合國環境綱要署



UNEP

Reference: DELC/BKLO/tlos

Date: 1 September 2010

Dear Mr. Gautier,

I refer to your letter dated 9 June 2010 inviting the United Nations Environment Programme (UNEP) to present written statements on the questions submitted to the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea for an advisory opinion in accordance with decision ISBA/18/C/13 of the Council of the International Seabed Authority.

I am pleased to submit herewith our written statements on the request which is before the Seabed Disputes Chamber. I apologize for the delay in sending our contribution but I still hope that it may assist in the deliberations.

UNEP does not intend to make any oral statements during the hearing.

Yours sincerely,

Bakary Kante
 Director

Philippe Gautier
 Registrar
 International Tribunal for the Law of the Sea
 Am Internationalen Seegerichtshof 1,
 22609 Hamburg
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Enclosure

ANNEX

According to Article 139 of the United Nations Convention on the Law of the Sea (the Convention), States Parties have a general obligation to ensure that activities in the Area carried out by state enterprises or natural or juridical persons which possess the nationality of States Parties or are effectively controlled by them or their nationals, are carried out in conformity with the part XI of the Convention. States Parties are obligated to respond for damages caused by their failure to carry out their responsibilities under Article 139. However, States' liability for damage is limited. A State is not liable if it has taken all necessary measures (I) to cooperate with the Authority in controlling sponsorship activities in the Area, and (II) to adopt laws and regulations and take administrative measures which are, within the framework of its legal system, reasonably appropriate for securing compliance with the rules, regulations and procedures of the Authority by persons under its jurisdiction.

The obligation under Article 139 of the Convention is not an absolute obligation of prevention of damage but an obligation of conduct rather than of result. Article 139 of the Convention can be qualified as a duty of due diligence which requires States Parties to introduce legislation and regulations applicable to private and public conduct which are capable of effectively implement Part XI of the Convention and to fully cooperate with the authority in order to ensure compliance. A State Party should therefore not be liable for damages caused by a sponsored enterprise which complies with the rules and regulations of the Authority and the obligations under the Convention.

States Parties' general obligation of due diligence is complemented by some specific obligations established in the Convention and the 1994 Implementation Agreement. These include the duties to: facilitate the implementation of the plan of work as approved by the Council (Article 153.3); secure compliance with any measure imposed upon a sponsored entity by the Authority (Article 153.5); ensure cooperation of sponsored contractors with the Authority in facilitating the acquisition of deep seabed technology by the Enterprise or developing States on fair and reasonable commercial terms and conditions (1994 Agreement, Section 5(b)).

The responsibilities and obligations of States Parties with respect to the sponsorship of activities in the Area are also defined by the principle of common heritage of mankind established in Article 136 of the Convention. According to this principle, the resources of the Area cannot be appropriated to the exclusive sovereignty of states but must be conserved and exploited for the benefit of all, without discrimination, allowing all States to share the rewards, even if unable to participate to the actual process of extraction. States must therefore ensure that sponsored entities comply with the Authority's international management rules that control the allocation of exploitation rights and the equitable sharing of benefits.

A due diligence obligation is also established in Article 145 of the Convention which provides that States Parties' shall take "necessary measures" to ensure effective protection for the marine environment in the Area. This standard of conduct does not make the State an absolute guarantor of the prevention of environmental harm, and therefore excludes state's responsibility in case of unavoidable or unforeseeable environmental damage, which by definition could not have been prevented or controlled. In addition, Article 194.1 of the Convention introduces a further element of flexibility to the requirement of due diligence, allowing differing degrees of diligence depending on the resources available to the State. Accordingly, developing countries' duty to prevent, reduce and control pollution of the marine environment from any source is limited to the use of "the best practicable means at their disposal and in accordance with their capabilities".