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President of the Seabed Disputes Chamber, Judge Tullio Treves, presiding

Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area

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

Verbatim Record

Seabed Disputes Chamber

of the International Tribunal for the Law of the Sea

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		Shunji Yanai
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THE PRESIDENT: Good morning. We will now continue the hearing in Case No. 17 concerning the Request for an advisory opinion on responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area.

Today we will hear statements of Nauru, the United Kingdom, the Russian Federation, the Intergovernmental Oceanographic Commission of the United Nations Educational, Scientific and Cultural Organization and the International Union for the Conservation of Nature. It is to be expected that not all participants will be able to speak during the morning sitting and the hearing will be continued by holding a sitting at 3 p.m.

I now give the floor to the delegation of Nauru, which has requested a speaking time of one hour and twenty minutes.

Before I call Mr Jacob to the lectern, I invite all speakers, as I did yesterday, not to speak too quickly because the interpreters sometimes have difficulty following them.

MR JACOB: Good morning, Honourable President, Members of the Seabed Disputes Chamber. It is indeed an honour to be here this morning to make this presentation on behalf of my Government, the Republic of Nauru, and the people of Nauru.

Mr President, with your permission the Nauruan delegation wishes to commence by reflecting upon the fundamental purpose of the Convention and the reason we are here today, which is: to promote global economic and social advancement in accordance with the purposes and principles of the Charter of the United Nations, specifically, in accordance with Article 1(3).

As clearly detailed in the preamble of the United Nations Convention on the Law of the Sea, the States Parties to the Convention are, paragraph 1: "… aware of the historic significance of this Convention as an important contribution to the maintenance of peace, justice and progress for all peoples of the world"; paragraph 5: "Bearing in mind that the achievement of [the Convention's] goals will contribute to the realization of a just and equitable international economic order

which takes into account the interests and needs of mankind as a whole and, in particular, the special interests and needs of developing countries"; and paragraph 7: "Believing that the Convention will promote the economic and social advancement of all peoples of the world, in accordance with the Purposes and Principles of the United Nations as set forth in the Charter".

Additionally, in stipulating the policies specifically relating to activities in the Area, article 150 provides that

> Activities in the Area shall…be carried out in such a manner as to foster healthy development of the world economy and balanced growth of international trade, and to promote international cooperation for the over-all development of all countries, especially developing States, and with a view to ensuring (a) the development of the resources of the Area …

Mr President, we must not lose sight of the gravity and practical meaning behind those words adopted by the architects of UNCLOS, particularly in regard to progress, international economic order, promotion of economic and social advancement, healthy development of the world economy, and development of the resources of the Area.

That is why we are here today. That is the purpose of the Convention as set out in the preamble: progress, promotion, advancement, and development.

Let us now consider this fundamental question: how can the Convention, in a practical and meaningful sense, achieve its critical mandate of promoting global economic and social development?

To answer this question, we must make a further inquiry: where does economic and associated social development come from? What fuels economic growth and increases the livelihoods of populations? What provides the basis for masses of people to be brought out of hunger, disease and poverty and enables them to obtain the fundamental human needs? What are the basic ingredients essential for economic and associated social development? The answer, quite simply, is natural resources. Economic development simply cannot occur without those basic ingredients for growth such as iron ore and the primary metals including nickel, copper, and alumina.

The Nauruan delegation wishes to point out for those unaware that nickel and copper are of course the metals of greatest economic interest in seabed polymetallic nodules in the Area.

From the Stone Age to the Bronze Age to the Iron Age, human evolution and progress has been defined by harnessing materials, minerals, and advancing tool-making and metal technology; this has ensured the survival and development of humanity. From providing early civilizations with the resources to build shelters and effectively hunt and gather food; to fuelling the industrial revolution; to advancing our scientific knowledge and medical development; and today, to providing the means of building clean alternative energy solutions and pollution abatement technology, which in many instances demand significantly more copper and nickel than traditional energy sources.

It can be noted that nickel is used in over 300,000 applications, and copper is essential to telecommunications, architecture, energy, plumbing, heating and transport. Indeed, copper and its alloys have been used by human civilization for over six thousand years. It has taken a tremendous amount of copper and steel to get developed States to where they are today and to give those States the things which are these days taken for granted. In 1900 we used just under 1 pound of copper per person. Today we use 6 pounds per person per year; and yet the vast majority of the world’s citizens have yet to participate in even the most basic progress.

Put simply, Mr President, there cannot be economic development without these raw materials, and we must identify a way to ensure developing States have an affordable and accessible supply of such primary metals. In particular, there are many developing States that simply do not have nickel and copper deposits; such States of course are the ones most in need of participating in seafloor polymetallic nodule mining in the Area.

Now let us reflect back on the original question posed: how can the Convention, in a practical and meaningful sense, achieve the goals set out in its preamble and

promote global economic and social development? The answer is, of course: by promoting the development of the resources in the international seabed area so as they can be utilized to fuel economic and social growth. Harnessing the value of these seafloor resources, particularly those containing nickel and copper, is essential if we are to maintain the standard of living in the developed world, and is critical if we are to simultaneously increase the standard of living of people in the developing world.

Indeed, over 30 years ago the United Nations realised the importance of seafloor polymetallic nodules to the future world economy and commissioned the United Nations Ocean Economics and Technology Office to further investigate the potential of the resource.

Ultimately, every human being deserves to have their basic rights and needs met, including: freedom from extreme poverty, hunger and disease; quality education; the right of women to give birth without risking their lives; productive and decent employment; and good health and shelter, all of which require the provision of housing, shelter, schools, hospitals, water pipes and electrical cables which in turn require huge quantities of metals from mineral resources.

Mr President, in the light of the significant ramifications for global economic and social development, the interpretation of the Convention's provisions pertaining to the Area has great significance for the livelihood of millions, if not billions, of people around the world today, and into the future. Extreme care is therefore warranted in interpreting these provisions here at the Seabed Disputes Chamber. Depending upon whether the interpretation encourages commercial development of seafloor resources, or discourages it, will mean the difference between life and death for millions of people moving forward.

Development of the resources of the Area is not just critical to economic and social progress, but these seafloor resources must be developed to help ensure the future environmental sustainability of the planet.

It is a simple fact that the metals required for economic and social growth must come from somewhere. The billions of people living in developing States such as China, India and Africa have a right to have their basic needs met and a higher standard of living. Unfortunately, the current supply of new and recyclable metals is simply not enough to feed this growth at sustainable prices.

Given that the demand for raw materials will only increase, we must look to the seafloor to provide a more environmentally friendly source of metals. Indeed, there are fundamental environmental advantages of obtaining our metal from the seafloor rather than from land.

For example, seafloor mining requires little terrestrial production infrastructure, and there will be minimal overburden as the ore occurs directly on the seafloor and will not require large pre-strips or overburden removal.

Importantly, obtaining our minerals from the seafloor avoids deforestation, as no trees will be cleared for the mining operation, and therefore, it will not decrease the earth's carbon absorption capacity. Conversely, the current main source of nickel, that being from land-based Nickel laterites, generally occur in equatorial regions, and every year that nickel is *not* mined from the seafloor means another year that virgin rainforests are stripped in equatorial regions causing associated tropical ecosystems to be destroyed as well as a decrease in the earth's carbon absorption capacity.

We must also consider that land represents only 30 per cent of the planet's surface but is currently subject to 100 per cent of world nickel and copper mining. Consequently, the emerging underwater mining industry has great potential to improve the global environmental footprint of the mining industry.

Moreover, as we know, key to environmental quality in the future is developing clean technologies, and minerals are essential to building such alternative energy and pollution abatement technologies. For example, a sum of approximately 500 kg of nickel plus 1000 kg of copper is required to build just one wind turbine, meaning that this single turbine requires 12 times more copper to create 1 kilowatt of power than conventional power sources. As well, nickel contributes to sustainable development

through water purification and distribution systems, air pollution abatement hardware, renewable energy infrastructure and new energy solutions such as fuel cells, concentrating solar power and cellulosic ethanol. Furthermore, alternative energy systems depend heavily on copper to transmit the energy they generate with maximum efficiency and minimum environmental impact. Outside of precious metals, copper is the best conductor of electricity and heat – improving energy efficiency of electrical equipment thereby assisting to reduce energy consumption on a global level.

It must also be acknowledged that poverty and environmental degradation are closely linked, and to achieve a sustainable global environment, poverty must be eliminated. Those living in poverty do not have the luxury or finances to worry about environmental sustainability, and the immediate need to survive leads to pollution and mismanagement of resources in their surrounding environment. Conversely, higher living standards and GDP per capita results in:

- Technological innovation which is essential for developing pollution abatement technology, cleaner and less resource-intensive production technologies, more fuel efficient and less-polluting fuels and improved energy efficiency in homes and businesses;
- Movement in the economy away from energy intensive manufacturing industries to service industries with decreased pollution;
- A demand for improved environmental quality that leads to the adoption of stricter environmental protection measures and regulations that internalize pollution externalities;
- Lower fertility rates which reduces population strain on resources; and
- Higher rates of education and increase in national knowledge base and awareness of the importance of healthy ecosystems and how to more efficiently manage resources.

Developing the resources of the seafloor will assist in supplying the raw materials necessary for this economic transition and increasing the environmental sustainability in developing States.

The rules and regulations governing the development of these resources have been diligently prepared over nearly four decades and show an overriding concern for the safeguarding of the environment, with significant input and direction from environmental experts and leading environmental groups from around the world. The rules have been agreed upon and adopted by 160 States.

It is comforting to know that exploitation of polymetallic nodules under the ISA's regulatory regime ensures that mining will only occur pursuant to stringent regulations that are internationally accepted and will be overseen and judged by the international community.

Having said that, if the regulations are uncommercial, or if the regulations are interpreted in such a way as to discourage private sector investment, it will most certainly be counterproductive and could bring greater harm to the planet's overall environment, given that such discouragement would force the mining industry to continue its focus on land based sources.

As previously highlighted, by not encouraging seafloor mining, you are effectively encouraging further terrestrial environmental degradation.

It must also be acknowledged that we are dealing with mining potato-sized rocks, and not oil and gas which can cause significant pollution and can be highly unstable if "lost" into the environment. There is a significant environmental difference between a vessel spilling oil into the ocean and one that might spill polymetallic nodules which would simply sink and rest on the ocean floorUnlike oil, the nodules are stable in the sea and on the seafloor as nature has placed them in a stable form.

When interpreting the provisions, the Chamber is also encouraged to ensure that a discrepancy is not created between what activities humans permit on land and what activities we permit on the seafloor. In order to fully inform the Chamber of the issues at hand, it can be noted that at the centre of a lot of the environmental debate surrounding the abyssal plains of the Area are microorganisms and small worms.

Now, whilst activities in the Area must occur in a sustainable manner in accordance with the relevant international environmental rules and regulations, and Nauru's applicant Nauru Ocean Resources Inc. is committed to complying with whatever regulations the ISA sees fit to adopt, we must nevertheless acknowledge that the abundance of life that exists on the abyssal planes in the Area pales in comparison to that which exists on land. If the pendulum swings too far in favour of protecting those microorganisms on the seafloor, it will directly result in humans being forced to obtain more metals from land which would be to the detriment of more "significant" life forms such as mammals, birds and reptiles. Worse still, it would, as previously pointed out, prejudice the supply of more accessible and affordable metals and thus decrease the rate of economic and social growth and thus result in more unnecessary hunger, disease and loss of life experienced by those living in poverty.

Therefore, whilst mining must take place sustainably and in such a manner that ensures no long-term serious environmental harm, unreasonable and uncommercial terms to protect the microorganisms on the abyssal plains could in effect also directly contribute to the deaths of millions of people living in poverty.

The Chamber may also like to consider that just about every coastal State approves dredging for ports and harbours and land reclamation and to supply sand and aggregate for cement. Indeed, the dredging industry currently dredges around 2 billion tonnes off the seafloor per year in areas close to the coastline where the abundance of life is exponentially richer than on the abyssal planes in the Area. In comparison, a single polymetallic nodule mining operation would merely harvest around 7 million tonnes of ore from the seafloor per annum in areas where there is far less abundance of life.

To quote one of the Authority's publications: *Deep-Seabed Polymetallic Nodule Exploration: Development of Environmental Guidelines,* on page 44:

> The abundance of life at the abyssal seafloor is relatively very low…the total macrobenthic biomass is roughly 0.05-0.5 g wet weight/m^2, which is indeed very low. In comparison, macrofaunal biomass on the continental shelves (i.e. > 50g / m^2, figure 3) is about 100 times greater. This is also true for macrofaunal abundance. For example, total macrofaunal abundance at 9° N, 140° W in the CCFZ is approximately 300 individuals

/ m² whereas macrofaunal abundance in shelf habitats often attains 20,000-30,000 individuals / m².

Indeed, it is hard to understand why some States would seek to discourage the development of polymetallic nodule mining on the seafloor by the private sector, particularly since States taking such a stance would seem to be in breach of the Charter of the United Nations, which certainly does not direct States to protect microorganisms at the expense of economic and social growth and at the possible expense of millions of human lives. Quite the contrary, the purposes and principles of the Charter, to which all States are bound and which UNCLOS has a mandate to promote, demands that such resources be developed to ensure economic and social growth. That is, in accordance with Chapter 1, Article 1(3), the Purposes of the United Nations are "To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character ..."

Moreover, when we consider tropical rainforests, where nickel laterites are mined, scientists can only take a guess at the abundance of life because it is simply just too rich and diverse. Indeed, when carrying out an environmental impact assessment to mine nickel laterites the effect on microorganisms is not taken into account. That is humanity has an accepted environmental impact assessment system for mining on land and dredging below water, but the permitting of those activities does not even take into account the associated effect on microorganisms, notwithstanding those activities occur in areas where the abundance of life is exponentially richer than that on the abyssal plains. Likewise, a freeway in America or an autobahn in Germany or cropping of farmland around the world does not involve a detailed study of microorganisms. People are not worried about the impact on microorganisms on land when it comes to these activities because humanity has determined that sustaining human life is more important than protecting microorganisms, which exist in trillions and are not a threatened species. Moreover, every one of us kills microorganisms every day whether we like it or not. Indeed, every time you breathe in air you are killing living organisms. Even human beings contribute to the killing of billions of microorganisms which are killed when humans eat food due to the growing and harvesting of crops.

These examples are useful to consider for the mere fact that it suggests seafloor mining will take place under environmental guidelines that are far more rigorous than terrestrial regimes, therefore implying that it should provide an environmentally advantageous alternative to terrestrial mining.

In order for the Chamber to see for themselves that seafloor mining can be carried out sustainably and as an environmentally advantageous alternative to terrestrial mining, our delegation would encourage the Chamber to review Nautilus Minerals Inc.'s Environmental Impact Statement, which was the culmination of many years of work done by leading environmental scientists and international groups, and represents one of the most comprehensive environmental studies ever carried out on the seafloor environment. This study is available to the public and has significantly advanced the public's knowledge and understanding of the seafloor environment. This EIS has led to the Government of Papua New Guinea granting an environmental permit for seafloor mining development in the Bismarck Sea at Nautilus' Solwara 1 deposit.

Also, should the Chamber deem it helpful to shed light on the questions at hand, it can be noted that there was also previously an environmental impact statement prepared by the Office of Ocean Minerals and Energy and the National Oceanic and Atmospheric Administration, under the Department of Commerce in the United States, which, according to the President and General Manager of Ocean Management Incorporated, "showed very little change outside the mining area, and after a year, changes were not detectable except for the actual tracks of our nodule collector". It can be noted that Ocean Management Incorporated was a private sector enterprise that successfully trial mined 800 tonnes of polymetallic nodules in the Clarion Clipperton Zone in the 1970s.

Of course, the advantages of seafloor mining are not just limited to the environment. For example, seafloor production does not require the social dislocation and the resulting impact on culture or disturbance of traditional lands common to many land-based operations, and the operation is largely robotic and will not require operators' exposure to typically dangerous mining or "cutting face" activities.

Obviously seafloor mining has many more advantages. However, the ones already highlighted are sufficient for the purpose of demonstrating that it is now time to develop these resources for the benefit of humanity as was originally intended: to foster, as articulated in article 150 of UNCLOS, a “healthy development of the world economy and balanced growth of international trade, and to promote international cooperation for the over-all development of all countries”.

So what does all that mean for us here at the Chamber today? Well, it demonstrates quite conclusively the pressing need to develop the resources in the Area.

How can the Chamber ensure that the regulatory regime encourages such resource development to promote economic and social progress and to ensure that the environmental benefits of developing those resources are realized?

The answer is to interpret the rules and regulations in such a way as to encourage private sector investment. Without the private sector the development of polymetallic nodules in the Area will continue at an extremely slow pace and the objectives of the Convention may never be met. The last 30 years have shown that without private sector investment, these resources may never be developed.

It might be useful for the Chamber to note that trial mining of polymetallic nodules took place in the Clarion Clipperton Zone in the 1970’s by private sector entities. Due to factors such as the uncertainty of legal title and uncommercial mining terms, private sector involvement ceased, and polymetallic nodule development activity has stalled ever since. Consequently, notwithstanding the Convention coming into effect many years ago, not a single payment has been distributed to a developing State through the Authority as a result of mining proceeds. By encouraging the private sector, all the international community will share in the rewards of the development of seafloor polymetallic nodules: by way of exploratory and environmental findings; by the technological advances involved; by increased training and employment opportunities; and by way of sharing in the resulting royalties.

So, how can the Chamber encourage the private sector to invest, and how should we interpret the articles of the Convention?

Firstly, we must provide legal certainty, without which it is unrealistic to expect anyone to commit the approximately 4 billion dollars required to carry out a full-scale polymetallic nodule mining and processing operation.

Secondly, we must ensure that the regulatory regime encourages States to sponsor the private sector; and since the sponsoring State's responsibility is directly linked to the contractor's obligations, we need to ensure that the contractor's obligations are unambiguous and commercially realistic.

The delegation of Nauru believes that it is well qualified to address today the questions put to the Chamber, given that Nauru is the first State to sponsor an application to the ISA by a private sector entity which has spent many years thoroughly investigating the legal and practical issues at hand.

Given the significance of private sector involvement in the Area, the delegation of Nauru believes that it is important to provide the Chamber with a brief background of Nauru's sponsorship and demonstrate the practical effects that this Advisory Opinion will have on a sponsoring State intending to carry out activities in the Area through the private sector.

Obviously Nauru, like many other developing States, does not have the financial and technical capacity to carry out polymetallic nodule exploration without the assistance of the private sector. Neither does Nauru have any commercial entities capable of such endeavours. This reality is evidenced by the fact that until Nauru's application, no developing State had applied for a plan of work for exploration within the reserved Area.

As a result, Nauru required assistance from an entity that was willing to invest in our country by establishing a national entity within Nauru that was willing to bring to Nauru the financial and technical capacity required to carry out the project. Indeed, for most developing States, the only means of participating in and directly benefiting from the activities in the Area is to partner with private sector enterprise and attract foreign investment.

Of course, this still presents a challenge as it is not easy to identify entities in the private sector currently willing to risk significant financial resources to carry out large scale polymetallic nodule exploration and pioneer the first mining operation in an unproven industry. That said, once the first mine can be proven, this will help to de-risk the industry and encourage other private sector entities to invest in the Area and partner with developing States.

Recognizing this need to partner with the private sector, Nauru is currently sponsoring an application to the ISA for a polymetallic nodule exploration contract submitted by Nauru Ocean Resources Inc., a Nauruan incorporated entity with access to the finances and technical expertise necessary to explore and develop the polymetallic nodule resource.

Nauru Ocean Resources is incorporated and registered in Nauru and subject to the laws and jurisdiction of Nauru, and therefore comes under Nauru's effective control. The Republic of Nauru has ultimate control over Nauru Ocean Resources, because the State can deregister the company at any time, forcing the company to cease its operations. No other State has control over the company – only Nauru.

Nauru's Minister for Commerce, Industry and Resources, Hon. Frederick Pitcher, signed a Certificate of Sponsorship for Nauru Ocean Resources Inc. on behalf of the Government of Nauru on 6 March 2008. The Certificate of Sponsorship states that the applicant is sponsored by and under the effective control of the Republic of Nauru and provides a declaration that the Republic of Nauru assumes responsibility in accordance with article 139, article 153, paragraph 4, and Annex III, article 4, paragraph 4, of the Convention.

Furthermore, a binding sponsorship agreement is in place between Nauru Ocean Resources and the Republic of Nauru, providing a legal mechanism through which Nauru can effectively control the company to ensure that Nauru Ocean Resources complies with the ISA contract for exploration, the regulations, and the Convention.

Whilst the sponsorship agreement is quite exhaustive and confers numerous powers upon Nauru to assist the State to take the necessary measures to fulfil its sponsorship responsibilities, Nauru believes that the Seabed Disputes Chamber may be able to clarify whether there are any additional measures the sponsoring State must take. If there are additional measures, additional safeguards can then be incorporated into the sponsorship agreement or, if required, legislation can be enacted.

Mr President, this request is not an attempt to diminish responsibility, but rather it is an attempt to ensure that the State can fulfil its obligations under the Convention to the highest degree.

From the very beginning Nauru has been excited to be involved in this partnership. At that time the Australian Government had just closed its refugee detention centre in Nauru, which left a large hole in Nauru's small economy. This partnership represented a valuable opportunity for Nauru to pursue an alternative avenue of development and could make a significant difference for the Nauruan people. As many Members may be aware, Nauru relies on foreign aid and support as well as imported food. Importantly, Nauru's land resources have been significantly depleted due to overharvesting of its phosphate deposits by other countries. This mining by foreign countries in the 1900s has since caused our island to be 80 per cent uninhabitable. Indeed, 80 per cent of our country is now virtually a moonscape, and this has in turn significantly impaired Nauru's opportunities to develop industries and grow its own food. Moreover, it has had significant ramifications for the habitation of indigenous Nauruans. This partnership to explore for minerals in the Area therefore allows us to benefit from resource development without our country being further raped of what few resources we have left. In effect, this provides us with a second chance and a chance for the mining industry to give back to a country ravaged by past excavation. Given that Nauru does not have any commercially prospective non-living seafloor minerals in its EEZ, the State is particularly interested in participating in activities in the Area.

Under our partnership with Nauru Ocean Resources, Nauru will receive significant benefits, including annual tax revenues, annual monetary contributions to health and

education in Nauru, monetary payments during exploration, employment in the project for Nauruan nationals and training and capacity building for Nauruan nationals.

In addition to pioneering the development of an alternative source of minerals critical to global economic and social development, Nauru Ocean Resources will be promoting the development of and directly contributing to an international regime that will distribute a percentage of mining proceeds to developing States, particularly those least developed and most in need of economic assistance.

This is the type of partnership the World Bank is actively seeking to encourage through such bodies as the International Finance Committee, whereby access to finance and technology is being brought to developing States.

Thus, how can the Chamber ensure that the regulatory regime encourages development and that a sufficient quantity of primary metals can be supplied to the world to promote economic and social progress?

The Nauruan delegation urges the Chamber to consider what our delegation has put forward and see fit to interpret UNCLOS in favour of promoting development and legal clarity, which is the fundamental purpose of UNCLOS as stated in its preamble. We have confidence that the Chamber will keep this critical need for development at the forefront of its deliberations on the issues raised by the questions put to the Chamber.

In providing certainty we must not compromise but rather promote the need for commercially viable regulations that encourage private sector investment, without which the development of polymetallic nodules in the Area will most likely not occur.

It is also necessary that the responsibilities and obligations of sponsoring States be interpreted and defined with sufficient clarity to assist developing States to determine accurately what their responsibilities are and efficiently allocate the necessary resources to fulfil these obligations.

Importantly, since the sponsoring State's responsibility is directly linked to the contractor's obligations, it is necessary for the Chamber to ensure that the contractor's obligations are unambiguous and realistic. This can be explained as follows: If one studies the three questions put to the Chamber, it is clear that Question 3 is dependent upon Question 1, that is, one cannot ascertain what "necessary and appropriate measures" a sponsoring State must take to fulfil its legal responsibilities and obligations until the extent and scope of such responsibilities and obligations is determined; and, given that the State has a fundamental obligation to ensure the compliance of the contractor with the contractors own obligations, it is necessary to first determine comprehensively what the obligations of the contractor actually are. This reasoning has been eloquently highlighted by Mr Michael Lodge, Legal Counsel to the ISA, in paragraph 5.8 of his written statement.

Given that it is critical to first determine what the obligations of the contractor are, the Nauruan delegation believes that it is absolutely essential to discuss here these obligations in detail, and if it is determined that the contractor's obligations cannot be precisely defined because the relevant provisions are either too broad or vague, we believe that it will then be necessary for the Chamber to narrow the scope of such provisions and provide a much more specific interpretation.

First, as stipulated in Regulation 30, the contractor shall continue to have responsibility for any damage arising out of wrongful acts in the conduct of its operations. This regulation is also reflected in Section 16.1 of the standard exploration contract:

> The contractor shall be liable for the actual amount of any damage, including damage to the marine 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 operations under this contract ...

Unfortunately, there exists no definition of the term "operations" as used in Regulation 30 and Section 16.1; this is problematic. It is absolutely essential that this term be defined, as the interpretation of what constitutes the contractor's operations is critical to determining the extent of contractor responsibility and liability, and in turn critical to determining the extent of sponsoring State responsibility and liability.

For example, Section 16.1 places liability on the contractor for wrongful acts or omissions of subcontractors. However, it is unclear whether that obligation extends to all subcontractors or only those subcontractors acting for the contractor in the conduct of its operations under the specific exploration contract. Upon analysis, it does not seem logical for that term to mean all subcontractors, because the contractors may have many different subcontractors acting for them around the world in the marine environment but with nothing to do with the particular exploration contract in question. Therefore, Section 16.1 must refer to only those subcontractors that are acting in the conduct of the contractor's operations under the contract. Having made that determination, we are left with the even harder task of determining what types of activities are included in the term "operations". This term therefore needs to be defined and narrowed in scope.

Secondly, pursuant to Regulation 31(3), the contractor must 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.

In the case of Regulation 31(3), the scope and extent of the contractor's responsibility, and in turn the scope and extent of the sponsoring State's responsibility, and thus the answer to Question 1, hinges upon the definition of "activities in the Area" and whether or not the event that has caused damage can be considered to be part of the contractor's activities in the Area.

Thus we look to the definition of "activities in the Area", which is defined in article 1, paragraph 3, of UNCLOS as meaning "all activities of exploration for, and exploitation of, the resources of the Area". In turn, we need to further consider what constitutes exploration and exploitation. Once we precisely ascertain the definition of "exploration" and "exploitation", we can then determine the extent of the contractor's obligations, and in turn the extent of the sponsoring State's responsibilities, and thus put ourselves in a position to solve Question 1 and be given assistance in answering Question 3, as the measures that the sponsoring State must take will differ depending upon the scope of the contractor's obligations.

Unfortunately, confusion may arise when interpreting the definition of “exploration” and “exploitation” which are defined in Regulation 1(3)(b) and Regulation 1(3)(a), respectively.

Now, for example, the term “transportation systems”, which is adopted in both definitions, could be either a reference to transporting the nodules from the seafloor to the surface or, given the reference to “marketing of metals”, it could extend to transporting the ore across the high seas from the mine site to the destination State, or both. Clearly this needs clarification.

We interpret “transportation systems” to be a reference to transporting the nodules from the seafloor to the surface. Indeed, the only reference to “transporting” in *The Recommendations For The Guidance Of The Contractors For The Assessment Of The Possible Environmental Impacts Arising From Exploration For Polymetallic Nodules In The Area* issued by the Legal and Technical Commission, which refers to information to be provided by the contractor, and with respect to transportation, limits this information to “methods for transporting the nodules to the surface”.

Likewise, in article 145(a), the activities to which the Authority shall take necessary measures include “such activities as drilling, dredging, excavation, disposal of waste, construction and operation or maintenance of installations, pipelines and other devices related to such activities”. The transportation of ore across the high seas, or the manoeuvring of vessels, is clearly not included in article 145(a); and we submit this is because the contractor is only responsible for those activities that it directly controls which will be limited to mining activities on the seafloor – and we respectfully seek the Chamber’s approval of this interpretation.

Certainly, it would cause numerous problems if the sponsoring State’s responsibility and liability was extended to the point where it may impinge upon flag State responsibility, which of course is inappropriate, and we must provide clarity that the sponsoring State’s responsibility is much narrower than that.

In this regard, it is important to note that a full-scale seafloor polymetallic nodule mining operation will likely involve upwards of 25 different vessels that, notwithstanding they will be operating in the high seas above the Area, will not be involved in the direct harvesting operation. These ancillary vessels will be required to service the mining vessel and to transport the ore and/or concentrate from the mining vessel and/or processing facility to steel refineries on land.

Those service and transport vessels will most likely not be owned or controlled by the contractor, and will most likely not be controlled by the sponsoring State: rather, they will be registered in numerous other flag States which have responsibility for the compliance of those vessels under the Convention and the various other international conventions and treaties governing shipping on the high seas.

Nevertheless, for the purpose of certainty, we respectfully urge the Chamber to make it absolutely clear that the contractor is not responsible or liable for such transport and service vessels, notwithstanding they are being used by the contractor to transport the ore and service the mining vessels. That is, those vessels must not fall into the definition of “transportation systems” as used in the definition of “Exploration” and “Exploitation”.

It is necessary that this be clarified and an explicit limit be placed on what activities the contractor is responsible for so that commercial contracts can be drafted that allocate risks appropriately between the different commercial entities operating in the Area and so that insurance providers can determine what type and level of cover is required. A key step in the negotiation of any mining contract is for each party to identify and assess the risks inherent in the proposed mining work. Risks need to be identified and allocated as clearly as possible. An assessment must be made about who is best able to carry or manage each risk, or how they should be shared, in a way that promotes efficiency and effectiveness in the safe performance of the work. If the definition is left, broad private investment will be discouraged and confusion will prevail.

The Nauruan delegation would also like to take this opportunity to detail why it is necessary that those types of activities that are not being directly carried out by the

contractor on the seafloor be expressly excluded from the contractor's and the sponsoring State's obligations and responsibilities.

Firstly, if activities such as the transportation of ore are considered to be part of the contractor's "activities in the Area", this will not only conflict with other parts of the Convention and other international conventions and treaties that consider those activities a flag State responsibility, but it will also set a very dangerous precedent, as it will imply that every vessel transporting ore in the high seas above the international seabed area must be sponsored under Part XI because that vessel is carrying out "activities in the Area".

There are currently thousands of vessels transporting billions of tonnes of ore and raw materials on the high seas. Every one of those vessels could potentially cause damage to the international seabed area by accidentally dumping ore or polluting. As we know, none of those vessels are required to be, nor have they ever been, sponsored by a State under Part XI of the Convention.

However, if it is determined that the contractor is responsible for the transport of ore from its mine site in the Area to the country to which the ore is sold, then it is also being determined that those vessels transporting the ore are carrying out "activities in the Area". If that was the case, every vessel that transports ore across the high seas, whether the ore originates from a mine on the seafloor or from a mine on land, must be sponsored because it is carrying out an activity in the Area. This would set a dramatic precedent and literally require the immediate sponsorship of thousands of vessels around the world. This was obviously not the intention of the Convention.

Moreover, when a land-based mining company loads its ore onto a vessel at port it no longer has responsibility or liability for the movements of the vessel transporting the ore to another country. For example, the major Australian and Brazilian iron ore miners are not responsible and liable for the ships that carry their iron ore across the high seas to Asia, and neither is the Commonwealth of Australia nor the Federal Republic of Brazil responsible or potentially liable, provided that the transport vessel is not registered in either country. Rather, it is the captain of the vessel, the owner of the vessel and the flag State in which that vessel is registered who are responsible

and potentially liable. There should be no difference between ore that is mined on land and transported across the high seas and ore which is mined from the international seabed area and transported across the high seas. If damage or pollution occurs to the Area during the process of transportation the contractor simply cannot be held responsible, and neither can the sponsoring State, with the exception being when the sponsoring State is also the flag State of the relevant vessel, or when the contractor or the sponsoring State have ordered the vessel to commit a wrongful act.

Mr President, I have a few more pages to read out but I believe my time is running out, I am informed. Nevertheless, you have the written statements in front of you. I would like to go on, but I have been told to stop. Before I step off the podium, I would like to give my colleague, Mr Robert Haydon, the final concluding remarks to our presentation.

THE PRESIDENT: Thank you very much, Mr Jacob. The Chamber is grateful for the careful management of the time allotted. We have, of course, your paper. I would like now to give the floor to the other representative of Nauru, Mr Haydon.

MR HAYDON: By now I trust that my colleague has sufficiently demonstrated to the Chamber that it is necessary to firstly determine the contractor's obligations prior to answering the three questions at hand pertaining to sponsor State responsibility, and I also hope it is now evident that such responsibilities must be limited and distinguished from vessels and installations flying the flag of a different State.

As has also been highlighted, the policy pertaining to the Area in article 150(a) provides that "Activities in the Area shall … be carried out in such a manner as to foster healthy development of the world economy and balanced growth of international trade … and with a view to ensuring (a) the development of the resources of the Area …"

The Nauruan delegation has submitted that this fundamental policy will most likely only be fulfilled, and the Convention's purposes met, if the private sector is encouraged to participate. Likewise, it has also been made clear that this in turn

requires the relevant rules and regulations to be interpreted in such a way as to encourage commercial investment.

My colleague has set forth a number of examples detailing how certain provisions pertaining to sponsor State responsibility must be interpreted in order to achieve this end. I hope that in this statement I can demonstrate to the Chamber that, in interpreting other provisions necessary to answer the three questions at hand, it would be prudent for the Chamber, where necessary and required, to seek further input and consultation from those private-sector entities currently engaged in commercial seafloor mineral exploration, particularly given there has to date been no non-government affiliated commercial enterprises involved in activities in the Area under the Authority's regulatory framework. The Nauruan delegation also considers it appropriate to address here certain commercial realities that may assist to further shed light on the issues we have raised.

I, too, find it necessary to start by making reference to the purposes and principles of the Charter of the United Nations, as well as the preamble to the Convention, and I would like to state that Nauru Ocean Resources Inc. is committed to unlocking an alternative supply of minerals that will provide more affordable and accessible primary metals necessary to achieve these universal principles and facilitate global social and economic development for current and future generations, which in turn will lead to a more stable, more just, and more secure world. At the same time the company intends to demonstrate that seafloor mining can be both environmentally and socially advantageous relative to terrestrial mining.

In effect, Nauru Ocean Resources, with the assistance and guidance of the ISA Secretariat, has pioneered a unique partnership agreement through which it can bring direct benefits to a developing State including employment; training; capacity building; technology transfer; foreign investment; increased tax revenue; and national self-determination, without causing the negative impacts generally associated with the extractive industry such as community dislocation and degradation of the natural environment and land.

Throughout the history of the Convention there have been divergent and opposing views between developing States looking for assistance and developed States seeking to promote the aspirations of their private sector. Nauru Ocean Resources' partnership with the Republic of Nauru represents now an alignment of these divergent views.

The Company intends to not only provide benefits to Nauru, but to work directly to ensure that economic and social progress occurs in other developing States by making supply of metals to those States more readily available. The Company is committed to ensuring that the metals produced from its operations in the International Seabed Area reach the communities most in need of raw materials. Through Nauru Ocean Resources' operations a percentage of minerals mined from the seafloor will be distributed to developing States, through either monetary contributions to community projects and/or direct supply of raw materials. Again, this will be a benefit Nauru Ocean Resources will provide to other developing States on top of the benefits provided to Nauru, and the company will work with the ISA, other International organisations, local governments and communities from around the world to identify areas of greatest need.

Specifically, the company will focus on building and implementing water purification and distribution systems in third world countries.

The company has chosen to focus on this humanitarian issue for two reasons; first, because the company is an underwater resource company, and it is in the business of working with water; but, secondly, and more importantly, lack of safe water and sanitation is the world's single largest cause of illness according to UNICEF, and about 4,500 children die each day from unsafe water and lack of basic sanitation facilities.

Consequently, Nauru Ocean Resources has established an initiative called the Clean Water from Underwater Metals Initiative, and through this initiative Nauru Ocean Resources will be supplying sustainable access to safe drinking water and basic sanitation to those developing States most in need.

Nauru Ocean Resources will also collaborate with scientific institutions currently studying the Great Pacific Garbage Patch to identify ways to best address this massive environmental problem and clean up the pollution. For those unaware, the Great Pacific Garbage Patch is a massive gyre of pollution in international waters located in the central North Pacific Ocean, including areas near the Clarion-Clipperton fracture zone. The patch is characterized by exceptionally high concentrations of pelagic plastics, chemical sludge, and other debris suspended in the upper water column that have been trapped by the rotational currents of the North Pacific gyre, which for decades have been drawing in waste material from across the North Pacific Ocean, predominantly from rubbish washing out from beaches, rivers and watersheds in North America and eastern Asia.

During commercial production, Nauru Ocean Resources will carry out clean-up operations in the Great Pacific Garbage Patch.

The company will also be committed to providing monetary donations to the ISA's Endowment Fund, which promotes and encourages the conduct of collaborative marine scientific research in the Area. By providing valuable training opportunities on board exploration and exploitation vessels contracted by the company, Nauru Ocean Resources will also be able to assist the ISA in its endeavour to promote the participation of qualified scientists and technical personnel from developing countries in marine scientific research programmes and activities.

Nauru Ocean Resources is looking forward to being able to play an important role in addressing world poverty and promoting higher standards of living, employment, and conditions of economic and social progress, as well as ensuring sustainable supply of natural resources for future generations. This, as detailed in Article 55 of the Charter of the United Nations, will assist to create conditions of stability and well-being which are necessary for peaceful and friendly relations among nations.

On top of striving to achieve those significant goals, the company is also committed to operating in line with the following internationally accepted environmental, social and governance principles and standards, including: the United Nations Global Compact; the Millennium Development Goals; the IFC Performance Standards on

Social and Environmental Sustainability; the World Bank Group Environmental, Health, and Safety Guidelines; and of course the Precautionary Principle.

Regarding the United Nations Global Compact, the company will adhere to the ten principles of the Compact which asks companies to embrace, support and enact, within their sphere of influence, a set of core values in the areas of human rights, labour standards, the environment and anti-corruption. These Ten Principles enjoy universal consensus and are derived from: the Universal Declaration of Human Rights; the International Labour Organization's Declaration on Fundamental Principles and Rights at Work; the Rio Declaration on Environment and Development; and the United Nations Convention against Corruption.

Importantly, Nauru Ocean Resources will also be assisting to achieve the Millennium Development Goal targets for poverty, unemployment, education, gender equity, childhood health and survival, maternal health, nutrition and disease.

Nauru Ocean Resources recognizes that the supply of more accessible and affordable raw materials to developing States is absolutely critical to promoting their economic development and alleviating the poverty, disease and hardship faced by billions of people around the world. The company believes in striking a balance between the environment and addressing these critical human needs and rights, and is determined to play an important role in supplying those in need with the raw materials necessary to help bring them out of poverty.

The company's management have been working to pioneer seafloor mining for nearly a decade, which has involved gaining an in-depth understanding of the various regulatory regimes governing such activities, and, in particular, how to appropriately balance the needs and interests of all stakeholders. Therefore, the company believes it could provide assistance should it be required by the Chamber moving forward on matters regarding seafloor mineral development activities. In addition to that offer, our delegation would also like to highlight here one or two points that demonstrate how such knowledge could be of assistance.

Firstly, when dealing with the three questions put to the Chamber it is necessary to analyze article 153(b), which stipulates that activities in the Area may be carried out by "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]."

Our delegation wishes to point out that similar to flag State registration, States sponsoring activities in the Area will often be sponsoring an entity which is related to another entity. In regards to this situation, it must be appreciated that notwithstanding one company may be related to, or may be a subsidiary of, another entity, if the applicant company is registered in and effectively controlled by a State, then that State, and only that State, need be the sponsor of the applicant.

In Nauru's case, for example, Nauru Ocean Resources Inc. is registered in and subject to the laws and jurisdiction of Nauru, and therefore comes under Nauru's effective control. The Republic of Nauru has ultimate control over Nauru Ocean Resources. On top of controlling the company through its national legislation, Nauru also controls the company through a binding sponsorship agreement.

There are multiple reasons why it may be necessary to have companies which are related to another entity in a separate country. For example, in Nauru Ocean Resources' case, its parent company is registered in Canada. The sole reason the parent was registered in Canada was to enable it to attract from the large financial markets in North America the significant capital required to undertake large scale seafloor exploration.

THE PRESIDENT: I am sorry to interrupt you for a second. I am informed that the French interpreters are having difficulty in following you, so please slow down. When we get to the end of your allotted time, we will see how we proceed.

MR HAYDON: Thank you, Mr President. I apologize.

This financial arrangement has nothing to do with control of the Nauruan company, which is exclusively controlled by the Republic of Nauru.

Indeed, it would seem crazy to suggest that the State (where the parent is incorporated) must also be a sponsor because, using Nauru's case again, the State of Canada cannot exert any control over Nauru Ocean Resources. For example, Canada cannot order the Nauru Ocean Resources' parent to change the board of directors of the subsidiary.

Moreover, there may be a number of entities and mining companies that are shareholders of Nauru Ocean Resources' (indeed, to raise $4 billion will likely involve significant investment from other major mining houses). Therefore, it could be a subsidiary of many companies incorporated in many different States. Also, the parent company may be registered in one State, but its owner and major shareholder may be registered in another State altogether. For entities listed on the stock market, the composition of their share register is constantly changing, so that would mean you would need to constantly change the sponsoring State.

The Nauruan delegation would also like to explain why there should be no residual liability, as has been suggested by one or two of the written statements submitted by other States to this Chamber. Indeed, residual liability would significantly harm investment and be prohibitive to many States looking to sponsor activities in the Area. Not only do article 139, paragraph 2, and Annex III, article 4(4) specifically imply the exclusion of residual liability, the very notion of residual liability completely ignores the commonsense appreciation that no human activity can be totally risk free. If the same logic were applied to the risks associated with automobile travel, which, though small, are much larger than those of seafloor mining, no one would ever ride in an automobile. Mining, like any other human activity, cannot guarantee absolute certainty. However, we do have the ability to compare the risks of alternative human actions against their benefits. The alternative to mining the seafloor for minerals carries the risk of a world increasingly unable to meet the development needs of all its human inhabitants. That risk far outweighs any possible benefits of imposing residual liability on Sponsoring States, which is a burden that is unacceptably high and could seriously halt economic and social development.

The Nauruan delegation would also like to take a moment to address a concept which has been raised by one member State, and that is "monopolisation", which is

defined as the “exclusive control of a commodity or service in a particular market, or the market condition that exists when there is only one seller.”

With regards to the polymetallic nodule industry, it should be clear when considering my following points that it would be virtually impossible ever to create a monopoly in the Area.

First of all, there are already eight contractors in the Area; thus it is, on first glance, fairly clear that a monopoly will not arise in the Area concerning polymetallic nodules, as there are already eight competitors.

Moreover, the international seabed area covers over 150 million square kilometres, with polymetallic nodule deposits occurring in every ocean. It is very easy to conclude from a simple arithmetic calculation that it would be virtually impossible to create a monopoly in the polymetallic nodule industry simply because there is too much international seabed area for others to explore and develop, and no single contractor would likely be able to finance the programme of work that the ISA would require to be carried out on all those licence areas.

Importantly, the Chamber must note that no contractor has been able yet to demonstrate that 75,000 square kilometres is sufficient to justify a mining operation. On the contrary, the fact that no mining has taken place yet would suggest that that size is *not* sufficient, particularly when seafloor topography may render much of the contractor’s area unsuitable to mining.

Supporting that conclusion is the fact that to process polymetallic nodules a contractor will need to design and build a processing plant that can produce approximately 60,000 tonnes of nickel per annum in order to justify the significant mining costs and processing capital and operating costs, and in order to compete with nickel laterite mines on land.

Regarding the current main source of nickel, being land-based nickel laterites, it can be noted that the combined capital expenditure for the Ambatovy, Goro and Koniambo nickel projects is approximately US$12 billion. Moreover, Ambatovy has a

project life of 30 years and Koniambo has the potential to extend its mine life to well in excess of 50 years.

In order to justify the approximately $4 billion capital expenditure for a seafloor poymetallic nodule project in the Area and to compete with these and other land-based nickel laterites, polymetallic nodule contractors will need to be able to mine a resource that will sustain economic production for similar or greater periods of time, and this simply may not be possible with an area as small as 75,000 square kilometres; therefore, it is probable that more than one licence will be required to sustain a viable operation.

It must also be acknowledged that the polymetallic nodule exploration regulations have been in place for approximately a decade, and notwithstanding significant advancements in offshore technologies and the witnessing of one of the biggest mining booms of all time, there has been no rush by the private sector to secure ground and no significant development of the resource. It is becoming increasingly clear that no party is willing to commit the significant capital required to fund the first polymetallic nodule project given the significant risk of being first, and that such a project will need to be financed from a private sector company which can attract investors and mining groups who are comfortable taking on such risk. Of course, such investors and mining groups require enough potential upside to reward them for funding an unproven and novel industry. Therefore, the project needs to have the potential to generate several nodule mines to be attractive to financiers, technology and mining industry partners. A single licence, whilst perhaps appropriate for a research group or secondary mining operations once the concept is proven commercially, may not provide the return on capital required by a company seeking to finance the technology it must develop for the first mine, especially given that the cost for the first mine will be greater than that of competitors developing the second mine, who will have a much lower technology risk and cheaper finance (and therefore an unfair advantage to the party establishing the first mine).

THE PRESIDENT: Excuse me for interrupting you, Mr Haydon. Do you think you would be able to conclude within the next five minutes?

MR HAYDON: Yes.

THE PRESIDENT: We will take our recess at the conclusion of your intervention.

MR HAYDON: Thank you, Mr President.

Finally, the Nauruan delegation reasserts that we must all work together through the framework of the Convention to promote the development of seafloor minerals. This in turn will provide the continued supply of metals necessary to ensure those living in developed States can maintain their levels of education, health and freedoms, and will also provide the additional supply of minerals necessary to ensure that developing States can be brought out of poverty and build vital infrastructure and homes for nearly one billion slum dwellers; clean water distribution systems for nearly one billion people without access to safe drinking water; and hospitals and medical equipment to combat disease which result in millions of young children dying unnecessarily each year.

Mr President, I respectfully request that the Chamber keep this need for development in mind when interpreting the relevant provisions, as well as the consequences of such interpretation to private sector investment.

Importantly, let us learn from the lessons of the past. In the 1970s the private sector was set to develop seafloor polymetallic nodules in the Clarion Clipperton Zone. However, there were legal uncertainties at the time surrounding seafloor resources in the international seabed area, as well as sentiment of uncommercial mining terms. These reasons contributed to the private sector walking away, which meant that mining did not eventuate, and because mining did not eventuate in the late 1970s, it is likely that millions of people have died in the past 30 years from deaths that could have been prevented had such mining been encouraged and taken place. Such mining would have, over that period of time, provided more affordable and accessible supply of minerals to developing States, and thus significantly promoted global economic and social growth.

Here we are, some 30 years on, and the private sector, through Nauru Ocean Resources, is finally again showing a willingness to risk the significant investment required to explore and develop this seafloor resource in a sustainable manner.

The Nauruan delegation is hoping that the Seabed Disputes Chamber ensures that the UNCLOS system is interpreted now to encourage, not deter, this private sector participation. Indeed, it would be a pity if failure to provide legal certainty and failure to encourage private sector investment in the Area were to contribute to denying developing States access to the raw materials they require to pull themselves out of poverty. As we know, without affordable and accessible copper and steel there can be no growth and economic development in these developing States, in effect condemning millions of the world's poor to continuing malnutrition, hunger, and disease.

Mr President, it is with this in mind that the Nauruan delegation urges the Chamber and all States Parties to reflect again on the fundamental purpose of the Convention as clearly stated in its preamble: progress, promotion, advancement, and development.

Finally, please reflect on what those four words mean for the poor, the starving, and the sick living in the developing world. What does UNCLOS represent, in real, every day terms, for the children living in poverty now and their children in the future?

Put simply: UNCLOS represents hope.

Thank you, Honourable President and distinguished Members of the Seabed Disputes Chamber.

THE PRESIDENT: Thank you very much, Mr Haydon. Of course, the oral statement of Nauru will appear in the *procès-verbal* of this session and as such it will be part of the case file. However, as some of the information contained in the original written statement has not been transmitted, Nauru could not give the whole of their original intervention. The Chamber, if Nauru so authorizes, will of course put at the disposal

of participants the complete text as a service for information purposes only. Does Nauru agree to that?

MR HAYDON: Yes.

THE PRESIDENT: The hearing will now be suspended for 30 minutes. We will reconvene at 12.05.

(*The sitting adjourned at 11.37 a.m.*)

THE PRESIDENT: I now give the floor to the representative of the United Kingdom, who has requested a speaking time of 45 minutes. Sir Michael, you have the floor.

Mr WOOD: Mr President, Members of the Seabed Disputes Chamber, it is an honour to appear before you in these proceedings, and to do so on behalf of the United Kingdom.

Mr President, it is an advantage to address the Chamber late in this oral hearing, since I can agree with much that has been said by earlier speakers, for example, by Germany, by Argentina and by Fiji. It is also a disadvantage because it is difficult to say anything new, and for that I apologize; I will do my best.

My remarks will be organized as follows. I shall begin with some words about the factual background of the Request for an advisory opinion. Next I shall address questions of jurisdiction and admissibility, followed by applicable law. I shall then turn to each of the three questions put to the Chamber. I shall not repeat what is said in the United Kingdom's written statement, which remains the basic account of our position.

Mr President, I need not to describe the facts in any detail. That has been done by the International Seabed Authority in both its written and oral statements. I should like to add that we are very grateful to the Authority for both the Dossier and its statements. I am sure that these will be of great assistance to the Chamber.

It was Nauru that proposed that the Council seek an advisory opinion.[1] As the representatives of the Authority explained on Tuesday, following an extensive debate, the Council did not adopt the proposal as formulated by Nauru. Instead, the Council followed the suggestion of many participants in the debate and asked for an opinion on three concise and abstract questions.[2]

The Chamber is not concerned with the particular facts of the applications by the Nauru entity and the Tonga entity, which remain pending before the Legal and Technical Commission; nor, in my submission, is the Chamber called upon to pronounce upon the 68-page draft sponsorship agreement between Nauru Ocean Resources Inc., United Nickel Inc. (a company registered in British Columbia), and the Republic of Nauru, which is summarized at length in their written statement and set out in full in an appendix to that statement. Members of the Chamber, I think I need not go into the questions of nationality or effective control that these arrangements raise; they are difficult questions.

It seems to have been generally understood, during the debate in the Council of the Authority, that the request for an advisory opinion and consideration of the two applications for plans of work were entirely distinct.[3] The delegate of Fiji, on the day the request was made by the Council, referring to the relationship between Nauru's application for an exploration licence and the proposal then before the Council to seek an advisory opinion from the Chamber, said "these are two very distinct and materially unrelated things".[4] As the delegate of Canada in the Council put it, article 191 "was never meant to provide a mechanism for individual States Parties to seek a legal opinion".[5] Unlike a judgment in a contentious case, an advisory opinion,

[1] *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 (UK Written Statement - hereafter 'WS', flag A).
[2] List of speakers and summary records of the 155th, 160th and 161st meetings of the Council prepared by the Secretariat [Dossier No. 3].
[3] List of speakers and summary records of the 155th, 160th and 161st meetings of the Council prepared by the Secretariat [Dossier No. 3], paras. 47 (South Africa), 52 (Fiji), 81 (Republic of Korea), 90 (Uganda).
[4] 6th May 2010 Statement by the Fiji Delegation [Dossier No. 4], third para.
[5] List of speakers and summary records of the 155th, 160th and 161st meetings of the Council prepared by the Secretariat [Dossier No. 3], para. 104.

however authoritative, is not itself legally binding. These points were all noted by speakers in the debate in the Council leading to this request.[6]

Mr President, I shall make three short points on jurisdiction and admissibility.[7]

My first point is that, as others have said, whenever the Chamber receives a request for an advisory opinion, it should consider both whether it has jurisdiction, and, assuming that it does, whether there are any reasons that would require it to decline to respond to the questions put to it. It should do so, if necessary, *proprio motu*.

Second, the Chamber only has jurisdiction to respond to legal questions, and only to legal questions arising within the scope of' the activities of the requesting organ. On this issue I can do no better than to refer to the excellent analyses in the written statements of Australia[8] and Mexico.[9] I would like to add just one point. The first two questions put to the Chamber are clearly legal questions. The third 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. In so far as a question put to the Chamber might lead into policy areas, it is incumbent upon the Chamber to confine its answer to those aspects of the question that can be answered on the basis of law.[10]

Yesterday I listened with great interest to Mexico's eloquent appeal for the introduction by sponsoring States of a strict liability regime.[11] However, in my view, this would require a policy decision by States Parties, whether taken through a collective decision or on an individual basis. It is not, I would suggest, 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 systems, since in doing so it would be stepping outside its judicial role. As the Permanent

[6] List of speakers and summary records of the 155th, 160th and 161st meetings of the Council prepared by the Secretariat [Dossier No. 3].
[7] See also ISA WS, paras. 2.1-2.8.
[8] Australia WS, paras. 4-13.
[9] Mexico WS, paras. 22-4. See also China WS, paras. 4-8.
[10] As Judge Ndiaye has written, in his private capacity, "one has to try to retain only the legal aspects *per se* of a question....": T.M.Ndiaye, "The Advisory Function of the International Tribunal for the Law of the Sea", 9 *Chinese JIL* (2010), para. 80.
[11] ITLOS/PV.2010/2, pp. 50-52.

Court 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."[12]

My third point as regards the question of admissibility is that there is an obvious difference between the apparently mandatory wording of article 191 of the Law of the Sea Convention ("shall give") and the clearly permissive wording of Article 65 of the Statute of the International Court ("may give").[13] As others have said, the Chamber must have some discretion to decline to respond to a request for an advisory opinion, if it is to be in a position to protect its judicial role. Nevertheless, in the present case, in my submission the Chamber does not need to consider this question since it has not been suggested by anyone that there are any plausible grounds for exercising that discretion; indeed, there are none. Therefore, in my submission, the Chamber should be careful on this occasion not to rule out such discretion absolutely.[14]

I turn now to the question of the applicable law. The law to be applied by the Chamber is described, in very general terms, in article 38 of the Statute of the Tribunal[15] and article 293 of the Convention.[16] The key provisions, for the purposes of the present proceedings, are to be found in Part XI of the Convention, including Annex III, and in the 1994 Agreement. As the representative of the Authority explained on Tuesday, it is important to note that the provisions of the Agreement and Part XI of the Convention are to be interpreted and applied together as a single instrument; and in the event of any inconsistency between the Agreement and Part XI, the provisions of the Agreement prevail.[17]

[12] *(1923) P.C.I.J. Series B, No. 5*, p. 29; cited with approval, most recently, in the *Accordance with international law of the unilateral declaration of independence in respect of Kosovo* Advisory Opinion, 22 July 2010, para. 29.
[13] *United Nations Convention on the Law of the Sea 1982: A Commentary*, Volume VI (S. Nandan, M. Lodge, Sh. Rosenne, eds.), p. 641 (paras. 191.1, 191.7(a)).
[14] *Contra* Mexico WS, paras. 50-54.
[15] Annex VI to the Convention.
[16] United Kingdom WS, paras. XX.
[17] UNGA res. 48/263 of 28 July 1994, para. 4; Agreement, art. 2, para. 1. This formula has been repeated in most instruments adopted with reference to Part XI since 1994: see, for example, the Introductory Notes to the Rules of Procedure of the Assembly and Council.

I shall not seek to describe the complex system for the exploration and exploitation of the resources of the Area – the so-called "parallel system". I would simply draw attention to the full, very good outline of the regulatory regime that is set out in Chapter IV of the Authority's written statement.[18] As others have pointed out[19], there are essentially three parties involved when a sponsored entity (the contractor) engages in activities in the Area, and the relationship between them is complex. They are the Authority, the sponsoring State or States, and the contractor. Others have already emphasized the essential role that sponsorship plays in ensuring compliance with the rules of the system.

As the Chamber is aware, the relevant provisions of the Convention are to be interpreted in accordance with the rules set forth in Articles 31 and 32 of the Vienna Convention on the Law of Treaties. In particular, the provisions of a treaty should not be looked at in isolation, but read together. This is particularly relevant to the interpretation of the various provisions in Part XI and Annex III dealing with the responsibility and liability of sponsoring States.[20]

However, the fact that the Convention must be interpreted as a whole does not mean that the Chamber should go outside the specific questions put to it, and seek to apply the general principles set forth in the Convention or general international law, as some appear to suggest.[21] Moreover, when referring to other provisions of the Convention, care must be taken to ensure that they are in fact relevant to the questions put to the Chamber. Article 304, for example, has been referred to[22], but in my submission it is a classic "without prejudice" clause; it is not in itself a source of obligation for States Parties to the Convention or sponsoring States in particular. What it says is that the specific provisions of the Convention regarding responsibility and liability for damage are without prejudice to (i) the application of existing rules (where such rules are applicable) and (ii) the development of future rules (which, when developed, will then apply in accordance with their terms). Likewise, article 194, paragraph 1, is a very general obligation imposed upon all States. It is to

[18] ISA WS, paras. 4.1-4.28.
[19] Republic of Korea WS, paras. 14-15, Romania WS, paras. 12-25.
[20] Republic of Korea WS, paras. 2-5.
[21] Mexico WS, paras. 59-68.
[22] Statement of Stichting Greenpeace Council (Greenpeace International) and the World Wide Fund for Nature, (not part of the case-file, but nevertheless on the Tribunal's website), pp. 4, 9.

be found among the general provisions of Part XII of the Convention. It requires States to take all measures that are necessary to prevent, reduce and control pollution of the marine environment "using for this purpose the best practicable means at their disposal and in accordance with their capabilities". The words that I have just quoted cannot and do not qualify specific obligations laid down elsewhere in the Convention, including the obligations incumbent upon those who choose to be sponsoring States.[23]

The Chamber will no doubt take care to distinguish between existing rules of law that are applicable and what may loosely be termed *lex ferenda* or "soft law". The Chamber will no doubt be conscious of the approach of the International Court of Justice and other international courts and tribunals when considering the sources of international law listed in Article 38 of the Statute of the Court. Reference has been made in the present proceedings, through the prism of article 304, to the International Law Commission's draft principles on allocation of loss in the case of transboundary harm arising out of hazardous activities.[24] Quite apart from the fact that the Commission expressly stated that it was not dealing with global commons, which in its view required separate treatment,[25] the Commission was also explicit that, while the draft principles were intended to contribute to the process of the development of international law,[26] the Commission did not attempt to identify the current status of the various aspects of the draft principles in customary international law, and the way in which the draft principles are formulated is not intended to affect that question.[27] Therefore, I think the status of those principles is clear.

Mr President, I now turn to the three questions put by the Council to the Chamber, but I would like to begin with six points that appear to me to be central to the present case.

First, the Chamber is not being asked to describe the obligations of States Parties in general, but rather those of sponsoring States; that is clear from the text of the

[23] UNEP WS.
[24] Statement of Stichting Greenpeace Council (Greenpeace International) and the World Wide Fund for Nature, Sections IV and V.
[25] *Yearbook of the International Law, Commission, 2006*, vol. II, Part Two, para. 67(8).
[26] *Yearbook of the International Law, Commission, 2006*, vol. II, Part Two, para. 67(5).
[27] *Yearbook of the International Law, Commission, 2006*, vol. II, Part Two, para. 67(13).

questions. It is also reflected in the title that has been given to these proceedings. Given the scope of the questions, it seems, for example, out of place to urge the Chamber to pronounce on the obligations of States Parties in the field of anti-monopolization.[28]

Second, as I have already noted, the Council has framed the questions in an abstract manner, without reference to any particular situation or application for a plan of work. As the representatives of the Authority made clear on Tuesday, this was a deliberate and conscious choice.[29] The abstract formulation of the three questions inevitably affects the degree of detail which the Chamber can provide in response. In my view, the Chamber is not being asked to set out in detail all of the obligations incumbent on sponsoring States. To do so would involve writing a treatise (covering the different stages of prospecting, exploration and exploitation, and the various resources that may be found in the deep seabed). Any attempt to do so could scarcely be exhaustive and would risk becoming out-of-date since the content of these obligations will evolve over time.

Third, it is important to recall, as many others have done, that the protection of the environment is at the heart of this case. The representatives of Nauru this morning painted a very broad, impressionistic picture of the economic, social and environmental considerations facing deep seabed mining in an overall perspective[30], but we are concerned today with the specific question of the obligations of sponsoring States.

In this regard we must recall that the deep seabed contains many fragile and sensitive ecosystems, which, once damaged, could take years, decades, to regenerate. It is essential that sponsoring States, and the entities that they sponsor, have the necessary measures in place for the purpose of preventing serious harm to the marine environment.

[28] Mexico WS, paras. 98-100.
[29] List of speakers and summary records of the 155th, 160th and 161st meetings of the Council prepared by the Secretariat [Dossier No. 3].
[30] ITLOS/PV.2010/3, pp. 2-11.

To say that, Mr President, is not to discourage seabed mining.[31] I do not believe it is the intention of anyone taking part in these proceedings to do that. No one is seeking to discourage private-sector investment in deep seabed mining; but a proper balance has to be struck with environmental concerns. Striking that balance is a matter for the Authority, and for the States Parties acting through the Authority.

It is right that the Convention, including Part XI, and the 1994 Agreement accord the highest importance to the protection and preservation of the marine environment. The Convention itself contains an important series of provisions to that end.[32] The protection of the marine environment was also one of the key issues dealt with during the negotiation of the 1994 Agreement.[33] Awareness of the importance of the preservation of the marine environment is likewise reflected in the Nodule Regulations[34], and the Sulphides Regulations adopted as recently as May this year.[35] It is clear that among the most important functions of sponsoring States is to ensure that the entities they sponsor comply scrupulously with the environmental provisions of the Convention, and the rules, regulations and procedures of the Authority, as well as those contained in their contracts.

My fourth general point is that in its written statement Nauru argued that there should be some differentiation of obligation based on levels of development.[36] I note that they have not repeated that suggestion today in their oral statement. It may nevertheless be helpful to say a few words about the point. As others have said, there is nothing in Part XI, or elsewhere in the Convention, or in the 1994 Agreement, to suggest that the obligations of sponsoring States vary depending upon their level of development. Any other conclusion, which could lead to what one

[31] Cf. Nauru, ITLOS/PV.2010/3, p. 1.
[32] Part XI (arts. 145, 162.2(w)); Part XII (arts. 209, 215), Annex III, art. 17.
[33] Under the Agreement, no less than four of the priority tasks of the Authority relate to this matter 1994 Agreement, annex, section 1, para. 5 (g), (h), (i) and (k).
[34] ISBA/6/A/18 [Dossier No. 16]. See, in particular, regulations 31 (Protection and preservation of the marine environment) and 32 (Emergency orders) as well as Sections 5 (Environmental monitoring), 6 (Contingency plans and emergencies) and 16 (Responsibility and liability) of the 'Standard clauses for exploration contract' at annex 4 to the Regulations.
[35] ISBA/16/A/12; ISBA/16/C/L.5, e.g., Regulation 5 (Protection and preservation of the marine environment during prospecting), Regulation 32 (Responsibility and liability), Regulation 35 (Emergency orders) And Part V (Protection and preservation of the marine environment).
[36] Nauru WS, paras. 2, 12-16. A similar suggestion had been made in the paper submitted by Nauru to the Council of the International Seabed Authority, *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*, ISBA/16/C/6.

might term a “sponsoring State of convenience”, could seriously jeopardise the Part XI regime, not least its provisions for environmental protection. It cannot have been intended that the standard of protection of the Area, “the common heritage of mankind”, should depend upon which group of States the sponsoring State belongs to. The Convention might be thought to go some way towards mitigating what Germany referred to as “sponsor shopping”, in that it requires more than one sponsoring State in some circumstances.[37] Article 4, paragraph 4, of Annex III itself begins with the words “The sponsoring State or States shall ...” However, this requirement for dual (or multiple) sponsorship would not assist where there is only one sponsoring State, or where each sponsoring State has some lesser obligations because of its level of development. Even where the co-sponsoring States have different levels of development, it would lead to a most curious result, with undesirable legal uncertainty, if in that case their obligations were to differ.

This morning Nauru addressed the meaning of “effective control”, which is relevant to determining which State or States are required to be sponsoring States in a particular case.[38] In my submission, the Chamber does not need to go into that no doubt difficult question. It is a question that relates to identification of the sponsoring State, not to its obligations.

In its written statement Nauru appeared to base much of its argument for differentiation on references to developing States in article 140, paragraph 1, and article 148. It described these as “principles”, and quoted them at the outset of its written statement, without, however, pointing out that in each case the reference was qualified by the words “as specifically provided for in this Part” (that is, Part XI). In other words, in each case there is a *renvoi* to other specific provisions of Part XI. The same is true of article 152, paragraph 2, relating to the exercise of the powers and functions of the Authority, which stipulates that “special consideration for developing States … specifically provided for in this Part shall be permitted”.[39] (One such specific provision, by no means insignificant, is the right for developing States to apply for ”reserved areas”.)

[37] Article 4(3) of Annex III; Nodules and Sulphides Regulations, regulation 11 (1) and (2).
[38] ITLOS/PV.2010/3, p. 13.
[39] *United Nations Convention on the Law of the Sea 1982: A Commentary*, Vol. VI (M. Nordquist, S. Nandan, Sh. Rosenne, M. Lodge, eds.), paras. 148.11(a) and 152.11(b).

Those who drafted Part XI took care to avoid introducing broad and general preferences; the express language referring only to such preferences as were specifically provided for in Part XI was deliberate, and it is clear. This is by no means unusual: similar care is taken in other contexts where States take upon themselves specific differentiated responsibilities, differing, at times, between developing and developed States, but also among the developed States themselves. Examples can be found in the WTO agreements[40], and those relating to climate change.[41] None of the provisions of Part XI relating to the obligations of sponsoring States specifically provides for any special position for specific categories of sponsoring States. The United Kingdom therefore agrees with those who have submitted that the provisions relating to the obligations of sponsoring States apply regardless of levels of development, economic situations or other circumstances.[42] The representative of Fiji put it very well yesterday when he said: "The requirements and standards established under Part XI of the Convention apply equally to all States without regard to economic status or financial and other resources capability."

My fifth general point is that the obligations of sponsoring States are, as Germany and others have clearly set out, conceptually distinct from those of the contractor. The contractor is liable for violations of the terms of the contract with the Authority, including those relating to the protection of the environment. The obligations of sponsoring States, on the other hand, are those set forth in the Convention, and

[40] See the WTO "schedule of concessions" system, e.g., General Agreement on Tariffs and Trade, art. II 55 U.N.T.S. 194 (1947), incorporated into the General Agreement on Tariffs and Trade, 1867 U.N.T.S. 187 (1994), art. 1(b); General Agreement on Trade in Services, 1869 U.N.T.S. 183 (1994), art. XX.

[41] See the United Nations Framework Convention on Climate Change, 1771 UNTS 107 (1992), art. 4 on the "common but differentiated responsibilities" of States with respect to the Convention and, accordingly, the list of States provided in Annex 1 to the Convention, differentiating those States from the States not listed in the Convention. The Kyoto Protocol to the United Nations Framework Convention on Climate Change, UN Doc FCCC/CP/1997/7/Add.1, Dec. 10, 1997, then defines States listed in the Annex to the Convention and those that are not separately (art. 1.6, 1.7 to the Protocol); provides for specific emission goals for the States listed in Annex 1 to the Convention (art. 3.1 to the Protocol); reiterates the differing responsibilities of States with respect to their specific obligations under the Protocol (art. 10); art. 3.5 provides a special procedure to establish the base year for the determination of the level of carbon stocks of States listed in Annex 1 to the Convention, which are undergoing a transition to a market economy, as opposed to the procedure provided for other States listed in Annex 1 (art. 3.4); and art. 3.6 grants "a certain degree of flexibility" in the implementation of the Protocol to States listed in Annex 1 to the Convention undergoing a transition to a market economy.

[42] Australia WS, para. 21; Germany WS, paras. 15-21; Russian Federation WS, paras. 3-11; IUCN WS, paras. 58-60.

include the adoption of laws and administrative measures. The international responsibility of sponsoring States arises from any failure to live up to their obligations under the Convention, for example from a failure to have in place the necessary laws and administrative measures.

My sixth and final general point about the questions is that the obligations of States with regard to these questions are set out in Convention itself. Whilst there may be some utility in having regard to the general principles of the law of State responsibility, ultimately the answers to the questions posed are to be found in particular provisions of the Convention. That is why my statement today, and the United Kingdom's written statement, concentrate upon the proper interpretation of the relevant provisions of Part XI. Any obligations for sponsoring States in relation to the matters which are the subject-matter of this request arise because they are parties to the Convention and, as Argentina stressed yesterday, must be implemented in good faith.

Mr Chairman, I now turn to the first question of the Chamber. This was considered at paragraphs 3.7 to 3.9 of the United Kingdom's written statement.

I will begin with three preliminary matters. First, I do not think that any particular importance attaches to the use of the rather cumbersome expression in the question, "legal responsibilities and obligations". This no doubt reflects differing terminology in the Convention, but it can only be a reference to a single concept, which I shall refer to as the sponsoring State's "obligations". Mexico's thorough analysis in its written statement seems to reach the same conclusion.[43]

The second preliminary point: Question 1 asks about the obligations of sponsoring States under the Convention, in particular Part XI, and the 1994 Agreement. The acts of any entity that a State Party sponsors in accordance with the Convention are not, as such, attributable to the State concerned in accordance with the rules on State responsibility. This is clear from paragraph 1 of article 139. If the acts of the entity were attributable to the State Party, that paragraph, setting out the obligations of the sponsoring State, would not have been necessary. Furthermore, if the

[43] Mexico WS, paras. 69-78.

sponsored entity is a commercial enterprise, its acts would not in any event meet the criteria for attribution of conduct to a State in accordance with customary international law. The sponsored entity would neither be an organ of a State, for the purposes of article 4 of in the IOC's Articles, nor be exercising "governmental authority", for the purposes of Article 5.

The third preliminary point arose this morning when the representative of Nauru raised an important point about the meaning of the term "activities in the Area".[44] This is, indeed, a key term that is used throughout Part XI and the associated instruments. Article 139, like the other provisions we are considering, uses this term "activities in the Area". I will just offer a couple of personal thoughts in response to the question put by Nauru this morning. As he said, the Area is defined in article 1 of the Convention; and so too is the term "activities in the Area". That is defined to mean all activities of exploration for, and exploitation of, the resources of the Area. Article 133 defines the term "resources of the Area" to mean mineral resources *in situ* in the Area at or beneath the seabed, and it distinguishes the use of the term "resources" and the use of the term "minerals", which applies when they are recovered from the Area. So it might be thought that the definition of "activities in the Area" in covering the exploration and exploitation of resources incorporates that definition of resources that refers to "resources *in situ".* There are other provisions that shed light on the term, but particularly clear is article 1 of Annex IV of the Statute of the Enterprise, which says that the Enterprise is the organ of the Authority which shall carry out activities in the Area directly, as well as the transporting, processing and marketing of minerals recovered from the Area.

Mr President, going back to Question 1, what then are the obligations of sponsoring States under the Convention? As the Authority said in its written statement, and as its representatives reiterated on Tuesday,

> [I]t 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.[45]

[44] ITLOS/PV.2010/3, pp. 17-18.
[45] ISA WS, para. 5.2.

Other speakers have dealt with these provisions in full and I do not intend to repeat everything they have said.

Article 139, paragraph 1, provides that State Parties "shall have the responsibility to ensure that activities in the Area ... shall be carried out in conformity" with Part XI. According to this provision, this responsibility exists whether the State is itself carrying out activities, or they are carried out by a State enterprise, or by its nationals, or by an entity which it or its nationals effectively controls.

Article 139, paragraph 2, makes it clear that damage caused by State's failure to carry out this responsibility entails liability (the extent of which is the issue raised by Question 2). The paragraph further stipulates that, in the case of a sponsoring State, the "responsibility to ensure" entails taking "all necessary and appropriate measures to secure effective compliance" by the contractor, referring to article 153 and article 4 of Annex III to the Convention.

Article 4, paragraph 4, of Annex III spells out in more detail the responsibilities of sponsoring States. This paragraph stipulates that a sponsoring State has the responsibility to ensure, within its legal system, that the contractor carries out its obligations under the contract with the Authority. Thus, a sponsoring State is obliged to ensure, in its domestic legal order, that the contractor meets the obligations contained in the contract.

Consistent with article 139, a failure by a sponsoring State to meet its obligations under article 4, paragraph 4, of Annex III entails liability for damage caused by such failure. The article also sets the scope of a sponsoring State's responsibility, stating that it must adopt laws and regulations and take administrative measures that are reasonably appropriate, within its own legal system, for securing compliance of persons under its jurisdiction. Thus the responsibility of sponsoring States arises not only in the event of damage to the environment but – and this is equally important – at the outset, when it is required to adopt laws and take measures aimed at preventing damage. In addition, States Parties are obliged to take "all measures necessary" to assist the Authority in fulfilling its own duty, that is, in ensuring

compliance with the relevant legal instruments mentioned in article 153, paragraph 4. This provision refers back to article 139, and has particular relevance for sponsoring States.

These provisions set the basic legal framework within which a sponsoring State operates under the Convention's legal regime. A sponsoring State cannot be held liable for the actions of a private entity, which is not its organ, as such. These provisions do not attribute the actions of sponsored entities to the State. The responsibility to ensure compliance by sponsored contractors entails the duty of the sponsoring State or States to take reasonably appropriate measures, in the language of article 4, paragraph 4, [of Annex 3] in its internal legal order, to prevent such breaches by sponsored entities.

In conclusion, and as I have already said, the articles on the responsibility and scope of liability of a sponsoring State need be read in conjunction with one another. Article 139 refers to article 4, paragraph 4, of Annex III, which is the more specific article with respect to sponsoring States. So measures deemed to be reasonably appropriate for securing compliance, as required by article 4, paragraph 4, should be considered to meet the standard of "necessary and appropriate measures" in the language of article 139.

I now move to Question 2, which we discussed at paragraphs 3.10 to 3.15 of our written statement. I will try to be very brief, Mr President.

As the Tribunal recalled in its Judgment on the merits in the *M/V "SAIGA" (No. 2) Case*[46], citing the *Factory at Chorzów* judgment,

> [i]t is a well-established rule of international law that a State which suffers damage as a result of an internationally wrongful act by another State is entitled to obtain reparation for the damage suffered from the State which committed the wrongful act and that 'reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the

[46] *The M/V "SAIGA" (No. 2) Case (Saint Vincent and the Grenadines* v. *Guinea),* (July 1, 1999), para. 170.

> situation which would, in all probability, have existed if that act had not been committed'...[47]

If the sponsoring State and the Authority could not agree, it would ultimately be for an international court or tribunal to decide the precise "extent of liability" of a sponsoring State for a breach of the Convention. The answer will follow from the evidence presented to the court or tribunal, and its appreciation thereof, as well as the relevant legal factors, some of which I have just mentioned. Indeed, it could well fall to this Chamber to decide the matter in the exercise of its contentious jurisdiction under article 187, paragraph (b)(i), in a dispute between the Authority and a sponsoring State about whether the latter has fulfilled its obligations. Judge Ndiaye, writing in his private capacity, asked the question: '[w]hat would happen if the dispute submitted to the Chamber or the Tribunal concerns a legal question for which an advisory opinion has already been rendered? Will they be able to extricate themselves from the principles and solutions adopted in the advisory opinion?"[48] The Chamber may wish to avoid tying in its hands in any future contentious case by making too detailed a pronouncement in this advisory opinion.

I now turn to Question 3 which, as others have said, is closely related to Question 1. I once again draw attention to our written statement, this time paragraphs 3.16 to 3.19.

Again, the various provisions of the Convention need to be read together and in context. In particular, one needs to note the provisions of the second sentence of article 139, paragraph 2, and of the second sentence of article 4, paragraph 4, of Annex III. Under the former, a sponsoring State is absolved from liability if it "has taken all necessary and appropriate measures to secure effective compliance"; under the latter 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". The test is an objective one.[49] While the

[47] *Merits, Judgment No.13, 1928, P.C.I.J., Series A, No. 17*, p. 47. See also Australia WS, paras. 27-42.
[48] T.M.Ndiaye, "The Advisory Function of the International Tribunal for the Law of the Sea", 9 *Chinese JIL* (2010), para. 52.
[49] Australia WS, para. 46. Cf. Nauru WS, para. 22.

measures need to be tailored to the sponsoring State's own legal system, that does not mean that what is necessary and appropriate is left to its sole appreciation. Nor is this a field in which the obligations are softened by a "margin of appreciation" doctrine. As the Netherlands has convincingly shown, it is misleading to speak of "flexibility" in this context.[50]

In addition to the general requirements found in article 139, article 4, paragraph 4, of Annex III specifies in plain terms what necessary and appropriate measures a State must take in order to meet its responsibility. According to that paragraph, a State will not be held liable for damage caused by a sponsored contractor if it has enacted "laws and regulations and taken administrative measures … reasonably appropriate for securing compliance".

It follows that the first of the positive steps a State must take is to put in place what the Netherlands termed yesterday a "public domestic regulatory framework". In other words, it must enact laws and regulations aimed at ensuring that entities it sponsors comply with their legal obligations specified in the Convention and in their respective contracts.[51] In these oral hearings, no one has suggested the contrary. Article 209, paragraph 2, reinforces this by providing that "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 ... operating under their authority". For the avoidance of doubt, I would recall that, contrary to what may have been suggested this morning, the flag State has clear obligations in relation to pollution matters arising for ships flying its flag.

On Tuesday, the Authority indicated some of the kinds of provisions that one might expect to find in legislation giving effect to the obligations of sponsoring States. She referred in particular to the German law, the *Meeresbodenbergbaugesetz*, and to the Czech law.

[50] Netherlands WS, para. 4.3, commenting on *United Nations Convention on the Law of the Sea 1982: A Commentary*, Volume VI (S. Nandan, M. Lodge, Sh. Rosenne, eds.), p. 127.
[51] Australia WS, paras. 24-25; China WS, paras. 32(a), 34; Mexico WS, para. 86-88; Netherlands WS, paras. 3.6, 4.2; Republic of Korea WS, para. 6; Philippines WS, *passim*; Romania WS, para. 33; IUCN WS, paras. 44-57.

Among other things, legislation is essential if victims are to have rights under domestic law. A contractual arrangement would be wholly inadequate for this. Nor can it be accepted that a sponsoring State is absolved from enacting laws and regulations because, and I quote from one of the written statements, "[e]nacting legislation specifically to regulate deep sea mining may prove too costly".[52]

But legislation in itself is not sufficient to relieve the State from its responsibilities. As is made clear in article 4, paragraph 4, of Annex III, administrative measures must also be taken by the sponsoring State for the purpose of securing compliance with the laws and regulations of the State.[53] Hence, following the enactment of appropriate legislation, a State is under a continuing obligation to take positive measures to ensure that the contractor fulfils the legislative requirements imposed upon it. Thus, whether a State has taken the necessary and appropriate measures and has lived up to its responsibilities is a matter that will depend upon the ongoing action or inaction of the State, and must be continuously evaluated.

The sponsoring State's responsibility is a conduct-based obligation, rather than a result-based one.[54] Taken together with the continuing nature of the obligation, this makes it difficult in practice to determine *ex ante* that a State has met its obligation to take the necessary and appropriate measures to secure compliance. Such a determination will vary in the context of each case, and will be measured against the requirements provided in article 139 and, more specifically, the measures articulated in article 4, paragraph 4, of Annex III on a continuous basis.[55] It is clear that for the sponsoring State merely to conclude a contract with the sponsored entity would not in practice be sufficient.[56]

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, and specifically this Chamber, if the matter comes before it in a contentious case, will have to take into account all of the circumstances, including

[52] Nauru WS, para. 26.
[53] Republic of Korea WS, para. 7.
[54] China WS, paras. 21(c) and (d), 26; Germany WS, paras. 7-8; Netherlands WS, paras. 3.6-3.8; Republic of Korea WS, paras.12-13; Romania WS, paras. 30-33.
[55] Australia WS, para. 22; IUCN WS, paras. 24-29.
[56] Netherlands WS, para. 4.2; Republic of Korea WS, para. 10.

the points I have just made. In practice, this decision can only be made *ex post facto,* by evaluating the legislation enacted and the measures taken over time by the State concerned.[57]

Mr President, Members of the Seabed Disputes Chamber, I hope the observations made in the United Kingdom's written statement, and again today, will assist the Chamber in its important task of ensuring the correct and consistent interpretation of the regime for the deep seabed. We welcome any greater clarity and understanding that the Chamber can bring to the key provisions of the Convention concerning the obligations of sponsoring States.

Mr President, Members of the Chamber, I am grateful for your attention.

THE PRESIDENT: Thank you very much, Sir Michael.

The Chamber will now recess and meet again at 3 p.m. sharp to listen to the statements of the Russian Federation, the Intergovernmental Oceanographic Commission of the United Nations Educational, Scientific and Cultural Organization and the International Union for the Conservation of Nature.

(*The sitting adjourned for lunch at 12.56 p.m.*)

[57] IUCN WS, para. 29.