

INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA
TRIBUNAL INTERNATIONAL DU DROIT DE LA MER



2010

Public sitting

held on Tuesday, 14 September 2010, at 3.00 p.m.

at the International Tribunal for the Law of the Sea, Hamburg,

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

<i>Present:</i>	President	Tullio Treves
	Judges	Vicente Marotta Rangel L. Dolliver M. Nelson Rüdiger Wolfrum Shunji Yanai James L. Kateka Albert J. Hoffmann Zhiguo Gao Boualem Bouguetaia Vladimir Golitsyn
	Registrar	Philippe Gautier

List of delegations:

International Seabed Authority

H.E. Mr Nii Odunton, Secretary General
Mr Michael W. Lodge, Legal Counsel
Dr Kening Zhang, Senior Legal Officer
Ms Gwenaëlle Le Gurun, Legal Officer

Germany

Dr Susanne Wasum-Rainer, Legal Adviser, Director-General for Legal Affairs, Federal Foreign Office
Dr Ingo Winkelmann, Head of Division, Federal Foreign Office
Mr Martin Lutz, Deputy Head of Division, Federal Ministry of Economics and Technology
Ms Ellen Maue, Deputy Head of Division, Federal Ministry of Justice
Ms Chia Lehnardt, Expert Assistant, Federal Ministry of Economics and Technology
Mr Dan Tidten, Expert Assistant, Federal Foreign Office

Netherlands

Dr Liesbeth Lijnzaad, Legal Adviser of the Ministry of Foreign Affairs
Prof Dr René Lefeber, Legal Counsel, Ministry of Foreign Affairs
Ms Winifred Bradbelt, Legal Counsel, Ministry of Transport and Water Management

Argentina

Ambassador Susana Ruiz Cerutti, Legal Adviser, Argentine Ministry of Foreign Affairs
International Trade and Worship
Minister Manuel Angel Fernandez Salorio, Consul General of the Argentine Republic in Hamburg
Dr Frida Armas Pfirter, Member of the Legal and Technical Commission of the International Seabed Authority

Chile

Minister Counsellor Roberto Plaza, Consul General of Chile in Hamburg

Fiji

H.E. Mr Pio Bosco Tikoisuva, High Commissioner of Fiji to the United Kingdom of Great Britain and Northern Ireland

Mexico

Ambassador Joel Hernandez G., Legal Adviser of the Ministry of Foreign Affairs

Nauru

Mr Peter Jacob, First Secretary, Nauru High Commission in Suva (Fiji)
Mr Robert Haydon, Advisor

United Kingdom of Great Britain and Northern Ireland

Sir Michael Wood KCMG, Member of the English Bar and Member of the International Law Commission
Mr Eran Sthoeger, New York University School of Law

Russia

Mr Vasiliy Titushkin, Deputy Director of the Legal Department, Ministry of Foreign Affairs
Mr Andrey Todorov, Attaché of the Legal Department, Ministry of Foreign Affairs

UNESCO/IOC

Mr Ehrlich Desa, Deputy Executive Secretary of UNESCO/IOC, Head of Budget and Finance of UNESCO/IOC's Capacity Development Section
Mr Nicolas Guerrero Peniche, Consultant for Legal Affairs Office of the Executive Secretary of UNESCO/IOC

IUCN

Mr Donald K. Anton, Barrister and Solicitor of the Supreme Court of Victoria, the Supreme Court of New South Wales, and the High Court of Australia; Member of the Bar of the State of Missouri, the State of Idaho, and the Supreme Court of the United States; and Senior Lecturer in International Law at the Australian National University College of Law
Mr Robert A. Makgill, Barrister and Solicitor of the High Court of New Zealand
Ms Cymie R. Payne, Member of the Bar of the State of California, the Commonwealth of Massachusetts, and the Supreme Court of the United States

1 **THE REGISTRAR** (*Interpretation from French*): On 6 May 2010, the Council of the
2 International Seabed Authority adopted decision ISBA/16/C/13, by which it decided
3 to request an advisory opinion from the Seabed Disputes Chamber of the Tribunal.
4 The text of the decision was transmitted to the Chamber by a letter from the
5 Secretary-General of the International Seabed Authority dated 11 May 2010,
6 received in the Registry by electronic mail on 14 May 2010, the original thereof
7 having reached the Registry on 17 May 2010.

8

9 The Request was made under article 191 of the United Nations Convention on the
10 Law of the Sea and article 131 of the Rules of the Tribunal.

11

12 (*Continued in English*) The case has been entered in the list of cases as Case
13 No. 17 and named *Responsibilities and Obligations of States sponsoring persons*
14 *and entities with respect to activities in the Area (Request for Advisory Opinion*
15 *submitted to the Seabed Disputes Chamber)*.

16

17 **THE PRESIDENT:** I declare open the hearing in Case No. 17 pursuant to
18 article 133, paragraph 4, of the Rules of the Tribunal.

19

20 At the very beginning of this sitting I wish to highlight that the case in which we are
21 hearing oral statements today and over the next two days is a double *première* in the
22 history of the International Tribunal for the Law of the Sea and the Seabed Disputes
23 Chamber. It is the first time that the Chamber is seized with a case and the first time
24 at all that a request to render an advisory opinion has been brought to the Tribunal.

25

26 It is with regret that I have to say that on this special occasion one of the Members of
27 the Chamber, Judge Chandrasekhara Rao, is prevented by illness from sitting on the
28 bench during the hearing.

29

30 I now call on the Registrar to read out, from the decision of the Council of the
31 International Seabed Authority, the questions on which the Chamber is asked to
32 render an advisory opinion.

33

34 **THE REGISTRAR:** The questions read as follows:

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37
38

1. What are the legal responsibilities and obligations of States Parties to the Convention with respect to the sponsorship of activities in the Area in accordance with the Convention, in particular Part XI, and the 1994 Agreement relating to the implementation of Part X1 of the United Nations Convention on the Law of the Sea of 10 December 1982?
2. What is the extent of liability of a State Party for any failure to comply with the provisions of the Convention, in particular Part XI, and the 1994 Agreement, by an entity whom it has sponsored under Article 153, paragraph 2(b), of the Convention?
3. What are the necessary and appropriate measures that a sponsoring State must take in order to fulfil its responsibility under the Convention, in particular Article 139 and Annex III, and the 1994 Agreement?

THE PRESIDENT: By an Order dated 18 May 2010, the President of the Seabed Disputes Chamber decided that the International Seabed Authority and the organizations invited as intergovernmental organizations to participate as observers in the Assembly of the Authority are considered likely to be able to furnish information on the questions submitted to the Seabed Disputes Chamber for an advisory opinion.

By the same Order, States Parties to the Convention, the International Seabed Authority and the intergovernmental organizations referred to above were invited to present written statements on the questions submitted to the Chamber for an advisory opinion, and 9 August 2010 was fixed as the time-limit within which written statements might be presented.

By the same Order, the President of the Seabed Disputes Chamber also decided that oral proceedings should be held and fixed 14 September 2010 – that means today – as the date for the opening of the hearing at which oral statements may be submitted to the Chamber by the States Parties to the Convention, the International Seabed Authority and the intergovernmental organizations referred to above.

After receipt of a request for an extension, by an Order dated 28 July 2010, the time-limit for the presentation of written statements was extended to 19 August 2010.

1 Pursuant to article 131 of the Rules of the Tribunal, by a letter dated 30 July 2010,
2 the International Seabed Authority communicated to the Chamber a Dossier of
3 documents likely to throw light upon the questions submitted to the Chamber. The
4 Dossier was placed on the website of the Tribunal.

5

6 Written statements were filed, in the order of receipt, by the following:

7 Interoceanmetal Joint Organization; the United Kingdom of Great Britain and

8 Northern Ireland; Nauru; the Republic of Korea; Romania; the Netherlands; the

9 Russian Federation; Mexico; the International Union for the Conservation of Nature;

10 Germany; China; Australia; Chile; the Philippines; and the International Seabed

11 Authority. After the expiry of the time-limit, a further statement was filed by the United

12 National Environment Programme. In accordance with article 134 of the Rules of the

13 Tribunal, the statements were placed on the website of the Tribunal.

14

15 In addition, the Registry received a joint statement of Stichting Greenpeace Council

16 (Greenpeace International) and the Worldwide Fund for Nature. In light of article 133

17 of the Rules of the Tribunal, the statement was not included in the case file. It was

18 nonetheless placed on the website of the Tribunal.

19

20 As indicated, the Seabed Disputes Chamber of the Tribunal is meeting today to hear

21 oral statements regarding the Request for an advisory opinion. In this regard, the

22 Chamber has been informed that representatives of the following States and

23 organizations wish to take the floor during the current oral proceedings: the

24 International Seabed Authority, Germany, the Netherlands; Argentina; Chile; Fiji;

25 Mexico; Nauru; the United Kingdom; the Russian Federation; the Intergovernmental

26 Oceanographic Commission of the United Nations Educational, Scientific and

27 Cultural Organization; and the International Union for the Conservation of Nature.

28

29 In preparation for the hearing, the Chamber yesterday listed four points which it

30 would like the International Seabed Authority to address pursuant to article 76 of the

31 Rules of the Tribunal. This list of points has been communicated to all delegations.

32

1 I would also like to mention that the Chamber may see a need to address questions
2 to delegations. Such questions would be sent by the Chamber to delegations
3 indicating to them a time-limit for the receipt of a written response.

4
5 The specific arrangements for the hearing have been made known by the Registry to
6 the participating delegations. The schedule of the hearing has also been made public
7 by a press release. This afternoon the Chamber will hear the International Seabed
8 Authority. The other delegations that I have just mentioned will speak tomorrow and
9 on Thursday.

10

11 I now give the floor to the representative of the International Seabed Authority. Your
12 Excellency, Mr Odunton, you have the floor.

13

14 **MR ODUNTON:** Mr President, Members of the Seabed Disputes Chamber, it is my
15 great honour to appear before you today on behalf of the International Seabed
16 Authority in my capacity as Secretary-General of the Authority. This is an historic
17 occasion, since it is the first time that the Chamber has been called upon to exercise
18 its important advisory jurisdiction under the Convention. I would like to recall that
19 almost sixteen years ago, on 14 November 1994, when the Convention entered into
20 force after the deposit of the sixtieth ratification, nobody could predict how well the
21 three bodies to be established under the Convention would discharge their
22 respective mandates. To our great satisfaction, the three bodies which were
23 subsequently established, namely the International Tribunal for the Law of the Sea,
24 the Commission on the Limits of the Continental Shelf and the International Seabed
25 Authority, have all been functioning effectively and efficiently.

26

27 Mr President, in the case of the Authority, I am particularly pleased to see that in the
28 past two years small island developing States such as Nauru and Tonga have
29 agreed to sponsor entities registered in their countries to apply to the Authority for
30 approval of plans of work for exploration in the reserved areas. In spite of the current
31 deferral of consideration of their applications, this symbolizes another step towards
32 the realization of the noble idea of “the common heritage of mankind.”

33

1 The proposal by the Government of Nauru to seek an advisory opinion on the
2 responsibilities and liabilities of a sponsoring State and the decision of the Council to
3 make a request to the Chamber for such an opinion demonstrate the sincerity of
4 States Parties to the Convention in participating in the activities in the Area and the
5 good faith in fulfilling their treaty obligations. Furthermore, the prompt action of the
6 Chamber to deal with the Request in accordance with article 191 of the Convention
7 and [article] 131 of the Rules of the Tribunal demonstrates that the seabed disputes
8 settlement mechanism as set out by the framers of the Convention is now fully
9 functional.

10

11 Mr President, to give an advisory opinion on matters of concern to an important
12 organ of the Authority is one of the most important functions given to the Chamber
13 under Part XI of the Convention. The Chamber has a high responsibility to ensure
14 that the provisions of Part XI of the Convention and the 1994 Agreement are
15 implemented properly and the regime for deep seabed mining as a whole is properly
16 interpreted and applied. You have all my confidence that the advisory opinion to be
17 rendered by the Chamber on the questions raised by the Council of the Authority will
18 be of far-reaching significance in guiding States Parties to the Convention in the
19 proper interpretation and application of the relevant provisions of Part XI of the
20 Convention and the 1994 Agreement.

21

22 Mr President, with your permission, I would now like to give the floor to the Legal
23 Counsel, Mr Michael Lodge, to make an oral statement to the Chamber on behalf of
24 the Authority on the present Case No. 17 on responsibilities and obligations of States
25 sponsoring persons and entities with respect to activities in the Area. Mr Lodge's
26 statement will be followed by supplementary statements by
27 Mr Kening Zhang and Ms Gwenaëlle Le Gurun, members of the delegation of the
28 Authority, who will make additional comments on specific aspects of the issues
29 involved.

30

31 I thank you.

32

33 **THE PRESIDENT:** Thank you very much, Mr Odunton. I understand that Mr Lodge
34 is now going to take the floor.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34

MR LODGE: Mr President, Members of the Seabed Disputes Chamber, I have the honour to appear before you today on behalf of the International Seabed Authority. It is a particular honour for me to appear on this occasion as it is the first ever occasion on which the Chamber has been called upon to exercise its jurisdiction to entertain a request for an advisory opinion pursuant to article 191 of the United Nations Convention on the Law of the Sea.

The responsibility of rendering an advisory opinion under Article 191 is one of the most important functions given to the Chamber under Part XI of the Convention. The Chamber has a responsibility to ensure that the provisions of Part XI of the Convention and the 1994 Agreement are implemented properly and that the regime for deep seabed mining as a whole is properly interpreted and applied. The guidance provided by the Chamber with respect to the proper interpretation and application of the relevant provisions of Part XI and the 1994 Agreement will inevitably be accorded the greatest measure of respect by States Parties to the Convention.

The importance of these proceedings for the work of the Authority is amply demonstrated by the fact that written statements on the issues involved have been submitted by 12 members of the Authority and three intergovernmental organizations which are observers to the Authority: the Interoceanmetal Joint Organization (which is also a contractor with the Authority); the International Union for Conservation of Nature and Natural Resources (IUCN); and the United Nations Environment Programme. No doubt these written statements will be of great assistance to the Chamber in its deliberations.

Mr President, the duty of all those participating in these proceedings is to assist the Chamber in its task. This is especially so in the case of the Authority and its Secretariat. Whilst it is only right that States Parties should express their individual positions on the interpretation of the relevant provisions of the Convention and the Agreement, the task of the Secretariat is primarily to assist the Chamber, as well as States Parties, by making sure that all relevant information is placed before the Chamber to enable it to come to a properly informed conclusion. It is in this spirit that the Secretariat has provided an extensive Dossier, pursuant to article 131 of the

1 Rules of the Tribunal, which contains the relevant rules, regulations and procedures
2 of the Authority as well as other documents, decisions and material likely to throw
3 light upon the three legal questions on which the advisory opinion is requested. The
4 Dossier is supplemented by a written statement on behalf of the Authority, in which
5 we sought to provide the Chamber with necessary background information relating to
6 the Request itself, as well as information on the regulatory regime governing
7 activities of prospecting, exploration and exploitation in the Area.

8

9 My remarks today on behalf of the Secretariat will be organized as follows. I shall
10 begin with some words about the factual background to the Request for an advisory
11 opinion. Next I shall address questions of jurisdiction and admissibility, followed by
12 comments on the applicable law. I shall then consider the questions put to the
13 Chamber. In doing so, I shall attempt also to respond to the list of questions
14 formulated by the Chamber, which I understand has already been circulated. I shall
15 not repeat all that is said in the Authority's written statement.

16

17 Mr President, I wish to begin by describing briefly something of the background to
18 the Council requesting the Chamber to give an advisory opinion. This background
19 may be useful in order to provide a factual nexus, as well as to shed light on the
20 actual questions before the Chamber, although it is important also to emphasize that
21 the Chamber is not required to make findings of fact or to express a legal opinion on
22 any aspect of the application by Nauru Ocean Resources Incorporated that is
23 presently pending before the Legal and Technical Commission of the Authority.

24

25 The factual background is set out in detail in Chapter 1 of the Authority's written
26 statement. It is sufficient to summarise it here as follows.

27

28 On 31 March 2008, two companies, Nauru Ocean Resources Incorporated,
29 sponsored by Nauru, and Tonga Offshore Mining Ltd., sponsored by Tonga, formally
30 notified the Secretary-General of their intention to submit applications for approval of
31 plans of work for exploration. According to the notification, Nauru Ocean Resources
32 Incorporated, which I shall refer to as NORI, is a company which was incorporated in
33 Nauru on 6 March 2008 and is also a subsidiary of another company by the name of
34 Nautilus Minerals Incorporated.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34

Both these applications were for plans of work in the so-called “reserved areas”. This is a term which is not defined in the Convention or the Agreement, but which lies at the heart of the “parallel system” for access to the mineral resources of the Area. The system is described in detail in Chapter 4 of the Authority’s written statement at paragraphs 4.3 to 4.4. The applications by NORI and Tonga Offshore Mining Ltd. were in fact the first applications to have been made for plans of work in the reserved areas since the Convention entered into force in 1994. As such, they were subject to a special procedure set out in the Authority’s Regulations and described in paragraph 1.5 of the Authority’s written statement.

Under the Convention, reserved areas that are contributed by contractors with the Authority are to be reserved for use by the Enterprise, or, if the Enterprise indicates that it does not wish to submit a plan of work for such area, for developing States or an entity sponsored by a developing State. It is important to appreciate that the implementation of the relevant provisions of Annex III of the Convention has been substantially affected as a result of the 1994 Agreement and also, at a procedural level, by the Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area adopted by the Authority. The combined effect of these various provisions is described in paragraph 4.16 of the Authority’s written statement.

The Enterprise, through its Interim Director-General, formally declared that it did not intend to carry out activities in the areas in question; the two applications were formally submitted through the Secretariat on 10 April 2008. As noted in the written statement, NORI’s application covers a total surface area of 74,830 square kilometres in the Clarion-Clipperton Zone of the Pacific Ocean. (*Slide shown*). The area lies within the reserved areas and is divided into four regions, 1A, 1B, 1C and 1D, covering areas of the seabed from within reserved blocks 13, 15, 22 and 25. The chart that has been produced is intended to help put this into context for the Members of the Chamber by showing the geographical location of the areas under application, highlighted in yellow and red.

What then happened to the two applications is described in Chapter 1 of the Authority’s written statement. In accordance with the procedures set out in the

1 Regulations, they were considered by the Legal and Technical Commission in
2 May 2008. As provided for in the Regulations, the deliberations of the LTC took
3 place in closed session under conditions of confidentiality. Although the LTC
4 considered the applications over four days, it reported that it had not reached a
5 consensus with respect to a recommendation to the Council and therefore decided to
6 continue its consideration of the applications at the next possible opportunity, which,
7 in the normal course of events, would be the next regular session of the Authority in
8 2009.

9

10 Mr President, at this point it may be worth noting that, although in its paper to the
11 Council at the sixteenth session in 2010, Nauru referred to differences of opinion
12 amongst some members of the LTC, it now accepts that there were no such
13 differences. This matter is also referred to at paragraph 1.8 of the Authority's written
14 statement, which cites a statement made to the Council on this particular issue by
15 the Chairman of the LTC. As noted above, the deliberations of the LTC with regard
16 to applications for plans of work take place in closed sessions, in conditions of strict
17 confidentiality. According to the practice of the Authority, the only official reports of
18 such deliberations are contained in formal reports of the chairman of the LTC to the
19 Council, or in formal recommendations to the Council on particular issues. I hope this
20 clarifies this particular matter to the Chamber.

21

22 What then happened was that on 5 May 2009, in advance of the fifteenth session of
23 the Authority, Mr Heydon, a director of both Tonga Offshore Mining and NORI, wrote
24 to the Secretariat requesting postponement of the applications, given that they were
25 the first by a commercial entity for exploration rights in a reserved area, as well as
26 what was described as the uncertainty surrounding sponsoring State responsibility
27 and liability. The letter also referred to the difficulty of raising capital due to the global
28 financial crisis and the fall in nickel price and the closure of many nickel mines. As
29 a result, the LTC postponed its consideration of the two applications "until further
30 notice". The present status of the applications, therefore, is that they remain pending
31 further consideration by the LTC. However, during the discussions in relation to the
32 request for an advisory opinion at the sixteenth session Nauru indicated that it would
33 be requesting the Secretary-General to reinstate the applications on the agenda for
34 2011.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34

On 5 May 2010, Nauru submitted its proposal that the Council seek an advisory opinion on certain matters regarding sponsoring State responsibility and liability. This proposal was issued as document ISBA/16/C/6. The proposal was added to the provisional agenda of the Council as item 7 and was discussed at the 155th, 160th and 161st meetings of the Council. Thirty-two delegations, including members of the Council and observers to the Council, took the floor to express their views on the issues. Formal written statements were made by Nauru on 3 May 2010 and by Fiji on 3 and 6 May 2010, and these statements are included in the Dossier submitted by the Secretariat. A summary record of the discussions in the Council has also been compiled by the Secretariat and is included in the Dossier.

As noted in the Dossier and in the various written statements, the eventual decision of the Council was not to adopt the proposal as formulated by Nauru, in which the questions were quite complex, lengthy and specific, but instead to follow the wishes of many participants in the debate and to ask for an opinion on three abstract but concise questions. The Council decision requesting the Chamber to give an advisory opinion was then adopted without a vote on 6 May 2010.

Mr President, that brings me on to the topic of jurisdiction and admissibility. On these particular aspects I wish to add only one short point to the comments made in Chapter II of the Authority's written statement; that is to agree with those who have contended that it is right that, 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 exist any reasons that require it to decline to respond to the questions put to it by the Council. Although many, including the Authority, have pointed out the differences in wording between article 191 of the Convention and Article 63 of the Statute of the International Court of Justice, I share the view expressed by other delegations that it is not necessary, for present purposes, for the Chamber to reach any firm conclusions as to the implications of that difference in language.

As far as the general analysis of the issues of jurisdiction and admissibility is concerned, I would simply refer the Chamber to the brief analysis at Chapter II of the

1 Authority's written statement and to the more exhaustive analyses of the relevant
2 legal provisions contained in the written statements submitted by Australia, Mexico
3 and the United Kingdom.

4

5 Mr President, the next question that would be considered by the Chamber is that of
6 the applicable law. In general terms, the law to be applied by the Chamber is set out
7 in Annex VI, article 38 of the Convention (the Statute of the Tribunal) and article 293
8 of the Convention. My colleague will deal with this issue in more detail in due course.

9

10 I wish to make only one general point at this stage and that is to remind the Chamber
11 that the regime for the Area is a conventional regime, the basis for which is found in
12 Part XI and Annex III of the Convention and in the 1994 Agreement. Annex IV of the
13 Convention, (which contains the Statute of the Enterprise) and Resolutions I and II
14 appended to the Final Act of the Third Conference, are also relevant in some
15 respects, as are some other provisions of the Convention which deal with the
16 protection and preservation of the marine environment. A particular point that must
17 not be overlooked is that, in accordance with Article 2 of the 1994 Agreement, the
18 provisions of the 1994 Agreement and Part XI of the Convention "shall be interpreted
19 as a single instrument"; in the event of any inconsistency between the 1994
20 Agreement and Part XI of the Convention, the provisions of the 1994 Agreement
21 shall prevail. The general principles set out in the Convention and the 1994
22 Agreement are given practical effect through the rules, regulations and procedures
23 established by the relevant organs of the Authority pursuant to the specific powers
24 and functions set out in the Convention and the 1994 Agreement. For present
25 purposes the most important of these are the Regulations on Prospecting and
26 Exploration for Polymetallic Nodules in the Area, adopted by the Assembly in 2000.

27

28 Mr President, I now turn to the questions put by the Council to the Chamber. It is not
29 my intention to address each of the three questions in detail. The Chamber has the
30 benefit of copious arguments from States Parties in the form of both written and oral
31 statements, and it would not be appropriate for the Secretariat to express a view with
32 respect to the positions expressed by member States. I propose therefore to make
33 only three general points with respect to the scope of the issues before the Chamber
34 and then to spend some time to elaborate to the Chamber how the provisions of the

1 Convention and the Agreement relating to State sponsorship and control by the
2 Authority over activities in the Area have been implemented in practice. My
3 colleague will then make some additional comments with specific relevance to
4 question number 3.

5
6 The first general point I wish to make is to emphasize that the Council has clearly
7 framed the three questions in an abstract manner, without reference to any particular
8 situation or application for plan of work. This was a deliberate and conscious choice,
9 as is apparent from the summary records of the meetings of the Council contained in
10 the Dossier prepared by the Secretariat. The abstract formulation of the three
11 questions inevitably affects the degree of detail which the Chamber can provide in
12 response to the questions.

13
14 Second, and flowing from the first point, the questions have been framed in a very
15 careful manner to focus on the obligations of the sponsoring States, rather than on
16 the obligations of all States Parties to the Convention in general. Furthermore, the
17 language of the questions is carefully directed towards the proper interpretation of
18 the relevant provisions of the Convention and the Agreement. As I noted earlier, the
19 regime for deep seabed mining is a Convention regime and the answer to questions
20 relating to the obligations of sponsoring States must, first and foremost, lie within the
21 provisions of the Convention itself (including the rules, regulations and procedures of
22 the Authority). The obligations for States Parties which are sponsoring States arise
23 because they are States Parties to the Convention. As we said in the Authority's
24 written statement, "It would appear that the overriding intent of the Convention and
25 the 1994 Agreement, and the Regulations, is that the purpose of State sponsorship
26 is to ensure that a State Party takes responsibility in accordance with Article 139,
27 Article 153, paragraph 4, and Annex III, Article 4, paragraph 4, of the Convention."
28 This suggests that the answer to the questions before the Chamber, in particular
29 Question 1, lies primarily in an interpretation of these provisions of the Convention.

30
31 The third general point I wish to make is to submit that there is nothing in Part XI or
32 elsewhere in the Convention, or in the 1994 Agreement, to suggest that the
33 obligations of sponsoring States vary in any way depending on their level of
34 development. In several places Part XI does provide for special consideration to be

1 given to the interests of developing States, but as others, including Australia,
2 Germany and the Russian Federation, the United Kingdom and the IUCN have
3 pointed out in their written statements, in every case where this occurs it is qualified
4 by the words as “specifically provided for in this Part” (that is, of course Part XI).
5 Examples where this occurs may be found in article 140, paragraph 1, article 148
6 and article 152, paragraph 2. Whilst there is real substance in the special
7 considerations to be accorded to developing States under these provisions, such as
8 for example the right to apply for “reserved areas”, nowhere is there any suggestion
9 that the other provisions of Part XI, such as those relating to the protection of the
10 marine environment, should be applied with any less rigour depending on the state
11 of development of the State concerned.

12

13 Having made these general points, it may be useful if I briefly outline for the benefit
14 of the Chamber the current status of activities in the Area and then take some time to
15 explain to the Chamber the way in which the criteria and procedures for State
16 sponsorship are elaborated in the rules, regulations and procedures of the Authority,
17 as required by Annex III, Article 4. A description of the overall regulatory regime
18 governing activities in the Area is set out in some detail in Chapter IV of the
19 Authority’s written statement and I certainly do not intend to repeat that here.

20

21 There are currently eight contractors with the Authority. These are:

22

- 23 (a) Yuzhmorgeologiya, which is a State enterprise sponsored by the Russian
24 Federation;
- 25 (b) Interoceanmetal Joint Organization (IOM), an international consortium
26 composed of and sponsored by Bulgaria, Cuba, Slovakia, Czech Republic,
27 Poland and the Russian Federation;
- 28 (c) The Government of the Republic of Korea, sponsored by the Republic of
29 Korea;
- 30 (d) China Ocean Mineral Resources Research and Development Association,
31 sponsored by China;
- 32 (e) Deep Ocean Resources Development Company, sponsored by Japan;
- 33 (f) IFREMER, sponsored by France;
- 34 (g) The Government of India, sponsored by India;

1 (h) The Federal Institute for Geosciences and Natural Resources of Germany,
2 sponsored by Germany.

3

4 All contracts issued to date cover the exploration phase only. The contracts were
5 entered into between 2001 and 2002 and, in accordance with the Regulations, each
6 has a duration of 15 years. The obligations incumbent upon contractors are
7 described in detail in the Authority's written statement. To date, the Authority has not
8 issued any plan of work for exploitation of deep seabed minerals; nor has any
9 application been made for such a plan of work.

10

11 As far as sponsorship requirements are concerned, the relevant provisions are found
12 in the Regulations, in particular Regulation 11, which contains the following specific
13 provisions. I would ask permission to read these out in full.

14

15 (a) Each application by a State enterprise or one of the entities
16 referred to in regulation 9(b) - which is a cross-reference to Article 153(2)
17 of the Convention - shall be accompanied by a certificate of sponsorship
18 issued by the State of which it is a national or by which or by whose
19 nationals it is effectively controlled. If the applicant has more than one
20 nationality, as in the case of a partnership or consortium of entities from
21 more than one State, each State involved shall issue a certificate of
22 sponsorship.

23

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

27

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

32

33 The Regulations do not provide for any particular format for the certificate of
34 sponsorship, nor do they require that any sponsorship agreement or details of any
35 legal or financial arrangements in existence between the sponsoring State and the
36 applicant entity be disclosed to the Authority. None of the current contractors or
37 sponsoring States have in fact provided copies of such agreements.

38

39 The situation is further complicated, however, by the fact that, with the exception of
40 the German contractor, all of the current contractors had previously been registered

1 pioneer investors under Resolution II of UNCLOS III. The 1994 Agreement contains
2 special provisions relating to pioneer investors under which they were deemed to
3 have satisfied the requirements of the Convention and the Agreement relating to the
4 issue of plans of work for exploration provided they made a request within 36 months
5 of the entry into force of the Convention. As such, the sponsoring States of these
6 contractors were not required to submit new declarations of sponsorship, but instead
7 were able to rely on the original sponsorship declarations that had been submitted to
8 the Preparatory Commission in support of the applications for registration as pioneer
9 investors. In the case of the German contractor, which was also subject to special
10 treatment as a prospective investor under the terms of the 1994 Agreement, a
11 certificate of sponsorship was submitted in the form of an undertaking signed by the
12 relevant ministry having effective control and supervision of the contractor entity. The
13 applications by the Nauruan and Tongan entities will thus be the first fresh
14 applications to have been made completely in accordance with the 2000 Regulations
15 and that are not subject to some sort of special procedure under the 1994
16 Agreement.

17

18 Regulation 11, paragraph 3(f), makes specific reference to the requirement in the
19 certificate of sponsorship of a declaration that the sponsoring State assumes
20 responsibility in accordance with articles 139, article 153, and article 4, paragraph 4,
21 of Annex III of the Convention. This suggests perhaps that the form of the certificate
22 is less important than the content of the duties and responsibilities attributable to the
23 act of sponsorship. An understanding of the content of these duties and
24 responsibilities is of course the issue which lies at the heart of the questions before
25 the Chamber.

26

27 Taking the relevant provisions of the Convention and the views expressed in the
28 various written statements as a whole, some general observations can be made.
29 First, it is necessary that sponsoring States Parties adopt some measures within
30 their legal systems to ensure compliance by the sponsored entity with Part XI, the
31 rules, regulations and procedures of the Authority and the terms of the contract. In
32 the absence of any such measures, sponsoring States Parties will fail to comply with
33 their responsibility. Divergent views have been expressed with respect to the form of
34 the legal instruments required, including what constitutes “necessary and appropriate

1 measures” for this purpose. However, several States Parties have submitted that the
2 terms “within legal systems” and “adoption of legislation” imply the need for a public
3 legal order and exclude the possibility that a mere contractual arrangement would
4 suffice. Another observation that can be made is that although the terminology
5 referring to the measures to be taken shows variation, such as “necessary and
6 appropriate measures” (article 139), “all measures necessary...” (article 153), and
7 “reasonably appropriate measures” (article 4, Annex III), no real conclusion can be
8 inferred from the slight variation of terms since they do not seem to alter the purpose
9 for which such measures must be taken. As a practical matter, it seems obvious that
10 the type and scope of necessary and appropriate measures would vary according to
11 the mineral resources in question and the activities taking place – whether they
12 cover prospecting, exploration or exploitation. My colleague will address the
13 Chamber further on this particular issue in due course.

14

15 Mr President, for the last part of my statement I wish to return to the issue of
16 exercise of control over activities in the Area by the Authority, specifically with
17 reference to article 153, paragraphs 4 and 5, of the Convention. There is a number
18 of ways in which the Authority exercises control over activities in the Area.

19

20 The first and most obvious way in which the Authority exercises control is by issuing
21 rules, regulations and procedures for the conduct of the activities in the Area. In
22 accordance with article 162, paragraph 2(o), of the Convention, these rules,
23 regulations and procedures shall relate to prospecting, exploration and exploitation in
24 the Area. Priority is to be given to the adoption of rules, regulations and procedures
25 for exploration for an exploitation of polymetallic nodules. As a consequence, the
26 Authority adopted the current regulations governing prospecting and exploration for
27 polymetallic nodules in 2000 and has recently adopted similar regulations relating to
28 seafloor massive sulphides. Given the current status of exploration activities, there
29 has been no requirement so far for the Authority to issue regulations governing the
30 exploitation phase.

31

32 The second way in which the Authority exercises control is through the binding
33 contracts which are the only basis upon which an entity may carry out activities in the
34 Area. This is a particularly important element when one considers the enforcement

1 provisions found in the standard clauses of contracts as well as the dispute
2 settlement provisions found in article 187 of the Convention. Indeed, the contractual
3 nature of the relationship between the Authority and those wishing to conduct
4 activities in the Area is not only fundamental to but is a defining characteristic of the
5 legal regime established by the Convention and the Agreement.

6

7 The third way in which the Authority exercises control is through the requirement in
8 the standard clauses that contractors provide an annual report on their activities.
9 This report is reviewed by the Legal and Technical Commission, which then provides
10 any necessary recommendations to the Secretary-General who in turn would
11 transmit any requests for further information to the contractor. In addition, there is
12 a requirement for periodic review of the implementation of the plan of work for
13 exploration at intervals of five years, to be undertaken jointly by the contractor and
14 the Secretary-General.

15

16 The Legal and Technical Commission has a particularly important role to play in the
17 supervision of activities in the Area. Under article 165 of the Convention, it is
18 required, *inter alia*, to supervise activities in the Area and to report to the Council, to
19 make recommendations on the protection of the marine environment, to make
20 recommendations to issue emergency orders and to make recommendations
21 regarding the direction and supervision of inspectors. Under the Regulations, the
22 Commission is also entitled to issue recommendations for the guidance of
23 contractors to assist them in performing their obligations under the contract. To date,
24 two sets of recommendations have been issued; one dealing with the
25 implementation of environmental monitoring requirements, and one dealing with the
26 methodology for reporting of financial expenditure.

27

28 At the risk of being repetitive, it is important to reiterate that, by reason of the 1994
29 Agreement, the implementation of the regime under Part XI is progressive in nature.
30 Under paragraph 5 of Section 1 of the Annex to the 1994 Agreement, the Authority is
31 required to adopt “rules, regulations and procedures necessary for the conduct of
32 activities in the Area as they progress”. Such rules, regulations and procedures shall
33 take into account the terms of the 1994 Agreement, the prolonged delay in seabed
34 mining and the likely pace of activities in the Area.

1

2 The consequence of this is that the measures currently in place must be regarded as
3 only partial measures. Both the Convention and the Regulations envisage that
4 additional measures may be taken. Relevant provisions include, for example,
5 Annex III, article 17, paragraph (1)(b)(xii), of the Convention which enables the
6 Authority to adopt rules, regulations and procedures on “mining standards and
7 practices, including those relating to operational safety, conservation of the
8 resources and the protection of the marine environment” as well as article 162,
9 paragraph 2(z), which envisages that the Authority would eventually have a staff of
10 inspectors to monitor activities in the Area and whether the terms and conditions of
11 contracts are being complied with.

12

13 Mr President, the Authority also exercises control over activities in the Area through
14 the link that is established with the sponsoring State. The importance of this link is
15 demonstrated by the fact that, under the Convention and the Regulations, there can
16 never be a situation where there is no sponsoring State. A contractor is required to
17 have sponsorship throughout the entire period of the contract and, in the event of
18 a termination of sponsorship, is required to either find a new sponsor or suffer
19 termination of the contract. The Regulations also contain other provisions of specific
20 relevance to the relationship with sponsoring States. For example, Regulation 31(2)
21 requires the Authority and sponsoring States to take a precautionary approach to
22 exploration activities. Regulation 31(6) requires contractors and sponsoring States to
23 cooperate with the Authority in the establishment and implementation of
24 environmental monitoring programmes and Regulation 32 requires the sponsoring
25 State to be notified of any incident that occurs which is likely to cause serious harm
26 to the marine environment. It is only reasonable to assume that the purpose of
27 notifying sponsoring States in this manner is to enable them to take necessary action
28 to fulfil their responsibilities as sponsoring States. Finally, Mr President, I would also
29 wish to draw the attention of the Chamber to article 190 of the Convention, which
30 provides that the sponsoring State is entitled to participate in legal proceedings
31 brought by or against a sponsored entity.

32

33 Mr President, that concludes my statement on behalf of the Authority. My colleagues
34 will be making supplementary statements dealing with specific issues, beginning with

1 my colleague Mr Kening Zhang, who will address you further on the question of the
2 applicable law.

3

4 Mr President, I thank you and the Chamber for your attention.

5

6 **THE PRESIDENT:** Thank you very much, Mr Lodge. The Chamber will now
7 withdraw for a break of 30 minutes, so the hearing will be continued at 4.35 when we
8 will listen to the further statements by the International Seabed Authority.

9 (*The sitting adjourned at 4.05 p.m.*)

10 **THE PRESIDENT:** The hearing now continues. I give the floor to Mr Zhang, who will
11 continue the statement of the International Seabed Authority.

12 **MR ZHANG:** Mr President, Members of the Seabed Disputes Chamber, I have the
13 honour to appear before you today in the hearing of Case No. 17 as a member of the
14 delegation of the International Seabed Authority. Like the Secretary-General and
15 Legal Counsel of the Authority, I am particularly honoured to appear on this historical
16 occasion when the Chamber has been called upon for the first time since its
17 establishment in 1996 to exercise its advisory jurisdiction as requested in
18 accordance with article 191 of the United Nations Convention on the Law of the Sea.

19 As stated in our written statement, the law to be applied to Case No. 17 by the
20 Chamber is set out, in general terms, in article 293 of the Convention and article 38
21 of the Statute of the Tribunal. The key provisions for the purposes of the present
22 proceedings are to be found in Part XI of the Convention, which includes Annex III,
23 and the 1994 Agreement. The relationship between Part XI of the Convention and
24 the 1994 Agreement is provided under Article 2, paragraph 1, of the annex to the
25 1994 Agreement, which reads: "the provisions of this Agreement and Part XI shall
26 be interpreted and applied together as a single instrument. In the event of any
27 inconsistency between the Agreement and Part XI, the provisions of this Agreement
28 shall prevail".

29 Other relevant provisions can be found elsewhere in the Convention, in particular in
30 Part XII, dealing with the preservation and protection of the marine environment.
31 Article 209, which specifically deals with pollution from activities in the Area, requests

1 the establishment of international rules, regulations and procedures in accordance
2 with Part XI of the Convention and the adoption by States of laws and regulations to
3 prevent, reduce and control pollution of the marine environment from activities in the
4 Area.

5 As introduced in the written statement of the Authority, although Part XII of the
6 Convention deals in general terms with the obligations of States to protect and
7 preserve the marine environment, there is no specific provision in Part XI which goes
8 beyond the general requirement in article 145 that “necessary measures shall be
9 taken in accordance with the Convention with respect to activities in the Area to
10 ensure effective protection of the marine environment from harmful effects which
11 may arise from such activities”. However, article 145 does require the Authority to
12 adopt rules, regulations and procedures for the prevention, reduction and control of
13 pollution and other hazards to the marine environment, and of interference with the
14 ecological balance of the marine environment. Under article 145 particular attention
15 shall be paid to the need for protection from harmful effects of such activities as
16 drilling, dredging, excavation, disposal of waste, construction and operation or
17 maintenance of installations, pipelines and other devices related to such activities.
18 Article 145 also requires the Authority to adopt the rules, regulations and procedures
19 for the protection and conservation of the natural resources of the Area and the
20 prevention of damage to the flora and fauna of the marine environment.

21 A similar enabling provision appears in Annex III, article 17, of the Convention, which
22 obliges the Authority to adopt rules, regulations and procedures on “mining
23 standards and practices, including those relating to operational safety, conservation
24 of the resources and the protection of the marine environment”. The 1994
25 Agreement also gives priority to the adoption of rules, regulations and procedures
26 incorporating applicable standards for the protection and preservation of the marine
27 environment and requires that an application for approval of a plan of work for
28 exploration is accompanied by an assessment of the potential environmental impacts
29 of the proposed exploration activities and a description of a programme for
30 oceanographic and baseline environmental studies. All these provisions, along with
31 other general principles set out in the Convention and the 1994 Agreement, are
32 given effect and substance in the Regulations on Prospecting and Exploration for

1 Polymetallic Nodules in the Area, which were adopted 10 years ago in 2000 by the
2 Assembly of the Authority in accordance with the Convention. For instance, Part V of
3 the Nodule Regulations is devoted to the protection and preservation of the marine
4 environment, which, with your permission, Mr President, I will elaborate as follows.

5 First, the Authority is under a duty to establish and keep under review environmental
6 rules, regulations and procedures to ensure effective protection of the marine
7 environment from harmful effects which may arise from activities in the Area.

8 Second, the Authority and sponsoring States are required to apply a precautionary
9 approach, as reflected in Principle 15 of the Rio Declaration, to activities in the Area.

10 Third, the Regulations impose a duty on each contractor to “take necessary
11 measures to prevent, reduce and control pollution and other hazards to the marine
12 environment arising from its activities in the Area as far as reasonably possible,
13 using the best technology available”.

14 The specific content of this duty on contractors is elaborated in the Nodule
15 Regulations and in the standard clauses annexed to them, as well as in the
16 recommendations for the guidance of the contractors for the assessment of possible
17 environmental impacts arising from exploration for polymetallic modules in the Area
18 issued by the Legal and Technical Commission in 2001. Therefore, the contractor is
19 required to gather environmental baseline data as exploration activities progress and
20 to establish environmental baselines against which to assess the likely effects of its
21 activities on the marine environment. The contractor is also required to establish and
22 implement a programme to monitor and report on such effects. The Nodule
23 Regulations also contain detailed procedures for the exercise by the Council of its
24 power to issue emergency orders to prevent serious harm to the marine environment
25 arising out of activities in the Area, pursuant to article 162, paragraph 2(w), of the
26 Convention.

27 In addition, under Regulation 33, which deals with the rights of coastal States, any
28 coastal State which has grounds for believing that any activity in the Area by a
29 contractor is likely to cause serious harm to the marine environment under its
30 jurisdiction or sovereignty may notify the Secretary-General in writing of the grounds
31 on which such a belief is based. The Secretary-General shall then provide the
32 contractor and its sponsoring State or States with a reasonable opportunity to

1 examine the evidence provided by the coastal State. The contractor and its
2 sponsoring State or States may submit their observations on the evidence to the
3 Secretary-General within a reasonable time. Eventually, if there are clear grounds for
4 believing that serious harm to the marine environment is likely to occur, the
5 Secretary-General shall act in accordance with Regulation 32 and, if necessary, shall
6 take immediate measures of a temporary nature as provided for in paragraph 2 of
7 Regulation 32. Pursuant to article 34 on objects of an archaeological or historical
8 nature, the contractors are obliged to immediately notify the Secretary-General of
9 any finding in the exploration area of an object of an archaeological or historical
10 nature and its location and take all reasonable measures to avoid disturbing such an
11 object. The Secretary-General shall transmit such information to the Director-
12 General of UNESCO.

13 All the aforementioned provisions depict the conventional regime of exploration and
14 exploitation of the resources in the Area and deal expressly with issues of
15 responsibility and liability in relation to marine environmental protection.

16 It is our submission that the relevant provisions of the Convention should be
17 interpreted in accordance with Articles 31 and 32 of the 1969 Vienna Convention on
18 the Law of Treaties, and in particular, for the purpose of the present case, in
19 accordance with the principle that the provisions of a treaty should not be looked at
20 in isolation, other than being read as a whole. This principle makes special sense to
21 the interpretation of the various provisions dealing with the responsibility and liability
22 of sponsoring States and should guide us on how to reconcile the use of slightly
23 different terms and expressions in different provisions dealing with basically the
24 same matter. We note that the written statement of the Republic of Korea takes and
25 elaborates this position. It is also our submission that when referring to other
26 provisions of the Convention we need to make sure that they are relevant to the
27 questions put to the Chamber.

28 We submit that the International Law Commission's Articles on Responsibility of
29 States for Internationally Wrongful Acts, as adopted by the UNGA in 2001, should be
30 treated as an indispensable source of "other rules of international law not
31 incompatible with" the Convention, as referred to under article 293, paragraph 1, and
32 "existing rules ... regarding responsibility and liability under international law" to be

1 applied “without prejudice”, as provided under article 304. The full text of the ILC’s
2 articles has been provided to the Chamber by the Secretary-General of the Authority
3 as Dossier No. 64 for easy reference in its proceedings of the current case.

4 Mr President, with your permission, I would like to give the floor to my colleague,
5 Ms Gwenaëlle Le Gurun.

6 Mr President, Members of the Seabed Disputes Chamber, I thank you for your
7 attention.

8 **THE PRESIDENT:** Thank you very much, Mr Zhang. I would now like to give the
9 floor to Ms Le Gurun.

10 **MS LE GURUN** (*Interpretation from French*): Mr President, Judges, it is an honour
11 for me to be before you and to represent the International Seabed Authority in the
12 first request for an advisory opinion which it has submitted to your Seabed Disputes
13 Chamber.

14 (*Continued in English*) Mr President, after making a few general comments, my
15 remarks are going to elaborate on what “necessary and appropriate” measures for
16 the purposes of article 139, article 153 and Annex III, article 4, paragraph 4, of the
17 Convention may be considered, by way of illustration, from earlier legislation adopted
18 by seven States in the 1980s under the Reciprocating States Regime and from two
19 more recent domestic laws adopted by the Czech Republic and the Federal Republic
20 of Germany to regulate prospecting, exploration and exploitation of mineral
21 resources in the Area.

22 My first general remark is that article 139, paragraph 2, article 153, paragraph 4, and
23 article 4, paragraph 4, of Annex III require States Parties to enact legislation and
24 adopt measures within their public legal framework. This is an obligation.

25

26 Those provisions of the Convention do not, however, elaborate on the “necessary
27 and appropriate” measures that a sponsoring State is responsible for taking. In
28 accordance with Article 31 of the Vienna Convention on the Law of Treaties, such
29 interpretation should be done “in accordance with the ordinary meaning to be given
30 to the terms of the treaty in their context and in the light of its object and purpose”.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34

The objective of adopting legislation and enacting measures is to assist the Authority to secure that sponsored natural or legal persons carry out activities in the Area in compliance with Part XI of the Convention, with the Agreement, with the Regulations of the Authority and with the approved plan of work. Accordingly, “necessary and appropriate” measures are those that transpose in domestic public legal systems the international duties and obligations of a sponsoring State according to Part XI of the Convention as interpreted by the Agreement and elaborated on in the Regulations of the Authority, as adopted so far.

An observation to make is that the “necessary and appropriate” measures within public legal systems may vary with the function of the type of mineral resources of the Area, and it may also vary according to the activities in the Area: prospecting, exploration, and exploitation. For example, the Czech Act No.158 of 18 May 2000 on Prospecting, Exploration for, and Exploitation of, Mineral Resources from the Seabed beyond the Limits of National Jurisdiction and Amendments to related Acts

governs the rights and obligations of natural persons ... and of legal entities ... engaged in prospecting, exploration for and exploitation of mineral resources from the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction.

Likewise, the German Seabed Mining Act of 6 June 1995, most recently amended by Article 160 of the Ordinance of 31 October 2006, applies in the Area to prospecting, exploration for, and exploitation of mineral resources which are, with the exception of water, all solid, liquid, or gaseous mineral resources found *in situ* at or beneath the seabed.

If the adoption of measures is mandatory, the interpretation of what constitutes “necessary and appropriate” measures is left very much to the discretion of the sponsoring State Party. The modalities of those measures as observed by several States in their written statement depend somewhat on all circumstances, including the particular characteristics of each national legal system. There is, for example, in the Convention, in the Agreement, or in the Regulations of the Authority no

1 requirement to communicate or to give publicity to domestic legislation or other
2 measures taken to implement article 139, article 153 and Annex III, article 4.

3

4 Article 21, paragraph 3, of Annex III, poses a limit to the discretion left to the State. It
5 reads as follows:

6

7 No State Party may impose conditions on a contractor that are
8 inconsistent with Part XI. However, the application by a State Party to
9 contractors sponsored by it, or to ships flying its flag, of environmental or
10 other laws and regulations more stringent than those in the rules,
11 regulations and procedures of the Authority adopted pursuant to
12 Article 17, paragraph 2(f) of this Annex shall not be deemed inconsistent
13 with Part XI.

14

15 The first element that may be included among “necessary and appropriate”
16 measures within public legal systems relates to general principles governing the
17 conduct of activities in the Area under Part XI of the Convention. The “necessary and
18 appropriate” measures may provide for the prohibition of activities in the Area without
19 an approved plan of work, as set out in article 153 of the Convention. For example,
20 section 9(1) of the Czech Act provides that activities in the Area are only carried out
21 pursuant to a written contract concluded with the Authority. Likewise, section 4(2) of
22 the German Act provides that, “Any person wishing to engage in activity in the Area
23 requires the approval of the *Oberbergamt* and a contract with the Authority.”

24

25 The second element concerns qualification standards for applicants as set out in
26 article 153 and article 4 of Annex III, and elaborated on in the two sets of
27 Regulations of the Authority. Those qualification standards relate *inter alia* to:
28 nationality or control and the conditions for sponsorship; the procedures for
29 prospecting and for approval of a plan of work for exploration; financial and technical
30 capabilities; accepting as enforceable and complying with the applicable obligations
31 created by the provisions of Part XI, and the Regulations of the Authority, the
32 decisions of the organs of the Authority and terms of contract with the Authority;
33 accepting control by the Authority of activities in the Area, as authorized by the
34 Convention; and providing the Authority with a written assurance that obligations
35 under the contract will be fulfilled in good faith.

36

1 As a result, a sponsoring State Party may adopt measures that relate to qualification
2 standards and to other conditions required for approval of a plan of work. The Czech
3 Act and the German Act illustrate how the requirements concerning the issuance of
4 a certificate of sponsorship to a qualified applicant, pursuant to Regulation 11, as
5 mentioned earlier, may be transposed. For example, section 4(6) of the German Act
6 provides that an applicant shall be sponsored if the application and the plan of work
7 meet the requirements of the Convention, the Agreement and the Regulations of the
8 Authority, and contain in particular the obligations pursuant to article 4(6)(a) to (c) of
9 Annex III to the Convention and the applicant: (a) provides the required reliability and
10 guarantee that the activities in the Area will be carried out in a manner that is both
11 orderly and serves the interests of operational safety, labour protection, and
12 environmental protection; (b) has access to the required funds for the orderly
13 carrying-out of the activities in the Area, and (c) can credibly show that the activities
14 planned for the Area can be carried out in an economical manner.

15

16 The Czech and the German Acts also provide for the designation of an agency in
17 charge of implementing legislation and ordinances.

18

19 Supervisory measures define how the authority in charge of implementing the
20 national legislation will check the compliance of the activities in the Area with
21 applicable law. For example, section 8 of the German Act provides that activities of
22 prospectors and contractors in the Area are subject to the supervision of the
23 *Oberbergamt*. For the exercise of supervision, the *Oberbergamt* can demand the
24 information necessary to fulfil its tasks and undertake visits. The supervisors are
25 entitled to enter operational facilities, business rooms, establishments and airborne
26 and waterborne vehicles used for prospecting and activities in the Area. Likewise,
27 the Czech Act includes section 16 on inspection activities. For purposes of
28 overseeing compliance with the Czech Act, the Ministry of Industry and Trade is
29 entitled to examine documentation and records referring to prospecting or activities
30 in the Area; to inspect objects, facilities and workplaces used for prospecting and
31 activities in the Area; to demand the submission of documents demonstrating
32 fulfilment of obligations. This is in concordance with the Regulations, Annex 4,
33 Section 14, entitled “Inspection”, which elaborates on article 153, paragraph 5, article
34 162, paragraph 2(z), and article 165, paragraph 2(m), of the Convention.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34

Elaborating on article 149 of the Convention and on the Regulations of the Authority, a prospector or a contractor is required to notify any finding of an object of an archaeological or historical nature and its location. The German Act transposes that obligation by designating the person to which such discovery must be reported and treated, taking into account article 149 of the Convention.

Under article 235, paragraph 2, of the Convention, States Parties are required to ensure that recourse is available in accordance with their legal systems for prompt and adequate compensation or other relief in respect of damage caused by pollution of the marine environment by natural or juridical persons under their jurisdiction. This implies to put in place an effective regime of civil liability with recourse for prompt and adequate compensation or other relief and to ensure financial security.

National legislation may include administrative and enforcement measures which are particularly relevant in the context of emergency orders issued by the Authority. For example, under Regulation 32(7) of the Nodules Regulations, if the contractor does not provide the Council with a guarantee of its financial and technical capability to comply promptly with emergency orders or to assure that the Council can take such emergency measures, the sponsoring State or States, upon the request by the Secretary-General and pursuant to articles 139 and 235, must take necessary measures to ensure that the contractor provides such a guarantee or that assistance is provided to the Authority in the discharge of its responsibilities regarding the prevention of serious harm to the marine environment. For example, the Czech Act, section 11(b), requires that prior to starting prospecting or activities in the Area, insurance should be effected against damage caused in the Area with an insurer certified under a separate regulation; for that purpose, the Czech Act defines damage as death, damage to health or property, and harm to the marine environment in the Area.

Sponsoring States may find “necessary and appropriate” to include sanctions in the form of administrative fines and penalties in order to enforce their domestic provisions on control of person or entity under sponsorship. For example, section 11 of the German Act includes a list of violations of several provisions of the German

1 Act that correspond to situations of non-compliance on the part of the natural or legal
2 person under sponsorship. This list defines as administrative offences *inter alia*
3 prospecting without registration or the conduct of activities without a contract with the
4 Authority.

5

6 In accordance with article 21, paragraph 2, of Annex III, any State Party must make
7 enforceable in its territory any final decision rendered by a court or tribunal having
8 jurisdiction under the Convention relating to the rights and obligations of the
9 contractor. Therefore, it is expected that domestic legislations envisage a
10 mechanism in order to make enforceable such decisions.

11

12 National legislation may also address the issue of concurrent proceedings. This is
13 the case of the Czech Act and of the German Act. Both Acts provide that if the
14 Authority has implemented a procedure under Annex III, article 18, or for violation of
15 the mandatory principles, rules, regulations and procedures issued by the Authority
16 in connection with prospecting or activities in the Area, then none will be prosecuted
17 under the domestic legislation. This is to avoid two procedures for the same offence
18 taking place, while ensuring that a procedure takes place if none has been
19 implemented by the Authority.

20

21 National legislation may also include transitional measures. Such transitional
22 measures take into account the existence of a previous national legislation that was
23 enacted prior to the entry into force of the Convention and of the Agreement. Other
24 transitional measures address the application of the legislation in relation to the
25 participation of a national under sponsorship in an international consortium
26 (paragraph 22 of the Czech Act). Such a situation arises with one of the contractors
27 that has concluded a contract for exploration for polymetallic nodules with the
28 Authority. Interoceanmetal Joint Organization is an international consortium formed
29 of six sponsoring States including the Czech Republic.

30

31 Mr President, also by way of illustration, some indication of the likely content of
32 necessary and appropriate measures may be gleaned from the interim national
33 legislation adopted in the early 1980s, in chronological order, by the United States of
34 America, Germany, the United Kingdom, France, USSR, Japan and Italy. For

1 example, with respect to the protection of the marine environment, the UK Deep Sea
2 Mining (Temporary Provisions) Act 1981 provides framework rules for the protection
3 of the marine environment and they are supplemented by a number of other
4 provisions in subordinate legislation.

5
6 For example, under section 2(2), one of the relevant factors to which the Secretary of
7 State must have regard in deciding on the issuance of a licence is “the desirability of
8 keeping an area or areas of the deep sea bed free from deep sea bed mining
9 operations so as to provide an area or areas for comparison with licensed areas in
10 assessing the effects of such operations”. Both the Regulations on Prospecting and
11 Exploration for Polymetallic Nodules and those for Polymetallic Sulphides include
12 a similar provision on environmental reference zones for the same comparison
13 purpose.

14
15 *(Interpretation from French)* Monsieur President, with your permission, I would now
16 like to hand over to Mr Michael Lodge who will submit a few final remarks.

17
18 **THE PRESIDENT** *(interpretation from French)* : Thank you very much, Ms Le Gurun.
19 *(Continued in English)* I call Mr Michael Lodge who will deliver the concluding
20 remarks.

21
22 **MR LODGE:** President and Members of the Chamber, that concludes the oral
23 statements on behalf of the Authority. I hope that that these statements, together
24 with the content of the Authority’s written statement and the Dossier submitted
25 previously, have helped to shed light on the legal questions on which the Advisory
26 Opinion is requested and will be of assistance to the Chamber in its task.

27
28 As the Secretary-General indicated at the outset, the Authority welcomes any greater
29 clarity and understanding that the Chamber can bring to the key provisions of the
30 Convention concerning the obligations of sponsoring States. Most of all, it is in the
31 interests of all States Parties that the provisions of the Convention and the
32 Agreement are implemented properly and that there is a clear and consistent
33 interpretation of the regime for deep sea bed mining.

34

1 Mr President, Members of the Seabed Disputes Chamber, thank you for your
2 attention.

3

4 **THE PRESIDENT:** Thank you very much indeed, Mr Lodge.

5

6 This brings us to the end of today's sitting. The Chamber will sit again tomorrow
7 morning at 10 o'clock. At that sitting the representatives of Germany, the
8 Netherlands, Argentina, Chile, Fiji and Mexico will address the Chamber to present
9 their oral statements.

10

11 The Chamber's sitting is now closed.

12

13

(The sitting is closed at 5.13 p.m.)