

(f) Written Statement of the Kingdom of the Netherlands**INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA
SEABED DISPUTES CHAMBER****RESPONSIBILITIES AND OBLIGATIONS OF STATES SPONSORING PERSONS
AND ENTITIES WITH RESPECT TO ACTIVITIES IN THE INTERNATIONAL
SEABED AREA****(REQUEST FOR ADVISORY OPINION SUBMITTED TO
THE SEABED DISPUTES CHAMBER)****WRITTEN STATEMENT OF THE KINGDOM OF THE NETHERLANDS****11 AUGUST 2010**

1. Introduction

1.1 In Decision ISBA/16/C/13, adopted on 6 May 2010, the Council of the International Seabed Authority (Authority) decided to request the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea (Tribunal) to render an advisory opinion on the following questions:

1. What are the legal responsibilities and obligations of States Parties to the Convention with respect to the sponsorship of activities in the Area in accordance with the Convention, in particular Part XI, and the 1994 Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982?

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

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

1.2 In his Order of 18 May 2010, the President of the Seabed Disputes Chamber of the Tribunal designated 9 August 2010 as the time-limit within which written statements on the questions may be presented to the Seabed Disputes Chamber by, among others, the States Parties to the 1982 United Nations Convention on the Law of the Sea (Convention). This time-limit was extended to 19 August 2010 by the President in his Order of 28 July 2010.

1.3 As the Kingdom of the Netherlands is a State Party to the Convention, it wishes to avail itself of the opportunity afforded by the President's Order of 18 May 2010 to make a written statement on the abovementioned request by the Council of the Authority for an advisory opinion of the Seabed Disputes Chamber.

2. The Legal Responsibilities and Obligations of States Parties to the Convention with respect to the Sponsorship of Activities in the Area

Introduction

2.1 The answer to the first question requires the identification and, as necessary, interpretation of the legal responsibilities and obligations of States Parties to the Convention with respect to the sponsorship of activities in the seabed and ocean floor and subsoil thereof beyond the limits of national jurisdiction (Area) that result from the Convention and the 1994 Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982 (Agreement). Such responsibilities and obligations cannot only be found in the Convention and the Agreement, but also in relevant instruments that have been adopted in accordance with the Convention, in particular the Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area (Nodules Mining Code) and the Regulations on Prospecting and Exploration of Polymetallic Sulphides in the Area (Sulphides Mining Code), and the terms of contracts concerning activities in the Area. The Seabed Disputes

Chamber is required to apply these instruments in the exercise of its functions relating to advisory opinions (Art. 293.1 Convention, and Arts. 38 and 40.2 Statute of the Tribunal).

2.2 The sponsorship requirements, and the criteria and procedures for their implementation, are set out in the Convention and the Mining Codes (Art. 153.2(b) Convention; see also Art. 4.3 Annex III Convention, Regulation 9(b) Nodules Mining Code, and Regulation 9(b) Sulphides Mining Code). In addition to States Parties to the Convention and the organ of the Authority which carries out activities in the Area (Enterprise), an entity is allowed to carry out activities in the Area if:

- (a) such activity is carried out in association with the Authority; and
- (b) such entity is sponsored by a State Party to the Convention.

A State Party to the Convention may only sponsor an entity if it is:

- (a) a state enterprise;
- (b) a natural or juridical person that possesses the nationality of that State; or
- (c) a natural or juridical person that is effectively controlled by that State or its nationals.

When a State meeting the sponsoring requirements wishes to sponsor an entity, it will have to provide evidence of its sponsorship in order for an application for an activity in the Area by an entity to be considered and approved by the Authority. With respect to the exploration of polymetallic nodules or sulphides in the Area, it is required to:

- (a) Issue a duly signed certificate of sponsorship (Regulation 11 Nodules Mining Code and Regulation 11 Sulphides Mining Code; for the contents of these certificates, see paragraphs 3 of these Regulations);
- (b) Certify, subject to exemptions applicable to pioneer investors under the Nodules Mining Code, that the entity meets or is considered to have met the financial and technical qualifications for carrying out proposed activities (Section 1.6(a)(i) Agreement, Regulation 12 Nodules Mining Code, and Regulation 13 Sulphides Mining Code).

2.3 The legal responsibilities and obligations of States Parties to the Convention with respect to sponsorship of activities in the Area relate to:

- (a) The carrying out of activities in the Area by a sponsored entity;
- (b) The transfer of technology and scientific knowledge to the Authority and developing States;
- (c) The protection and preservation of the marine environment; and
- (d) The termination of sponsorship.

These four categories concern legal responsibilities and obligations under the Convention and the Agreement that *specifically* apply to States Parties to the Convention which sponsor activities in the Area (sponsoring States). In the response to the first question, the identification and, as necessary, interpretation of legal responsibilities and obligations with respect to sponsorship of activities in the Area is limited to these categories. Since these activities take place under the jurisdiction and control of the sponsoring State, legal responsibilities and obligations under the Convention that *generally* apply to activities under

the jurisdiction and control of States Parties to the Convention, including for instance those in Part XII of the Convention, are applicable to activities in the Area as well.

The carrying out of activities in the Area by a sponsored entity

2.4 Activities in the Area must be carried out in accordance with the Convention and the Agreement. The Authority is required to exercise such control over activities in the Area as is necessary for the purpose of securing compliance with these instruments (Art. 153.4 Convention). Exploration and exploitation activities may only be carried out on the basis of a contract with the Authority (Art. 153.3 Convention and Art. 3.5 Annex III Convention). States Parties are required to assist the Authority by taking all measures necessary to ensure such compliance (Art. 153.4 Convention). It is in this context that a sponsoring State has the responsibility to ensure, within its legal system, that an entity sponsored by it carries out activities in the Area in conformity with the terms of its contract and its obligations under the Convention and the Agreement (Art. 4.4 Annex III; see also Art. 139.1).

The transfer of technology and scientific knowledge to the Authority and developing States

2.5 The Convention and the Agreement seek to promote and encourage the transfer of technology and scientific knowledge to the Enterprise and developing States (Article 144 Convention).

2.6 With respect to the transfer of technology, sponsoring States are required, at the request of the Authority, to cooperate fully and effectively with entities sponsored by them and the Authority in facilitating the acquisition of deep seabed mining technology by the Enterprise or its joint venture, or by a developing State or States seeking to acquire such technology on fair and reasonable commercial terms and conditions, consistent with the effective protection of intellectual property rights. Sponsoring states must ensure that entities sponsored by them cooperate fully with the Authority for this purpose (Section 5.1(b) Annex Agreement). Pursuant to the Agreement, the provisions relating to transfer of technology in Article 5 of Annex III to the Convention, including those related to sponsoring States in paragraph 5 of that Article, do not apply (Section 5.1.2 Annex Agreement).

2.7 With respect to the transfer of scientific knowledge, sponsoring States are required to cooperate with entities sponsored by it and the Authority in drawing up practical programmes for the training of personnel of the Authority and developing States (Regulation 27.1 Nodules Mining Code and Regulation 29 Sulphides Mining Code).

The protection and preservation of the marine environment

2.8 The Convention and the Agreement seek to ensure the effective protection of the marine environment from harmful effects which may arise from activities in the Area (Art. 145 Convention). In addition to the legal responsibilities and obligations incumbent on sponsoring States under Part XII of the Convention, several specific obligations are imposed on sponsoring States by the Mining Codes. First, the precautionary approach must be applied to activities by sponsoring States as well as the Authority (Regulation 31.2 Nodules Mining Code and Regulation 33.2 Sulphides Mining Code). Accordingly, a sponsoring State must apply the precautionary approach to:

- (a) The decision to sponsor an activity in the Area;

- (b) The adoption of measures to ensure that an entity sponsored by it carries out activities in the Area in conformity with the terms of its contract and its obligations under the Convention and the Agreement; and
- (c) The application of environmental laws and regulations in addition to those in the rules, regulations and procedures of the Authority.

2.9 Second, sponsoring States are required to cooperate in the establishment and implementation of programmes for monitoring and evaluating the impacts on the marine environment of activities under an approved plan of work for exploration as well deep seabed mining in general (Regulations 31.4 and 31.6 Nodules Mining Code, and Regulations 33.6 and 34.1 Sulphides Mining Code).

2.10 Third, a sponsoring State is, at the request of the Authority's Secretary-General, required to take measures to ensure that:

- (a) An entity sponsored by it provides a guarantee of its financial and technical capability to comply promptly with emergency orders of the Authority's Council to prevent serious harm to the environment; or
- (b) Assistance is provided to the Authority in the discharge of its responsibilities to take such practical measures as are necessary to prevent, contain and minimize serious harm to the marine environment arising out of the entity's activities in the Area (Regulation 32.7 Nodules Mining Code and Regulation and Regulation 35.8 Sulphides Mining Code).

The termination of sponsorship

2.11 If a State terminates its sponsorship, it is required to promptly notify the Authority's Secretary-General in writing and inform him of the reasons for terminating its sponsorship (Regulation 29.1 Nodules Mining Code and Regulation 31.1 Sulphides Mining Code). Termination of sponsorship does not discharge the sponsoring State from any obligations accrued while it was a sponsoring State (Regulation 29.4 Nodules Mining Code and Regulation 31.4 Sulphides Mining Code).

Submissions

2.12 It is the opinion of the Kingdom of the Netherlands that the answer to the first question should be that the *specific* legal responsibilities and obligations of States Parties to the Convention with respect to sponsorship of activities in the Area relate to:

- (a) The carrying out of activities in the Area by a sponsored entity (Arts. 139 and 153.4 Convention, and Art. 4.4 Annex III Convention);
- (b) The transfer of technology and scientific knowledge to the Authority and developing States (Art. 144 Convention, Section 5.1(b) Annex Agreement, Regulation 27.1 Nodules Mining Code, and Regulation 29 Sulphides Mining Code);
- (c) The protection and preservation of the marine environment (Art. 145 Convention, Regulations 31.2, 31.4, 31.6 and 32.7 Nodules Mining Code, and Regulations 33.2, 33.6, 34.1 and 35.8 Sulphides Mining Code); and
- (d) The termination of sponsorship (Regulation 29.1 Nodules Mining Code and Regulation 31.1 Sulphides Mining Code).

2.13 Since the purpose of the first question is to identify and, as necessary, interpret the legal responsibilities and obligations of sponsoring States, the advisory opinion should not identify and interpret the rights of sponsoring States under the Convention and the Agreement, such as their rights relating to:

- (a) The participation and appearance in proceedings if the sponsored entity is a party to a dispute referred to in Article 187 of the Convention (Art. 190 Convention);
- (b) The submission of a plan of work with respect to reserved areas (Art. 9.4 Annex III Convention, Regulation 17.1 Nodules Mining Code, and Regulation 18.1 Sulphides Mining Code);
- (c) The application of more stringent environmental or other laws and regulations than those in the rules, regulations and procedures of the Authority (Art. 21.3 Annex III Convention);
- (d) The opportunity to examine evidence provided by a coastal State which has grounds for believing that an activity in the Area by a contractor is likely to cause serious harm to the environment under its jurisdiction or sovereignty and to submit observations thereon (Regulation 33.2 Nodules Mining Code and Regulation 36.2 Sulphides Mining Code).

3. The Extent of Liability of States Parties to the Convention for Non-Compliance with the provisions of the Convention and the Agreement by Sponsored Entities

Introduction

3.1 To answer the subsequent questions, it is relevant to identify the reasons for the introduction of the concept of sponsorship in the Convention with respect to activities in the Area. Activities in the Area are subject to a special legal regime in order to protect the interests of the international community. This regime enables States and their nationals to carry out activities in the Area, but introduces a number of safeguards to protect the interests of the international community. One of those safeguards is the requirement of sponsorship. It appears from the ordinary meaning of these legal responsibilities and obligations in their context and in the light of their object and purpose that the introduction of this requirement was considered necessary for the following reasons:

- (a) To prevent States not party to the Convention, their state enterprises, and natural or juridical persons possessing their nationality or effectively controlled by them or their nationals from using the provisions of the Convention and the Agreement to obtain access to the mineral resources of the Area;
- (b) To prevent States Parties to the Convention from becoming a convenient jurisdiction through which access could be obtained to the mineral resources of the Area without the acceptance of international obligations to secure that the relevant provisions under the Convention and the Agreement will be complied with;
- (c) To assist the Authority in exercising control over activities in the Area in order to secure that the relevant provisions under the Convention and the Agreement will be complied with given that enforcement of those provisions, including decisions of the Seabed Disputes Chamber under Article 39 of the Tribunal's Statute, in respect of a natural or juridical person is a sovereign right of the State or States which have jurisdiction over such person.

3.2 The answer to the second question requires the identification and, as necessary, interpretation of rules on the liability of a State Party for the failure to comply with the relevant provisions of the Convention and the Agreement by an entity whom it has sponsored to carry out activities in the Area. These rules are not only found in provisions of the Convention and the Agreement, including instruments adopted in accordance therewith, but also in other rules of international law. The Seabed Disputes Chamber is required to apply such other rules of international law to the extent that they are not incompatible with the Convention or the Agreement (Art. 293.1 Convention).

3.3 Sponsored entities are not Parties to the Convention and the Agreement. Hence, they are not, as such, bound by the provisions of these instruments. Obligations under the Convention and the Agreement can nevertheless be imposed on such entities through:

- (a) The conclusion of a contract with the Authority under Article 153.3 of the Convention; and
- (b) The implementation of the Convention and the Agreement by the sponsoring State in its domestic law.

3.4 The Convention and the Agreement impose legal responsibilities and obligations on the sponsoring State related to compliance with these instruments by entities sponsored by it. This is a subset of the legal responsibilities and obligations of States Parties to the Convention with respect to the sponsorship of activities in the Area that have been identified above in response to the first question. This subset consists of the sponsoring State's responsibility to ensure that an entity sponsored by it:

- (a) Carries out activities in the Area in conformity with the terms of its contract and its obligations under the Convention and the Agreement (Art. 4.4 Annex III Convention; see also Arts. 139.1 and 153.4 Convention);
- (b) Cooperate fully with the Authority to facilitate the acquisition of deep seabed mining technology by the Enterprise or its joint venture, or by a developing State or States in the circumstances set out in the Agreement (Section 5.1(b) Annex Agreement);
- (c) Provides a guarantee of its financial and technical capability to comply promptly with emergency orders of the Authority's Council to prevent serious harm to the environment in the circumstances set out in the Mining Codes (Regulation 32.7 Nodules Mining Code and Regulation 35.8 Sulphides Mining Code).

The responsibilities and obligations referred to in subparagraph (b) and (c) above are implicit in the responsibilities and obligations referred to in subparagraph (a) and do not need to be considered separately.

3.5 Pursuant to the Convention, a State Party is liable for damage caused by its failure to carry out its responsibilities under Part XI of the Convention and the Agreement (Art. 139.2 Convention). The responsibilities of the sponsoring State referred to in the paragraph above arise under Part XI of the Convention and the Agreement, and the failure to comply with these responsibilities entails liability for damage caused by such failure. However, it appears from the context of this provision that the establishment of such liability depends on:

- (a) The conduct of the sponsoring State in carrying out its responsibilities under Part XI of the Convention and the Agreement;
- (b) The sponsored entity's liability under Article 22 of Annex III to the Convention;

(c) The general rules of international law related to the liability of States.

The conduct of the sponsoring State

3.6 A sponsoring State is not liable for damage caused by a failure of an entity sponsored by it to comply with its obligations if it has taken all necessary and appropriate measures to secure effective compliance (Art. 139.2 Convention). To this end, it must have adopted laws and regulations and taken administrative measures which are, within the framework of its legal system, reasonably appropriate for securing compliance by persons under its jurisdiction (Art. 4.4 Annex III). It appears from these provisions that the sponsoring State's responsibility to ensure that an entity sponsored by it complies with its obligations is not absolute, but depends on the efforts of that State to carry out its responsibilities. It is a due diligence obligation.

3.7 A due diligence obligation requires States to adopt, implement, supervise and enforce measures of a legislative, administrative, or juridical nature to prevent legally protected interests from being harmed by the acts of state and non-state actors. In order to establish a breach of a due diligence obligation, it is necessary to determine the degree of diligence which must be observed by States. The case concerning *British Claims in the Spanish Zone of Morocco* provides some general guidance in this respect: States should act with *diligentia quam in suis*, i.e. the degree of diligence with which national interests are protected, and the degree actually exercised may not be significantly less than the degree other States may reasonably expect to be exercised (*United Nations Reports of International Arbitral Awards*, vol. II, 615 at 644).

3.8 Whether an obligation is a due diligence obligation can usually be inferred from its content, context, and object and purpose. In general, obligations which focus on the action to be taken rather than the result of such action, such as obligations which require States to take measures – and irrespective whether such measures must be ‘appropriate’, ‘necessary’ or ‘effective’ – can be characterized as due diligence obligations. The ultimate objective of such an obligation may be to achieve a certain result, e.g. the prevention of damage, but the obligation itself is oriented towards the action to be taken, i.e. the adoption of measures. This is also the view of the International Law Commission. For example, the Draft Articles on the Prevention of Transboundary Harm from Hazardous Activities provide that “[t]he State of origin shall take all appropriate measures to prevent significant transboundary harm or at any event to minimize the risk thereof” (Art. 3). In the commentary, it is explained that this obligation is “one of due diligence” (*Yearbook of the International Law Commission*, vol. II, Part Two, at 154 (para. 7); See also commentary on Article 6 of the Draft Articles on the Law of Aquifers, UN Doc. A/63/10, para. 1).

3.9 There is an internationally wrongful act of a State when conduct is attributable to that State and such conduct constitutes a breach of an international obligation of that State (Art. 2 Articles on Responsibility of States for Internationally Wrongful Acts, UN Doc. A/Res/56/83, Annex). Such internationally wrongful act involves legal consequences even in the absence of damage (Part Two Articles on Responsibility of States for Internationally Wrongful Acts). In the event of damage, the responsible State is required to compensate for the damage caused by the internationally wrongful act, insofar such damage has not been made good by restitution (Art. 36 Articles on Responsibility of States for Internationally Wrongful Acts). However, a responsible State is only required to compensate if there is a causal connection between the internationally wrongful act of that State and the damage (Art. 31.2 Articles on Responsibility of States for Internationally Wrongful Acts). Accordingly, liability of a State

under Article 139.2 of the Convention only arises if the damage is caused by the failure of that State to adopt, implement, supervise and enforce measures to secure compliance with the Convention and the Agreement by entities sponsored by it. Such a failure will thus not by itself result in an obligation for the sponsoring State to compensate for damage caused by an entity sponsored by it.

Liability of the contractor

3.10 The liability of the sponsoring State is without prejudice to the liability of the sponsored entity under Article 22 of Annex III to the Convention (Art. 139.2 Convention). The sponsored entity incurs responsibility and liability for any damage arising out of wrongful acts in the conduct of its operations (Art. 22 Annex III Convention; see also Regulation 30 Nodules Mining Code and Regulation 32 Sulphides Mining Code). This liability is in every case for the actual amount of the damage. Liability for damage arising out of acts of the sponsored entity that are not wrongful is not provided for under the Convention or the Agreement.

3.11 It appears from this construction that the liability system of the Convention and Agreement imposes primary liability on the sponsored entity for damage arising out of wrongful acts in the conduct of its operations. Accordingly, a sponsoring State thus only incurs liability if it:

- (a) Has failed to carry out its responsibilities under Part XI; and
- (b) The entity sponsored by it has not redressed the damage.

This system channels liability and prevents double recovery of damages.

3.12 If a sponsored entity does not provide redress for damage for which it is liable under the Convention or the Agreement – e.g. in case of exonerations, time limits or insolvency – neither the Convention nor the Agreement provide for residual liability of the sponsoring State, provided that the State has carried out its responsibilities under Part XI and has thus acted in accordance with the applicable due diligence standard. The establishment of such residual liability has been considered by the ‘Preparatory Commission for the International Sea-Bed Authority and the International Tribunal for the Law of the Sea’ (See UN Doc. LOS/PCN/L.79, paras. 48–49). However, such liability cannot found in the Nodules Mining Code or the Sulphides Mining Code.

General rules of international law related to liability of States

3.13 The liability of the sponsoring State is also without prejudice to the rules of international law (Art. 139.2 Convention). The relevant rules of international law are those related to the responsibility of States for internationally wrongful acts and the liability of States for acts not prohibited by international law. The provisions of the Convention and the Agreement regarding responsibility and liability are without prejudice to application of existing rules and the development of further rules regarding responsibility and liability (Art. 304 Convention; see also Art. 235.3). Since the adoption of the Convention and the Agreement, international law regarding responsibility and liability has been codified and further developed. These developments, however, do not affect the above analysis of the relevant provisions of the Convention and the Agreement.

3.14 Under the general rules of international law related to responsibility of States for internationally wrongful acts, conduct is only attributable to a State under specific circumstances. In principle, conduct of natural or juridical persons under the jurisdiction of a State is as such not attributable to that State (See commentary of the International Law Commission on Chapter II of the Articles on Responsibility of States for Internationally Wrongful Acts, *Yearbook of the International Law Commission*, vol. II, Part Two, at 38 (para. 3)): This also applies to conduct of state enterprises unless they are exercising elements of governmental authority (*ibid.*, at 48 (para. 6)). Accordingly, under general international law, a sponsoring State cannot be held responsible for the conduct of an entity sponsored by it. However, it has the responsibility to ensure that activities within its jurisdiction or control do not cause damage to (the environment of) other States or areas beyond the limits of national jurisdiction. This obligation is a due diligence obligation.

3.15 Under general international law, no residual liability of States arises for damage caused by activities within their jurisdiction or control irrespective whether the activities are considered hazardous. States should, however, take all necessary measures to ensure that prompt and adequate compensation is available for victims of transboundary damage caused by hazardous activities within its jurisdiction or control (Principle 4 Principles on the Allocation of Loss in the Case of Transboundary Harm Arising Out of Hazardous Activities, UN Doc. A/Res/61/36, Annex). Such an approach had already been adopted in the Convention with respect to damage caused by pollution of the marine environment. It provides that States shall 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 (Art. 235.2 Convention). This obligation is applicable to sponsoring States.

Submissions

3.16 It is the opinion of the Kingdom of the Netherlands that the answer to the second question should be that the sponsoring State can only be held liable in the event it has not exercised due diligence in ensuring that an entity sponsored by it carries out activities in the Area in conformity with the terms of its contract and its obligations under the Convention and the Agreement (Art. 4.4 Annex III Convention).

4. The Necessary and Appropriate Measures to Be Taken by Sponsoring States

Introduction

4.1 The answer to the third question envisages the identification of the necessary and appropriate measures that a sponsoring State must take in order to fulfil its responsibility under the Convention and the Agreement. This is tantamount to identifying the standard of due diligence that a State must observe with respect to activities in the Area sponsored by it.

4.2 Article 4.4 of Annex III to the Convention provides some guidance in determining what such measures might be. The ultimate objective of these provisions is compliance with the Convention and the Agreement by entities carrying out activities in the Area. To this end, sponsoring States are required to adopt "laws and regulations" and to take "administrative measures". This points towards the need to establish a public domestic regulatory framework. Hence, a contractual arrangement between a sponsoring State and an entity sponsored by it would not be sufficient to comply with these provisions of the Convention.

4.3 The laws, regulations and administrative measures of a sponsoring State must be “reasonably appropriate” for securing compliance by entities sponsored by it “within the framework of its legal system”. In a commentary on the Convention, it is suggested that “[t]his implies some flexibility in the type of measures, and does not necessarily require sponsoring States to take enforcement action against contractors, but it does clearly require some action to be taken by the sponsoring State” (*United Nations Convention on the Law of the Sea 1982, A Commentary*, vol. VI, 2002, at 127). Although the Kingdom of the Netherlands holds the view that the text of the Convention allows for flexibility and the form and content of the laws, regulations and administrative measures of sponsoring States do therefore not have to be identical, it is submitted that compliance with a due diligence obligation requires the adoption, implementation, supervision and enforcement of measures (See paragraph 3.7 above). Nothing in Article 4.4 of Annex III to the Convention, or Articles 139.1 or 153.4 of the Convention, suggests flexibility in this respect. The flexibility relates to the substance of the measures and the methods of implementation, supervision and enforcement of such measures. Accordingly, a sponsoring State has, for example, discretion to decide whether an authorization is required for activities in the Area by an entity sponsored by it, and whether such an authorization attaches to an activity or an entity. This margin of discretion notwithstanding, the laws, regulations and administrative measures of a sponsoring State as well as their implementation, supervision and enforcement are not exempted from judicial review to assess whether they may be expected to secure compliance by entities sponsored by it.

4.4 The introduction of a requirement for sponsored entities to establish and maintain financial security, e.g. a bank guarantee, to cover potential financial risks is necessary to ensure that financial resources are available for the implementation of contingency plans and emergency orders, and for the satisfaction of claims for damages. However, the introduction of such requirement by itself would not be sufficient for a sponsoring State to fulfil its responsibility under the Convention and the Agreement. The concept of sponsorship was not only introduced to ensure redress of damage or an imminent threat of damage, but also to prevent damage and, in the event that a sponsored entity has not carried out its activities in the Area in conformity with the terms of its contract or its obligations under the Convention and the Agreement, correct wrongful conduct.

4.5 Finally, the liability of a sponsored entity under Article 22 of Annex III to the Convention can only be effectuated if recourse is available for prompt and adequate compensation or other relief in respect of damage caused by it. Irrespective whether other jurisdictions permit the submission of claims for damage, it is submitted that the sponsoring State must allow within its legal system for the submission of such claims (See also paragraph 3.15 above in respect of damage caused by pollution of the marine environment). Effective legal remedies must be available for injured persons to bring claims for damages in a sponsoring State against an entity sponsored by it, in particular to effectuate the liability of such an entity under Article 22 of Annex III to the Convention. In order to secure the enforcement of judgments and arbitral awards without the need for their recognition in a foreign jurisdiction, this would also require financial security to be established and maintained in the sponsoring State.

Submissions

4.6 It is the opinion of the Kingdom of the Netherlands that the answer to the third question should be that the necessary and appropriate measures that a sponsoring State must take in order to fulfil its responsibility under the Convention and the Agreement include:

- (a) The adoption, implementation, supervision and enforcement of a domestic public regulatory framework to ensure that an entity sponsored by it carries out activities in the Area in conformity with the terms of its contract and its obligations under the Convention and the Agreement;
- (b) The provision of effective legal remedies within its legal system for prompt and adequate compensation or other relief in respect of damage caused by an entity sponsored by it.

5. Submissions

The Kingdom of the Netherlands submits that the answer to the questions should be as follows:

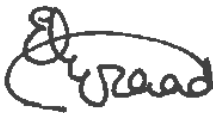
(1) The *specific* legal responsibilities and obligations of States Parties to the Convention with respect to sponsorship of activities in the Area relate to:

- (a) The carrying out of activities in the Area by a sponsored entity (Arts. 139 and 153.4 Convention, and Art. 4.4 Annex III Convention);
- (b) The transfer of technology and scientific knowledge to the Authority and developing States (Art. 144 Convention, Section 5.1(b) Annex Agreement, Regulation 27.1 Nodules Mining Code, and Regulation 29 Sulphides Mining Code);
- (c) The protection and preservation of the marine environment (Art. 145 Convention, relevant provisions of Part XII Convention, Regulations 31.2, 31.4, 31.6 and 32.7 Nodules Mining Code, and Regulations 33.2, 33.6, 34.1 and 35.8 Sulphides Mining Code); and
- (d) The termination of sponsorship (Regulation 29.1 Nodules Mining Code and Regulation 31.1 Sulphides Mining Code);

(2) The sponsoring State can only be held liable in the event it has not exercised due diligence in ensuring that an entity sponsored by it carries out activities in the Area in conformity with the terms of its contract and its obligations under the Convention and the Agreement (Art. 4.4 Annex III Convention);

(3) The necessary and appropriate measures that a sponsoring State must take in order to fulfil its responsibility under the Convention and the Agreement include:

- (a) The adoption, implementation, supervision and enforcement of a domestic public regulatory framework to ensure that an entity sponsored by it carries out activities in the Area in conformity with the terms of its contract and its obligations under the Convention and the Agreement;
- (b) The provision of effective legal remedies within its legal system for prompt and adequate compensation or other relief in respect of damage caused by an entity sponsored by it.



E. Lijnzaad
Representative of the Kingdom of the Netherlands

The Hague, 11 August 2010