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Proposal to seek an advisory opinion from the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea on matters regarding sponsoring State responsibility and liability

Submitted by the delegation of Nauru

1. In 2008 the Republic of Nauru sponsored an application by Nauru Ocean Resources Inc. for a plan of work to explore for polymetallic nodules in the Area. Nauru, like many other developing States, does not yet possess the technical and financial capacity to undertake seafloor mining in international waters. To participate effectively in activities in the Area, these States must engage entities in the global private sector (in much the same way as some developing countries require foreign direct investment). Not only do some developing States lack the financial capacity to execute a seafloor mining project in international waters, but some also cannot afford exposure to the legal risks potentially associated with such a project. Recognizing this, Nauru's sponsorship of Nauru Ocean Resources Inc. was originally premised on the assumption that Nauru could effectively mitigate (with a high degree of certainty) the potential liabilities or costs arising from its sponsorship. This was important, as these liabilities or costs could, in some circumstances, far exceed the financial capacities of Nauru (as well as those of many other developing States). Unlike terrestrial mining, in which a State generally only risks losing that which it already has (for example, its natural environment), if a developing State can be held liable for activities in the Area, the State may potentially face losing more than it actually has.

2. Discussions on this issue were held with the International Seabed Authority, and it was suggested that a sponsoring State might be able to fulfil its sponsorship obligations and avoid liability if it entered into a contractual arrangement with a contractor under which:

(a) The State was given the powers to inspect and verify the contractor's programme of work and carry out an environmental auditing programme;

(b) The contractor undertook to comply with all terms and requirements of the Authority regulations and the exploration contract.

3. This solution would provide the sponsoring State with the confidence to participate in the Area, as it would be clear to the State what was required to avoid liability. At the same time, this arrangement would uphold the integrity of Part XI of the United Nations Convention on the Law of the Sea, as the sponsoring State would be in a position to compel the compliance of the contractor.

4. While the application process was being finalized, however, differing opinions arose from members of the Legal and Technical Commission regarding the interpretation of the provisions in the Convention and the 1994 Agreement relating to the implementation of Part XI of the Convention (General Assembly resolution 48/263) that pertain to the responsibility and liability of sponsoring States, and it became apparent that clarification would need to be sought regarding those provisions before moving forward. Without clarity on the issues of responsibility and liability, it is extremely difficult for a developing State to confidently sponsor activities in the Area, as no meaningful assessment can be made of the legal risks and potential liabilities, and it would be impossible to implement mitigating measures to avoid such liabilities with any certainty. As a result, the State would be left exposed to unforeseen liability under international law.

5. Ultimately, if sponsoring States are exposed to potential significant liabilities, Nauru, as well as other developing States, may be precluded from effectively participating in activities in the Area, which is one of the purposes and principles of Part XI of the Convention, in particular as provided for in article 148; article 150, subparagraph (c); and article 152, paragraph 2. As a result, Nauru considers it crucial that guidance be provided on the interpretation of the relevant sections of Part XI pertaining to responsibility and liability, so that developing States can assess whether it is within their capabilities to effectively mitigate such risks and in turn make an informed decision on whether or not to participate in activities in the Area. Clarification is sought with regard to the following:

(a) What sponsoring States' responsibilities and obligations are under Part XI of the Convention. In particular, clarification is sought on the meaning of the terms "ensure", "securing compliance" and "secure effective compliance".

(b) The meaning of the term "ensure" in the context of:

(i) Article 139, paragraph 1, of the Convention, which provides that "States parties shall have the responsibility to ensure that activities in the Area ... shall be carried out in conformity with this Part";

(ii) Annex III, article 4, paragraph 4, which states that "The sponsoring State or States shall, pursuant to article 139, have the responsibility to ensure, within their legal systems, that a contractor so sponsored shall carry out activities in the Area in conformity with the terms of its contract and its obligations under this Convention";

(iii) Article 153, paragraph 4, which provides that "States parties shall assist the Authority by taking all measures necessary to ensure such compliance in accordance with article 139".

6. The term "ensure" is commonly defined as to "make certain" or "guarantee". In reality, however, no amount of measures taken by a sponsoring State could ever

fully ensure or guarantee that a contractor carries out its activities in conformity with the Convention. For example, enacting national legislation that penalizes the contractor for not complying with the Convention will work to deter the contractor from breaching the Convention; however, it will never ensure that the contractor always complies. The notion of “ensuring” or “guaranteeing” becomes even more untenable when one considers the large number of subcontractors and third parties that will likely be involved in a contractor’s mining operations. Taking this into consideration, what is the meaning of the term “ensure” in the aforementioned clauses? Clarification is also sought with regard to the meaning of the term “securing compliance” as adopted in annex III, article 4, paragraph 4, and the meaning of the term “secure effective compliance” as adopted in article 139, paragraph 2. In particular, guidance is sought on the following four questions:

(a) Can the same meaning be ascribed to both terms, or does “secure effective compliance” denote a lower standard of responsibility than “securing compliance”? If they do share a similar interpretation, please provide guidance on what these terms essentially mean for a developing State attempting to fulfil its responsibility under Part XI. Again, in reality no amount of measures taken by a sponsoring State could ever fully “secure compliance” of a contractor when the contractor is a separate entity from the State;

(b) How do these two terms operate in relation to the term “ensure”, as referenced in paragraph 5 above? Can all three terms be used interchangeably, or does “ensure” denote a higher standard of responsibility?;

(c) If it is determined that “secure effective compliance” does denote a lower standard than “ensure”, what is this standard of responsibility?;

(d) Which standard does the sponsoring State ultimately have to meet to fulfil its responsibilities under Part XI and avoid liability?

7. How can a sponsoring State comply with its responsibility under Part XI to secure the effective compliance of the contractor? In particular, what measures is the sponsoring State required to take? Clarification is sought on the meaning of and relationship between the following terms:

(a) “All necessary and appropriate measures”, in the context of article 139, paragraph 2;

(b) “All measures necessary”, in the context of article 153, paragraph 4;

(c) “measures which are ... reasonably appropriate”, in the context of annex III, article 4, paragraph 4.

8. These three clauses essentially provide that the sponsoring State can be relieved of liability if it takes certain measures to secure the contractor’s effective compliance; however, while referring to the same requirement, each clause adopts different wording to describe the types of measures the State is required to take. Clarification is sought on whether those three terms have the same or different meanings. For example, the term “measures which are ... reasonably appropriate” appears to be less onerous and suggests fewer measures than “all measures necessary”. If it is determined that those terms do have different meanings, which term takes precedence? That is, in order for the sponsoring State to fulfil its responsibility under Part XI and secure the contractor’s effective compliance, must

the sponsoring State take “all necessary and appropriate measures”, “all measures necessary” or “measures which are ... reasonably appropriate”?

9. Regarding the clauses referred to in paragraph 7 above, it is unclear who determines what is appropriate and/or necessary. Clarification is sought on whether it is the sponsoring State itself that determines what is appropriate or necessary, or if this is to be determined objectively by a governing body such as the Authority or the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea. It is also noted that:

(a) Annex III, article 4, paragraph 4, states that a sponsoring State shall not be liable if it has adopted laws and regulations and taken administrative measures which are “within the framework of its legal system, reasonably appropriate for securing compliance by persons under its jurisdiction”. The nature of this wording suggests that the test contains a subjective element and that it takes into account the individual characteristics of each State, implying that the measures required would differ from State to State;

(b) On the other hand, article 153 provides that States parties shall assist the Authority by taking all measures necessary to ensure compliance with the relevant provisions of Part XI. This suggests there is less scope for flexibility. Moreover, provisions appearing in other parts of the Convention suggest that States must meet an objective international standard when adopting national legislation. For example, in the context of adopting national legislation to prevent, reduce and control pollution of the marine environment, States must adopt rules and measures which are “no less effective than international rules, standards and recommended practices and procedures” (see article 208, paragraph 3; article 209, paragraph 2; and article 210, paragraph 6). While those three articles appear in Part XII of the Convention, they provide a relevant example of how this issue has been dealt with in other parts of the Convention. Questions then arise as follows:

(i) If it is decided that it is up to the State to determine by its own standards what appropriate and necessary measures are, is the State nevertheless required to observe certain minimum standards and obligations? If so, what are these minimum standards and obligations?;

(ii) If it is the case that a governing body is to determine what appropriate and necessary measures are, clarification is sought on what will constitute “all necessary and appropriate measures”;

(iii) For example, what factors will the governing body consider when determining whether appropriate measures have been taken, and what tests potentially need to be satisfied?;

(iv) Furthermore, given that a developing State may not be in a position to monitor seafloor mining activities or enforce legislation governing such activities as effectively as a developed State, does the standard of measures required for developing States differ from that required for developed States? If the standard does differ, please advise how it differs;

(v) Again, reference is made to article 148; article 150, subparagraph (c); and article 152, paragraph 2, which stipulate that the effective participation of developing States in activities in the Area should be promoted. It has been demonstrated that developing States are unlikely to sponsor activities in the

Area if they face potential significant liabilities that cannot be effectively mitigated with a high degree of certainty. Given that this is an issue which is potentially threatening to the participation of developing States in activities in the Area, how do article 148; article 150, subparagraph (c); and article 152, paragraph 2, operate in the context of determining the appropriate measures for developing States to take to fulfil their responsibilities? That is, can those provisions pertaining to sponsoring State responsibility and liability be interpreted in such a way as to promote the effective participation of developing States?

10. Is the Seabed Disputes Chamber in a position to provide guidance on what specific measures developing States such as Nauru and Tonga must take to fulfil their responsibilities under article 139 and annex III, article 4, and to avoid liability? If so, please advise on such issues as:

(a) Whether the measures should be compliance-based (for example, active monitoring and auditing by the State), enforcement-based (for example, enacting legislation prescribing standards to be observed and penalties for breaching such standards) or a mixture of both;

(b) How frequently such measures should be carried out;

(c) The standard that must be met in carrying out such measures.

11. What is the meaning of the word “caused” under article 139, paragraph 2, which states that “damage caused by the failure of a State Party or international organization to carry out its responsibilities under this Part shall entail liability”? Clarification is also sought with regard to the following:

(a) The State’s responsibility under Part XI is to secure the contractor’s effective compliance with the Convention; however, it seems unlikely that a State’s failure to carry out this responsibility would ever be the actual “cause” of damage inflicted by the contractor. Is “damage caused by” in this context meant to be interpreted as “damage resulting from”?

(b) Also, please advise on the nature of the causal link contemplated by this clause. For example, does the State’s failure to carry out its responsibility have to be a direct cause of the damage for the State to be liable, or does the mere fact that there has been a failure by the State to ensure compliance result in State liability if damage does occur. Alternatively, is the State liable only if it can be proven that damage resulted from the State’s failure to ensure compliance? Also, does the degree of “causality” affect the degree of State liability? That is, is liability proportionate to the degree to which it can be said that the State’s failure to secure compliance resulted in the damage?

12. Clarification is sought regarding the extent of sponsoring State liability under Part XI of the Convention. In particular, is there a limit to the extent of liability that a developing State such as Nauru or Tonga may face? For example, in a situation in which a developing State has failed to fulfil its responsibilities under Part XI and little or no recourse can be had against the contractor and its insurer, is it possible that a developing State may be liable to pay full reparation for actual damages caused by said contractor? Will the scale of liability take into account the developing State’s financial capacity?

13. Under Part XI, could the sponsoring State still be exposed to liability even if it has satisfactorily fulfilled its responsibilities to secure the contractor's effective compliance? That is, in a situation in which a sponsoring State has fulfilled its obligations under Part XI, damage has been caused by a wrongful act of the contractor in the conduct of its operations and the contractor does not have sufficient assets to cover the cost of the damages and the damages are not covered in full by its insurance, does the sponsoring State remain relieved of liability, or is it possible that the sponsoring State may be required to cover part or all of the unpaid costs? Who ultimately bears the costs in this situation?

14. Clarification is sought with regard to whether the sponsoring State is responsible and potentially liable under Part XI for all activities associated with the contractor's mining operations in international waters (for example, mining, processing and transporting) or just those activities that occur on the seafloor. On the one hand, article 135 states that "Neither this Part nor any rights granted or exercised pursuant thereto shall affect the legal status of the waters superjacent to the Area or that of the airspace above those waters"; on the other hand, the definition of "exploitation" in the Regulations on Prospecting and Exploration for Polymetallic Nodules includes the construction and operation of processing and transporting systems, which would obviously extend well beyond the seafloor.

15. If the operation of Part XI does extend beyond the seafloor, and if the sponsoring State continues to remain responsible for ensuring the compliance of the contractor's activities that reach beyond the seafloor, how does sponsoring State responsibility and liability interact with flag State responsibility and liability, considering that the mining operation will likely involve the use of vessels registered in different flag States and potentially be under the management and control of nationals from other States? That is, will responsibility lie with the sponsoring State, the flag State or the State whose nationals control the vessel, or will there be joint liability?

16. Annex III, article 4, paragraph 4, states that "A sponsoring State shall not, however, be liable for damage caused by any failure of a contractor sponsored by it to comply with its obligations if that State party has adopted laws and regulations and taken administrative measures which are, within the framework of its legal system, reasonably appropriate for securing compliance by persons under its jurisdiction". This raises the following questions:

(a) Could Part XI be satisfied by the sponsoring State entering into a contractual agreement with the contractor on terms similar to those appearing in the draft sponsorship agreement summarized in the annex to the present document?;

(b) If it is not possible to satisfy this clause by entering into such a contractual arrangement, what laws and regulations and administrative measures must a developing State such as Nauru or Tonga take to fulfil its obligations and avoid liability? For example, is the State required to enact legislation specifically dealing with exploration and exploitation of polymetallic nodules in international waters (in effect, enacting legislation that reflects the regulations developed by the Authority), or can the State satisfy this clause through more general national legislation that may already be in place, such as its mining law and environmental law?

17. As has been stressed throughout the present proposal, the sponsorship agreement (like all other measures) will not absolutely guarantee that the contractor will comply with Part XI of the Convention. It therefore needs to be determined whether the sponsorship agreement would be sufficient to demonstrate that the State has taken all appropriate and necessary measures to secure the contractor's effective compliance. As demonstrated in the present proposal, this raises its own set of questions, none more pressing than whether the standard of measures required for a developing State differs from that required for a developed State.

18. Regarding this issue, while the sponsorship agreement is effective in so far as it provides the State with numerous rights and powers to monitor, audit and regulate the activities of the contractor, in reality different States will have vastly different abilities to carry out such powers and regulation. That is, while efforts will be made under the sponsorship agreement to assist the developing State in performing its responsibilities (for example, financial and technical assistance will be provided to the State, and, should the State lack the capacity to effectively monitor the activities, the contractor will engage suitably qualified and independent safety and environmental officers to monitor on the State's behalf), it is unfortunately not possible for developing States to perform their responsibilities to the same standard or on the same scale as developed States. This is particularly the case when dealing with the regulation of deep-sea mining. For example, the deep-sea environment is a highly specialized field, and it is unlikely that developing States (particularly landlocked States) will have the skills, training and capacity to, for example, verify whether the mining activities are likely to cause serious pollution incidents or harm to the environment.

19. Additionally, regarding preventive measures, the sponsorship agreement stipulates that the State must be satisfied that certain conditions have been met prior to approving the commencement of the activities. While providing the State with a powerful tool to assist in promoting compliance, this effectively places an onus on the State to determine whether certain conditions have been met, which raises the following question: is the developing State able to make its own judgement based on its capacities to determine whether the conditions have been met, or is there a minimum standard of diligence required by all States?

Annex

Draft sponsorship agreement as a means of satisfying State obligations under Part XI of the United Nations Convention on the Law of the Sea

1. The Republic of Nauru (the “State”) and Nauru Ocean Resources Inc. (the “Contractor”) have drafted an agreement that, inter alia:

(a) Attempts to satisfy the State’s obligations under Part XI by giving the State various powers and mechanisms to regulate and enforce the Contractor’s compliance;

(b) Sets out the terms under which the State agrees to sponsor the Contractor, including making provision for:

(i) Royalty payments to the State during commercial production;

(ii) The implementation of training and recruitment programmes for nationals of the sponsoring developing State, as well as preferential treatment for such nationals to be employed in the project under such conditions as to which they are, at a minimum, entitled under international law;

(iii) Scientific and technical assistance to the State, including promoting and funding programmes of scientific, educational and technical assistance, with the objective of increasing the State’s capacity to protect and preserve the marine environment within the State’s own exclusive economic zone.

2. A summary of some of the key terms of the draft agreement (“Sponsorship Agreement”) is provided below. In an attempt to satisfy the State’s responsibilities under Part XI, the Sponsorship Agreement has been specifically drafted to provide the State with the following powers and measures:

(a) Preventive measures;

(b) Regulatory measures;

(c) Deterrents (undertakings and indemnities);

(d) Financial undertakings, insurances and guarantees;

(e) Enforcement measures.

3. It is our belief that these measures could demonstrate that the State has taken “all necessary and appropriate measures” to secure the Contractor’s effective compliance under Part XI (keeping in mind, however, that, like all other measures, they cannot absolutely guarantee such compliance). Indeed, many of the obligations facing the Contractor under the Sponsorship Agreement go well beyond those which would normally be expected in a commercial agreement of this nature.

4. That being said, it would not be desirable to commit a developing State to such a sizeable project and unforeseen risks unless it was possible to obtain some form of assurance that such a Sponsorship Agreement would satisfy the State’s obligations and relieve the State of liability under Part XI or, alternatively, would fulfil the State’s obligations when combined with other specific and ascertainable measures.

5. As a result, guidance is sought on whether a Sponsorship Agreement that contains provisions such as those listed below would, in principle, satisfy the State's sponsorship obligations and relieve the State of liability under Part XI.

Preventive measures

6. Firstly, it is a condition of the Sponsorship Agreement that the Contractor must obtain approval from the State prior to commencing or carrying out any exploration, significant exploration activities or exploitation, as the case may be. This approval will only be granted if the Contractor satisfies certain minimum conditions aimed at verifying that the Contractor is in the best position to comply with its international obligations, as follows:

(a) To enable the State to carry out the required checks and balances and determine whether to grant such approval, the Contractor is required to submit to the State all relevant information pertaining to the proposed activities. Such information includes, for example:

- (i) The approved plan of work and any conditions or limitations that have been imposed by the International Seabed Authority or other regulatory body;
- (ii) A description of the programme of oceanographic and environmental studies to be undertaken;
- (iii) Copies of all relevant insurance policies and undertakings as to the currency of each policy;
- (iv) A description of proposed measures for the prevention of serious safety incidents, serious pollution incidents and serious harm to the marine environment and of proposed measures for the reduction and control of other pollution, other harm to the marine environment and other risks to safety at sea;
- (v) Project conformity plans specifying the procedures for predicting, avoiding, remedying and mitigating risks associated with the activities;
- (vi) Project contingency plans for responding effectively to potentially adverse incidents arising from the activities;

(b) The State will assess this information and has the power under the Sponsorship Agreement to withhold approval of the proposed activity until it is satisfied that certain conditions have been met including, inter alia:

- (i) All relevant insurances required for the exploration, significant exploration activities and/or exploitation have been effected;
- (ii) An appropriate bank guarantee (and, in the case of exploitation, an additional rehabilitation bank guarantee) has been provided;
- (iii) The Contractor has sufficient financial capacity to carry out the plan of work and the proposed contingency measures;
- (iv) The Contractor can show that it has a valid contract with the Authority for the activities contemplated in the plan of work and that it has obtained all other authorizations and approvals from the relevant regulatory bodies that are necessary to carry out said activities.

7. These measures are designed to enable the State to determine whether the Contractor will likely be able to comply with its international obligations. As these measures are carried out prior to any activities commencing, they provide the State with an effective preventive tool that, while not completely guaranteeing the Contractor's compliance, will assist in identifying and avoiding potential risks that would otherwise increase the likelihood of non-compliance.

Regulatory measures

8. The Sponsorship Agreement provides the State with numerous means of monitoring and regulating the activities of the Contractor once exploration and/or exploitation has commenced. Such measures will assist the State in identifying any non-compliance and provide the State with the power to require the Contractor to remedy any such breaches (while at the same time deterring the Contractor from causing a breach). Importantly, the State is given the power to conduct:

- (a) An auditing programme;
- (b) An environmental and safety performance monitoring programme.

9. The purpose of these two programmes is to verify, inter alia:

- (a) The Contractor's compliance with and/or ability to comply with its international obligations and the terms of the Sponsorship Agreement;
- (b) That the appropriate insurance policies are in place;
- (c) The Contractor's financial information and financial capacity;
- (d) Whether any activities are causing or are likely to cause serious pollution incidents or serious harm to the marine environment;
- (e) Whether appropriate measures are being taken to reduce pollution and harm to the marine environment;
- (f) That only those activities which have been permitted and approved are being carried out;
- (g) Whether the Contractor, the activities, project personnel, vessels, equipment and installations are in compliance with all of the Contractor's international obligations pertaining to safety at sea;
- (h) Whether the Contractor is protecting the rights of third parties to legitimately use and operate in the ocean in accordance with international law.

10. To ensure that the State can effectively carry out these two programmes, the Contractor must procure for the State (including any auditors or independent environmental or safety officers representing the State) free access to: (a) vessels and installations being used in the activities; and (b) documents, data and equipment relating to the activities, and must provide all reasonable assistance requested by the State to allow its officers or representatives to access, inspect, audit and monitor the relevant activities.

11. If such programmes reveal that the Contractor must make changes in order to better comply with the Sponsorship Agreement or the Contractor's international obligations, the State or its representatives can make a recommendation to that

effect, and the Contractor must promptly implement said recommendations to improve its compliance.

12. In addition to these measures, the Contractor is under an obligation to notify the State if there has been any non-compliance, and failure to provide such notification will trigger enforcement measures. Moreover, there is a continuing obligation on the part of the Contractor to provide the State with full and timely disclosure of all material information that may have an impact on the Contractor's compliance or ability to comply (for example, any fact, circumstance or change in circumstances that arises which may prejudice any insurance policy).

13. As a further safeguard, the Contractor is required to submit to the State, every six months during exploration and on a quarterly basis during exploitation, a report detailing each aspect of the project and highlighting whether the Contractor is in compliance.

Deterrents (undertakings and indemnities)

14. While it is not possible for a sponsoring State to absolutely guarantee that the Contractor will comply with its international obligations or the State's directions, there are nonetheless certain stipulations that can be imposed on the Contractor which, owing to their onerous nature, will operate to deter the Contractor from breaching such obligations. The Sponsorship Agreement contains such provisions in the form of undertakings and indemnities provided by the Contractor to the State, as detailed below.

Undertakings

15. Under the Sponsorship Agreement, the Contractor is required to make numerous legally binding undertakings regarding various aspects of the project. Should any of these undertakings be breached, the State has the right to immediately impose stringent enforcement measures (including ordering the suspension or termination of the activities, depending upon the nature of the breach and any remedial action taken by the Contractor). Owing to the gravity of the enforcement measures, the Contractor would, in practical terms, likely ensure that the undertakings are fulfilled and that the activities are carried out in accordance with its international obligations.

16. For example, the Contractor is first required to make a broad undertaking that it will comply with, and that all activities carried out will be in compliance with, all of the Contractor's international obligations. The Contractor is then required to provide more specific undertakings, including that it will:

(a) Obtain all necessary permits and authorizations and only carry out activities with due care and skill and in a manner that has been approved by the Authority or under an applicable international law;

(b) Comply with, and that all activities will be in compliance with, all of the Contractor's international obligations pertaining to the marine environment, including ensuring that no activities cause any serious harm to the marine environment or serious pollution incidents;

(c) Comply with, and that all activities, vessels, equipment and installations will be in compliance with, all of the Contractor's international obligations

pertaining to safety at sea, and that such vessels, installations and equipment will have undergone all necessary inspections, surveys, tests and audits and have received all necessary certifications prior to use; be at all times kept in good working order and safe operational condition; be repaired and maintained at all necessary times; and remain in a condition and at all times be operated in a manner that does not present an unreasonable threat of harm to the marine environment or safety at sea;

(d) Comply with the Contractor's international obligations pertaining to the protection of the rights of third parties to legitimately use and operate in the ocean in accordance with international law;

(e) Rehabilitate the marine environment in accordance with rehabilitation, aftercare and completion criteria and standards or any other remedial requirements under the Contractor's international obligations.

Indemnities

17. The Sponsorship Agreement contains extensive provisions under which the Contractor agrees to indemnify the State, in its sponsorship role, against costs, damages and claims or other liabilities resulting from the project. The indemnifications cover, for example, costs that may arise from a failure by the Contractor to prevent serious harm to the marine environment; prevent safety incidents; prevent pollution incidents; pay fees, fines, royalties or other payments to the Authority or other regulatory bodies; observe the rights of other legitimate users of the ocean; meet the rehabilitation requirements; or comply with relevant international laws. The indemnities also cover claims or demands made by, or liabilities owed to, regulatory bodies, other countries, persons or organizations that are under the jurisdiction of other countries, other Authority contractors and marine scientific researchers.

18. Combined with the undertakings listed above, these indemnities provide compelling reasons for the Contractor to comply with its obligations; otherwise, the Contractor faces significant financial penalties.

Financial undertakings, insurance and guarantees

19. It is important that the Contractor maintain sufficient financial capabilities to not only carry out the plan of work but also to meet the potential costs of carrying out contingency or emergency measures and dealing with potential environmental damage and/or rehabilitation. The Sponsorship Agreement aims to ensure that the Contractor is in the best financial position to deal with such issues by stipulating financial capacity requirements, insurance requirements and bank guarantee requirements, and by requiring that a deed of guarantee be provided.

20. For example, for all years in which exploration, significant exploration activities and/or exploitation are being carried out, the Contractor must satisfy certain financial capacity requirements (taking into account any bank guarantees, rehabilitation bank guarantees and insurances) in order to respond to and cover the reasonable costs or damages resulting from a breach of the Contractor's international obligations. The Contractor is also bound to notify the State any time there is an event which is likely to be materially adverse to the financial condition

of the Contractor. Should a situation arise in which the Contractor does not have sufficient financial capacity, the State may order a suspension of the activities.

21. Furthermore, the Contractor is required to warrant that all applicable insurances required under the Contractor's international obligations will be effected and maintained for the duration of the project (including all insurances pertaining to the marine environment, pollution and safety at sea). Indeed, it is a condition that no vessel, installation or equipment shall operate or be used unless a valid insurance policy is in force in respect of said vessel, installation or equipment. Moreover, only those activities covered by the insurances effected and maintained in accordance with the Contractor's international obligations shall be carried out.

22. To further ensure the Contractor's performance and ability to meet financial obligations, both a deed of guarantee and a bank guarantee will be required.

Enforcement measures

23. Under the Sponsorship Agreement, the State has the power to take enforcement measures, particularly measures necessary to prevent serious safety and pollution incidents and serious harm to the marine environment, should the Contractor fail to comply with its international obligations or the Sponsorship Agreement.

24. In a case in which the Contractor has committed only a minor breach of its obligations, the State can order the Contractor to promptly remedy said breach; however, if there has been a material breach or if an emergency exists or is likely to occur, the State has the power to require the immediate suspension of the activities (providing such suspension does not conflict with the Contractor's international obligations or an emergency order issued by the Authority and would not result in a safety incident or serious harm to the marine environment). The suspended activities can then legally be resumed only upon approval by the State (provided, of course, that the Authority also approves such a resumption).

25. The State also has the right to terminate sponsorship (and require the immediate cessation of all activities) if there has been a significant material breach which has not been remedied by the Contractor within an appropriate time.

26. For a Contractor in commercial production, any suspension or termination of the activities will result in significant financial loss and potential liabilities to third parties (for example, failure to supply ore under offtake agreements), and may even prove fatal for the Contractor. This is an outcome that the Contractor will likely wish to avoid at all costs. As a result, providing the State with the ability to order such suspension and/or termination is effectively granting the State as much power as it should require to deter the Contractor from breaching its international obligations.