



Council Legal and Technical Commission

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Advisory opinion of the Seabed Disputes Chamber on the responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area

Report of the Secretary-General

1. The purpose of the present note is to inform members of the Council and members of the Legal and Technical Commission of the developments that have taken place since the decision of the Council at the sixteenth session to request an advisory opinion pursuant to article 191 of the 1982 United Nations Convention on the Law of the Sea from the Seabed Disputes Chamber of the International Tribunal on the Law of the Sea on matters relating to the responsibilities and obligations of sponsoring States. The decision of the Council is contained in document ISBA/16/C/13.

2. Members of the Council and of the Legal and Technical Commission will recall that at its 161st meeting on 6 May 2010, the Council requested the Chamber 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?”

3. The Secretary-General of the Authority communicated the decision of the Council to the Registrar of the Tribunal by letter dated 11 May 2010. On 17 May



2010, the request was entered in the list of cases as No. 17 under the name “Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area”.

4. In accordance with article 133, paragraph 1, of the Rules of the Tribunal, the Registrar, by note verbale dated 17 May 2010, notified all States Parties to the Convention of the request for an advisory opinion. The Registrar also notified the Secretary-General of the United Nations of the request for an advisory opinion, by letter dated 18 May 2010, pursuant to article 4 of the Agreement on Cooperation and Relationship between the United Nations and the International Tribunal for the Law of the Sea of 18 December 1997.

5. By order 2010/3 dated 18 May 2010, pursuant to article 133, paragraph 2, of the Rules of the Tribunal, the President decided that the Authority and the organizations having observer status in the Assembly of the Authority were considered likely to be able to provide information on the questions contained in the request. Accordingly, the President invited the States Parties, the Authority and the aforementioned intergovernmental organizations to submit written statements on those questions and fixed 9 August 2010 as the time limit for their submission. By the same order, the President also fixed 14 September 2010 as the opening date of the oral proceedings.

6. Those time limits were fixed with a view to meeting the requirement in Article 191 of the Convention that advisory opinions are given as a matter of urgency.

7. By order 2010/4 dated 28 July 2010, the President, upon a request submitted to the Chamber, extended the time limit for the submission of written statements to 19 August 2010.

8. The dossier was submitted to the Chamber by letter dated 30 July 2010 on behalf of the Secretary-General of the Authority pursuant to order 2010/3 dated 18 May 2010 of the President of the Chamber and to article 131 of the Rules of the Tribunal. The dossier contains the relevant rules, regulations and procedures of the Authority, as well as other documents, decisions and material likely to throw light upon the three legal questions on which the advisory opinion of the Chamber was requested.

9. At the request of the Chamber, the Legal Counsel of the Authority submitted a note dated 26 August 2010 on the Likely impact of exploration and mining activities for nodules on the marine environment, a letter, dated 17 September 2010, in response to one of the questions communicated by the Chamber prior to the hearing in supplement to the responses already provided in the oral statement of the Authority on 14 September 2010, and a letter dated 15 November 2010 on the different phases involved in exploration and exploitation of polymetallic nodules and polymetallic sulphides in the Area.

10. Within the time limit fixed by the President of the Chamber, written statements were submitted by the following 12 States Parties, listed in order of their receipt: United Kingdom of Great Britain and Northern Ireland, Nauru, Republic of Korea, Romania, Netherlands, Russian Federation, Mexico, Germany, China, Australia, Chile and Philippines. Within the same time limit, the Authority, the Interoceanmetal Joint Organization and the International Union for Conservation of Nature and Natural resources also submitted written statements. In accordance with

article 133, paragraph 3, of the Rules of the Tribunal, the Registrar transmitted copies thereof to the States Parties, the Authority and the organizations that had submitted written statements.

11. A written statement from the United Nations Environment Programme received by the Registry after the expiry of the time limit fixed by order 2010/4 dated 28 July 2010 was nevertheless included in the case file by decision of the President of the Chamber and was accordingly circulated to the States Parties, the Authority and the intergovernmental organizations that had submitted written statements. The statement was also posted on the Tribunal's website.

12. On 17 August 2010, the Registry received a statement submitted jointly by Stichting Greenpeace Council (Greenpeace International) and the World Wide Fund for Nature. It was not included in the case file, since it had not been submitted under article 133 of the Rules, but it was posted in a separate section of the Tribunal's website. It was also transmitted to the States Parties, the Authority and the international organizations that had submitted written statements.

13. On 10 September 2010, the Chamber decided not to accede to the petition from Stichting Greenpeace Council (Greenpeace International) and the World Wide Fund for Nature for permission to participate in the advisory proceedings as *amici curiae*.

14. Within the time limit fixed in the order dated 18 May 2010, the following nine States Parties expressed their intention to participate in the oral proceedings: Argentina, Chile, Fiji, Germany, Mexico, Nauru, Netherlands, Russian Federation and United Kingdom. Within the same time limit, the Authority, the Intergovernmental Oceanographic Commission of the United Nations Educational, Scientific and Cultural Organization and the International Union for Conservation of Nature and Natural Resources also expressed their intention to participate in the oral proceedings. All appeared at the four public sittings held on 14, 15 and 16 September 2010 in Hamburg, Germany. This was a "double première" as observed by the President of the Chamber at the opening of the oral hearings, since it marked the first time that the Chamber had been "seized with a case and the first time at all that a request to render an advisory opinion had been brought to the Tribunal".¹ It was also the first time that the hearing had been broadcast over the Internet (as a webcast).

15. On 1 February 2011, the Seabed Disputes Chamber unanimously adopted its advisory opinion, the reading of which took place in Hamburg, Germany. The text of the *dispositif* as contained in paragraph 242 of the opinion is reproduced in the annex to the present note, in the original languages of the opinion (English and French), as well as in Arabic, Chinese and Russian. The full text of the opinion will be made available to members of the Council and to members of the Legal and Technical Commission. The request from the Council, the orders, the text of the advisory opinion, the dossier and additional information submitted by the Authority, the written and oral proceedings and press releases are available on the website of the Tribunal.

16. The Council is invited to discuss the content of the advisory opinion and to make such recommendations for further action as it deems necessary.

¹ ITLOS/PV.2010/1/Rev.1, Verbatim record — Uncorrected, lines 24-27, p. 1.

Annex

Text of the *dispositif* of the advisory opinion of the Seabed Disputes Chamber

[Original: English and French]

242. For these reasons,

The Chamber,

1. Unanimously,

Decides that it has jurisdiction to give the advisory opinion requested;

2. Unanimously,

Decides to respond to the request for an advisory opinion;

3. Unanimously,

Replies to Question 1 submitted by the Council as follows:

Sponsoring States have two kinds of obligations under the Convention and related instruments:

A. The obligation to ensure compliance by sponsored contractors with the terms of the contract and the obligations set out in the Convention and related instruments.

This is an obligation of “due diligence”. The sponsoring State is bound to make best possible efforts to secure compliance by the sponsored contractors.

The standard of “due diligence” may vary over time and depends on the level of risk and on the activities involved.

This “due diligence” obligation requires the sponsoring State to take measures within its legal system. These measures must consist of laws and regulations and administrative measures. The applicable standard is that the measures must be “reasonably appropriate”.

B. Direct obligations with which sponsoring States must comply independently of their obligation to ensure a certain conduct on the part of the sponsored contractors.

Compliance with these obligations may also be seen as a relevant factor in meeting the “due diligence” obligation of the sponsoring State.

The most important direct obligations of the sponsoring State are:

(a) The obligation to assist the Authority set out in article 153, paragraph 4, of the Convention;

(b) The obligation to apply a precautionary approach as reflected in principle 15 of the Rio Declaration and set out in the Nodules Regulations and the Sulphides Regulations; this obligation is also to be considered an integral part of the “due diligence” obligation of the sponsoring State and applicable beyond the scope of the two regulations;

(c) The obligation to apply the “best environmental practices” set out in the Sulphides Regulations but equally applicable in the context of the Nodules Regulations;

(d) The obligation to adopt measures to ensure the provision of guarantees in the event of an emergency order by the Authority for protection of the marine environment; and

(e) The obligation to provide recourse for compensation.

The sponsoring State is under a “due diligence” obligation to ensure compliance by the sponsored contractor with its obligation to conduct an environmental impact assessment set out in section 1, paragraph 7, of the annex to the 1994 Agreement. The obligation to conduct an environmental impact assessment is also a general obligation under customary law and is set out as a direct obligation for all States in article 206 of the Convention and as an aspect of the sponsoring State’s obligation to assist the Authority under article 153, paragraph 4, of the Convention.

Obligations of both kinds apply equally to developed and developing States, unless specifically provided otherwise in the applicable provisions, such as principle 15 of the Rio Declaration, referred to in the Nodules Regulations and the Sulphides Regulations, according to which States shall apply the precautionary approach “according to their capabilities”.

The provisions of the Convention which take into consideration the special interests and needs of developing States should be effectively implemented with a view to enabling the developing States to participate in deep seabed mining on an equal footing with developed States.

4. Unanimously,

Replies to Question 2 submitted by the Council as follows:

The liability of the sponsoring State arises from its failure to fulfil its obligations under the Convention and related instruments. Failure of the sponsored contractor to comply with its obligations does not in itself give rise to liability on the part of the sponsoring State.

The conditions for the liability of the sponsoring State to arise are:

- (a) Failure to carry out its responsibilities under the Convention; and
- (b) Occurrence of damage.

The liability of the sponsoring State for failure to comply with its “due diligence” obligations requires that a causal link be established between such failure and damage. Such liability is triggered by a damage caused by a failure of the sponsored contractor to comply with its obligations.

The existence of a causal link between the sponsoring State’s failure and the damage is required and cannot be presumed.

The sponsoring State is absolved from liability if it has taken “all necessary and appropriate measures to secure effective compliance” by the sponsored contractor with its obligations. This exemption from liability does not apply to the failure of the sponsoring State to carry out its direct obligations.

The liability of the sponsoring State and that of the sponsored contractor exist in parallel and are not joint and several. The sponsoring State has no residual liability.

Multiple sponsors incur joint and several liability, unless otherwise provided in the Regulations of the Authority.

The liability of the sponsoring State shall be for the actual amount of the damage. Under the Nodules Regulations and the Sulphides Regulations, the contractor remains liable for damage even after the completion of the exploration phase. This is equally valid for the liability of the sponsoring State.

The rules on liability set out in the Convention and related instruments are without prejudice to the rules of international law. Where the sponsoring State has met its obligations, damage caused by the sponsored contractor does not give rise to the sponsoring State's liability. If the sponsoring State has failed to fulfil its obligation but no damage has occurred, the consequences of such wrongful act are determined by customary international law.

The establishment of a trust fund to cover the damage not covered under the Convention could be considered.

5. Unanimously,

Replies to Question 3 submitted by the Council as follows:

The Convention requires the sponsoring State to adopt, within its legal system, laws and regulations and to take administrative measures that have two distinct functions, namely, to ensure compliance by the contractor with its obligations and to exempt the sponsoring State from liability.

The scope and extent of these laws and regulations and administrative measures depends on the legal system of the sponsoring State.

Such laws and regulations and administrative measures may include the establishment of enforcement mechanisms for active supervision of the activities of the sponsored contractor and for coordination between the activities of the sponsoring State and those of the Authority.

Laws and regulations and administrative measures should be in force at all times that a contract with the Authority is in force. The existence of such laws and regulations, and administrative measures is not a condition for concluding the contract with the Authority; it is, however, a necessary requirement for carrying out the obligation of "due diligence" of the sponsoring State and for seeking exemption from liability.

These national measures should also cover the obligations of the contractor after the completion of the exploration phase, as provided for in regulation 30 of the Nodules Regulations and regulation 32 of the Sulphides Regulations.

In the light of the requirement that measures by the sponsoring States must consist of laws and regulations and administrative measures, the sponsoring State cannot be considered as complying with its obligations only by entering into a contractual arrangement with the contractor.

The sponsoring State does not have absolute discretion with respect to the adoption of laws and regulations and the taking of administrative measures. It must

act in good faith, taking the various options into account in a manner that is reasonable, relevant and conducive to the benefit of mankind as a whole.

As regards the protection of the marine environment, the laws and regulations and administrative measures of the sponsoring State cannot be less stringent than those adopted by the Authority, or less effective than international rules, regulations and procedures.

The provisions that the sponsoring State may find necessary to include in its national laws may concern, inter alia, financial viability and technical capacity of sponsored contractors, conditions for issuing a certificate of sponsorship and penalties for non-compliance by such contractors.

It is inherent in the “due diligence” obligation of the sponsoring State to ensure that the obligations of a sponsored contractor are made enforceable.

Specific indications as to the contents of the domestic measures to be taken by the sponsoring State are given in various provisions of the Convention and related instruments. This applies, in particular, to the provision in article 39 of the Statute prescribing that decisions of the Chamber shall be enforceable in the territories of the States Parties, in the same manner as judgements and orders of the highest court of the State Party in whose territory the enforcement is sought.

Done in English and French, both texts being authoritative, in the Free and Hanseatic City of Hamburg, this first day of February, two thousand and eleven, in three copies, one of which will be placed in the archives of the Tribunal and the others will be sent to the Secretary-General of the International Seabed Authority and to the Secretary-General of the United Nations.

(Signed) Tullio **Treves**
President

(Signed) Philippe **Gautier**
Registrar
