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Author

Anton, Donald K

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The Principle of Residual Liability in the Seabed
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for the Law of the Sea: The Advisory Opinion
on Responsibility and Liability for International
Seabed Mining (ITLOS Case No. 17)

Donald K. Anton*

Associate Professor of Law, The Australian National University College of Law. The author is a member of the International Union for Conservation of Nature and Natural Resources (IUCN), Commission on Environmental Law and its Specialist Group on Oceans, Coasts and Coral Reefs. He appeared before ITLOS as Legal Counsel with colleagues Cymie Payne and Robert Makgill on behalf of the IUCN in ITLOS Case No 17 (with Youna Lyons also participating in the written submissions). This contribution draws on previous analysis by the author in Donald K Anton, Robert A Makgill & Cymie R Payne, Envtl Pol'y & L 60 and the Written Statement of the International Union for the Conservation of Nature, (19 August 2010), Request for Advisory Opinion, online: <http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_17/StatementIUCN.pdf>.

It is axiomatic that all states have a duty to prevent environmental harm – to ensure that activities under their jurisdiction and control do not cause harm to the environment beyond their own national jurisdiction.¹ Under the *United Nations Convention on the Law of the Sea* (hereafter “UNCLOS”), this duty is embellished in positive language so that states “have the obligation to protect and preserve the marine environment”.² According to the International Court of Justice, the duty to prevent harm is firmly entrenched in customary international

¹ See e.g., Daniel Bodansky, *The Art and Craft of International Law* (Cambridge Massachusetts: Harvard University Press, 2010) at 28; Patricia Birnie, Alan Boyle & Catherine Redgwell, *International Law & the Environment*, 3d ed (Oxford: Oxford University Press, 2009) at 143-145 [Birnie et al]; Alexandre Kiss & Dinah Shelton, *International Environmental Law*, 3d ed (Ardsley, NY: Transnational Publishers, 2004); Ved P Nanda & George Pring, *International Environmental Law & Policy for the 21st Century* (Ardsley, NY: Transnational Publishers, 2003) at 21-22; Philippe Sands, *Principles of International Environmental Law*, 2d ed (Cambridge: Cambridge University Press, 2003) at 241; David Wirth, “The Rio Declaration on Environment and Development: Two Steps Forward and One Back, or Vice Versa?” (1995) 29 Ga L Rev 599 at 619; P M Dupuy, “Overview of the Existing Customary Legal Regime Regarding International Pollution” in Daniel B Magraw, ed, *International Law and Pollution* (Philadelphia: University of Pennsylvania Press, 1991) at 63; Sanford E Gaines, “Taking Responsibility for Transboundary Environmental Effects” (1991) 14 Hastings Int'l & Comp L Rev 781 at 796-797; Rüdiger Wolfrum, “Purposes and Principles of International Environmental Law” (1990) 33 German Yearbook of International Law 308 at 309; Alexandre Kiss, “The International Protection of the Environment” in Ronald St J Macdonald & Douglas M Johnston, eds, *The Structure and Process of International Law: Essays in Legal Philosophy, Doctrine and Theory* (The Hague; Boston: Martinus Nijhoff, 1986) at 1074-75.

² Art 192, *United Nations Convention on the Law of the Sea*, 10 December 1982, 1833 UNTS 396, 21 ILM 1261 (entered into force 16 November 1994) [UNCLOS]. All references to the Convention in this article are taken from the United Nations, *The Law of the Sea: Official Text of the United Nations Convention on the Law of the Sea with Annexes and Index, Final Act of the Third United Nations Conference on the Law of the sea, Introductory Material on the Convention and Conference*, UN Pub Sales No E.83.V.5 (1983). Under Article 194 and Section 5 of Part XII of UNCLOS, specific obligations to prevent pollution are imposed on states.

law.³ It is also embedded in Article 3 of the *Convention on Biological Diversity*, the ratification of which has a universality approaching that of the *Charter of the United Nations*.⁴ Normative scepticism that has surrounded the obligation⁵ would no longer seem to have a place in legal analysis, although what I consider peccadilloes about its utility and application retain some currency.⁶

While some commentators have maintained that the duty to prevent harm entails absolute or strict liability,⁷ the overwhelming consensus of states and writers is that the obligation of prevention is not one that dictates the perfect achievement of result.⁸ Rather, the duty of

³ *Legality of the Threat of Use of Nuclear Weapons*, Advisory Opinion, [1996] ICJ Rep 226 at 241-42. See also International Law Commission, "Draft Articles on Prevention of Transboundary Harm from Hazardous Activities with Commentaries" in *Yearbook of the International Law Commission 2001*, vol 2, part 2 (New York: UN, 2008) at 148 (para 3).

⁴ *Convention on Biological Diversity*, 5 June 1992, 1760 UNTS 79, Can TS No 24, 31 ILM 818 (entered into force 29 December 1993) at article 3. The *Convention on Biological Diversity* has 193 parties as of October 19, 2011. The United States (which has signed), Andorra, South Sudan (and perhaps Palestine), are the only states that have yet to ratify the Convention. These states are, of course, bound by the mirror Article 3 obligation reflected in customary international law.

⁵ See Oscar Schachter, *International Law in Theory and Practice* (Dordrecht: Martinus Nijhoff Publishers, 1991) at 364-65. See also Daniel Bodansky, "Customary (and Not So Customary) International Environmental Law" (1995) 3 Independent Journal of Global Legal Studies 105 at 116.

⁶ See John H Knox, "The Myth and Reality of Transboundary Environmental Impact Assessment" (2002) 96 Am J Int'l L 291.

⁷ Mr Beesley, 2114th Mtg "Summary Records of the Meetings of the Forty-First Session, 2 May-21 July 1989" in *Yearbook of the International Law Commission 1989*, vol 1 (New York: UN, 1992) at 127 (para 24) (UNDOC A/CN.4/SERA/1989); see also Jan Schneider, *World Public Order of the Environment: Towards an International Ecological Law and Organization* (Toronto: University of Toronto Press, 1979) at ch 6; L F E Goldie, "Liability for Damage and the Progressive Development of International Law" (1965) 14 ICLQ 1189; Gaines, *supra* note 1. See also Francisco Orrego Vicuña, "State Responsibility, Liability, and Remedial Measures Under International Law: New Criteria for Environmental Protection" in Edith Brown Weiss, ed, *Environmental Change and International Law: New Challenges and Dimensions* (Tokyo: United Nations University Press, 1992) 124 at 133-35; Alan Boyle, "Nuclear Energy and International Law: An Environmental Perspective" (1989) 60 Brit YB Int'l L 257 at 289-296.

⁸ See e.g. René Lefebvre, *Transboundary Environmental Interference and the Origin of State Liability* (The Hague; Boston: Kluwer Law International, 1996) at 63-67. Nevertheless, it remains important to bear in mind the need to examine the primary rules of international environmental law in play in any given case because, as James Crawford rightly observes: ...different primary rules of international law impose different standards ranging from "due diligence" to strict liability, and that breach of the correlative obligations gives rise to responsibility without any additional requirements. There does not appear to be any general principle or presumption about the role of fault in relation to any given primary rule, since it depends on the interpretation of that rule in light of its object or purpose.

James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge: Cambridge University Press, 2002) at 13. In the context of ultra-hazardous activities, for example, the standard associated with the primary rule may well be strict or absolute responsibility – if harm and causation are proved, responsibility automatically follows. See Canada, Department of External Affairs, *Claim against the Union of Soviet Socialist Republics for Damage Caused by Soviet Cosmos 954*, Annex A, Statement of Claim, para 22, reprinted in (1979) 18 ILM 899 at 907; UN Secretariat, International Law Commission, *Survey of liability regimes relevant to the topic of international liability for injurious consequences arising out of acts not prohibited by international law* (international

prevention requires the exercise of due diligence by a state to prevent significant environmental harm from activities within its jurisdiction or control.⁹

The due diligence standard, when met, raises a significant equitable problem of allocation. The question becomes where the loss should lie for significant extra-territorial harm caused by activities under the jurisdiction and control of a state when due diligence has been in fact exercised to prevent such harm.¹⁰ Even if harm results from an activity subject to the jurisdiction or control of a state, a state exercising due diligence does not commit a wrongful act through the breach of an international obligation because the standard of care in relation to the obligation to prevent harm is met in such a case. Accordingly, under a due diligence standard neither an injured state—nor any state possessing *erga omnes* rights in the event of environmental harm caused in areas beyond all national jurisdiction¹¹—will be able invoke state responsibility in order to seek reparations.¹² Without more then, the default position of international law is to allow the loss occasioned by environmental harm in such circumstances to rest with the innocent state subject to the harm.

In this context, another question arises as to whether a “residual liability” does in fact or ought to rest with the state of the origin of extra-territorial harm—which exercises due diligence—if the actor or entity under its jurisdiction or control that caused the harm is impecunious or cannot otherwise be held liable. In Case Number 17,¹³ the Seabed Disputes

liability in case of loss from transboundary harm arising out of hazardous activities), UNGA, 56th Sess, UN Doc A/CN.4/543, (2004); *Principles on the Allocation of Loss in the Case of Transboundary Harm Arising Out of Hazardous Activities*, GA Res 61/36, UNGAOR, 61st Sess, Supp No 10, UN Doc A/RES/61/36 (2006). See International Law Commission, “Draft Principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities, with commentaries” in *Yearbook of the International Law Commission 2006*, vol 2, part 2 (New York: UN, 2006) 110 at 156 online: <http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_10_2006.pdf> [ILC Allocation Commentaries]. See also Alexandre Kiss & Dinah Shelton, “Strict Liability in International Environmental Law” in Tafsir Malick Ndiaye & Rüdiger Wolfrum, eds, *Law of the Sea, Environmental Law, and Settlement of Disputes: Liber Amicorum Judge Thomas A Mensah* (Dordrecht: Martinus Nijhoff Publishers, 2007) 1131; Xue Hanqin, *Transboundary Damage in International Law* (Cambridge: Cambridge University Press, 2003) at 299-300; Vicuña, *supra* note 7 at 133-35; C Wilfred Jenks, “Liability for Ultrahazardous Activities in International Law” (1966) 117 Rec des Cours 99 at 158-168.

⁹ See e.g. Phoebe Okowa, *State Responsibility for Transboundary Air Pollution in International Law* (Oxford: Oxford University Press, 2000) at 79-83.

¹⁰ See ILC Allocation Commentaries, *supra* note 8 at 111-113, 118-119.

¹¹ See Seabed Disputes Chamber of the International Tribunal for the Law of the Sea, *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, Advisory Opinion, (Feb. 1, 2011), at para 180 [“Advisory Opinion”]. The Advisory Opinion makes clear that in a case of environmental harm to the Area as defined in Part X of the Convention (i.e., the “common heritage” beyond national jurisdiction), every party to UNCLOS is “entitled to claim compensation in light of the *erga omnes* character of the obligations relating to preservation of the environment of the high seas and in the Area”.

¹² See Arts 1, 2 and 42, Draft Articles on the Responsibility of States for Internationally Wrongful Acts, *Report of the ILC on the Work of Its Fifty-third Session*, UNGAOR, 56th Sess, Supp No 10, UN Doc A/56/10 (2001) at 26-40 [Draft Articles].

¹³ Seabed Disputes Chamber of the International Tribunal for the Law of the Sea, Case No 17, *Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area (Request for Advisory Opinion submitted to the Seabed Disputes Chamber)*, online: <<http://www.itlos.org/index>>.

Chamber of the International Tribunal for the Law of the Sea had occasion to consider this complex issue in relation to a request for an advisory opinion by the Council of the International Seabed Authority (hereafter "ISBA").¹⁴

II. THE BACKGROUND OF CASE NO. 17

A. The Request for the Advisory Opinion

The ISBA request for the advisory opinion had its genesis in 2008 with two applications to the ISBA for approval of plans of work for exploration in a "reserved area". By way of background, the seabed and its resources that lie beyond national jurisdiction (known as "The Area") are declared to be "the common heritage of mankind" by *UNCLOS*.¹⁵ An important concomitant of common heritage in *UNCLOS* is the explicit promotion of effective participation and special consideration of developing states in the exploration and exploitation of minerals in the Area. This, in turn, is implemented by what is known as a "parallel system" of exploration and exploitation (as modified by the 1994 Implementation Agreement).¹⁶ The parallel system places exploration and exploitation of the Area under the control of the ISBA. All prospective exploration and exploitation activities (either carried out by a state entity or a private entity) are required to be sponsored by a party to *UNCLOS* and sponsoring states must apply to the ISBA for approval of a plan of work for exploration and licenses for exploitation. In the case of developing states, under the parallel system established under *UNCLOS* parts of the Area subject are reserved for activities by the ISBA "in association with developing states".¹⁷ These sections are referred to as "reserved areas".

The 2008 applications for approval of plans of work were lodged by Nauru Ocean Resources, Inc. (a Nauruan corporation sponsored by Nauru) and Tonga Offshore Mining Ltd. (a Tongan corporation sponsored by Tonga). However, in 2009, because of a concern about liability for damage that might be caused by exploration, a request was made to the ISBA

php?id=109>. See generally Donald K Anton, Robert A Makgill & Cymie R Payne, "Advisory Opinion on Responsibility and Liability" (2011) 41 Envtl Pol'y & L 60; David Freestone, "Advisory Opinion of the Seabed Disputes Chamber of International Tribunal for the Law of the Sea on "Responsibilities and Obligations of States Sponsoring Persons and Entities With Respect To Activities in the Area", online: (2011) 15:7 ASIL Insights <<http://www.asil.org/insights110309.cfm>>; Ilias Plakokefalos, "Seabed Disputes Chamber of the International Tribunal for the Law of the Sea: Responsibilities and obligations of states sponsoring persons and entities with respect to activities in the area – Advisory Opinion", (2011) J Envtl L, Advance Access (27 September 2011), online: <<http://jel.oxfordjournals.org/content/early/2011/09/26/jel.eqr021.abstract>>.

¹⁴ The Chamber has jurisdiction to give advisory opinions when requested by the Assembly or Council of the International Seabed Authority. See art 191, *UNCLOS*, *supra* note 2.

¹⁵ Art 136, *UNCLOS*, *supra* note 2. The establishment of the Area as common heritage is rightly seen as one of the most significant advances in international law. See Kemal Baslar, *The Concept of Common Heritage of Mankind in International Law* (The Hague, Netherlands: Kluwer Law International, 1998) at xxi, 7.

¹⁶ *Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982*, GA Res 48/263, UNGAOR, 48th Sess, Supp No 263, UN Doc A/RES/48/263 (1994).

¹⁷ Annex III, Article 8, *UNCLOS*, *supra* note 2. Under *UNCLOS* Annex III Article 9, paragraph 4 (to the extent it has not been modified by the 1994 Agreement on Part XI, Annex, Section 2) it is also possible for any party to notify the Authority of its intent to submit a plan of work in a reserved area.

that both applications be postponed. Before proceeding, Nauru proposed that the ISBA seek an Advisory Opinion from the Chamber on several specific questions to clarify the liability of sponsoring states. In support of its proposal, Nauru submitted:

... 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 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 ... 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 [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.¹⁸

Ultimately, the Council of the ISBA decided to request an Advisory Opinion from the Chamber on three 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?¹⁹

It is Question 2, relating to the *extent* of liability (and the possibility of limits), that raised the issue of residual liability. This is treated fully below. However, the bearing of the Chamber's opinion on residual liability in Question 1, must be examined first.

B. Question 1 as the Predicate to Residual Liability

No doubt, for international environmental lawyers, the most exciting aspect of the Opinion is the way in which the Chamber opines on Question 1. It is here that a number aspects of the law that are clarified and advanced, especially in connection with common heritage of humankind obligations. After addressing preliminary issues not important to residual liability,

¹⁸ ISBA Doc ISBA/16/C/6 (5 March 2010), paras 1, 5 online: <<http://www.isa.org.jm/files/documents/EN/16Sess/Council/ISBA-16C-6.pdf>>.

¹⁹ ISBA Doc ISBA/16/C/13 (6 May 2010), online: <http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_17/Request/English/Dossier_No_7.pdf> [ISBA Doc ISBA/16/C/13].

the Chamber began its analysis by identifying the primary obligations of sponsoring states under *UNCLOS*. In particular, it highlighted obligations arising under Articles 139(1),²⁰ 153(4)²¹ and Annex III, Article 4(4).²² Reading these three provisions together, the Chamber determined that the basic obligation of a sponsoring state is “to ensure” that “activities in the Area” conducted by the sponsored entity or contractor are “in conformity” or “in compliance” with:

- Part XI of the Convention (governing The Area);
- Relevant Annexes to the Convention;
- Rules, Regulations and Procedures of the Authority;
- The terms of its exploration contract with the Authority; and
- Any other obligations under the Convention.²³

The need to analyze the duty “to ensure” required the Chamber to confront the general international obligation to prevent harm to the environment beyond national jurisdiction discussed above. This resulted in a determination by the Chamber that, indeed, a standard of “due diligence” applies when considering whether a state has breached the duty to prevent harm or has met its obligation “to ensure”.²⁴ In hinting pretty strongly at how it would approach Question 2, the Chamber indicated that meeting the obligation “to ensure” compliance by the contractor will limit the state’s liability.²⁵ In this connection, the Chamber made clear that the sponsoring State’s obligation “to ensure” is not to achieve in all cases the result that a contractor in fact complies with the requirements of the Convention. Rather, the Chamber described it

²⁰ Article 139(1) of *UNCLOS*, *supra* note 2 provides: “States Parties shall have the responsibility to ensure that activities in the Area, whether carried out by States Parties, or state enterprises or natural or juridical persons which possess the nationality of States Parties or are effectively controlled by them or their nationals, shall be carried out in conformity with this Part. The same responsibility applies to international organizations for activities in the Area carried out by such organizations”.

²¹ Article 153(4) of *UNCLOS*, *supra* note 2 provides: “The Authority shall exercise such control over activities in the Area as is necessary for the purpose of securing compliance with the relevant provisions of this Part and the Annexes relating thereto, and the rules, regulations and procedures of the Authority, and the plans of work approved in accordance with paragraph 3. States Parties shall assist the Authority by taking all measures necessary to ensure such compliance in accordance with article 139”.

²² Annex III, Article 4(4) of *UNCLOS*, *supra* note 2 provides: “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. 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”.

²³ Advisory Opinion, *supra* note 11 at paras 103, 104.

²⁴ Elsewhere the Chamber makes clear that the standard of due diligence owed by sponsoring states is not to be differentiated based on levels of economic development, with the exception of the precautionary approach. *Ibid* at para 159.

²⁵ *Ibid* at para 109.

as an obligation “to deploy adequate means, to exercise best possible efforts, to do the utmost, to obtain this result”.²⁶

Considering the content of the due diligence obligation the Chamber described it as a “variable concept” that “may change over time as measures considered sufficiently diligent at a certain moment may become not diligent enough in light of, for instance, new scientific or technological knowledge”. Further, the Chamber recognized that “the standard of due diligence has to be more severe for the riskier activities”.²⁷ The Chamber goes on to point out that the Convention requires the sponsoring State to adopt “laws and regulations” and to take “administrative measures which are, within the framework of its legal system, reasonably appropriate for securing compliance by persons under its jurisdiction”.²⁸ Following its discussion of due diligence, the Chamber then outlines the “direct obligations” of sponsoring states under the Convention and general international law. Two especially important direct obligations considered by the Chamber are requirements tied to the precautionary approach and environmental impact assessment.

Turning to the precautionary approach, the Chamber stated that “the link between an obligation of due diligence and the precautionary approach is implicit in the *Southern Bluefin Tuna Cases*.²⁹ It then observed “that the precautionary approach has been incorporated into a growing number of international treaties and instruments, many of which reflect the formulation of Principle 15 of the Rio Declaration” and that “this has initiated a trend towards making this approach part of customary international law”.³⁰ In light of the Chamber’s findings, it concluded that states must apply a precautionary approach as an integral part of their due diligence obligations “in situations where scientific evidence concerning the scope and potential negative impact of the activity in question is insufficient but where there are plausible indications of potential risks.” Disregarding such risks would constitute a failure to comply with the precautionary approach, and accordingly a failure to meet the standard of due diligence.

The second direct obligation mentioned here is the requirement for the preparation of an Environmental Impact Assessment (hereafter “EIA”). Referring to the ICJ’s *Pulp Mills*³¹ judgment, the Chamber stressed that EIA is both “a direct obligation under the Convention

²⁶ *Ibid* at para 110.

²⁷ *Ibid* at para 117.

²⁸ *Ibid* at paras 119, 212-241. The Chamber gives more specific indications concerning the content of these measures, including their enforcement, under its reply to Question 3. *Ibid* at paras 212-241.

²⁹ *Ibid* at para 132; See *Southern Bluefin Tuna Cases (New Zealand v Japan; Australia v Japan)*, Order of 27 August 1999, ITLOS Nos 3 and 4 online: <http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_3_4/Order.27.08.99.E.pdf> [Southern Bluefin Tuna].

³⁰ *Ibid* at paras 135, 161. The Chamber cited the Convention’s regulations and the ICJ’s invocation of the precautionary approach in the *Pulp Mills* case as support for its applicability here. *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*(Judgment of 20 April 2010) <<http://www.icj-cij.org/docket/files/135/15877.pdf>>. The mining regulations, governing prospecting and exploration for polymetallic nodules and sulphides, explicitly require States and the ISA to apply Rio Declaration Principle 15. That formulation requires that “where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation”. The Chamber noted that under Principle 15, states are to apply precaution “according to their capabilities,” which might indicate a less strict standard for developing states.

³¹ *Pulp Mills*, *supra* note 30.

and a general obligation under customary international law".³² The Chamber acknowledged that the ICJ decision had been limited to consideration of impacts on the environment in a transboundary context. It went on to state, however, that the ICJ's reasoning may also apply to activities in an area beyond the limits of national jurisdiction, and the Court's references to "shared resources" may apply to resources that are the common heritage of mankind.³³ The Court concluded by stating that the EIA requirement extended beyond the scope of the application of the specific provisions of the regulations. Presumably, failing to carry out an adequate EIA before permitting an activity to proceed when required would fail to meet the diligence due.

III. QUESTION 2 AND THE ISSUE OF RESIDUAL LIABILITY

Rules to govern liability and compensation for environmental harm that fall outside the ordinary rules of state responsibility (i.e. where due diligence is the applicable standard and it has been exercised) have been sought at least since the appearance of the "further development" injunction to states in Principle 22 of the 1972 *Stockholm Declaration on the Human Environment* (hereafter "the Stockholm Declaration").³⁴ In environmental treaty after treaty since the Stockholm Declaration "further development" clauses have appeared that require states to cooperate in the elaboration and adoption of norms to regulate liability and compensation.³⁵ As a result, liability conventions have increasingly been negotiated. The ordinary posture of international law in these conventions is first to look to a responsible private operator or contractor for compensation for harm caused that is not the result of a wrongful act attributable to the state.³⁶ The residual liability of states when an operator or contractor is unable to or shielded from providing compensation, however, has not yet been a regular feature of these liability conventions.³⁷

Question 2 posed by the ISBA, directly raised the possibility that residual liability might be found by the Chamber to form part of the extent of sponsoring state liability under UNCLOS. In particular, in setting out the limits of liability for sponsoring states, Article 139(2) of UNCLOS leaves a "liability gap" in at least three instances:

³² *Southern Bluefin Tuna*, *supra* note 29 at para 145.

³³ *Ibid* at para 148.

³⁴ Report of the United Nations Conference on the Human Environment, *Declaration of the United Nations Conference on the Human Environment*, UN Doc A/CONF.48/14/Rev.1, 2 -65 and Corr.1 5 at Principle 22. Principle 22 provides that states shall "develop further the international law regarding liability and compensation for victims of pollution and other environmental damage caused by activities within the jurisdiction and control of such States to areas beyond their jurisdiction".

³⁵ Andronico O Adede, *International Environmental Law Digest: Instruments for International Responses to Problems of Environment and Development* (New York: Elsevier, 1993) at 189-196.

³⁶ See Gunther Doeker & Thomas Gehring, "Private or International Liability for Transnational Environmental Damage – The Precedent of Conventional Liability Regimes" (1990) 2 J Envtl L 1; International Law Commission, *supra* note 8 at paras 340-386.

³⁷ A notable exception moving in this direction is article 15, *Basel Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Wastes and Their Disposal*, Decision V/29 and Annex III, Report of the Fifth Meeting of the Conference of the Parties to the Basel Convention, UN Doc UNEP/CHW.1/WG/1/9/2 (1999) (not in force).

where a state takes all necessary and/or appropriate measures required by international law and the blameless actions of the contractor nevertheless cause environmental harm;

where a state takes the requisite necessary and/or appropriate measures and the private operator is blameworthy, but insolvent or its assets are beyond the reach of the sponsoring state; and

where the sponsoring state has failed to take the required measures but there is no causal link with the environmental harm.³⁸

The possibility of residual liability, thus, became important for these situations. Undoubtedly it had even greater importance in this case because if residual liability was not available and the contractor could not be held liable, then damage to the common heritage would go unremedied. On the other hand, Question 2 also comprised the crux of Nauru's concern about the barriers to developing state sponsorship of activities in the Area that expansive state liability that would pose.

A. The Breadth of Question 2 and Aspects of Applicable Law

In unpacking Question 2, it is worth noting at the outset that it is relatively narrow. Question 2 asks about "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 who it has sponsored under Article 153, paragraph 2(b) of the Convention".³⁹ Despite any limits that exist under these provisions, states have comprehensive and detailed obligations established by a large number of treaties and customary international law to protect and preserve the marine environment in a host of different ways.⁴⁰ A breach of these wide-ranging obligations caused by deep seabed mining that is attributable to the state is a wrongful act for which a state is responsible under international law and for which the state must make reparations.⁴¹

It is important to recognise that the question posed is but a narrow aspect of this much broader responsibility on the part of states. Even if state liability is in some manner limited

³⁸ *Written Statement of the International Union for the Conservation of Nature*, (19 August 2010) Request for Advisory Opinion at 28-29, online: <http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_17/StatementIUCN.pdf>.

³⁹ ISBA Doc ISBA/16/C/13, *supra* note 19.

⁴⁰ Some of these obligations beyond the Convention are confirmed by this Tribunal's jurisprudence in *Southern Bluefin Tuna*, *supra* note 29 (addressing scientific uncertainty and requirements of "prudence and caution"); *MOX Plant Case (Ireland v UK)* (3 December 2001), ITLOS No 10 (Provisional Measures) (prescribing measures relating to exchange of information, monitoring risk, and pollution prevention based on requirements "co-operation" and "prudence and caution"). See further Alan Boyle, "The Environmental Jurisprudence of the International Tribunal for the Law of the Sea" (2007) 22 Int'l J Mar & Coast L 369.

⁴¹ On responsibility see *Phosphates in Morocco (Italy v France)*, [1938] PCIJ (Ser A/B) No 74 at 28 (Preliminary Objections); *Case Concerning Corfu Channel (UK v Albania)*, [1949] ICJ Rep 4 at 23 (Merits); *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v US)*, [1986] ICJ Rep 14 at paras 283, 292 (Merits); *Case Concerning Gabčíkovo-Nagymaros Project (Hungary v Slovakia)*, [1997] ICJ Rep 7 at 38 (Merits). See also *Rainbow Warrior* arbitration, XX RIAA 217 (1990) at 251. On reparations see *Case Concerning the Factory at Chorzów (Germany v Poland)* (Jurisdiction) (1927), PCIJ (Ser A) No 9 at 21; *LaGrand Case (Germany v United States)*, [2001] ICJ Re 466 at 485 (Merits)..

(under Article 139(2) or Article 4(4) of Annex III to the Convention) for damages caused by a sponsored entity as a result of its breaches of Part XI of the Convention, a state's broader responsibility will still remain. And, a state will continue to be responsible for any attributable breach of its broader obligations occasioned by the same harm to the marine environment. This is so because Article 139(2) is expressly “[w]ithout prejudice to the rules of international law” and each and *every* internationally wrongful act entails the responsibility of a state.⁴²

Another notable aspect about Question 2, is the applicable law. Article 38 of the Statute of the International Tribunal for the Law of the Sea sets forth the applicable law in the Seabed Disputes Chamber.⁴³ Article 38 directs the Chamber to “apply,” *inter alia*, the “provisions of Article 293” of the Convention. Article 293, in turn, requires the application of the “Convention and other rules of international law not incompatible with t[he] Convention.” The Convention itself confirms, in a number of places, the injunction of Article 38 of the Statute to apply relevant and compatible rules of international law outside the Convention. Articles 235(1), 139(2) and 304 of *UNCLOS* all preserve the application of general international law outside the Convention in the context of responsibility and liability.

B. The Relevant Liability Norms in *UNCLOS*

The liability of a state arising from a sponsored entity's failure to comply with the provisions of *UNCLOS* is governed by the general responsibility and liability provisions set out in Article 235 of *UNCLOS*, as well as the more specific provisions of Articles 139(1) and (2) and Annex III, Article 4(4).⁴⁴ In addition, in determining the scope of liability Article 304 of *UNCLOS* requires “the application of existing rules . . . regarding responsibility and liability under international law.” This includes “further rules” of customary international law on responsibility and liability “develop[ed]” since the adoption of *UNCLOS*, as well as general principles of international law.⁴⁵

Article 235 of *UNCLOS* establishes general rules of responsibility and liability in relation to convention's broad obligations to protect and preserve the marine environment. It provides:

⁴² *Responsibility of States for Internationally Wrongful Acts*, GA Res 56/83, UNGAOR, 56th Sess, Supp No 49, UN Doc A/RES/56/83 (2002) at art 1.

⁴³ Annex VI, *UNCLOS*, *supra* note 2.

⁴⁴ *UNCLOS* contains other responsibility and liability provisions that are not implicated by the question presented, including Articles 31, 42(5), 106, 110(3), 232, and 263. These provisions may lend assistance in the interpretation of liability under *UNCLOS* per Article 31(2) of the *Vienna Convention on the Law of Treaties*, 1155 UNTS 331.

⁴⁵ *The M/V “Saiga” (No 2)*(Saint Vincent and the Grenadines v. Guinea), ITLOS Case No 2 (1 July 1999) (Merits), at paras 169-171, reprinted in (1999) 38 ILM 1323, 1357 (applying “Article 42, paragraph 1, of the Draft Articles of the International Law Commission on State Responsibility”). For a sapient analysis of this aspect see Louise de la Fayette, “ITLOS and the Saga of the Saiga: Peaceful Settlement of a Law of the Sea Dispute” (2000) 15 Int'l J Mar & Coast L 355 at 388-391. See also US Department of State, Bureau of Public Affairs, “Commentary – The 1982 United Nations Convention on the Law of the Sea and the Agreement on Implementation of Part XI” (1995) 6 Law of the See Convention: Letters of Transmittal and Submittal and Commentary 6 (Supp No 1) 5 at 51; Moira L McConnell & Edgar Gold, “The Modern Law of the Sea: Framework for the Protection and Preservation of the Marine Environment?” (1991) 23 Case W Res J Int'l L 83 at 88.

1. States are responsible for the fulfillment of their international obligations concerning the protection and preservation of the marine environment. They shall be liable in accordance with international law.
2. 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.
3. With the objective of assuring prompt and adequate compensation in respect of all damage caused by pollution of the marine environment, States shall cooperate in the implementation of existing international law and the further development of international law relating to responsibility and liability for the assessment of and compensation for damage . . .

Article 139 of *UNCLOS* sets forth more specific responsibility and liability for states in relation to activities in the Area under Part XI of the convention. Article 139 does, however, include the proviso that it is "without prejudice to international law." It provides in pertinent part:

1. States Parties shall have the responsibility to ensure that activities in the Area, whether carried out by States Parties, or state enterprises or natural or juridical persons which possess the nationality of States Parties or are effectively controlled by them or their nationals, shall be carried out in conformity with this Part. . . .
2. Without prejudice to the rules of international law and Annex III, Article 22, damage caused by the failure of a State Party or international organization to carry out its responsibilities under this Part shall entail liability; States Parties or international organizations acting together shall bear joint and several liability. A State Party shall not however be liable for damage caused by any failure to comply with this Part by a person whom it has sponsored under Article 153, paragraph 2(b), if the State Party has taken all necessary and appropriate measures to secure effective compliance under Article 153, paragraph 4, and Annex III, Article 4, paragraph 4.

Annex III of *UNCLOS* addresses the basic conditions set for prospecting, exploration and exploitation in the Area. Article 4 of Annex III prescribes the qualifications that applicants seeking to engage in activities in the Area must possess. In relation to qualified sponsored entities, such as a contractor, under Article 153(2) of the convention, Article 4(4) of Annex III provides:

The sponsoring state . . . 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. 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.

As explained in relation to the applicable law to be applied in answering Question 2, in the context of the convention's responsibility and liability provisions (including Articles 253, 139 and Annex III, Article 4(4)), Article 304 of *UNCLOS* anticipates the application of contemporary rules on the subject as they emerge. Article 304 provides:

The provisions of this Convention regarding responsibility and liability for damage are without prejudice to the application of existing rules and the development of further rules regarding responsibility and liability under international law.

C. Residual Liability Outside of UNCLOS

As can be seen, no explicit form of residual liability is provided for by *UNCLOS*. If residual liability was going to be found to be applicable by the Chamber in Case No. 17, it was because its application would be warranted as an “existing rule” of liability that had been further developed since 1982 when *UNCLOS* was adopted. While establishing the existence of this customary norm was always going to be difficult, one route to establishing residual liability was suggested by two written statements in the case: one by the IUCN⁴⁶ and one as statement received by the NGO Stichting Greenpeace Council (Greenpeace International) and the World Wide Fund for Nature (hereafter “Greenpeace statement”). The Greenpeace statement was not made part of the record of the case, but in an ITLOS first, it was included with the written statements on the ITLOS website.⁴⁷

A statement made by Mexican Ambassador Joel Hernandez during the oral proceedings also suggested a way in which residual liability might be found applicable.⁴⁸ Ambassador Hernandez urged an interpretation of *UNCLOS* that incorporated strict liability for sponsoring states into their duty to prevent harm. However, even if the Chamber was otherwise prepared to limit this strict liability to ultra-hazardous activities,⁴⁹ it was of the view “that liability for damage of the sponsoring State arises only from its failure to meet its obligation of due diligence”, which ruled out strict liability altogether.⁵⁰

Both the IUCN and Greenpeace statements attempted to demonstrate the emerging trend of residual state liability by pointing to the International Law Commission’s (ILC) Principles on the Allocation of Loss in the Case of Transboundary Harm Arising out of Hazardous Activities. Both conceded that the point of departure for the principles on allocation is the establishment by Principle 4(2) of principal liability for a private operator(s) in the first instance. However, the Principles recognize a situation may arise in which prompt and adequate compensation for harm by a private operator, like a sponsored entity, fails. In such a situation, a residual liability

⁴⁶ *Written Statement of the International Union for the Conservation of Nature*, at paras 98-113, online: International Tribunal for the Law of the Sea <http://www.itlos.org/case_documents/2010/document_en_336.pdf>.

⁴⁷ Statement of Stichting Greenpeace Council (Greenpeace International) and the World Wide Fund for Nature at 19-23, online: International Tribunal for the Law of the Sea <http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_17/Statement_Greenpeace_WWF.pdf>.

⁴⁸ See also Oral Statement of Ambassador Joel Hernandez, Legal Adviser of the Mexican Ministry of Foreign Affairs of Mexico (15 September 2010), ITLOS/PV.10/2/Rev.1 at 46-47, online: International Tribunal for the Law of the Sea <http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_17/PV_2010.2.Rev_1_E.pdf>.

⁴⁹ See sources *supra*, note 8.

⁵⁰ Advisory Opinion, *supra* note 11 at para 189.

remains with the state under Principle 4(5) to "ensure that additional financial resources are made available."⁵¹

One obstacle in clearly proving Principle 4 to be reflective of custom was the ILC Commentary to the Principles. The Commentary recognizes that the Principles are intended to aid in "the process of development of international law in this field,"⁵² indicating they are a work of progressive development instead of codification of existing custom. This view is further supported by the fact that they are styled "Principles" instead of "Draft Articles" ripe for negotiation. On the other hand, the Commentary also explicitly leaves open the question of whether the various Principles it sets out currently reflect custom⁵³ and some commentators are of the view that the Principles "show how the Commission has made use of general principles of law [and] successfully reflects the modern development of civil-liability treaties, without in any way compromising or altering those which presently exist".⁵⁴

Be this as it may, it was argued that cogent reasons existed for concluding that residual liability was applicable and as a basis for inviting the Chamber to apply the doctrine. First, it was argued that it would be inequitable to leave damages unremedied merely because the source state has acted with all due diligence or the private operator is insolvent.⁵⁵ It was claimed that this argument had added force for the Area because of its common heritage legal status. The question was posed as to why a party deriving the principal benefit of exploitation of global public goods⁵⁶ in the Area should be able to shift the loss occasioned by environmental harm to the world at large? Allowing such an outcome was said to undermine long attempts by the international community to ensure that environmental externalities associated with public goods are accounted for and paid by the user benefiting from such goods.⁵⁷

⁵¹ *Principles on the Allocation of Loss in the Case of Transboundary Harm Arising Out of Hazardous Activities*, GA Res 61/36, UNGAOR, 61st Sess, UN Doc A/RES/61/36 (2006).

⁵² "ILC Principles Commentary" in *Yearbook of the International Law Commission 2000*, vol 2 part 2 (New York: UN, 2006) at 111 para 5 (UNDOC. A/CN.4/SER.A/2000/Add. 1).

⁵³ *Supra* note 51 at para 13.

⁵⁴ Birnie et al, *supra* note 1 at 321.

⁵⁵ See Mr Robert Q Quentin-Baxter, Special Rapporteur, "Second report on international liability for injurious consequences arising out of acts not prohibited by international law" in *Yearbook of the International Law Commission 1981*, vol 2, part 1 (New York: UN, 1983) at 103, 112-118 (UNDOC. A/CN.4/SER. A/1981/Add. 1); Mr Julio Barboza, Special Rapporteur, "Second report on international liability for injurious consequences arising out of acts not prohibited by international law" in *Yearbook of the International Law Commission 1986*, vol 2, part 1 (New York: UN, 1988) at 145, 160 (UNDOC. A/CN.4/SER. A/1986/Add.1).

⁵⁶ It is true that benefits of exploitation (once exploitation begins) are internationally shared under Article 82(2) of UNCLOS, *supra* note 2, but the distribution is so small and widely dispersed as to be inconsequential to the argument.

⁵⁷ See *Convention on the Protection and Use of Transboundary Watercourses and International Lakes*, 17 March 1992, 1936 UNTS 269, 31 ILM 1312 (entered into force 6 October 1996) at art 2(5)(b); WHO, *European Charter on the Environment and Health, Principles for Public Policy*, WHO Doc ICP/RUD 113/ConfDoc/1, art 11, reprinted in 20 Envtl Pol'y & L 57 (1990); *Rio Declaration on Environment and Development, Report of the United Nations Conference on Environment and Development*, UN Doc. A/CONF.151/6/Rev.1, (1992), 31 ILM 874 (1992), Annex I, Principle 16 at 6; OECD, *Recommendation of the Council on the Implementation of the Polluter-Pays Principle*, Doc No C(74) 223 (1974).

Examining how residual liability would operate in practice, both the IUCN and Greenpeace statements started from the point of the failure of due diligence on the part of sponsoring state. So, if a sponsored entity fails to comply with the provisions of *UNCLOS* and the 1994 Agreement, and the sponsoring state has failed to take all reasonable measures to prevent such non-compliance, the state will be responsible for the consequences under standard rules of state responsibility. However, under the terms of Article 139(2), a state that has taken such measures will limit its liability accordingly.⁵⁸ The real question posed for the Chamber was not whether it should take account of contemporary trends like residual liability in the law. Clearly it was required to do so under Articles 235(1), 139(2) and 304 of *UNCLOS*. The real question was whether it could find, first, that residual liability was a customary norm outside of *UNCLOS*, and if so, whether it posed any sort of conflict with the convention.

The IUCN submitted that Articles 235(1), 139(2) and 304 of the convention indicate that the *UNCLOS* is to be considered to be a “living” instrument, that must be interpreted not only in light of its objects and purposes under Article 31(1) of the Vienna Convention on the Law of Treaties, but also in light of present day conditions and evolving normativity. This sort of evolutionary interpretative methodology for treaties has been recognized even absent the injunctions contained in Articles 235(1), 139(2) and 304. In *Loizidou v. Turkey*, for example, the European Court of Human Rights observed that:

the [European Human Rights] Convention is a living instrument which must be interpreted in the light of present day conditions is firmly rooted in the Court’s case-law ... It follows that these provisions cannot be interpreted solely in accordance with the intentions of their authors as expressed more than forty years ago.⁵⁹

It was said that undertaking activities in the Area creates a unique relationship between the sponsoring state, the community of nations, the sponsored entity and the International Seabed Authority. A state’s liability ought to be benchmarked to contemporary standards of responsibility and liability that accords with its role as a sponsor of an entity carrying out activities within the Area, which has the legal status of common heritage for all humanity. This role and relationship of a sponsoring state makes it particularly appropriate for the Chamber to have regard for the principle of residual liability in determining the contemporary extent of sponsoring state liability for actions or omissions of sponsored entities that cause environmental damage to the Area.

It was claimed by both the IUCN and Greenpeace that the Chamber ought to make allowance for the advent of the principle of residual state liability embodied in Principle 4(5) of ILC Principles of Allocation to prevent a situation in which no party is responsible for environmental harm to the common heritage. Even if the sponsoring state had exercised all diligence that was due by taking all necessary and appropriate measure to secure compliance by the contractor, liability would not end with insolvency or a bar to operator liability. The

⁵⁸ Importantly, though, a state’s responsibility remains fully engaged with regard to the actions of its agents, organs, or individuals that it directs or controls. See *Responsibility of States for Internationally Wrongful Acts*, GA Res 56/83, UNGAOR, 56th Sess, Supp No 10, UN Doc A/RES/56/83 (2002) ch II.

⁵⁹ *Loizidou v Turkey* (1995), 310 ECHR (Ser A) at para 71. See also *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law (Mexico)* (1999), Advisory Opinion OC-16/99, Inter-Am Ct HR (Ser A) No 16, at para 115. See also concurring opinion of Antônio A Cançado Trindade in *ibid*, at para 10.

sponsoring state would have the ultimate responsibility to ensure that financial resources were made available to remediate the environmental harm to the area.

This could be accomplished, it was asserted, by reading residual liability into the requirements of “all necessary and appropriate measures,” “necessary measures,” and the adoption of “laws . . . regulations and . . . administrative measures which are . . . reasonably appropriate for securing compliance” found in Articles 139 (2), 153(4), and Annex III, Article 4(4). This would mean that a sponsoring state’s legal system, in order to meet the requirements of due diligence, would have to include a provision ensuring additional state financial resources were made available when an operator could not be held liable. Both the IUCN and Greenpeace also urged the establishment of an industry fund to help rectify all damage from activities in the Area.

In the end the Chamber was unwilling to read this much into applicable international law. The Chamber stated that it was aware that “under the current *UNCLOS* provisions gaps in liability . . . might occur” and “of the efforts made by the International Law Commission” to close the gaps by “address[ing] the issue of damages resulting from acts not prohibited under international law.”⁶⁰ However, according to the Chamber, “such efforts have not yet resulted in provisions entailing State liability for lawful acts.”⁶¹ Until the law firms in this direction, the Chamber, instead, pointed out that “the [Seabed] Authority may wish to consider the establishment of a trust fund to compensate for the damage not covered” relying on Article 235(3) of *UNCLOS*.⁶²

IV. CONCLUSION

As the international community moves closer to exploiting the resources of the deep seabed,⁶³ it is imperative that an adequate and effective liability regime is in place to protect and preserve a mostly unknown environment. The environment of the Area has importance for activities other than mining. For instance, deep in the hydrothermal vent ecosystems of the Area may lay life forms that still await discovery and development of options for energy, food, and medi-

⁶⁰ Advisory Opinion, *supra* note 11 at para 209.

⁶¹ *Ibid.*

⁶² *Ibid* at para 205.

⁶³ In 2011, for instance, the Council of the International Seabed Authority approved four applications relating to plans of work for exploration of polymetallic nodules. See *Decision of the Council relating to a request for approval of a plan of work for exploration for polymetallic nodules submitted by Nauru Ocean Resources Inc.*, ISBA Doc ISBA/17/C/14 (19 July 2011), online: International Seabed Authority <<http://www.isa.org.jm/files/documents/EN/17Sess/Council/ISBA-17C-14.pdf>>; *Decision of the Council relating to a request for approval of a plan of work for exploration for polymetallic nodules submitted by Tonga Offshore Mining Limited*, ISBA Doc ISBA/17/C/15 (19 July 2011), online: International Seabed Authority <<http://www.isa.org.jm/files/documents/EN/17Sess/Council/ISBA-17C-15.pdf>>; *Decision of the Council relating to an application for approval of a plan of work for exploration for polymetallic sulphides by China Ocean Mineral Resources Research and Development Association*, ISBA Doc ISBA/17/C/16 (19 July 2011), online: International Seabed Authority <<http://www.isa.org.jm/files/documents/EN/17Sess/Council/ISBA-17C-16.pdf>>; *Decision of the Council relating to an application for approval of a plan of work for exploration for polymetallic sulphides submitted by the Government of the Russian Federation*, ISBA Doc ISBA/17/C/17 (19 July 2011), online: International Seabed Authority <<http://www.isa.org.jm/files/documents/EN/17Sess/Council/ISBA-17C-17.pdf>>.

cine for present and future generations.⁶⁴ Moreover, we are largely ignorant of the full implications of how mining will harm the environment. For example, it is still unknown how mining will impact benthic life and its food supply away from mining areas.

A significant defect currently exists in the liability framework concerning harm caused by a sponsored entity in the Area. It has the potential to render the liability regime inadequate and ineffective. The problem is the near certainty that significant, recurring environmental harm caused by sponsored entities will occur for which the text of the Convention seems to impose no liability. The Convention itself provides as solution for the possibility of gaps in liability by allowing international law outside the Convention to be brought to bear in these situations. One must hope that the law of residual liability catches up before a disaster occurs. In the meantime, the International Seabed Authority should be moving to establish the fund highlighted by the Chamber under Article 235(3) of *UNCLOS*.

⁶⁴ Donald K Anton, "Law for the Sea's Biological Diversity" (1997) 36 Colum J Transnat'l L 341 at 346-349.