In 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 International Seabed Area

(Request for Advisory Opinion Submitted to the Seabed Disputes Chamber)

PETITION OF

STICHTING GREENPEACE COUNCIL (GREENPEACE INTERNATIONAL)

AND

THE WORLD WIDE FUND FOR NATURE

TO BE GRANTED *AMICUS CURIAE* STATUS

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I. Introduction

By this Petition, Greenpeace International (formally Stichting Greenpeace Council, hereinafter GPI) and the World Wildlife Fund International Centre for Marine Conservation (hereinafter WWF) seek the permission of the Seabed Disputes Chamber to participate jointly in the present advisory proceedings as *amicus curiae*. The three questions before the Honorable Chamber raise matters of significant concern with regard to the prevention of harm to the marine environment arising from activities in the Area, which the petitioners are well placed to present. More specifically, GPI and WWF seek a decision from the Chamber to:

- Admit and treat the Memorial submitted concurrently with this Petition as part of the pleadings in this case; and
- Permit GPI and WWF to make a joint oral submission in support of the arguments presented in the Memorial during the hearings provisionally scheduled for 14-16 September 2010.

In the following, GPI and WWF will explain their interest in participating in these proceedings, and will present their arguments why such participation will assist the Chamber in responding to the questions before it without jeopardizing the urgency with which its opinion must be given according to Article 191 of the UN Convention on the Law of the Sea. Conscious, however, that this Petition raises a question of procedure that has not been previously addressed, we will first explain the basis on which the Chamber has the authority to accept *amicus curiae* participation in advisory proceedings, and discuss the desirability of exercising this authority.

II. Authority of the Seabed Disputes Chamber to Admit *Amici Curiae*

Access to the Seabed Disputes Chamber is conditioned by Article 37 of the Statute of the International Tribunal for the Law of the Sea (ITLOS), read together with Part XI, Section 5 of United Nations Convention on the Law of the Sea (LOSC). These provisions make it clear that with the exception of (prospective) contractors, natural persons and non-governmental organizations are unable to institute proceedings before the Chamber, unless a special agreement to that effect is reached between all parties to the dispute. Moreover, Articles 31 and 32 of the Statute suggest that the right to intervene in ongoing disputes before the Chamber is limited to States Parties to LOSC, or parties to another international agreement whose interpretation or application is in question.

Although these provisions greatly constrain the possibilities for individuals or NGOs, like GPI and WWF, to become *parties* to a case before the Chamber, they do not touch on the issue of *participation* in proceedings by interested non-parties.

Article 133 of the Rules of the Tribunal is relevant to the question of third-party participation in advisory proceedings before the Chamber. Pursuant to paragraphs 1 and 2, States Parties, as well as intergovernmental organizations which are likely to be able to furnish pertinent information, must be notified of requests for an advisory opinion. Paragraph 3 adds that the Chamber, or its President if the Chamber is not sitting, must invite these States Parties and intergovernmental organisations to present written statements within a prescribed time-limit. Article 133 reads as follows:

Article 133

> 1. The Registrar shall forthwith give notice of the request for an advisory opinion to all States Parties.

> 2. The Chamber, or its President if the Chamber is not sitting, shall identify the intergovernmental organizations which are likely to be able to furnish information on the question. The Registrar shall give notice of the request to such organizations.
>
> 3. States Parties and the organizations referred to in paragraph 2 shall be invited to present written statements on the question within a time-limit fixed by the Chamber or its President if the Chamber is not sitting. Such statements shall be communicated to States Parties and organizations which have made written statements. The Chamber, or its President if the Chamber is not sitting, may fix a further time-limit within which such States Parties and organizations may present written statements on the statements made.
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> 4. The Chamber, or its President if the Chamber is not sitting, shall decide whether oral proceedings shall be held and, if so, fix the date for the opening of such proceedings. States Parties and the organizations referred to in paragraph 2 shall be invited to make oral statements at the proceedings.

Article 133 reflects an undertaking to notify the most obvious "stakeholders" and invite them to submit information or views before the Chamber issues an advisory opinion, but by its plain meaning, Article 133 is not an exhaustive list of the entities whose views the Chamber may take into consideration in formulating its opinion. There is nothing in the wording of Article 133, or indeed any other provision of the Convention, Statute or Rules, which would bar the Chamber from accepting, on a discretionary basis, the submissions of additional third parties – such as States not yet party to LOSC, intergovernmental organizations not invited by the Chamber, regional governments, NGOs, operators in the Area, or other interested persons – if the Chamber deems their submissions relevant and helpful in fulfilling its advisory functions.

The Statute grants the Tribunal, including the Chamber, a large degree of freedom to conduct contentious proceedings as it deems appropriate. Article 27 states that:

> The Tribunal shall make orders for the conduct of the case, decide the form and time in which each party must conclude its arguments, and make all arrangements connected with the taking of evidence.

Article 40(2) leaves the conduct of advisory proceedings before the Chamber even more open. The Chamber must be "guided" by the rules of procedure applicable to contentious proceedings before the Tribunal, insofar as it "recognizes them to be applicable":

> In the exercise of its functions relating to advisory opinions, the Chamber shall be guided by the provisions of this Annex relating to procedure before the Tribunal to the extent to which it recognizes them to be applicable.

This provision is restated in Article 130 of the Rules of the Tribunal.

Accordingly, in the absence of a clear rule for or against the admission of third-party submissions, the Chamber has the power to make an appropriate arrangement. If the Chamber nevertheless desired to identify an express basis to accept third-party submissions, it could be guided by Article 77(2) of the Rules, which provides that:

> The Tribunal may, if necessary, arrange for the attendance of a witness or expert to give evidence in the proceedings.

Comparably, Article 82(1) of the Rules allows the Tribunal to "arrange for an inquiry or an expert opinion".

In summary, although there is no express legal basis for *amicus curiae* participation in ITLOS proceedings in general, and Chamber advisory proceedings in particular, neither is there a bar to it. "[O]ne should hesitate … to conclude from the lack of practice and the silence of the Statute and Rules that NGOs would be prevented from any form of participation in legal proceedings." Philippe Gautier, *NGOs and Law of the Sea Disputes*, *in* CIVIL SOCIETY, INTERNATIONAL COURTS AND COMPLIANCE BODIES 233, 242 (Tullio Treves, Marco Frigessi di Rattalma, Attila Tanzi, Alessandro Fodella, Cesare Pitea &

Chiara Ragni, eds., 2005). It is up to the Chamber to decide on the most appropriate course of action.

III. Desirability of Accepting *Amici Curiae* in General

A. Proceedings before international courts raise matters of public interest that may not be fully addressed in pleadings of States and intergovernmental organizations

Proceedings before international courts increasingly involve issues of broad public concern, such as protection of human rights or the environment, and the impact of decisions and pronouncements transcends the interests of the parties to the dispute. A criminal case before an international tribunal may affect the peace and stability of a region; a trade dispute may impact the ability of States worldwide to enact environmental or labor legislation; a human rights ruling may reach deep into the lives of citizens across a continent, setting standards on such matters as religious dress, euthanasia or adoption.

Despite the overall high standards of representation before international dispute settlement mechanisms, litigants may omit discussion of important aspects from their pleadings. The reasons for this may include strategic choice, diplomatic sensitivity, absence of a direct concern about the wider implications of a case, or a simple lack of resources or expertise. These problems are perhaps particularly likely to arise in non-adversarial proceedings, where the court or tribunal is not necessarily presented with two or more opposing parties who have a direct stake in properly illuminating the issue at hand from different sides.

In most public international organizations, it has long been the practice to supplement the views of States with contributions from selected observer organizations, including NGOs, who are thought to bring a valuable added perspective to intergovernmental

decision-making. A similar trend is evident among the major international tribunals and dispute-settlement mechanisms, which increasingly permit *amicus curiae* participation by NGOs and others on a discretionary basis.

B. Most major international tribunals and dispute settlement-mechanisms permit amicus curiae *participation*

Both the European Court of Human Rights (ECHR) and the Inter-American Court of Human Rights (IACHR) have an extensive *amicus* practice. Since 1998, the ECHR has been expressly empowered under Article 36(2) of the European Convention on Human Rights to "invite any High Contracting Party which is not a party to the proceedings or any person concerned who is not the applicant to submit written comments or take part in hearings." In practice, the Court had begun to accept substantial numbers of *amicus* briefs even before 1998. *See* Jona Razzaque, *Changing Role of Friends of the Court in the International Courts and Tribunals*, 1 NON-ST. ACTORS & INT'L L. 169, 182 (2001). Rule 44(2) of the ECHR Rules of Court sets time limits and other rules for *amici*. The IACHR lacks an express basis for *amicus* participation, but has accepted numerous *amicus* briefs in both contentious and advisory proceedings. *See* Dinah Shelton, *The Participation of Non-Governmental Organizations in International Judicial Proceedings*, 88 AM. J. INT'L L. 611, 638 (1994).

Turning to the international criminal courts and tribunals, the International Criminal Court's Rules of Procedure and Evidence provide for *amicus* participation at trial and on appeal. Rule 103 allows the Chamber to invite a State, organization or person to submit written or oral observations. Rule 149 states that the same applies, *mutatis mutandis*, to the Appeals Chamber. Rule 103 is nearly identical in wording to Rule 74 of the Rules of

Procedure and Evidence of the International Criminal Tribunal for the Former Yugoslavia (ICTY), which, in turn, is identical to Rule 74 of the Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda (ICTR). Both the ICTY and ICTR have made extensive use of *amici*, accepting submissions by States, NGOs and legal experts. *See* Lance Bartholomeusz, *The* Amicus Curiae *before International Courts and Tribunals*, 5 NON-ST. ACTORS & INT'L L. 209, 243-53 (2005). The Special Court for Sierra Leone and the Extraordinary Chambers in the Courts of Cambodia may also receive submissions from *amici. See* their Rules 74 and 33, respectively.

At the World Trade Organization (WTO), *amicus* briefs have been accepted in both Panel and Appellate Body proceedings. *See* Bartholomeusz, at 254-64. The issue first arose in the *Shrimp/Turtle Case*, after two environmental NGOs filed unsolicited submissions. Initially, the Panel rejected the submissions on the grounds that Article 13 of the Dispute Settlement Understanding (DSU) provided Panels with the explicit authority only to "*seek* information and technical advice from any individual or body which it deems appropriate" (emphasis added) – not to accept unsolicited submissions. The Appellate Body, however, considered this reading "unnecessarily formal and technical in nature." *United States—Import Prohibition of Certain Shrimp and Shrimp Products,* Report of the Appellate Body (12 October 1998) WT/DS58/AB/R, para. 107. It held that Articles 12 and 13 of the DSU, read together, provide a Panel with the "discretionary authority either to accept and consider or to reject information and advice submitted to it, *whether requested by a panel or not.*" *Id.*

In the *Carbon Steel Case* (*United States — Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United*

Kingdom, Report of the Appellate Body (7 June 2000), WT/DS138/AB/R), the Appellate Body (AB) – to which Articles 12 and 13 of the DSU do not apply – had to consider its own views with respect to *amicus curiae* briefs after it received two submissions from industry groups. The AB found itself in a position which can be compared to that of the Chamber in the present proceedings:

> 39. In considering this matter, we first note that nothing in the DSU or the *Working Procedures* specifically provides that the Appellate Body may accept and consider submissions or briefs from sources other than the participants and third participants in an appeal. On the other hand, neither the DSU nor the *Working Procedures* explicitly prohibit acceptance or consideration of such briefs. []

The AB noted its "broad authority to adopt procedural rules which do not conflict with any rules and procedures in the DSU or the covered agreements," *id.*, and concluded that "we have the legal authority under the DSU to accept and consider *amicus curiae* briefs in an appeal in which we find it pertinent and useful to do so." *Id.*, para. 42. Thus, although the two briefs in question were rejected, the Appellate Body determined that it did have the authority to accept *amicus* briefs.

The Appellate Body's decision set an example which has subsequently been followed by other trade-related dispute settlement bodies, including NAFTA Chapter 11 tribunals operating under the UNCITRAL Arbitration Rules (*e.g.*, *Methanex Corp. v. United States, Decision on Authority to Accept Amicus Submissions* (15 January 2001)) and the International Centre for Settlement of Investment Disputes (*see Aguas Argentinas, S.A., Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentina*, Order of 19 May 2005, Case No. ARB/03/19).

The Permanent Court of International Justice (PCIJ) broadly welcomed participation by non-governmental entities, such as international employers' and workers'

organizations, in advisory proceedings. Shelton, at 622-23. Although Article 66 of the Statute of the International Court of Justice (ICJ) closely follows Article 66 of the 1929 Revised Statute of the PCIJ, the ICJ's practice in the field of *amicus curiae* participation in advisory proceedings is more limited and ambiguous. In 1950, the Court accepted a request from the International League for the Rights of Man to file written observations in the *International Status of South-West Africa Case*, Advisory Opinion of 11 July 1950, ICJ Reports 1950, p. 130. The League's submission was ultimately not taken into account by the Court as it was filed late. *Id*.. Since that time, the ICJ has refused a number of requests to participate as *amicus* in advisory proceedings, without however pronouncing itself on the Court's authority to appoint *amici*. Bartholomeusz, at 221-24.

In 2004, the ICJ adopted Practice Direction XII, dealing with NGO submissions in advisory proceedings:

> 1. Where an international non-governmental organization submits a written statement and/or document in an advisory opinion case on its own initiative, such statement and/or document is not to be considered as part of the case file.
>
> 2. Such statements and/or documents shall be treated as publications readily available and may accordingly be referred to by States and intergovernmental organizations presenting written and oral statements in the case in the same manner as publications in the public domain.
>
> 3. Written statements and/or documents submitted by international non-governmental organizations will be placed in a designated location in the Peace Palace. All States as well as intergovernmental organizations presenting written or oral statements under Article 66 of the Statute will be informed as to the location where statements and/or documents submitted by international non-governmental organizations may be consulted.

The statement that NGO submissions are "not to be considered as part of the case file" may appear as an affirmative position, but more probably is intended to make clear to interested organizations that unsolicited submissions will not, *ipso facto*, become part

of the pleadings in a case. The purpose of Practice Directions is not to amend the Rules of Court (*see* ICJ Press Release, 30 July 2004), but to streamline procedures and working methods.

In conclusion, with regard to *amicus curiae* participation in ICJ advisory proceedings, "it would appear that, its current position notwithstanding, the Court has not completely closed the window it opened in 1950." Eduardo Valencia-Ospina, *Non-Governmental Organizations and the International Court of Justice*, in CIVIL SOCIETY, INTERNATIONAL COURTS AND COMPLIANCE BODIES 227, 232 (Tullio Treves, Marco Frigessi di Rattalma, Attila Tanzi, Alessandro Fodella, Cesare Pitea & Chiara Ragni, eds., 2005).

C. Amici curiae *can provide the Chamber with valuable added perspectives*

Apart from the general considerations that have convinced most international courts and tribunals to accept *amicus* participation, a number of particular considerations flow from the nature of the deep seabed legal regime.

Article 140(1) of the Law of the Sea Convention makes it clear that the deep seabed regime is established "for the benefit of mankind as a whole," rather than for the benefit of States. Although some might argue that States (or international organizations established by States) are the sole proper spokesperson for "mankind," this view is challenged by the express reference, in Article 140(1), to "peoples who have not attained full independence or other self-governing status," as well as by the decision to give standing to (prospective) contractors before the Seabed Disputes Chamber without the need for diplomatic protection by the State of nationality, under Article 187. It would seem contrary to the object and purpose of Part XI to read Article 133 of the Rules in

such a manner that only current States Parties and selected intergovernmental organizations are entitled to inform the Chamber on behalf of "mankind as a whole."

From a more practical point of view, exploration and exploitation of the deep seabed raise complex environmental, technological and legal questions, and the expertise most useful to the Chamber will frequently be found in the hands of private parties, not governments. The Chamber's task would be made easier if it could accept such expertise directly from the private parties concerned, in the event that it does not find its way into the pleadings of States Parties or intergovernmental organizations.

Finally, the participation of independent NGOs and experts in Chamber advisory proceedings could add to their legitimacy by helping to prevent a perception that undue weight is given to economic interests, to the detriment of the environment. With States standing to benefit financially from the exploitation of deep seabed resources, the marine environment lacks an impartial advocate. NGOs, marine biologists and other experts could ensure environmental concerns are properly represented.

Then UN Secretary-General Kofi Annan observed that restricting global governance to States is a thing of the past:

> The United Nations once dealt only with Governments. By now we know that peace and prosperity cannot be achieved without partnerships involving Governments, international organizations, the business community and civil society. In today's world, we depend on each other.

Kofi Annan, UN Secretary General, Davos, January 1999, at http://www.un.org/News/Press/docs/1998/19980130.SGSM6448.html.

In 2003, Secretary-General Annan established an Eminent Persons Group on UN-Civil Society Relations. That Group reported in June 2004 that:

> [C]ivil society and other constituencies are important to the United Nations because their experience and social connections can help the United Nations do a better job, improve its legitimacy, identify priorities and connect it with public opinion. Civil society can also raise new issues, focus attention on the moral and ethical dimensions of decisions in the public sphere, expand resources and skills, challenge basic assumptions and priorities and protest unfair decisions. So enhanced engagement, carefully planned, will make the United Nations more effective in its actions and in its contributions to global governance.

We the Peoples: Civil Society, the United Nations and Global Governance: Report of the Panel of Eminent Persons on United Nations–Civil Society Relations, UN Doc. A 58/17 (11 June 2004), para. 27.

Principle 10 of the 1992 *Rio Declaration on Environment and Development* stresses the need to handle environmental issues "with participation of all concerned citizens," including "effective access to judicial and administrative proceedings, including redress and remedy."

Implementing access to justice in environmental matters is one of the key objectives of the 1998 Aarhus Convention (Convention on Access to Information, Public Participation in Decision Making and Access to Justice in Environmental Matters, June 25, 1998, 2161 U.N.T.S. 44), adopted in the framework of the United Nations Economic Commission for Europe. This Convention, which has attracted widespread ratification in Europe and Central Asia, requires each State Party to provide access to justice in environmental matters to members of the public concerned (Article 9), including "non-governmental organizations promoting environmental protection" (Article 2(5)). It also requires States Parties to "promote the application of the principles of [the] Convention in international environmental decision-making processes and within the framework of international organizations in matters relating to the environment." In Decision II/4 (UN

Doc. ECE/MP.PP/2005/2/Add.5, 20 June 2005), the States Parties invited international forums, including any multilateral international environmental decision-making process, to "take into account the principles of the Convention" and to "consider how their own processes might further the application" of these principles, as reflected in the Almaty Guidelines on Promoting the Application of the Principles of the Aarhus Convention in International Forums. Annex to Decision II/4, adopted at the second meeting of the Parties held in Almaty, Kazakhstan, on 25-27 May 2005.

D. Third-party participation will not 'open floodgates' and jeopardize the urgency of proceedings

The most frequently cited practical argument against *amicus* participation in international proceedings is that NGOs and others may overwhelm the judges and parties with large numbers of submissions. The available evidence suggests that this problem is largely illusory.

As discussed above, the ICJ appears to have received only a modest number of *amicus* briefs in over 50 years of operation, while as of 2005, ITLOS had not received any. *See* Gautier, at 240. More relevant, however, is the experience of the ECHR, whose Statute has explicitly welcomed *amicus* briefs since 1998, in spite of its notorious caseload.

Between 1 November 1998 and 31 December 2004, the ECHR delivered some 4,000 judgments in response to over 4,300 applications. Bartolomeusz, at 235. Between 1 November 1998 and 31 March 2005, the Court delivered judgments in 36 cases in which a third party had sought to participate as an *amicus curiae*; only one of these applications was rejected. *Id.* These figures show that *amicus* briefs were filed in fewer than 1% of

cases. They reflect the reality that NGOs and other interested third parties are faced with capacity constraints of their own, and have little reason to invest in filing numerous or extensive *amicus* briefs, except in cases in which they have information and perspectives to offer that are likely to be of use to the judges.

IV. Interest of GPI and WWF

Greenpeace and WWF are two of the foremost environmental organizations globally, and both have been campaigning for protection of the marine environment for decades. The present advisory proceeding raises questions with regard to the international obligations of States that sponsor activities in the Area – including deep seabed mining – and their responsibility for, *inter alia*, damage to the marine environment caused by such activities. The applicable legal regime contains a number of obscure terms and provisions, and the manner in which they are interpreted by the Chamber may have a significant bearing on the preservation of that environment.

As set out in the Memorial filed concurrently with this Petition, the ecosystems of the deep seabed are poorly studied and understood, and little is known about the potential impacts of deep seabed mining on these ecosystems, as well as on the ecosystems of the superjacent waters. GPI and WWF wish to participate as *amicus curiae* in these proceedings to highlight that LOSC, as well as customary international environmental law, impose a range of relevant obligations on sponsoring States. The combined purpose of these obligations is to ensure that the risks of activities in the Area are properly internalized, so as to discourage ill-advised projects and ensure that the risk of these activities is not simply transferred to third parties and the environment.

A. Greenpeace International

Greenpeace is a global environmental organization, consisting of 28 independent national and regional offices on six continents, coordinated by Greenpeace International (Stichting Greenpeace Council) in Amsterdam, the Netherlands.

Greenpeace has been campaigning since the 1970s for protection of the marine environment. Its campaigns have helped pave the way for numerous treaties and resolutions in the field of international law of the sea, including the moratorium on commercial whaling adopted by the International Whaling Commission in 1982; UN General Assembly Resolution 44/225 of 22 December 1989, calling for a moratorium on all large-scale pelagic driftnet fishing on the high seas; the 1992 Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR Convention); the 1993 and 1996 amendments to the London Dumping Convention, banning the dumping into the sea of radioactive or industrial wastes, banning the at-sea incineration of industrial wastes, and restricting the conditions for the introduction into the marine environment of other wastes or matter; the 1998 Protocol on Environmental Protection to the Antarctic Treaty, banning *inter alia* the disposal of waste into seas surrounding the Antarctic; and the 2009 Hong Kong International Convention for the Safe and Environmentally Sound Recycling of Ships.

Greenpeace International enjoys observer or similar status with numerous intergovernmental organizations in the field of law of the sea, including the International Maritime Organization and the International Seabed Authority.

B. World Wide Fund for Nature

WWF is a foundation registered under Swiss law. As one of the world's largest conservation organizations, WWF acts globally and locally through a network of over 90 offices in over 40 countries around the world. On-the-ground conservation projects managed by these offices are active in more than 100 countries. The central secretariat for the network, called WWF International, is located in Gland, Switzerland.

WWF's mission is to stop the degradation of the planet's natural environment and to build a future in which humans live in harmony with nature, by:

- conserving the world's biological diversity
- ensuring that the use of renewable natural resources is sustainable
- promoting the reduction of pollution and wasteful consumption.

WWF enjoys observer or similar status and is actively working in a large number of regional and global organizations entrusted with the conservation and sustainable use of the oceans and their resources, including the International Maritime Organization, the International Whaling Commission, the United Nations General Assembly, the United Nations Ad Hoc Open-ended Informal Working Group to study issues relating to the conservation and sustainable use of marine biological diversity beyond areas of national jurisdiction, and the Convention on Biological Diversity.

WWF was granted observer status with the International Seabed Authority in 2009 and attended the Authority's Annual Sessions in 2009 and 2010.

V. Conclusion

For the foregoing reasons, GPI and WWF respectfully request this Chamber to grant the two requests stated in the Introduction, to:

- Admit and treat the Memorial submitted concurrently with this Petition as part of the pleadings in this case; and
- Permit GPI and WWF to make a joint oral submission in support of the arguments presented in the Memorial during the hearings provisionally scheduled for 14-16 September 2010.

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