

# Legal Opinion

## *On the application of Article 137 UNCLOS in the Dutch legal order and the obligations of the Netherlands under Articles 137 and 139(1) UNCLOS in respect of participation of juridical persons in deep-seabed mining outside an ISA mandate*

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**For:** Stichting Greenpeace Nederland

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### 1. Introduction and scope

By instructions dated 1 May 2026, Stichting Greenpeace Nederland has asked me to advise on three questions concerning the international obligations of the Netherlands, and the position of Dutch companies, under the United Nations Convention on the Law of the Sea (UNCLOS) in relation to mining in the deep-seabed area beyond the limits of national jurisdiction ('the Area') conducted outside the regime of the International Seabed Authority (ISA). These questions are:

- (1) How is Article 137 of UNCLOS integrated into the Dutch legal order, and can private companies be considered directly bound by it?
- (2) What legal consequences arise under UNCLOS for the Kingdom of the Netherlands ('the Netherlands') where Dutch companies are actively participating as a key sub-contractor in deep-seabed mining by another company in international waters ('the Area') in the absence of an ISA mandate?
- (3) What legal means does the Netherlands have at its disposal to take action against such companies?

This Opinion addresses these questions as a matter of public international law, in particular the law of the sea and the law of treaties. Some of the matters raised by the questions — most notably the means of enforcement considered under Question 3 — also engage aspects of Dutch administrative and civil law. I address those aspects only so far as is necessary to answer the questions from an international-law perspective, and on the basis of preliminary research; I do not give a definitive opinion on them. A full assessment of the domestic-law aspects and the viability and framing of any domestic proceedings may require separate expert advice on Dutch administrative and/or civil law.

Within public international law, the Opinion addresses the obligations arising under Articles 137 and 139(1) of UNCLOS. It does not address other bases on which the Netherlands' international obligations in relation to deep-seabed mining might be assessed — including the customary obligation to prevent significant harm to the environment of areas beyond national jurisdiction and the related provisions of UNCLOS (notably Article 194) — which fall outside the scope of this Opinion.

## **2. Summary of conclusions**

This summary states the principal conclusions of the Opinion. It should be read together with the reasoning and the qualifications set out in the body, and is subject to the scope noted in the Introduction and, as regards the application to Allseas, to the facts provided by Greenpeace Nederland.

On Question 1 (the status of Article 137 UNCLOS in the Dutch legal order and its application to private companies):

UNCLOS forms part of the Dutch legal order without any need for transposing legislation. Article 137(1) (second sentence) and Article 137(3) are directly effective within the meaning of Article 93 of the Constitution, being unconditional and sufficiently precise, and are by their terms addressed not only to States but to natural and juridical persons. They are, therefore, in principle capable of binding juridical persons such as Allseas.

On Question 2 (the consequences for the Netherlands of Dutch corporate participation in deep-seabed mining outside an ISA mandate):

The Netherlands is subject to obligations under both Article 139(1) and Article 137. Article 139(1) requires it to take reasonably appropriate measures to ensure that its nationals and controlled entities do not engage in exploitation activities in the Area outside the regime of Part XI. Article 137 reaches more widely: it obliges the Netherlands not to recognise or give legal effect to any claim, appropriation or dealing in minerals predicated on unilateral activity in the Area outside Part XI, and it requires the Netherlands to take reasonably appropriate measures to ensure that its nationals and controlled entities do not themselves appropriate the Area or its resources or deal in recovered minerals.

On Question 3 (the legal means available to the Netherlands):

The available means fall into three groups: non-judicial engagement (which the Government has already begun), public law enforcement, and civil law proceedings. The public-law enforcement avenues appear presently unavailable in the absence of implementing legislation; that absence may constitute a failure to discharge the positive obligation identified under Question 2. The principal available route is therefore civil law: an action in tort by the State against Allseas under Article 6:162 Civil Code (Burgerlijk Wetboek, 'BW'); a parallel action by a representative organisation against Allseas; and an action against the State itself for failure to take adequate measures. Whether and how to pursue any of these is a matter of Dutch civil law and procedure, on which separate advice from Dutch civil-law counsel should be obtained.

## **3. Factual background**

This Opinion accepts the following facts, as provided to me by Greenpeace Nederland. In March 2025, TMC announced that its US subsidiary, The Metals Company USA LLC, had initiated a process with NOAA to apply for exploration licences and commercial recovery permits under the US Deep Seabed Hard Mineral Resources Act 1980 (DSHMRA) and NOAA's implementing regulations. On 24 April 2025, the United States issued Executive Order 14285, 'Unleashing America's Offshore Critical Minerals and Resources,' directing the expediting of such permitting, and on 29 April 2025, TMC USA

submitted applications for a commercial recovery permit and two exploration licences under DSHMRA.<sup>1</sup> The United States is not a Party to UNCLOS.

Allseas Group S.A. is an offshore engineering and construction company with its registered office in Switzerland. It employs over 4,000 personnel and operates a fleet of specialised heavy-lift, pipelay and support vessels, and is the beneficial owner of the *Hidden Gem*, a Malta-flagged vessel adapted for the recovery of polymetallic nodules from the deep seabed. In 2019, Allseas and TMC entered into a Strategic Alliance Agreement, and in May 2026, they signed a Contract for Development Work and Commercial Production for the development, commissioning and operation of the first commercial nodule collection system in preparation for the commencement of nodule recovery operations in the Clarion Clipperton Zone of the Pacific Ocean.<sup>2</sup>

Allseas has several Dutch subsidiaries, including: Allseas Engineering B.V., with offices in Delft, Eindhoven and Enschede, which provides project management and engineering services to the group, and which is the operator of the *Hidden Gem*; Bluemarine Offshore Yard Service B.V., based in the Port of Rotterdam, which functions as the group's logistics hub for project materials, vessel consumables and equipment storage and maintenance; Allseas Fabrication B.V., with operational sites at Delft, Heijningen and Enschede, providing fabrication, testing and coating services; Machinefabriek Schaap B.V., based at Hardinxveld-Giessendam, providing repair and fabrication of complex steel components; and Allseas Shipperservices B.V., based at Wierden, providing marine transport services.

The Kingdom of the Netherlands ratified UNCLOS in 1996 and is a party to 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. It has not adopted specific implementing legislation in respect of the obligations under Articles 137 and 139(1) of UNCLOS.

#### **4. Question 1 — Article 137 UNCLOS in the Dutch legal order, and its application to juridical persons**

Question 1 asks whether Article 137 UNCLOS has legal effect within the Dutch legal order and, if so, whether it can be applied to private companies such as Allseas. I address this question in six steps. Section (a) sets out the status of UNCLOS within the Dutch legal order and explains why the absence of specific implementing legislation does not affect the internal legal status of its provisions. Section (b) sets out the test, established in the case law of the Supreme Court, for determining whether a treaty provision has direct effect within the meaning of Article 93 of the Constitution. Section (c) addresses a distinct, further question — whether a provision that has direct effect is also capable of binding juridical persons. Section (d) applies this framework to Article 137, concluding that Article 137(1) (second sentence) and (3) are directly effective and, by their terms, capable of binding natural and juridical persons. Section (e) considers what this means for Allseas. Section (f) draws the conclusions together.

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<sup>1</sup> World First: TMC USA Submits Application for Commercial Recovery of Deep-Sea Minerals in the High Seas Under U.S. Seabed Mining Code, at [World First: TMC USA Submits Application for Commercial Recovery of Deep-Sea Minerals in the High Seas Under U.S. Seabed Mining Code - The Metals Company](#).

<sup>2</sup> TMC and Allseas Sign Commercial Agreement for the First Offshore Nodule Recovery Operation, at <https://investors.metals.co/news-releases/news-release-details/tmc-and-allseas-sign-commercial-agreement-first-offshore-nodule/>

### *a. The status of UNCLOS within the Dutch legal order*

The fact that the Netherlands has not enacted specific implementing legislation in respect of Articles 137 and 139(1) UNCLOS has no bearing on the internal legal status of those provisions. Pursuant to an unwritten constitutional rule of Dutch law, provisions of treaties that are in force for the Netherlands form part of the national legal order automatically and without an act of transformation.<sup>3</sup>

The legal status of UNCLOS in the Dutch legal order cannot serve as a substitute for implementing legislation. For instance, specific legislation will be needed to determine under what conditions the Netherlands will act as a sponsoring state and how breaches of ISA regulations or contracts will be enforced.

However, the legal status of UNCLOS in the Dutch legal order does mean that under certain conditions, provisions of UNCLOS can have direct legal effect for Dutch natural or juridical persons, and that, within the scope of their powers as determined by Dutch law, the executive branch as well as the courts are obliged to give effect to the provisions of UNCLOS.<sup>4</sup>

Whether Article 137 has legal effect for juridical persons is governed by Articles 93 and 94 of the Constitution (*Grondwet*). Article 93 of the Constitution provides that “[p]rovisions of treaties and of decisions of international organisations, which according to their contents can bind everyone, have binding force after they have been published”. Article 94 of the Constitution adds the supremacy consequence: statutory rules in force within the Kingdom shall not be applied if such application is in conflict with treaty provisions that ‘can bind everyone’. Since there is no indication of a conflict between Article 137 of UNCLOS and Dutch statutory law, this Opinion is limited to Article 93.

Article 93 of the Constitution provides that treaty provisions can be binding on natural and juridical persons if they ‘can bind everyone’. Provisions that satisfy this criterion have, in Dutch, ‘rechtstreekse werking’. This term can be translated as ‘self-executing’ or ‘directly effective’; In this Opinion, I will refer to such provisions as provisions that have ‘direct effect’.

### *b. The test for direct effect*

The leading test for assessing whether a treaty provision has direct effect is authoritatively laid down in the judgment of the Supreme Court (Hoge Raad) concerning the direct effect of the WHO Framework Convention on Tobacco Control (*Rookverbod case*).<sup>5</sup>

On the basis of this case and subsequent case-law, the question of the extent to which a treaty provision has direct effect within the meaning of Article 93 of the Constitution must be answered through an interpretation of that provision. That interpretation must take place by reference to the standards of Articles 31–33 of the Vienna Convention on the Law of Treaties of 23 May 1969.<sup>6</sup> If it cannot be determined on the basis of the text or the drafting history that direct effect of the treaty provision was

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<sup>3</sup>HR 3 March 1919, ECLI:NL:HR:1919:126, (*Grenstractaat van Aken*). See further Leonard Besselink, *Internationaal Recht en Nationaal Recht*, in N. Horbach e.a., *Handboek Internationaal Recht*, TMC Asser Instituut Press, 2007, p. 63-64.

<sup>4</sup>Besselink (n 3) at 63-65.

<sup>5</sup>HR 10 October 2014, ECLI:NL:HR:2014:2928 (*Rookverbod*).

<sup>6</sup>*Id.*, par. 3.5.1.

not intended, the content of that provision is decisive. The question then is whether the provision is unconditional and sufficiently precise to be applied as objective law within the national legal order.<sup>7</sup>

If the result to be achieved in the national legal order under a treaty provision is unconditional and sufficiently precisely described, the mere circumstance that the legislative or executive branches have freedom of choice or policy discretion as regards the measures to be taken to achieve that result does not preclude the provision from having direct effect.<sup>8</sup>

### *c. The addressee of the norm: application to private parties*

If a provision satisfies these criteria and, in principle, has direct effect, the subsequent question concerns the addressee of the norm: whom does the provision bind? A provision may be directly effective yet, by its terms, be addressed only to the state, in which case it operates vertically, between the individual and the state. This is, for instance, the case for most provisions of the European Convention on Human Rights. The Convention is addressed to the contracting states, and its substantive guarantees are formulated as protections of the individual against the state rather than as obligations of private parties. For that reason, such provisions do not, by their terms, bind private actors, and their effect in relations between private parties can only be indirect. This was confirmed by the Hof Den Haag in the Milieudefensie/Shell appeal.<sup>9</sup> The court held that Articles 2 and 8 ECHR have no direct effect between private parties or between a private party and an undertaking, but that those rights can nonetheless work through Article 6:162 of the Civil Code: by way of indirect horizontal effect ("indirecte horizontale werking"), human rights may influence the content and scope of civil-law norms, in particular the unwritten social standard of care.<sup>10</sup>

However, where a treaty provision is both directly effective under the Article 93 criterion and, by its terms, addressed to private parties — so that it binds not only states but "anyone," including natural and juridical persons — that addressee-based limitation does not apply. Such a provision can, at a minimum, inform the content of open civil-law norms such as Article 6:162 BW in the manner established in Shell, but it can, in principle, go further and have direct effect in relation to private actors, whether invoked in the relationship between natural or juridical persons, or relied upon by the state in its relationship with a juridical person. Whether a given provision meets both conditions — direct effect and a private-party addressee — is a question of interpretation of that specific provision, to which the analysis turns below.

### *d. Application to Article 137 UNCLOS*

Article 137 UNCLOS provides:

1. No State shall claim or exercise sovereignty or sovereign rights over any part of the Area or its resources, nor shall any State or natural or juridical person appropriate any part thereof. No such claim or exercise of sovereignty or sovereign rights nor such appropriation shall be recognized.

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<sup>7</sup>Id, par. 3.5.2.

<sup>8</sup>Id, par. 3.5.3.

<sup>9</sup>Hof Den Haag 12 November 2024, ECLI:NL:GHDHA:2024:2099 (Milieudefensie c.s./Shell), in particular r.o. 7.18 and 7.24–7.27; annotated by T.R. Bleeker in M&R 2025/12.

<sup>10</sup>Id.

2. All rights in the resources of the Area are vested in mankind as a whole, on whose behalf the Authority shall act. These resources are not subject to alienation. The minerals recovered from the Area, however, may only be alienated in accordance with this Part and the rules, regulations and procedures of the Authority.

3. No State or natural or juridical person shall claim, acquire or exercise rights with respect to the minerals recovered from the Area except in accordance with this Part. Otherwise, no such claim, acquisition or exercise of such rights shall be recognized.

Applying the framework set out above, two questions arise in respect of Article 137: first, whether the provision satisfies the *Rookverbod* criteria for direct effect; and second, whether, by its terms, it is addressed to private parties such as Allseas, so as to be capable of binding them. These are considered in turn below.

As to the first question, based on an interpretation of the text and review of the drafting history,<sup>11</sup> it cannot be determined that the states negotiating UNCLOS did not intend to provide for direct effect of Article 137 – the criterion formulated by the Supreme Court in the *Rookverbod* case. This is a common phenomenon; states generally do not, given divergent constitutional arrangements, express a view on whether or not to grant direct effect, so the absence of an indication is unremarkable and does not weigh against direct effect.<sup>12</sup>

In this situation, the question is whether Article 137 is unconditional and sufficiently precise to be applied as objective law. This question can be answered in the affirmative. Though certain terms included in Article 137 (‘appropriation’, ‘alienation’) leave room for interpretation, the ordinary meaning of the terms of Article 137, read in their context and in the light of the object and purpose of UNCLOS, as required by Article 31 of the Vienna Convention on the Law of Treaties, makes clear that this Article prohibits juridical persons from engaging in activities related to the exploitation of the seabed – whether through appropriation or alienation of the resources of the Area (paragraphs 1 and 2) or claiming, acquiring or exercising of rights with respect to minerals recovered from the Area except in accordance with Part XI (paragraph 3). The context of Article 137 in part XI and the object and purpose of UNCLOS as a whole make clear that rights in the Area and to its resources can be obtained only in accordance with the provisions of the UNCLOS regime, which is to say, only with the authorisation of the ISA established by the 1982 Convention.<sup>13</sup>

The second question is whether Article 137 can be applied against private persons such as Allseas. This too is a matter of treaty interpretation based on Articles 31 and 32 of the Vienna Convention on the Law of Treaties. As a matter of the plain text of Article 137, the provision is explicitly addressed not only to States but also to “natural or juridical persons.” Paragraph 1 (second sentence) expressly extends the prohibition to appropriate any part of the Area or its resources to all natural and juridical persons, other than in accordance with Part XI. Similarly, Paragraph 3 extends the prohibition to claim, acquire or

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<sup>11</sup> Satya N. Nandan & Michael W. Lodge (eds.), under the general editorship of Myron H. Nordquist, *United Nations Convention on the Law of the Sea 1982: A Commentary, Vol. VI* (Martinus Nijhoff, 2002); Alexander Proelss (ed.), *United Nations Convention on the Law of the Sea: A Commentary* (C.H. Beck / Hart / Nomos, 2017).

<sup>12</sup> Memorie van toelichting, *Goedkeuring van het op 10 december 1982 te Montego-Bay tot stand gekomen Verdrag van de Verenigde Naties inzake het recht van de zee, met bijlagen* (Rijkswet), Kamerstukken II 1995/96, 24 433 (R 1549), nr. 3.

<sup>13</sup> Robin Churchill, Vaughan Lowe and Amy Sander, *The Law of the Sea*, 4<sup>th</sup> ed, Manchester UP 2022 p 425.

exercise rights with respect to the minerals recovered from the Area except in accordance with Part XI to all natural and juridical persons. Interpreted in the context of Article 137 as a whole, the sentence in par. 2 ‘may only be alienated in accordance with...’ likewise should be interpreted as meaning that natural and juridical persons may not alienate minerals recovered from the area. This conclusion is supported by scholarly work that makes clear that Article 137 was drafted with the intention of binding corporate actors.<sup>14</sup>

This reading — that the prohibitions in Article 137 are addressed to, and bind, natural and juridical persons and not only States, otherwise than in accordance with Part XI — is supported by the drafting history and by scholarly commentary, which indicates that ‘the Article 137 drafters intended a comprehensive prohibition on State or private claims to Area resources.’<sup>15</sup> When Article 137 is read in its context and in the light of the object and purpose of UNCLOS, it is clear that the parties intended to create a regime for the deep seabed that protects the common heritage of mankind. Rights in the Area and to its resources can be obtained only with the authorisation of the ISA established by the 1982 Convention.<sup>16</sup> Allowing private parties to engage in exploitation outside this regime would defeat the object and purpose.

It might be objected that Article 137(3), by prohibiting claims, acquisition or exercise of rights "except in accordance with this Part," makes its own operation conditional upon an elaborate — and as yet incomplete — regulatory regime, and is therefore neither unconditional nor sufficiently precise to function as objective law. That objection does not succeed. The provision must be assessed, as the Hoge Raad held in *Rookverbod*, by reference to whether it is "capable of functioning as objective law in the context in which it is invoked." A distinction must be drawn between the prohibition itself and the exception to it. The prohibition — that no natural or juridical person may claim, acquire or exercise rights with respect to minerals recovered from the Area — is stated unconditionally and in precise terms; it is only the exception ("in accordance with this Part") that refers to the Part XI regime.

The existence of that exception thus does not render the prohibition conditional in the relevant sense. At most, it means that, where a juridical person holds an authorisation under Part XI, the court must determine whether the conduct falls within the exception — a question that may, depending on the state of the Authority's rules, require further appreciation. But in the context in which the provision is here invoked, namely where there is no authorisation under Part XI at all, no such further appreciation is required: the conduct falls squarely within the prohibition and outside any exception, and Article 137(3) can be applied as objective law without more.

It follows that Article 137(1) (second sentence) and, in particular, Article 137(3) UNCLOS are directly effective within the meaning of Article 93 of the Constitution and, being addressed by their terms to natural and juridical persons, are capable of binding private parties such as Allseas. This has two consequences, which should be kept distinct. At a minimum, and as established in *Shell*, the prohibitions in Article 137 inform the content of open civil-law norms, in particular the unwritten standard of care under Article 6:162 BW: a private actor bears duties of care derived in part from these provisions and may be exposed to liability in tort for their breach. Beyond that indirect route, because Article 137 is

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<sup>14</sup>J. Dingwall, *International Law and Corporate Actors in Deep Seabed Mining* (Oxford University Press 2021), par. 5.3.1 and 5.3.2.

<sup>15</sup>G. Walker (general editor), *Definitions for the Law of the Sea. Terms not Defined by the 1982 Convention* (Martinus Nijhoff Publishers, 2012), p. 98.

<sup>16</sup>Churchill, Lowe and Sander (n 13), p 425.

addressed not only to States but to natural and juridical persons, it can also have direct effect against such persons: the prohibition binds the private actor itself, and may be applied as objective law by the courts.

*e. Invocability against Allseas*

It follows from the foregoing that the general conclusion reached above — that Article 137(1) (second sentence) and Article 137(3) are directly effective and, by their terms, capable of binding natural and juridical persons — applies to Allseas as a juridical person. Article 137 is, in principle, capable of being invoked against it.

Whether any particular activity contemplated by or carried out by Allseas in fact falls within the prohibitions of Article 137 is a distinct question, which depends on a factual appraisal of Allseas's role in the operation. The consequences of Allseas's involvement and the obligations they entail for the Netherlands are addressed — so far as is necessary and on the assumptions set out therein — under Question 2.

*f. Conclusion on Question 1*

In summary:

- (a) UNCLOS forms part of the Dutch legal order without the need for transposition, by virtue of the unwritten constitutional rule of automatic incorporation.
- (b) Article 137(1) and (3) UNCLOS qualify as directly effective provisions within the meaning of Article 93 of the Constitution: their content is unconditional and sufficiently precise to be applied as objective law.
- (c) Both provisions are, by their terms, addressed to natural and juridical persons, and not only to States, and are therefore in principle capable of binding a private actor such as Allseas.
- (d) At a minimum, the prohibitions in Article 137 inform the unwritten standard of care under Article 6:162 BW, so that conduct breaching them is capable of constituting a tort enforceable before the Dutch courts. Beyond that, because Article 137 is addressed to private parties, it can also have direct effect against them: the prohibition binds juridical persons and may be applied as objective law by the courts.

## **5. Question 2 — Legal consequences under UNCLOS for the Netherlands, where Dutch companies are actively participating as a key sub-contractor in deep-seabed mining by another company in the absence of an ISA mandate**

Question 2 asks what legal consequences arise under UNCLOS for the Netherlands, where Dutch companies actively participate as key subcontractors in deep-seabed mining by another company in international waters, in the absence of an ISA mandate. I address this question in four steps. Section (a) discusses the legal obligations under Article 139(1), concluding that this Article obliges the Netherlands to ensure that juridical persons which possess its nationality or are effectively controlled by it or their nationals do not engage in activities in the Area outside the regime of Part XI. Section (b) discusses the independent obligation under Article 137, which arises whether or not the conduct in question amounts to “activities in the Area” and which reaches conduct that Article 139(1) does not: the appropriation of resources upstream of recovery, and the dealing in recovered minerals downstream. Section (c) discusses the measures that the Netherlands is required to take pursuant to Articles 137 and 139(1). Section (d) discusses the moment in time when they are triggered. Section (e) draws together the conclusions.

### ***a. Applicability, contents and scope of Article 139(1)***

Article 139(1) 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.

I address the legal consequences that arise under Article 139(1) for the Netherlands in three steps: (i) the application of Article 139(1) in a situation where the Netherlands does not act as sponsoring State, (ii) the connection between the Netherlands and Allseas for purposes of application of Article 139(1) and (iii) the application of the clause ‘activities in the Area’ to the (planned) activities of Allseas.

#### *(i) Application outside the situations of sponsoring States*

On what I consider to be the more persuasive interpretation, Article 139(1) imposes an obligation on the Netherlands to prevent activities in the Area by juridical persons that possess its nationality or that it effectively controls, even if these persons are not subject to a sponsoring relationship.

This reading rests on three interpretative steps, in line with the principles of the Vienna Convention on the Law of Treaties: the ordinary meaning of the terms, the context, and the object and purpose of Part XI and UNCLOS as a whole. As the International Court of Justice recalled in its judgment in the *Territorial Dispute (Chad/Libya)* case: ‘in accordance with customary international law, reflected in Article 31 of the Vienna Convention on the Law of Treaties, a treaty must be interpreted in good faith

and in accordance with the ordinary meaning to be given to its terms and in the light of its object and purpose'.<sup>17</sup>

First, the ordinary text of paragraph 1 is clear: it refers to the 'responsibility of States', without, in express terms, restricting itself to sponsoring States. On this point, there is a clear distinction between the language of Article 139(1) and that of Annex III, Article 4(4), which stipulates: 'The sponsoring State, or States, shall, pursuant to article 139, have the responsibility to ensure ...'. This formulation does limit itself to sponsoring States; it shows that if the negotiating States had intended to limit a particular provision to sponsoring States, they were well aware of the terms needed to secure that limitation. Article 139(1) does not use this limiting clause and, in the ordinary meaning of its terms, applies to all States.

Second, the application of Article 139(1) to non-sponsoring states is supported by the article's context. The role of context for the purposes of treaty interpretation means that a treaty 'must be read as a whole, and interpreted in such a way as to promote internal consistency and harmony between its various provisions.'<sup>18</sup> The context comprises Article 138, stipulating that the 'general conduct of States in relation to the Area shall be in accordance with the provisions of this Part.' This Article clearly applies to all States Parties, and provides a general obligation to act in accordance with Part XI. The immediately following text of Article 139(1) specifies this obligation with the 'responsibility to ensure' clause, but there is no indication that 'States' in Article 139(1) means something else than the immediately preceding Article 138.

The context also comprises Article 153(4) of UNCLOS. This 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.... States Parties shall assist the Authority by taking all measures necessary to ensure such compliance in accordance with article 139'. The scope of the Authority's obligations and powers to exercise control over juridical persons operating outside the regime of Part XI is somewhat unclear; the relevant provisions address the Authority's role primarily in relation to contractors operating *within* the regime. However, Article 157 UNCLOS gives the Authority broad residual powers, providing 'The Authority shall have such incidental powers, consistent with this Convention, as are implicit in and necessary for the exercise of those powers and functions with respect to activities in the Area.' It must be assumed that at a very minimum, these powers include signalling situations where juridical persons engage in activities in the Area outside the scope of Part XI, and drawing such situations to the attention of States. It is in respect of such situations, that the second sentence of Article 153(4) is relevant, requiring States Parties to 'assist the Authority by taking all measures necessary to ensure such compliance in accordance with article 139'. If the obligations of States Parties under Article 139(1) were limited to sponsoring States, this second sentence of Article 153(4) would be non-operational in relation to situations where the Authority would need to act in relation to activities in the Area outside the regime of Part XI. This contextual interpretation thus supports a reading of Article 139(1) as applying to all States, not just sponsoring States.

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<sup>17</sup> ICJ Reports 1994, pp. 21-22, par. 41. See for further references to cases that support and apply this approach Olivier Corten and Pierre Klein (eds), *The Vienna Convention on the Law of Treaties. A Commentary* (Oxford University Press, 2011), p. 818-823.

<sup>18</sup> European Court of Human Rights, *Saadi v United Kingdom*, Appl. Nr 13229/03, Judgment of 29 January 2008, par. 62.

Third, the interpretation of Article 139(1) as applying to non-sponsoring States is supported by the object and purpose of Part XI and UNCLOS as a whole. The requirement under Article 31 of the Vienna Convention on the Law of Treaties that a treaty shall be interpreted in the light of its object and purpose means that any interpretation that would diminish the practical effects of the treaty is to be avoided.<sup>19</sup> Considerations of effectiveness thus play a predominant role.<sup>20</sup> A fundamental objective of Part XI is to secure that the Area is reserved for the common heritage of mankind.<sup>21</sup> Part XI is set up to secure that no State may claim or exercise sovereignty or sovereign rights over any part of the Area and its resources, and that minerals are not susceptible to unilateral national appropriation. Rights in the Area and to its resources can be obtained only in accordance with the provisions of the UNCLOS regime, which is to say, only with the authorisation of the ISA.<sup>22</sup> If Article 139(1) were read as bearing only on sponsoring States, conduct by the nationals or controlled entities of a State Party outside the Part XI framework would fall into a gap, subject only to the more limited provision of Article 137 discussed below. This would undermine the effectiveness of the regime that seeks to protect the common heritage of mankind.

For determining the scope of Article 139(1) and its applicability to States outside the situation of sponsorship, the Advisory Opinion of the Seabed Disputes Chamber also needs to be considered. The Chamber has read the responsibility in Article 139(1) as referring to sponsoring States. It reasoned that, since the entities which conduct activities in the Area mentioned in Article 139(1) can do so only where a State Party sponsors them, the provision must be read as referring to sponsoring States.<sup>23</sup> On that reading, Article 139(1) would presuppose sponsorship. Since the Netherlands does not currently act as a sponsoring state, Article 139(1) would not govern the obligations of the Netherlands against juridical persons such as Allseas.

However, that reading is not conclusive for rejecting the wider interpretation of Article 139(1) based on the ordinary text, the context and the object and purpose. The assumption on which the Chamber's reading rests is that "the entities which conduct activities in the Area mentioned in article 139, paragraph 1, of the Convention can do so only when there is a State Party sponsoring them". This limitation may be explained by the fact that the question put to the Chamber was limited to a sponsorship situation. Moreover, in substance, the statement is ambiguous. It can either be read as a normative statement to the effect that legally, all activities in the Area require sponsorship; that statement would be legally correct, but does not exclude that, in practice, activities can take place outside the regime. It can also be read as an empirical premise that in 2011, operation in the Area outside a sponsoring relationship was not a realistic prospect. That premise no longer holds: there is now a realistic scenario in which entities conduct activities in the Area *without* any sponsoring State. In either reading, the Chamber's restrictive reading of Article 139(1) is not controlling in the situation now under consideration.

The wider interpretation of Article 139(1), as not being limited to sponsoring States, is supported by the authoritative commentary by Nordquist, that notes 'Paragraph 1 places a general obligation, which

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<sup>19</sup> Oliver Dorr and Kirsten Schmalenbach (eds), *Vienna Convention on the Law of Treaties. A Commentary* (Springer, 2012), p. 545.

<sup>20</sup> *Id.*, p. 547; Corten and Klein (n 17), 831.

<sup>21</sup> UNCLOS, preamble and Article 136.

<sup>22</sup> Robin Churchill, Vaughan Lowe and Amy Sander, *The Law of the Sea*, 4<sup>th</sup> ed, Manchester UP 2022 p. 425.

<sup>23</sup> Responsibilities and Obligations of States Sponsoring Persons and Entities with respect to Activities in the Area, Advisory Opinion of 1 February 2011, ITLOS Seabed Disputes Chamber, ITLOS Reports 2011, p. 10 (Case No. 17), par. 101.

would exist in any event, on both States Parties and international organizations to ensure ...'<sup>24</sup> The words "in any event" indicate an obligation that would obtain independently of the express formulation in UNCLOS — and a pre-existing obligation of that kind cannot depend on the status of sponsorship, which UNCLOS itself introduced. Proelss, while following the Seabed Disputes Chamber on the centrality of sponsorship, describes the responsibility under Article 139(1) as the "primary" responsibility of States and international organizations, guaranteed by the requirement of sponsoring.<sup>25</sup> That formulation is not inconsistent with the wider reading: a responsibility identified as "primary" does not, on its face, exhaust the obligations the provision imposes.

(ii) *Relationship between the Netherlands and Allseas for the purposes of Article 139(1)*

The relevant connecting factor under Part XI is nationality or effective control: States have obligations in relation to natural or juridical persons that possess their nationality, or are effectively controlled by them or their nationals. That criterion is drawn from the provisions governing sponsorship and eligibility to operate under the Part XI regime, but under the terms of Article 139(1) applies more broadly to conduct that takes place outside the regime.

Consistent with the scope set out in the Introduction, this is not a corporate-law opinion: no independent analysis of the Allseas group's corporate structure, control relationships, or the precise allocation of functions among its constituent legal entities has been undertaken. I do not determine which entity carries the connection required by Article 139(1), and whether it rests on nationality or on effective control; those are questions of fact and of Dutch law that lie outside the scope of this Opinion.

Nonetheless, a few observations can be made of the application of the relevant criteria to the connection between Allseas and the Netherlands. Although the parent company, Allseas Group S.A., is registered in Switzerland, the Group's deep-sea mineral collection operations are closely connected to the Netherlands. That connection arises principally from the intertwining of the operations of Allseas Group S.A. with those of its Netherlands-based subsidiaries, which together carry out the engineering, fabrication, assembly, vessel-preparation and logistical functions on which the operation depends. By way of illustration, the production vessel *Hidden Gem* is registered to a Swiss group company and beneficially owned by Allseas Group S.A., while the design and engineering of the collection system, and the commercial operation and technical management of the vessel, are carried out by the Netherlands-based subsidiary Allseas Engineering B.V. (Delft). One of the Dutch subsidiaries would thus be directly involved in the activities covered by Article 139(1). The Chamber's definition is not, moreover, confined to the bare acts of recovery and lifting: it extends to activities "directly connected with" them. Engineering, technical management and vessel-preparation functions that are directly connected with the operation of the collector and the recovery and lifting of nodules — including, on the facts provided, the design and engineering of the collection system and the technical management of the *Hidden Gem* carried out by Allseas Engineering B.V. — therefore may fall within "activities in the Area" on the Chamber's own reading, and so engage Article 139(1) directly, without the need to characterise them as mere support for an operation conducted by another.

I note in this context that the Government of the Netherlands has treated Allseas as having a sufficient connection to the Netherlands. In a parliamentary debate on deep-sea mining, Minister Hermans shared

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<sup>24</sup> Nordquist (n 11), p. 126.

<sup>25</sup> Proelss (n 11), p. 972.

the view that the developments are a cause for concern and confirmed that the government would ‘enter into discussions with Allseas about this’.<sup>26</sup> This understanding is reflected in the Government's preparation of its parliamentary answers; in an internal background note of the Ministry of Foreign Affairs of 9 September 2025, prepared for the answer to parliamentary questions, the Government framed the matter as concerning the involvement of Allseas "as operational partner of TMC" and the responsibility of the Netherlands should exploitation of the international seabed by TMC take place without an international permit. The same note records that, following the motion of the member Postma of 11 June 2025 requesting that the Government enter into discussions with Allseas, this was followed up at the official level by staff of the Ministries of Economic Affairs and Foreign Affairs.<sup>27</sup> While these statements do not constitute a legal determination of nationality or control, they reflect the Government's own working premise that Allseas is, to a relevant degree, a Dutch undertaking with which the Netherlands can and does engage.

For the purposes of this Opinion, I therefore assume that Allseas, and/or its relevant Netherlands-based subsidiaries, are connected to the Netherlands by nationality or effective control to a degree sufficient to engage the responsibility of the Netherlands under Article 139(1).

*(iii) Activities in the Area*

Article 139(1) attaches to "activities in the Area". That term is defined in Article 1(1)(3) of UNCLOS as "all activities of exploration for, and exploitation of, the resources of the Area." In its 2011 Advisory Opinion, the ITLOS Seabed Disputes Chamber gave the term ‘activities in the Area’ a narrow meaning. It held that "activities in the Area" comprise the recovery of minerals from the seabed and their lifting to the water surface, together with activities directly connected with such recovery and lifting — such as the evacuation of water from the minerals and transportation within that part of the high seas when directly connected with extraction and lifting.<sup>28</sup> The operation contemplated by the May 2026 contract between TMC and Allseas includes elements that fall squarely within this definition — in particular, the operation of the collector vehicle on the seabed, the recovery of nodules and their lifting to the Hidden Gem; these activities thus engage the obligations of the Netherlands under Article 139(1).

I note that this does not bring all activities that may be covered by the May 2026 contract within the scope of ‘activities in the Area’; the Seabed Chamber excluded, for instance, processing (normally conducted at a plant on land) and transportation to points on land.<sup>29</sup> To the extent that, under the May 2026 contract, such activities will be carried out by Allseas, these would not be subject to the obligation under Article 139(1).

There is one other aspect that needs to be considered in relation to the role of Allseas, from the perspective of the clause ‘activities in the Area’, Question 2 is posed on the footing that a Dutch company is "actively participating as a key sub-contractor in deep-seabed mining by another company." On the facts provided — in particular the May 2026 contract for the development, commissioning and

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<sup>26</sup> Handelingen II 2024/25, nr. 94, item 6 (Tweeminutendebat Energieraad d.d. 16 juni 2025), 11 juni 2025, p. 94-6-2 (Minister Hermans).

<sup>27</sup> Beslisnota bij Antwoord op vragen van het lid Teunissen over het mijnbouwbedrijf dat sneller wil beginnen met het mijnen in de Stille Oceaan, 13 oktober 2025.

<sup>28</sup> ITLOS Seabed Disputes Chamber (n 23), par. 94-96.

<sup>29</sup> Id, par. 95-96.

operation of the collection system, and Allseas Engineering's role as operator and technical manager of the Hidden Gem — Allseas itself will carry out such activities and thus be subject to Article 139(1).

The question whether all ways in which Allseas, or its subsidiaries, is involved in the activities in the Area qualify as 'carrying out' such activities to make Article 139(1) applicable, or whether they can rather be qualified as the provision of material support to an operation carried out by another, is a question that I do not determine. That is a factual appraisal of Allseas's precise role, which lies outside the scope of this Opinion.

***b. The independent reach of Article 137***

Article 137 UNCLOS, already quoted under Question 1 in relation to the obligations of juridical persons, is copied here again with a view to the analysis of the obligations of the Netherlands:

1. No State shall claim or exercise sovereignty or sovereign rights over any part of the Area or its resources, nor shall any State or natural or juridical person appropriate any part thereof. No such claim or exercise of sovereignty or sovereign rights nor such appropriation shall be recognized.
2. All rights in the resources of the Area are vested in mankind as a whole, on whose behalf the Authority shall act. These resources are not subject to alienation. The minerals recovered from the Area, however, may only be alienated in accordance with this Part and the rules, regulations and procedures of the Authority.
3. No State or natural or juridical person shall claim, acquire or exercise rights with respect to the minerals recovered from the Area except in accordance with this Part. Otherwise, no such claim, acquisition or exercise of such rights shall be recognized.

Two features of Article 137 distinguish it from Article 139(1) and make it an appropriate additional basis for assessing the legal obligations of the Netherlands vis-à-vis Allseas. First, it unequivocally applies to all States Parties, and not only to sponsoring States. This means that even if the broad interpretation of Article 139(1) as applying not only to sponsoring States were rejected, Article 137 would provide a fallback basis for the Netherlands' obligations vis-à-vis Allseas. Secondly, Article 137 is not confined to "activities in the Area" as the ITLOS Seabed Disputes Chamber construed that term; it operates more broadly on the Area, its resources, and the minerals recovered from it. Article 137 can thus reach conduct — in particular the appropriation of the Area or its resources, and the claiming, acquisition, exercise of rights over, or alienation of, recovered minerals — whether or not that conduct falls within the ITLOS definition of "activities in the Area".

Certain of the operative terms of Article 137 (notably "appropriation" and "alienation") are not defined in the Convention. In terms of treaty interpretation, the meaning of these terms and the Article as a whole should be guided by the context, notably including Article 139(1); they are to be interpreted to promote internal consistency and harmony between these provisions.<sup>30</sup> In addition, Article 137 should be interpreted in the light of the object of the Convention to ensure that all activities in relation to the Area are carried out in line with the protection of the common heritage of mankind. In any case, the analysis that follows does not depend on resolving their precise scope, but only on the core prohibition and the express duty of non-recognition, which are not in doubt.

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<sup>30</sup> European Court of Human Rights, *Saadi v United Kingdom* (n 18), par. 62.

The analysis of Article 137 proceeds in two steps: the scope of the obligation it imposes on the Netherlands, and the application to juridical persons that participate as a key sub-contractor in deep-seabed mining by another company.

*(i) Scope of the obligation*

The core of Article 137 is clear: no State or person may appropriate any part of the Area or its resources, and no claim, acquisition or exercise of rights with respect to minerals recovered from the Area may be made otherwise than in accordance with Part XI; and, by the express terms of Article 137(1) (third sentence) and Article 137(3) (second sentence), such appropriation, and any such claim, acquisition or exercise of rights, "shall not be recognized." Article 137(2) anchors this scheme in the common heritage of mankind, vesting all rights in the resources of the Area in mankind as a whole and permitting alienation of recovered minerals only in accordance with Part XI. Article 137(2) is not merely declaratory of the common-heritage principle. By providing that the minerals recovered from the Area "may only be alienated in accordance with this Part," it states a substantive prohibition on alienation outside Part XI that runs in parallel to the prohibitions in paragraphs 1 and 3. As concluded under Question 1, that prohibition, interpreted in the context of Article 137 as a whole, binds natural and juridical persons and not only States: a private actor may no more alienate minerals recovered from the Area otherwise than in accordance with Part XI than it may appropriate the Area or exercise rights over the minerals. The non-recognition machinery secures all three prohibitions alike.

Article 137 functions as a general safeguard, securing that the minerals of the Area are appropriated, claimed, acquired, alienated or otherwise dealt with (referred to in this Opinion as "dealings") only in conformity with the UNCLOS regime. The authoritative commentary by Proelss notes that it 'serves as safeguard for the attribution of the rights over the Area to all of mankind. Not only does it prohibit all public and private occupation other than the recovery of minerals according to the rules of the Convention, but through the State's obligation not to recognise any measures of occupation contrary to the Convention regime, it also provides a protection mechanism for the above-mentioned prohibition'<sup>31</sup>

The duty of non-recognition is the feature of Article 137 that bears most directly on the obligations of the Netherlands, and it is a critical complement to the obligations of private parties discussed under Question 1. The obligation of States not to recognise non-conforming claims and dealings is what secures the regime. As the commentary observes, Article 137 'aims to ban all national permission or recognition of private ownership rights to (parts of) the deep seabed.'<sup>32</sup> The mechanism ensures that a breach of the prohibitions in Article 137 by private actors is both legally ineffective and economically unattractive.<sup>33</sup>

The duty of non-recognition does more than bind the State's own organs not to give legal effect to non-conforming claims and dealings. It also implies a positive obligation on States Parties to take measures to ensure that private actors connected to them by nationality or effective control do not themselves appropriate the Area or its resources, exercise rights over recovered minerals, or otherwise give effect to such claims and dealings. This positive obligation is the better view as a matter of treaty interpretation under Article 31 of the Vienna Convention. It is supported by the unqualified terms of the non-recognition duty, read in the light of the wider context (including the interpretation of Article 139(1)

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<sup>31</sup> Proelss (n 11), p. 959.

<sup>32</sup> *Id.*, p. 962.

<sup>33</sup> *Id.*, p. 959.

set out above) and of the object and purpose of Part XI, notably the protection of the common-heritage regime; it is also supported by scholarly commentary.<sup>34</sup> Confining the duty to the State's own organs, without any obligation to act in respect of connected private actors, would leave it largely ineffective against private activity outside Part XI, and would, to that extent, defeat the object and purpose of the regime.

*(ii) Application to juridical persons that participate as a key sub-contractor in deep-seabed mining by another company*

Article 137 prohibits, as primary conduct, the appropriation of the Area's resources and the claiming, acquisition, exercise of rights over, or alienation of, recovered minerals. The question for present purposes is whether, and how, that prohibition and the associated duty of non-recognition bear on a juridical person that participates in such an operation as a sub-contractor. Two routes are relevant: the direct application of Article 137 to conduct of Allseas that itself falls within the prohibition; and the duty of non-recognition, which operates on the operation and its product regardless of which entity performs each step.

As to the first route, the commercial label "sub-contractor" as included in Question 2 does not determine the legal analysis; what matters is the nature of the conduct. To the extent that Allseas, or a connected entity, itself operates the collector, recovers nodules, lifts them to the surface, or claims, acquires, exercises rights over or alienates the recovered minerals, it engages in conduct that Article 137 prohibits directly, and is on that footing a principal addressee of the prohibition rather than a mere supplier to another's operation. On the facts provided — in particular the May 2026 contract for the development, commissioning and operation of the collection system, and Allseas Engineering's role as operator and technical manager of the Hidden Gem — Allseas appears likely to perform functions of this kind. Whether any particular function does so is a factual appraisal of Allseas's precise role, which lies outside the scope of this Opinion; but in so far as it does, Article 137 applies to that conduct without any need to characterise Allseas as a contributor to the conduct of another.

As to the second route, the duty of non-recognition does not turn on which entity performs the actual appropriation. By the express terms of Article 137(1) (third sentence) and Article 137(3) (second sentence), no non-conforming appropriation, claim, acquisition or exercise of rights "shall be recognized." The duty is defined by the outcome it forbids: the giving of legal or commercial effect to unilateral exploitation of the Area. It therefore bears directly and independently on the sub-contracting relationship and on the recovered product, regardless of any question as to whether Allseas is itself a principal. The Netherlands may not, through its own organs, give legal or commercial effect to the operation or its proceeds — for example by recognising or enforcing title to, or contracts for the sale of, minerals recovered outside Part XI, or by treating the recovered nodules as lawfully owned property within its jurisdiction. To the extent that the sub-contract between Allseas and TMC, or arrangements downstream of it, would require Dutch legal or commercial recognition of such an operation or its product, the duty of non-recognition bites on those dealings.

These two routes do not require Article 137 to be read as imposing obligations on persons who merely supply or assist an operation conducted by another. Whether the duty of non-recognition extends that

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<sup>34</sup> Dingwall (n 14), ch. 5; Toby Fisher and Samantha Robb, *Untouchable Metals: How the Obligations of UNCLOS States Parties Limit the Commercial Viability of Unilateral Deep Sea Mining*, EJIL: Talk!, 23 June 2025.

far — to nationals who contribute material elements to a unilateral operation without themselves appropriating the Area or dealing in its minerals — is a further question that has not been tested in the case law or addressed in the commentary, and on which I express no concluded view. It is unnecessary to resolve it here: on the facts provided, Allseas's involvement is likely to engage Article 137 by the first route, and the duty of non-recognition engages the operation and its product by the second, in either case without resort to a contribution-based extension.

Applied to the Netherlands, this means that Article 137 and its duty of non-recognition generate a positive obligation on the Netherlands to take reasonably appropriate measures, within its legal system, to secure that persons that are nationals of, or effectively controlled by, the Netherlands or its nationals, do not (i) appropriate any part of the Area or its resources, or claim, acquire or exercise rights over minerals recovered from it, otherwise than in accordance with Part XI; or (ii) acquire, alienate, market or otherwise give legal or commercial effect to minerals so recovered. It also requires the Netherlands not to give legal or commercial effect, through its own organs, to such an operation or its product. These obligations under Article 137 arise independently of Article 139(1): even if the wider reading of Article 139(1) set out above were not accepted, and Article 139(1) were confined to sponsoring States, the obligations of the Netherlands identified here — the duty of non-recognition, and the positive obligation in respect of appropriation and dealing — would still arise under Article 137.

*c. The measures required pursuant to Articles 137 and 139(1)*

It follows from the above that the obligations of the Netherlands vis-à-vis Allseas rest on both Article 139(1) and Article 137: Article 139(1) governs activities in the Area, and Article 137 reaches both that conduct and the further conduct — the appropriation of the Area and its resources, and the dealing in recovered minerals — that lies outside it. The provisions thus overlap in their core but are not co-extensive.

For determining what these obligations require, guidance can be found in the 2011 Advisory Opinion of the Seabed Disputes Chamber. Although this Opinion was rendered in the context of sponsorship, the standard it articulates is not tied to that context. Its characterisation of the obligation as requiring reasonably appropriate legislative and administrative measures, reflects the *type* of obligation the words impose, and does not depend on a sponsoring relationship; sponsorship was the occasion for the construction, not its source. That standard therefore carries over to the wider obligation under Article 139(1), and, the obligation under Article 137 protecting the same regime, supplies the appropriate measure of what Article 137 requires as well.

The Chamber held that the obligation under Article 139(1) is one of conduct ("due diligence"), requiring the State to adopt laws, regulations and administrative measures that are, within its legal system, reasonably appropriate for securing compliance, while leaving the choice of measures to the State.<sup>35</sup> For purposes of this Opinion, two categories of measures are particularly relevant: legislation and enforcement measures.

First, discharging the 'responsibility to ensure' and the obligation of non-recognition require the State to adopt laws and regulations and to take administrative measures that are, within the framework of its

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<sup>35</sup> ITLOS Seabed Disputes Chamber (n 23), par 110, 227.

legal system, "reasonably appropriate" for securing compliance by persons under its jurisdiction.<sup>36</sup> This does not mean that all States Parties to UNCLOS that have not (yet) adopted such legislative measures are in breach of their obligations; such legislative measures are required when necessary for securing compliance. A State that has no connection to natural or juridical persons that may engage in activities in the Area, thus is in a different position than a State with natural or juridical persons that are or will be engaged in such activities. States in the latter category, such as the Netherlands, are required to adopt the necessary legislative measures. At a minimum, such legislation should include a prohibition on engaging in activities in the Area unless the appropriate conditions of approval, regulation, and oversight have been met, consistent with the Part XI regime. A survey of national legislation regarding activities in the Area shows that several states have adopted legislation that specifically includes such prohibitions.<sup>37</sup>

Second, the Chamber made clear that laws and regulations alone may not suffice; the required measures may need to include administrative supervision and mechanisms for the active enforcement of the relevant conduct to secure compliance.<sup>38</sup> A survey of national legislation in relation to activities in the Area shows that several states have adopted legislation that specifically provides for such means in relation to activities in the Area without sponsorship or without contract, including enforcement orders requiring persons to stop harmful action and penalties.<sup>39</sup>

#### ***d. The moment in time when the obligations under Articles 137 and 139(1) are engaged***

It remains to consider at what point the obligation is engaged. Being an obligation of conduct, it requires the State to take reasonably appropriate measures once it is, or ought to be, aware that a person connected to it is about to participate in an operation of the kind described: an operation for the recovery for commercial purposes of polymetallic nodules from the Area, that is to proceed under the United States DSHMRA route rather than under any authorisation of the Authority under Part XI.

It is not necessary, for the purposes of this Opinion, to fix the precise moment at which that point was first reached; it may well have been reached earlier, as the Government's own engagement with Allseas suggests. What can be said with confidence is that it has been reached no later than the conclusion of the May 2026 contract. That contract is a concrete, documented commitment by Allseas to the development, commissioning and operation of the first commercial nodule collection system, in

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<sup>36</sup> *Id.*, par 218, 228. For present purposes, and consistently with the connecting factor adopted above, the relevant persons are those possessing the nationality of, or effectively controlled by, the Netherlands or its nationals.

<sup>37</sup> See the database maintained by the ISA at <https://isa.org.jm/national-legislation-database/>. Examples are the legislation adopted by Belgium (Law of 25 May 2024 on the Protection of People and the Environment in the Prospection, Exploration and Exploitation of the Resources of the Seabed and Ocean Floor and its Subsoil beyond the Limits of National Jurisdiction, art. 8); Tuvalu (Seabed Minerals Act 2014, art. 37); Singapore (Deep Seabed Mining Act 2015, art. 4).

<sup>38</sup> ITLOS Seabed Disputes Chamber (n 23). par 218.

<sup>39</sup> Examples are the legislation adopted by Belgium (Law of 25 May 2024 on the Protection of People and the Environment in the Prospection, Exploration and Exploitation of the Resources of the Seabed and Ocean Floor and its Subsoil beyond the Limits of National Jurisdiction, art. 24); China (Law of the PRC on the Exploration and Exploitation of Resources in the Deep Seabed Area (2016), art. 25 (cessation of the unlawful act and imposition of a fine); Germany (Act Regulating Deep Seabed Mining 1995, art 11 (fines) and 12 (imprisonment), Japan (Act on Interim Measures for Deep Seabed 1982, art. 44), Tuvalu (Seabed Minerals Act 2014, art. 23 (enforcement orders and penalties)); Singapore (Deep Seabed Mining Act 2015, art. 4 (penalties)). Links to these laws are contained in the database maintained by the ISA at <https://isa.org.jm/national-legislation-database/>.

preparation for recovery in the Clarion Clipperton Zone; from that point, at the latest, the participation of a connected company in a non-conforming operation is no longer a hypothetical prospect but a present and advancing fact.

The same is true of the duty of non-recognition and the positive obligation under Article 137: the duty to take preventive measures does not await the moment of recovery. Article 137(1) bears on appropriation of the Area's resources from the outset, while Article 137(3) and 137(2) bear on the recovered minerals from the moment of recovery onward; but the State's obligation to take measures in respect of all of these, being one of conduct, is engaged once a connected person is, or ought to be, known to be embarking on the operation — not when any particular mineral is recovered.

The obligation being one of due diligence, it is moreover forward-looking: it does not await the recovery of any mineral. The responsibility to ensure under Article 139(1) — like the positive obligation under Article 137 — operates before the prohibited activities take place; its very content is to take measures that prevent them. The duty to take reasonably appropriate measures is therefore engaged now.

### *e. Conclusion on Question 2*

In summary:

(a) Article 139(1) obliges the Netherlands to ensure that juridical persons which possess its nationality or are effectively controlled by it or its nationals do not engage in activities in the Area outside the regime of Part XI.

(b) Under Article 137, read in the light of Article 139(1), the Netherlands is subject to two related but distinct obligations. First, a duty of non-recognition: it must not, through its own legislative, administrative or judicial organs, recognise or give legal or commercial effect to any claim, appropriation or dealing in minerals predicated on unilateral activity in the Area outside Part XI. Secondly, a positive obligation of prevention: it must take reasonably appropriate measures to secure that persons of its nationality or under its effective control do not appropriate the Area or its resources or exercise rights over recovered minerals, and do not acquire, alienate or market the minerals so recovered. These obligations under Article 137 arise independently of Article 139(1).

(c) Discharging these obligations requires the Netherlands, as a matter of due diligence, to adopt legislation prohibiting the conduct identified in (a) and (b) by persons which possess its nationality or are effectively controlled by it or its nationals, and to provide for concrete measures — including administrative supervision and enforcement — allowing it to secure compliance where such persons unlawfully engage in that conduct.

(d) This obligation is not contingent on extraction; on the available information, it is already engaged, the May 2026 contract being a commitment to the operation in reliance on the unilateral United States route.

## 6. Question 3 — Legal means available to the Dutch State

Question 3 asks what legal means the Netherlands has at its disposal to take action regarding Dutch corporate participation in unilateral deep-seabed mining in the Area. These fall into three groups: non-judicial engagement, public law enforcement, and civil law proceedings. I address the question in six sections. Section (a) considers non-judicial engagement, which — the obligation identified in Question 2 being one of conduct — is both a legitimate means of discharging that obligation and the most readily available. Section (b) explains why the conventional public-law enforcement avenues appear presently unavailable in the absence of implementing legislation. Sections (c) to (e) address the civil law paths, on which the analysis principally turns: an action by the State against Allseas (c), an action by a representative organisation against Allseas (d), and an action against the State for failure to discharge its obligations (e). Section (f) draws the conclusions together.

### *a. Non-judicial means: engagement and consultation*

The obligation identified in Question 2 is an obligation of conduct — to take reasonably appropriate measures — and may be discharged in part by non-judicial means. Requiring information and, where appropriate, calling on juridical persons to terminate a particular conduct is itself a measure that can contribute to compliance. The Government has, in fact, already taken steps of this kind: as noted above, it confirmed that contact with Allseas had been taken up at the official level by the Ministries of Economic Affairs and Foreign Affairs.<sup>40</sup> Such engagement does not, on its own, exhaust the State's obligation but it is a legitimate and available means, and may be the most readily deployable in the short term, pending any legislation.

### *b. Public-law enforcement avenues*

Preliminary research has not revealed domestic legislation enacted by the Netherlands that implements Articles 137 and 139(1) of UNCLOS in the form of any regulatory or supervisory regime for deep-seabed mining. There is no sponsorship statute, no licensing regime, no designated competent authority, and no administrative power to impose orders or penalties in respect of deep-seabed mining-related conduct by Dutch juridical persons. It follows that the conventional public-law enforcement avenues — administrative and criminal prosecution — appear at present to be unavailable to the Netherlands.

This absence is legally significant. As set out in Question 2, the obligations under Articles 137 and 139(1) generate a positive obligation on the Netherlands to take reasonably appropriate measures to secure that Dutch nationals and entities under Dutch control do not engage in or give effect to the prohibited conduct. Thus, the current absence of any such regime may represent a failure to discharge that positive obligation.

As noted in the Introduction, the conclusion that the conventional public-law enforcement avenues appear presently unavailable rests on preliminary research into the relevant Dutch legislation. It cannot be excluded that public-law instruments not identified here — whether under existing legislation of general application or otherwise — may be available; a definitive assessment would require separate advice from Dutch public-law counsel.

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<sup>40</sup> See accompanying text to (n 27).

### *c. A civil action by the State against Allseas*

An alternative route for the State is to initiate proceedings, in its own name, against Allseas in tort (*onrechtmatige daad*) under Article 6:162 BW. The substantive legal basis could be the direct effect of Articles 137(1) and 137(3) of UNCLOS, established in Question 1 above: breach by Allseas of a directly effective treaty prohibition constitutes an unlawful act capable of supporting a claim for declaratory relief, an injunction, and, in appropriate cases, damages.

Given that no specific public law provisions implementing Articles 137 and 139(1) UNCLOS have been enacted, the limits stemming from the principle that a civil law action by the State should not take place where public law actions are available (*doorkruisingsleer*) established in *Staat/Windmill*<sup>41</sup> do not apply. The decisive question under that doctrine is whether the public-law regime can achieve a result equivalent to that of the civil route, in particular as regards the time and effort involved and the associated cost risk; where it can, the civil route is, in principle, barred.<sup>42</sup> Since no equivalent public-law power seems to exist here, the limitations stemming from *Windmill* accordingly do not arise.

### *d. A civil action by a representative organisation against Allseas*

The same legal basis is available to a representative organisation acting under Article 3:305a BW. Articles 137(1) and 137(3) UNCLOS, being directly effective provisions capable of horizontal application, their breach by Allseas would constitute an unlawful act under Article 6:162 BW, invocable by a legal person whose articles include the protection of the marine environment or the common heritage of mankind, provided the further requirements under Dutch civil law are satisfied. The relief sought would be similar in structure to that available to the State: a declaration of unlawfulness and an injunction against further conduct.

### *e. A civil action against the State for non-enforcement*

A separate and complementary avenue is a civil action against the Dutch State, by a representative organisation under Article 3:305a BW, for failure to take adequate measures to discharge its obligations under Articles 137(1), 137(3) and 139(1)(1) UNCLOS. The doctrinal basis is the line of authority running through *Urgenda*<sup>43</sup>, under which the State's failure to take adequate measures to give effect to its international obligations may, in defined circumstances, constitute an unlawful act under Article 6:162 BW.

The substantive obligations of the State were identified in Question 2: (i) the positive obligation under Articles 137(1) and 137(3) to take legislative and administrative measures to ensure that Dutch-national or Dutch-controlled persons do not engage in, or give effect to, the prohibited conduct; (ii) the duty of non-recognition in Articles 137(1) (third sentence) and 137(3) (second sentence); and (iii) under Article 139(1) the due-diligence obligation in respect of Dutch-national and Dutch-controlled juridical persons.

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<sup>41</sup>HR 26 January 1990, ECLI:NL:HR:1990:AC0965, NJ 1991/393 (*Staat/Windmill*).

<sup>42</sup>HR 22 October 1993, ECLI:NL:HR:1993:ZC1107, NJ 1994/494 (*Staat/Magnus*), par. 3.3-3.4 (in which the Hoge Raad held the State's private-law claim admissible precisely because, at the time it was brought, no equivalent public-law power yet existed; the Court indicated that, had such a power existed, recourse to the private route would in principle not have been permitted). See also P.J. Huisman, 'De toelaatbaarheid van privaatrechtelijk overheidshandelen', *Jurisprudentie Bestuursrecht plus* 2020, 21-41.

<sup>43</sup>HR 20 December 2019, ECLI:NL:HR:2019:2006, English translation ECLI:NL:HR:2019:2007 (*Urgenda*).

### *f. Conclusion on Question 3*

In summary:

- (a) Public-law enforcement avenues appear presently unavailable; their absence may itself constitute a failure to discharge the positive obligation identified in Question 2.
- (b) In the absence of such legislation, the State retains a civil law avenue: an action in tort against Allseas under Article 6:162 BW, founded on the direct effect of Articles 137(1) and 137(3) UNCLOS.
- (c) A parallel action by Greenpeace Nederland or another representative organisation under Article 3:305a BW against Allseas is available on the same substantive basis.
- (d) An action against the State, by a representative organisation under Article 3:305a BW, for failure to take adequate measures to give effect to its obligations under Articles 137(1), 137(3) and 139(1) UNCLOS, is also available in principle. Its substantive basis under Article 137 does not depend on the wider reading of Article 139(1); where that wider reading is accepted, Article 139(1) provides a further basis and the action is correspondingly stronger.
- (e) As to relief, the direct-effect and unlawfulness analysis in this Opinion supports, in principle, both a declaration that the conduct (or the State's failure to act) is unlawful and, against Allseas, an injunction restraining further unlawful conduct. Against the State, a court could not dictate the content of specific legislation, but the *Urgenda* line indicates that it may order the State to achieve a result by measures of its own choosing.

These civil-law avenues are set out as options that follow from the international-law analysis in this Opinion — the direct effect of Articles 137(1) and 137(3), and the obligations of the Netherlands under Question 2 — which provides the substantive basis on which such claims could in principle be founded. Whether and how to pursue any of them, the relief obtainable, and the framing and prospects of any particular action, are matters of Dutch civil law and procedure on which separate advice from Dutch civil-law counsel should be obtained.