

NZ lawyer at Law of the Sea Tribunal

Lawyer Robert Makgill is to appear before the International Tribunal for the Law of the Sea in Hamburg in September to present oral submissions to the Seabed Disputes Chamber.

The proceedings before the Tribunal arise out of a request by the International Seabed Authority for an advisory opinion regarding the responsibilities and obligations of states sponsoring persons and entities to undertake mining activities in the international sea area.

Article 139 of the United Nations Convention on the Law of the Sea generally provides that “damage caused by the failure of a State ... to carry out its responsibilities” in the international seabed “shall entail liability”. However, Article 139 goes on to provide that a State “shall not be liable for damage caused by any failure to comply” with the Convention “by a person whom it has sponsored” to undertake activities in the international sea area.

The Republic of Nauru has sponsored an application from a private company to the Authority to undertake exploration activities in the international seabed. Nauru’s application stated that, like other developing States, it does not yet possess the technical or financial resources to undertake seabed mining in international waters, and that the cost of damages that might arise from seabed mining in the Area could exceed its financial resources.

Nauru’s sponsorship of the private company was premised on the assumption that, should the application be approved, it could take specific steps to limit its liability for any damage. This line of reasoning caused some debate within the Authority. Nauru therefore asked the Authority to seek an advisory opinion from the Tribunal to clarify the obligations imposed by the Convention on States sponsoring mining activities in the international sea area.

Before leaving for Hamburg Mr Makgill said it would seem fair to conclude that Nauru was particularly concerned about the potential liability that might arise should a failure by the private company to comply with the requirements of the Convention result in serious damage to the surrounding marine environment.

Mr Makgill, a barrister and solicitor who has offices in Auckland and Queenstown, will be presenting oral submissions based on a written statement submitted on 19 August 2010 to the Tribunal on behalf of the International Union for the Conservation of Nature (IUCN).

He said that appearing in the Tribunal was “not an opportunity to go over the IUCN’s statement again, but rather to present submissions on issues arising out of the written statements of other parties.”



Robert Makgill

“As the IUCN is the only party representing the environment *per se*, it is likely that in our oral submissions we will need to address the written statements of a number of sovereign states.”

The IUCN is the world’s oldest and largest global environmental organisation. Its membership includes more than 1,000 government and non-government organisations, whose general objective is to encourage sustainable development. The union’s large governmental membership means that the international community regards it as an intergovernmental organisation.

“That places it in the unique position where it is sometimes recognised as having standing in international law, a privilege usually reserved for sovereign states,” Mr Makgill said.

In the present case the IUCN participates as an observer in the Assembly of the Authority and, as such, was invited to provide the written statement to the Tribunal.

“The IUCN as an organisation is very conscious that its membership includes the government departments of a large number of sovereign states. It does not become involved in environmental advocacy like non-governmental organisations, such as Greenpeace, because the interests of its members are so diverse. This is probably seen as a good thing by the Tribunal. In fact while Greenpeace sought leave to participate in the proceedings, this was not granted.

“The IUCN does not see its participation in these proceedings as one of advocacy, but rather as one of assisting the Tribunal to clarify the existing international law concerning sustainable development and its application to international waters. The decision that the Tribunal makes will have implications for the standard of environmental compliance that must be achieved internationally when exploiting seabed resources. The need for robust standards is clearly evidenced through the Deepwater Horizon oil spill in the Gulf of Mexico.”

A director of North South Environmental Law, Mr Makgill is the firm’s principal litigator and specialises in environmental and natural resources law. He regularly appears before local authorities, the Environment Court and the High Court and is certified as a Hearings Commissioner. He was awarded a doctoral scholarship to work at the Maritime Institute of the Ghent School of Public International Law, Belgium, in 2005. He is presently completing a PhD through Ghent University, which focuses on the governance of natural resources in the territorial water, Exclusive Economic Zone and Continental Shelves of sovereign states.

Information on the Tribunal’s proceedings can be found on the Tribunal’s website at http://www.itlos.org/start2_en.html. ■