

Protecting the common heritage of mankind



An Advisory Opinion from the International Tribunal for the Law of the Sea has broken ground in respect of duties owed to mankind, and an environmental lawyer from New Zealand with a passion for surfing had an important part to play in the process, **Darise Bennington** discovers

Far beneath the high seas lie minerals with the potential to make someone millions. Sailing those same high seas are commercial entities eager to take advantage of what lies beneath. But with the high seas seabed (known as the 'Area') declared "the common heritage of mankind" by the 1982 *United Nations Convention on the Law of the Sea* (Convention) – how can commercial entities take advantage of these natural resources? The answer: through State sponsorship – and commercial entities can be sponsored by any State in the world, even a landlocked State with no direct access whatsoever to the world's oceans.

With the Deepwater Horizon disaster (the BP oil spill) still reverberating around the world – and as the long-reaching implications of its fallout continue to make themselves known, the next question is how do we protect our oceans from disasters that may occur as a result of activities introduced in pristine and untouched seas by these same commercial entities? And if we can't protect them completely, how do we ensure that when the damage is done, that someone takes responsibility for ensuring that it is rectified and that the environment is returned as far as is possible to its pre-tainted state?

These were the issues that were discussed in-depth (albeit in a very tightly constrained time frame) before the Seabed Disputes Chamber (Chamber) of the International Tribunal for the Law of the Sea (ITLOS) in September 2010. Over

a four-day period, the seventeenth case to come before ITLOS heard 12 separate parties (Germany, the Netherlands, Argentina, Chile, Fiji, Mexico, Nauru, the UK, Russia, the International Seabed Authority, the Intergovernmental Oceanographic Commission of the United Nations Educational, Scientific and Cultural Organization, and the International Union for Conservation of Nature and Natural Resources (IUCN)) address the issue as to what were the responsibilities and obligations of States that sponsored persons and entities seeking to undertake activities in the Area. Appearing before the Chamber in Hamburg was Robert Makgill, an environmental lawyer whose firm, North South Environmental Law, has offices in Auckland and Queenstown; Makgill joined American environmental lawyers Cymie Payne and Donald Anton, arguing on behalf of intergovernmental agency IUCN for responsibilities and liabilities that would ensure that sponsoring States endeavoured to protect the "common heritage of mankind".

The issues

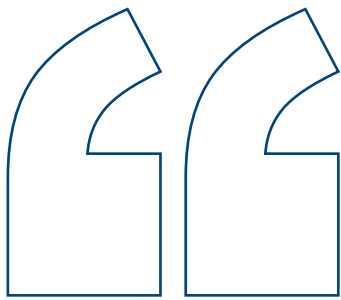
The Advisory Opinion had its genesis in proposals put forward by Nauru and Tonga, as sponsoring States of commercial entities, Nauru Ocean Resources Inc and Tonga Offshore Mining Ltd, that were seeking to undertake exploration and mining activities in the Area. Wanting to determine the extent of its obligations and liability, Nauru

sought, through the International Seabed Authority (Authority), an advisory opinion. As a developing nation that did not yet possess "the technical and financial capacity to undertake seabed mining in international waters", Nauru wished to know whether it could effectively mitigate any potential liability or costs that might arise out of its sponsorship of a commercial entity undertaking the activities (and for which sponsorship, it would receive royalties).

The questions put to the Chamber were:

1. What are the legal responsibilities and obligations of States Parties to the Convention with respect to the sponsorship of activities in the Area in accordance with the Convention, in particular Part XI, and the 1994 Agreement relating to the implementation of Part XI of the Convention?
2. What is the extent of liability of a State Party for any failure to comply with the provisions of the Convention, in particular Part XI, and the 1994 Agreement, by an entity whom it has sponsored under Article 153, paragraph 2(b) of the Convention?
3. What are the necessary and appropriate measures that a sponsoring State must take in order to fulfil its responsibility under the Convention, in particular Article 139 and Annex III, and the 1994 Agreement?

Effectively, what Nauru wanted to know was if something were to happen (akin to Deepwater Horizon) in the Area as a result of the activities undertaken by Nauru Ocean Resources Inc during its sponsorship, would Nauru be responsible and liable for the costs of rectification? Or as Makgill explains, Nauru was trying to determine "what obligations



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and responsibilities they have in terms of complying with the Convention itself, in terms of promulgating their own regulation, and in terms of the activities of the sponsored operator in the case that the sponsored contractor or entity fails to comply with its obligations, and that results in environmental damage or catastrophe". These are the nexus of the questions, he says, and each of the States seeking to be heard in the matter had different views on this.

Duties owed to mankind

When I first met Makgill, he was days away from leaving for Hamburg, preparing from his Parnell office to "represent nature", via emails with his American colleagues (one based in Australia, the other in California), and drafting submissions that would argue that there could not be a gap in the law, ie where the company responsible couldn't afford to clean up, and the sponsoring State was not responsible. "There can't be a lacuna in the Convention, whereby if the company fails for some reason, nobody becomes responsible for cleaning up the damage", says Makgill. "It can't be. You can't have an environmental catastrophe take place, for example

Deepwater Horizon, and everyone wipes their hands." Makgill and his colleagues were arguing that as the State gets a pecuniary benefit from the company in terms of royalties, it should have a residual liability. "Say the company can't afford the entire clean up, but bears primary responsibility and can clean up to a certain point, if there's a residual amount that needs to be covered, then the State comes in and picks it up."

While Nauru and other developing States were in favour of reducing the extent of their liability on the basis that they were developing States, Makgill and his team were not. "Simply because a country has less technical and financial capacity, doesn't mean that it should be able to satisfy a lower environmental standard than a first-world developed country," he says.

Makgill and his team were also proponents of introducing a 'super fund', to which all States would contribute, and that would take the final responsibility for any clean up that was required.

Out of his team of three, Makgill was responsible for question one – "what are the responsibilities and obligations of the States, and how are they to be implemented?" –

while his colleagues focused on the question of liability.

So what are the responsibilities and obligations?

The Chamber said in its Advisory Opinion, dated 1 February 2011, that first, there is an obligation of due diligence. "The sponsoring State is bound to make best possible efforts to secure compliance by the sponsored contractors," the Chamber stated at [242]. "This 'due diligence' obligation requires the sponsoring State to take measures within its legal system. These measures must consist of laws and regulations and administrative measures. The applicable standard is that the measures must be 'reasonably appropriate'."

Among the most important of the obligations on sponsoring States, said the Chamber at [122], were the following:

- the obligation to assist the Authority in the exercise of control over activities in the Area;
- the obligation to apply a precautionary approach;
- the obligation to apply best environmental practices;
- the obligation to take measures

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- to ensure the provision of guarantees in the event of an emergency order by the Authority for protection of the marine environment;
- the obligation to ensure the availability of recourse for compensation in respect of damage caused by pollution; and
- the obligation to conduct environmental impact assessments.

Said the Chamber at [123], "It must nevertheless be stated, at the outset, that compliance with these obligations can also be seen as a relevant factor in meeting the due diligence 'obligation to ensure' and that the said obligations are in most cases couched as obligations to ensure compliance with a specific rule."

What 'due diligence' means in this context, explains Makgill when I meet him again after the Advisory Opinion has been released, is that the State has to make sure that it has domestic legislation in place to ensure that there are sufficient levels of compliance with regards to the activity, that a "precautionary approach" is taken, that an environmental assessment is undertaken, and that there is monitoring.

With respect to the laws adopted in the State's domestic legislation, the Chamber, in its answer to question three, stated that the sponsoring State did not have absolute discretion as to which laws and regulations should be adopted. "It must act in good faith," it said, "taking the various options into account in a manner that is reasonable, relevant and conducive to the benefit of mankind as a whole" (at [242]). Furthermore, the rules and regulations adopted by the sponsoring State cannot be less stringent than those adopted by the Authority, or less effective than international rules, regulations and procedures.

The 'due diligence' obligations created are not static; they cannot easily be described in precise terms, as it's a variable concept, the Chamber said at [117]. "It may change over time as measures considered sufficiently diligent at a certain moment may become not diligent enough in light, for instance, of new scientific or technological knowledge. It may also change in relation to the risks involved in the activity."

The Chamber did not make the distinction sought by Nauru and opposed by Makgill and his team – that of preferential treatment for developing States. The Chamber concluded at [158] that "the general provisions concerning the responsibilities and liability of the sponsoring State apply equally to all sponsoring States, whether developing or developed". Developing further one of the arguments Makgill had explained to me when I first met with him, the Chamber clarified why no such distinction could be made at [159]:

"Equality of treatment between developing and developed sponsoring States is consistent with the need to prevent commercial enterprises based in developed States from setting up companies in developing States, acquiring their nationality and obtaining their sponsorship in the hope of being subjected to less burdensome regulations and controls. The spread of sponsoring States 'of convenience' would jeopardize uniform application of the highest standards of protection of the marine environment, the safe development of activities in the Area and protection of the common heritage of mankind."

Liability

Having answered question one, the Chamber then turned to question two and the issue of liability. Said the Chamber at [242], "The liability of the sponsoring State arises from its failure to fulfil its obligations under the Convention and related instruments. Failure of the sponsored contractor to comply with its obligations does not in itself give rise to liability on the part of the sponsoring State."

An important prerequisite to a sponsoring State being found liable was the fact of damage. Said the Chamber at [178], "[T]he failure of a sponsoring State to carry out its responsibilities entails liability only if there is damage." This, said the Chamber, constituted an exception to customary international law on liability.

Damage caused by the sponsored contractor will not automatically result in the sponsoring State becoming liable, nor can a causal link simply be presumed, the Chamber said. "The liability of

the sponsoring State for failure to comply with its due diligence obligations requires that a causal link be established between such failure and damage," said the Chamber at [242]. "Such liability is triggered by a damage caused by a failure of the sponsored contractor to comply with its obligations."

For those States who have complied with all their obligations and responsibilities and put in place the requisite domestic legislation to govern the sponsored contractor's activities, there is the chance of being "absolved from liability", so long as "it has taken 'all necessary and appropriate measures to secure effective compliance' by the sponsored contractor with its obligations".

Disappointing some, the Chamber declared that the liability of the sponsoring State and the sponsored contractor existed in parallel and was not joint and several, nor did it find that the sponsoring State had any residual liability.



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Annual Economic Update

Presentations by Dominick Stephens
Director, Senior Economist at Westpac Institutional Bank.

Wellington -

Date: Tuesday 8 March 2011
Venue: PricewaterhouseCoopers,
113-119 The Terrace, Wellington
Time: 4:30pm to 6:00pm

Christchurch -

Date: Thursday 17 March 2011
Venue: Canterbury Club, Cnr Worcester
Blvd & Durham Street, Christchurch
Time: 12:30pm to 2:00pm

Dominick will discuss the current state of the New Zealand economy, business and consumer confidence, GDP, interest and exchange rates, international competitiveness, relationships with NZ major trading partners and assessment of 2011 conditions. CPD Credits apply.



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Groundbreaking

The opinion is groundbreaking in many respects. The first of which is not lost on me, trawling as I so often do through multiple judgments, dissenting in total, dissenting in part, sometimes tacitly attacking the decisions of other members of the presiding judiciary, other times being extremely overt in attacking not just the decisions but the members themselves. For the first time, the judges were able to come together and provide a unanimous decision on each of the three questions. This is good for States, says Makgill, because it's a signal of consistency and one that is not fraught with political tension.

Also groundbreaking was the Chamber's extension of the "precautionary principle" (as articulated in Principle 15 of the *Rio Declaration on Environment and Development*). At [132], the Chamber noted that in ITLOS's order of 27 August 1999 in the *Southern Bluefin Tuna Cases (New Zealand v Japan; Australia v Japan)* (2000) 1 (1) MJIL 153, the link between an obligation of due diligence and the precautionary approach was implicit. "This emerges from the declaration of the Tribunal that the parties 'should in the circumstances act with prudence and caution to ensure that conservation measures are taken,'" the Chamber said. It was then confirmed, it said, in further statements at [79] and [80] of the order respectively: that "there is scientific uncertainty regarding measures to be taken to conserve the stock of southern bluefin tuna"; and that "although the Tribunal cannot conclusively assess the scientific evidence presented by the parties, it finds that measures should be taken as a matter of urgency".

The Chamber then referred to the then leading environmental law decision of the International Court of Justice, *Pulp Mills on the River Uruguay* [2007] ICJ Rep 21 ICJ 23 January 2007, in which it was stated at [164] that "a precautionary approach may be relevant in the interpretation and application of the Statute". *Pulp Mills*, says Makgill was the most

recent authority on international environmental law; in his opinion, the Chamber's advisory opinion has overtaken *Pulp Mills* "because it takes the concept of due diligence as it exists between bordering jurisdictions and it extends it to the high seas as a duty that is owed to mankind in general". *Pulp Mills* was a transboundary issue, where Uruguay had developed pulp mills on a river that passed through Argentina. *Pulp Mills* was important, says Makgill, "because it came out and said there was a due diligence owed by Uruguay to have the proper laws in place to ensure that an environmental impact assessment and a certain threshold of environmental compliance occurred".

Having observed that the precautionary approach had been incorporated into a growing number of international treaties and other instruments, the Chamber stated that, in its view, this had initiated a trend towards making the precautionary approach part of customary international law (at [135]).

This statement, says Makgill, is huge. Although the precautionary approach is not in the Convention, it is in the Regulations, so the statement that it is a matter of customary international law is a "very clear step forward, because there hasn't been a decision that has been prepared to say that decisively up until now".

Interestingly, it would appear that the members of the Chamber have picked up on the idea of a super fund, as proposed by Makgill and his team, with the observation that a trust fund to cover the damage not covered under the Convention *could* be considered.

Disappointment

There were some who found that the opinion of the Chamber did not go as far as they would have liked. The issue of strict liability had been argued by Makgill's team; however, the Chamber did not agree that "liability without fault" should be imposed on a sponsoring State. "The Chamber ... would like to point out that liability for damage of the sponsoring State arises only from its failure to meet its obligation of due diligence," said the Chamber at [189]. "This rules out the application of strict liability."

However, as Makgill notes, the Chamber did not "nail the lid on the coffin" in respect of further development. "I think that what they were saying is that there's a potential for new regulations and there's always the potential that [the International Law Commission articles Anton relied on in his argument for strict liability] will become part of international law, at which time, you'll have to go back and say, well, actually, there is a strict liability."

Binding

As an advisory opinion, Makgill says it's not necessarily binding; however, generally, States will follow it. "At the end of the day... technically it's binding because it's based on an agreement between the parties to accept the judgment, but there's nothing to force the parties to accept the judgment."

Punching above our weight

So how did an environmental lawyer with a boutique practice in New Zealand find himself on the other

side of the world, representing nature, and making submissions to protect the common heritage of mankind? For Makgill, it was his passion for the sea – "the sea is really close to my heart, I've grown up by it" – that inspired him to undertake a Master's that focused on the environmental law of the ocean. As a keen surfer, he points out that surfers are interested in more than just seeking out the next big wave, they're also interested in water quality, ecology, segment dynamics, all the additional things that create the environment in which they prefer to spend most of their days.

It was his desire to protect the environment that led to him initially channelling his environmental law work into surfing cases; and it was his love of surfing that no doubt led to him choosing the south-west of France to do his sabbatical in 2002. Basing himself in Biarritz, which just so happens to be an excellent spot for both surfing and making contacts with fellow lawyers and academics with expertise in the environmental law of the sea, Makgill was offered a doctoral scholarship to undertake a PhD in ocean governance and natural resources by the Ghent School of Public International Law, at the University of Ghent in Belgium.

It was through the contacts he made during this time and subsequently that saw him being invited to join the team that would help ensure that the common heritage of mankind will remain protected against capitalist endeavours destined to seek out the mineral wealth hidden beneath the high seas.

His experience appearing before the Chamber is clearly one that has left a lasting impression. The whole proceedings were broadcast by a web podcast, but what struck him most was how amicable and civilised the proceedings were. The process is anything but adversarial, with Makgill admitting that his team went through their submissions several times to ensure there wasn't anything in them that could be deemed offensive to one of the other States. "I liked the high levels of courtesy and respect that were shown," he said. "The level of courtesy that was shown was enormous."

Also, prior to the hearing beginning, all of the delegates were invited into the Chamber to meet the members of the judiciary presiding over the case. The judges, he says, were all enquiring after some of New Zealand's top environmental lawyers, and asking to have their regards passed on.

It is easy to forget when you're based at what feels like the bottom of the world that the law we develop here to suit our particular conditions is often seen as groundbreaking overseas. The clearly affable Makgill admits that what "grates him occasionally" is the fact people bemoan our *Resource Management Act* 1991. "The reality is we have some pretty sophisticated environmental laws in New Zealand," he says. "We were the first country in the world to include sustainable development, or in our case, sustainable management, into our legislation, and a lot of countries have looked to us." With others considering our legislation "revolutionary" and very "forward looking", it's something about which we should feel rightly proud. It's certainly ensuring that New Zealand lawyers are being sought to help protect the planet on which we live.