Historic environmental law decision

Having the majority of his team's submissions accepted by the Seabed Disputes Chamber in an historic international law ruling was a career highlight for New Zealand environmental law lawyer Robert Makgill.

On 1 February, the chamber of the International Tribunal for the Law of the Sea (ITLOS) unanimously adopted an advisory opinion on state responsibility in respect of private entities undertaking seabed mining activities in international waters.

The opinion made a number of important statements, including that the precautionary principle, as formulated in the Rio Declaration, forms part of the corpus of customary international environmental law.

Mr Makgill presented submissions on behalf of the International Union for the Conservation of Nature (IUCN), together with two American lawyers, at the ITLOS in Hamburg last September (see *LawTalk* 758). Reading the opinion, Mr Makgill was pleased that many of the points argued by the IUCN team formed part of the advisory opinion.

"The chamber's findings on state responsibility and the precautionary principle are significant additions to the *opinio juris* of international environmental law following on from the Pulp Mills decision of the ICJ," Mr Makgill says.

The 1982 United Nations Convention on the Law of the Sea declares the seabed area beyond national jurisdiction (the Area) as the "common heritage of mankind". The Area is managed by the International Seabed Authority (ISA). State parties to the convention can apply for exploration and exploitation rights themselves or sponsor applications by private entities.

In 2008, Nauru and Tonga put forward proposals to sponsor commercial entities to undertake mining. Nauru requested that the ISA Secretary General seek an advisory opinion from the ITLOS regarding the extent of a sponsoring state's liability for seabed mining activities. Nauru sought clarity as to whether developed and developing states shared the same level of responsibility and liability for seabed mining activities, and whether sponsoring states could govern the mining activities of private entities by way of contract.

The council of the ISA reformulated Nauru's request into three questions, which (paraphrased) asked: what are a state's responsibilities regarding the sponsored activity; what is the extent of a state's liability; and what measures must a state take to fulfil its obligations?

The chamber found that sponsoring states owe a high level of due diligence to other states with regard to the activities of sponsored entities in international waters. The chamber reiterated the due diligence requirements set out in the decision of the International Court of Justice in *Pulp Mills on the River of Uruguay* [(Argentina v Uruguay) Merits, Judgment, ICJ Reports 2010]. It went further, finding that the precautionary principle, as expressed in principle 15 of the Rio Declaration, forms part of customary international law and as such forms part of a state's due diligence obligations.

"That's a significant finding," Mr Makgill says. "As far as I'm aware it's the first express statement by an international court that the precautionary principle forms part of customary international law."

High seas there for the benefit of all

Robert Makgill

Another important statement within the advisory opinion is that responsibilities of sponsoring states are owed equally by all states. "Nauru questioned whether a lesser standard should apply to it because it is a developing state. However, the chamber accepted our argument that there was no difference in the level of due diligence owed by a developing state as compared to developed states. As well as being owed equally by all states, the responsibility of due diligence is owed to all states.

"All states have an interest in international waters," Mr Makgill says. "In *Pulp Mills*, the ICJ found that a responsibility of due diligence exists between bordering states. The chamber extended the responsibility in respect of international waters to one that is owed to states per se. It took due diligence out of the trans-boundary context and applied it to the high seas, which are there for the benefit of all states.

"I think this influenced the chamber in its consideration of liability – the second question – where it found the principle of *erga omnes* applies, which means that any state can potentially make a claim against another state that fails to comply with the convention's provisions and regulations relating to seabed mining in international waters."

Considering the extent of liability a state owes for a sponsored entity, the chamber found there was no strict or residual liability.

"Damage caused by the sponsored contractor will not automatically result in the sponsoring state becoming liable" Mr Makgill says. "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.

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"Furthermore, states that sponsor mining operations do not bear any residual liability for damages not compensated by a mining company responsible for any damage" Mr Makgill says. "If you have a Deepwater Horizon situation and the sponsored contractor doesn't have sufficient financial reserves to address the damage, there is no residual liability for the state to meet the gap. There is a liability gap."

The chamber held that measures taken by a state to fulfil its responsibilities must include having laws in place to ensure environmental due diligence. Contractual arrangements with the sponsored entity are not sufficient. "Rather, states must ensure that there are appropriate laws, monitoring and enforcement to ensure that a sufficient level of due diligence is achieved."

Mr Makgill says he is very happy with the decision. "I consider that the opinion has a strong environmental flavour and sets a solid framework for the future management of mineral exploration and exploitation in the high seas."

As well as being important in terms of its findings, the opinion was also the first time the ITLOS had exercised its advisory jurisdiction and the first time is had reached a unanimous decision.

It's not common to be counsel in international environment law proceedings, Mr Makgill says. He got the opportunity because he is doing a PhD in that area through which he has established a good network of international contacts. "That said, it does seem that new kinds of opportunities are becoming available in the South Pacific as a result of increased interest in natural resource exploitation and conservation." *lt*

People

Christopher Toogood QC

Christopher Toogood QC has been appointed a High Court Judge. Justice Toogood, who will sit in Auckland, graduated from Victoria University in 1972 and was admitted the following year. After 18 years as a litigation lawyer, he joined the independent bar in 1990 and was appointed Queen's Counsel in 1999. He has specialised in civil and commercial litigation, employment, sports and criminal law. Justice Toogood has also been appointed a member of the Arbitration Panel of the Court of Arbitration for Sport, Lausanne. He joins Sir Thomas Eichelbaum, Tim Castle, Simon Jefferson, Barry Paterson QC, Judge Robert Spear, and David Williams QC as New Zealanders on the Arbitration Panel.

John Faire

Associate Judge **John Faire** has been appointed a temporary Judge of the High Court sitting in Auckland, from 28 February until 3 June this year. He was first appointed a Master of the High Court (as they were then known) in 1996.

John Marshall QC will undertake an inquiry into the part the Ministry of Justice played in the publication of names of victims on the Judicial Decisions Online website. He will look at the circumstances surrounding the publication of the names contained in judicial decisions, and report back with regard to any changes that could be made to the ministry's procedures to prevent such an event happening again.

Justice **Mark Cooper** of the High Court will head a Royal Commission on the Christrhuch earthquake. The Commission will investigate the build environment in the Christchurch CBD, and look at why the Canterbury Television, PGC, Forsyth Barr and Hotel Grand Chancellor buildings suffered such extensive damage. *lt*

On The Move

Elaine Pratley

Elaine Pratley is moving from the Ministry of Foreign Affairs and Trade to commence a Rotary Peace Fellowship in Bangkok, Thailand, before relocating to Beijing in October this year.

Joanne (Wattie) Watson, sole practitioner, of the firm Wattie Watson & Crew Ltd in Hamilton, has taken up a role with the United Firefighters Union of Australia in Melbourne. As a result Wattie Watson & Crew has ceased.

Philip Milne

Philip Milne will start practice as a barrister on 1 April. He will be based in Waterfront Chambers Wellington and will also work out of Christchurch. A former partner at Simpson Grierson, Phil is currently special counsel in the Wellington local government and environment team. He will continue to specialise in environmental, resource management, local government and public law as well as commissioner work.

Jane Traynor

Jane Traynor has joined Stephens in Wellington as a staff lawyer. Before joining the firm, Jane worked in Auckland as a litigation solicitor, then travelled to London in 2005. During her time in London, Jane worked in law firms and government departments, including the Serious Fraud Office and the Companies Investigation Branch Insolvency Service.