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**RESPONSIBILITIES AND OBLIGATIONS OF SOUTH AFRICA  
REGARDING SPONSORSHIP OF ENTITIES ACTIVE IN THE AREA**

**By**

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degree

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### **ACKNOWLEDGEMENTS**

I want to thank God firstly for providing me with open doors in my life to have reached this part of my journey.

Secondly I want to thank my parents for their unconditional love and support. Without them none of this would have been possible. I want to thank Adv. Leon Gerber for mentoring me throughout this dissertation, and getting me interested in extractive industry law in the first place. ABSTRACT

Deep seabed mining is a sector that poses many environmental challenges. These challenges are addressed by various international instruments that impose obligations on the parties involved therein. The aim of this study is to establish what these obligations are, as well as South Africa's compliance. International instruments were considered to identify these obligations, namely UNCLOS III, the Advisory Opinion and the ISA Draft Regulations. The status of South Africa's compliance will be determined by analysing its domestic legislation and applying it to obligations identified in the instruments. This was done at 3 levels, namely naturalistic, direct and indirect. After applying this method, this study found that South Africa is to a certain extent compliant with these obligations, but that much could still be done to improve its compliance. This study concluded with recommendations including implementing marine scientific research.

#### LIST OF ACRONYMS

UNCLOS	Codification on the Law of the Sea and the development of the United Nations Convention on the Law of the Sea (UNCLOS)
UNCLOS III	The Third UN Conference on the Law of the Sea
EEZ	Exclusive Economic Zone
NEMA	National Environmental Management Act 107 of 1998
MPRDA	Mineral and Petroleum Resources Development Act 28 of 2002
NEM: ICMA	Integrated Coastal Management Act
ISA	International Seabed Authority
JSE	Johannesburg Stock Exchange
CHM	Common Heritage of Mankind
OES	One Environmental System
WMLs	Waste Management Licenses
EAs	Environmental Assessments

#### KEYWORDS

UNCLOS

South Africa  
Advisory Opinion  
Deep Seabed Mining  
Area  
ISA Draft Regulations  
Obligations

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## CHAPTER 1: INTRODUCTION

### 1.1 Background to the research

The international law of the sea is a body of rules that bind States and other subjects of international law. It is dynamic, which means that it is constantly changing. The development of the law of the sea has to be studied in the context of public international law for it to be fully understood.

The law of the sea fulfils certain functions in international relations. Primarily, international law governs the relationship between States, and establishes their respective jurisdictions. In the same way, the United Nations Convention on the Law of the Sea allocates different jurisdictions to the multiple zones of the sea. These zones include internal waters, territorial seas, the contiguous zone, the exclusive economic zone, archipelagic waters, the continental shelf, the high seas and the Area. The primary focus of this research will be on the Area, and the rights and obligations of the coastal States relating to this jurisdictional zone. The second function that the law of the sea fulfils is coordinating international cooperation between States. This pertains to marine ecosystems, and specifically migratory species. International cooperation is also used in the case of marine pollution. The international law of the sea aims to safeguard the common interests of the international community as a whole by providing a legal framework.

The international law of the sea contains three principles. They are:

- The principle of freedom.
- The principle of sovereignty.
- The principle of the common heritage of mankind.

The Codification on the Law of the Sea and the development of the United Nations Convention on the Law of the Sea (UNCLOS) started in 1958. This came about after World War II prompted the need for clarification on the control of offshore natural resources. The Second UN Conference on the Law of the Sea was held in 1960 and mainly focused on the outer limit of the territorial sea. The breadth of territorial sea could not be established at this

meeting. The third UN Conference on the Law of the Sea (hereafter referred to as UNCLOS III) was established as an ongoing process between 1973-1982. It reviewed certain aspects of UNCLOS I, including deep seabed mining technology. Advances in technology, at the time, purportedly made the mining of the deep seabed a possibility. This meant that coastal states would likely aim to extend their legal continental shelf to the deep seabed. If this were to happen, the end result would be that all seabed would be divided between coastal States. Another issue with deep seabed mining was that only States with the necessary technological and financial resources would be able to exploit the resources on the deep seabed. This was unfair toward developing States and consequently unacceptable. The abovementioned issues made it clear that it was necessary to develop a legal framework that regulated the exploitation of the natural resources in the deep seabed. This led to the 1994 Agreement and consequently Part XI of UNCLOS III.

Part XI of UNCLOS III contains the duties and obligations that States have to comply with when sponsoring an entity that is active in the Area. If South Africa were to get involved in deep seabed mining, it would have to comply with the obligations set out herein.

## 1.2 Aims & objectives

The aim of this dissertation is to determine South Africa's obligations as well as its compliance with these obligations when sponsoring an entity that is active in the Area as set out by the Advisory Opinion. There are certain obligations placed on a State when getting involved with deep seabed mining. It is important to know these obligations and how they can be implemented and applied in domestic law.

The objective of this dissertation, or how the aim will be achieved, will be to do an in-depth analysis of UNCLOS III, the Advisory Opinion and domestic legislation of South Africa relating to deep seabed mining in a direct or indirect manner. It is of importance to note that the main focus of this dissertation is on the Area, not the EEZ or the territorial seas, which means that international law will be the primary focus. As international law is too broad, the focus will not be on international law as a whole, but on the International Law of the Sea.

## 1.3 Research question(s)

Primary question:

- Does South Africa comply with the obligations placed on it by UNCLOS with respect to its duties related to the area?

Secondary question

- What are the obligations related to deep seabed mining placed on a State?
- What is the current status of South Africa's compliance with the elements/criteria?
- With regards to the elements/criteria, what are examples that have been used to address it?

## 1.4 Research methodology

This dissertation will be conducted by means of a desktop analysis of relevant international law sources. These sources include, but are not limited to, Part XI of UNCLOS III, with specific focus on the responsibilities and obligations as interpreted and applied in the Advisory Opinion. After determining the criteria set out in these documents, South Africa's level of compliance will be established by analysing domestic legislation at three levels:

- Naturalistic/spirit of the law
  - The Constitution
- Direct level
  - NEMA
  - MPRDA
- Indirect level
  - King IV Code
  - Companies Act
  - NEM: Integrated Coastal Management Act

Consideration will be given to where South Africa is compliant by using examples from current domestic legislation. The areas in which South Africa is non-compliant will also be determined, as well as how this can be remedied. One possible solution to this will be something similar to the 'One Environmental System' that is used for mining. This will mean that laws and procedures relating to deep seabed mining will be consolidated and codified in one system.

### 1.5 Relevance of the research

Deep seabed mining for natural resources is a sector with many challenges and opportunities. It is important to have the necessary technological and financial capabilities in place, as well as the regulatory regime that dictates the procedure to be followed. Deep seabed mining runs the risk of damaging the environment, in much the same way that surface mining does. Deep seabed mining is a sector that is still in relatively early stages, with the first commercial operation to begin early in 2019 in Papua New Guinea. There have been other seabed mining operations at relatively shallow depths. There are specific obligations placed on a State when sponsoring an entity that is active in the Area. If South Africa were to get involved in deep seabed mining, as a signatory, there are various procedures that have to be implemented to ensure compliance with the obligations as set out in UNCLOS III. South Africa as it is known today has largely been built on its mining industry, with large deposits of gold, diamonds, platinum and coal as a major driving force. There has been an increased demand for metals and minerals, while at the same time, land-based natural resources are depleting. If South Africa wants to continue competing internationally in the natural resources sector, it will have to get involved with deep seabed mining by sponsoring an entity sooner rather than later.

### 1.6 Chapter overview

Chapter 1 discussed the background to the international law of the sea and the movement towards codifying it into a document, namely UNCLOS III. The Implementation Agreement and Part XI of UNCLOS III are the most relevant to this study. This chapter also included the research methodology the author would use to answer the primary and secondary questions, and the aims and objectives of the study. Chapter 2 considered the obligations that international instruments placed on States regarding deep seabed mining. In this chapter, the obligations of UNCLOS III, the Advisory Opinion and the ISA Draft Regulations were discussed in particular. Chapter 3 regarded South Africa's current level of compliance by analysing the regulatory framework relevant to the mining regime. This was done at three levels, namely the naturalistic level which included the Constitution, the direct level which included the MPRDA and the indirect level that contained laws and codes such as the Companies Act and the King IV Report. In chapter 4, the compliance was regarded in a more direct manner by comparing the current framework discussed in chapter 3 with the criteria identified in chapter 2. After identifying the areas in which South Africa's legislation was compliant with the identified criteria and where it was lacking, the author made certain recommendations. These included the theoretical consolidation of all relevant provisions in one document, as has been done in the Kingdom of Tonga. In chapter 5, the concluding chapter, the author considered the conclusions of the previous chapters and consolidated them into one chapter. This chapter also included a summary of the recommendations and the manner in which the answers to the primary and secondary questions were reached.

## CHAPTER 2: OBLIGATIONS PLACED ON STATES RELATED TO DEEP SEABED MINING

### 2.1 Introduction

In this Chapter, the obligations placed on States by UNCLOS III and the Advisory Opinion will be identified and discussed. The obligations placed on States by the International Seabed Authority's Draft Regulations will also be considered, after which a summary of all identified criteria will be discussed.

### 2.2 UNCLOS III

The principle of the common heritage of mankind is enshrined in Part XI of UNCLOS III. The rights of the resources in the Area are vested in mankind as a whole, and the International Seabed Authority (ISA) acts on behalf of mankind. The ISA acts as a custodian for the

resources in the Area in much the same way as the State is the custodian for South Africa's mineral and petroleum resources. The principle of the common heritage of mankind entails that the marine environment be preserved for present and future generations, as well as the equitable sharing of benefits. As the principle of the common heritage of mankind is so central to the resources in the Area, there are certain obligations that States have to comply with in order to ensure that future generations benefit as well.

Article 139 sets out the responsibility of States to ensure compliance with the international regulatory framework, as well as their liability for damage. It requires States to ensure that activities in the Area are carried out in conformity with Part XI. If damage occurs as a result of the failure of a State Party to carry out its responsibilities in conformity with Part XI it will cause the State Party to become liable. If a State Party sponsors an entity in terms of article 153(2)(b) and damage is caused as a result of failure to comply with Part XI by this entity, the State Party will not be held liable if it has taken the appropriate measures to comply with article 153(4) and Annex III(4)(4). This will be further expanded on under the section "Advisory Opinion".

Article 140 states that activities in the Area should be carried out for the benefit of mankind as a whole. This means that the interests and needs of developing States have to be taken into consideration. The Area should also be used exclusively for peaceful purposes. In the event that there are resource deposits in the Area that lie across the national jurisdiction of coastal States, certain measures should be taken with regard to the rights and interests of the affected coastal States. These measures include consultations and a system of prior notification. The prior consent of the affected coastal State shall also be required in the event that activities in the Area will result in the exploitation of resources that lie within the national jurisdiction of aforementioned coastal State.

Article 143 pertains to marine scientific research. It states that marine scientific research in the Area should be carried out for peaceful purposes exclusively, as well as for the benefit of mankind as a whole. It further determines that States Parties are to conduct marine scientific research in the Area. It can enhance the knowledge of the ocean, but also poses a risk to the environment. For this reason, the research should be conducted in accordance with Part XIII of UNCLOS. Article 144 focuses on the transfer of technology. It is worded in much the same way as Article 143 as it places an obligation on States Parties to cooperate with regards to the transfer of technology, as well as scientific knowledge pertaining to activities in the Area.

Article 145 and 146 relates to the protection of the marine environment and human life, respectively. Article 145 states that necessary measures have to be taken to ensure that the marine environment is protected from any harmful effects that may be a result from activities in the Area. Necessary measures should also be taken to ensure that human life is protected. With both of these provisions, the International Seabed Authority will adopt rules and regulations to ensure that these obligations are met.

Article 147 pertains to the accommodation of activities in the Area and in the marine environment. It states that activities in the Area should be carried out with other activities in the Area considered. This includes installations being used for deep seabed mining. These installations are to be erected according to the provisions in Part XI. Notice should also be given with regards to any activities pertaining to the installations. The installations may not be established in areas that may cause interference with sea lanes that are essential to international navigation, nor in areas that are used for intense fishing activity. Article 149 relates to archaeological and historical objects. It states that any of these objects are to be either preserved or disposed of for the benefit of mankind as a whole. Preference should be given to the State or country of cultural, historical or archaeological origin.

Article 150 falls under section 3 of UNCLOS III, which sets out the provisions relating to the development of resources of the Area. More specifically, article 150 contains policies relating to activities in the Area. This article does not place direct obligations on States, but rather gives a broad view of how deep seabed mining or other activities in the Area should be conducted. This includes the idea that these activities should be conducted in a way that promotes the healthy development of the world economy as well as a balanced growth of international trade. The resources in the area should be exploited according to the principles of conservation. The article stipulates other ways in which activities in the Area should be conducted in order to contribute to the economy and society. These include the establishment of just and stable prices for minerals derived from the Area, an enhancement of opportunities for States Parties to participate in the development of resources in the Area and the development of the common heritage for the benefit of mankind as a whole.

UNCLOS III contains duties and obligations for States sponsoring an entity to conduct activities in the Area. Some of them are direct and unambiguous, such as the duty of a sponsoring State to give prior notification to a State that may be affected when resource



deposits lie across their national jurisdiction. Others are more like 'soft' obligations and open to interpretation, such as most of the policies in article 150. It is for this reason that certain States, including the Republic of Nauru and the Kingdom of Tonga, requested an Advisory Opinion of the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea.

## 2.3 Advisory Opinion

The necessity for an Advisory Opinion came about after two approvals of plans of work were applied for by Nauru Ocean Resources, Inc. and Tonga Offshore Mining Ltd. These are State corporations that are sponsored by the respective States. The applications were received by the ISA in 2008. In 2009, however, a concern was raised regarding liability for damage as a result of exploration. This led the States to make a request to the ISA that both applications be postponed. Nauru then propositioned the ISA to seek an Advisory Opinion from the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea (hereafter the Chamber) regarding the liability of sponsoring States.

The Council of the ISA decided, in accordance with Article 191 of UNCLOS III to request the Chamber for an Advisory Opinion regarding three questions:

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 United Nations Convention on the Law of the Sea of 10 December 1982?"
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?"

These questions will be discussed under separate headings.

### 2.3.1 Question 1

There are three key provisions when regarding the obligations of the sponsoring States, namely article 139(1); article 153(4); and Annex III, article (4)(4), of UNCLOS III. These provisions mainly refer to the obligation of the sponsoring State to "ensure" that activities in the Area comply with the rules to which they refer. These rules include:

- Part XI of UNCLOS, including article 139(1);
- Relevant Annexes to UNCLOS III;
- Rules, Regulations and Procedures of the Authority, as well as the plans of work approved in accordance with article 153(3) in Article 153(4);
- The terms of the exploration contract it has with the Authority in Annex III, article 4(4);  
And
- Any other obligations under UNCLOS III.

The Chamber had to determine what this "responsibility to ensure" entailed. In paragraph 110 of the Advisory Opinion, the Chamber made the distinction that this responsibility is one of conduct, not of result, and further that it is an obligation of due diligence. This obligation requires a sponsoring State to "deploy adequate means, to exercise the best possible efforts, to do the utmost, to obtain this result." The due diligence obligation placed on States requires the State to implement mechanisms in its legal system to ensure compliance from the sponsored contractors. These mechanisms include laws, regulations and administrative measures. It is important to note that, while the standard to measure compliance with the due diligence obligation is "reasonably appropriate", this obligation is not stagnated. This means that the obligation changes over time, when new scientific or technological knowledge becomes available, or depending on the nature of activities. The riskier the activity, the more stringent the standard for compliance with the due diligence obligation.

A State also has direct obligations. These are independent from their duty to ensure that the

sponsored contractor complies with the provisions set out in UNCLOS. These direct obligations include a State's responsibility to apply a precautionary approach, best environmental practices, ensuring the availability of recourse for compensation with regards to damage caused by pollution and to carry out environmental impact assessments (EIAs). The precautionary approach refers to the obligation of a sponsoring State to take all suitable measures to prevent damage that could occur as a result of the activities of the sponsored entity, even in cases where there is scientific uncertainty about the scope of the potential damage. The obligations of best environmental practices and EIAs will be briefly discussed under the section "ISA Draft Regulations".

### 2.3.2 Question 2

In order for a state to incur liability, there needs to be a failure on the State's part to carry out its responsibilities in terms of UNCLOS, as well as an occurrence of damage. In the event that a State fails to comply with its due diligence obligations, a causal link needs to be established between the failure and the resulting damage. If a sponsoring State has taken "all necessary and appropriate measures to secure effective compliance" from the sponsored contractor with regards to its obligations, the State will be exempt from liability. This does not apply in the case of a State's failure to carry out its direct obligations.

### 2.3.3 Question 3

The Chamber concluded that "necessary and appropriate measures" related to the "responsibility to ensure", in that it required sponsoring States to adopt laws and regulations, as well as take administrative measures to ensure the sponsored contractor's compliance with its obligations under UNCLOS III. These measures are also necessary to exempt the State from liability. This could include establishing enforcement mechanisms that would allow for active supervision of the contractor's activities. A contractual obligation between the sponsoring State and sponsored contractor would not be sufficient when considered as a substitute for laws and regulations. It would be difficult to verify whether the sponsoring State had met its obligations, which would lead to a lack of transparency. The laws and regulations a State adopts regarding the protection of the marine environment may neither be less strict, nor less effective, than those adopted by the Authority or in terms of international rules and regulations.

The Chamber lastly gave indications of factors to consider when adopting laws and regulations, which included the States having to act in good faith and ensure the obligations placed on the sponsored entities are enforceable. With regards to the State's domestic legal system, the environmental laws may be stricter than those imposed by the ISA. It is also preferable to include provisions that relate to the financial viability and technical capacity of sponsored entities, as well as establishing mechanisms relating to direct obligations.

## 2.4 ISA Draft Regulations

The ISA is busy developing the "Mining Code", which comprises the regulations, recommendations, procedures and the draft exploitation code that determine the way in which activities in the Area are to be conducted. These instruments all use UNCLOS III and the 1994 Implementing Agreement relating to deep seabed mining as its legal framework. To date, there have been regulations regarding the prospecting and exploration of polymetallic nodules, polymetallic sulphides and cobalt-rich crusts. The regulations that will be discussed in this section are the Draft Regulations on Exploitation of Mineral Resources in the Area. The most recent at time of publication was drafted at the 24<sup>th</sup> session of the Legal and Technical Commission. These Draft Regulations contain certain obligations that relate to and expand on those mentioned in UNCLOS III and the Advisory Opinion.

The Draft Regulations expand on an issue raised in the Advisory Opinion, namely the fact that there may be certain gaps in the liability regime which would mean the damage of the Area would be inefficiently redressed. These gaps include the situation where a sponsoring State releases the Primary and Direct Obligations and the contractor cannot meet its liability in full; or the sponsoring State fails to release the Primary and Direct Obligations, but the damage is not a causal result of this failure. Freestone also identified another possible gap in the liability regime, where the Chamber made no determination that the sponsoring States are strictly liable for the actions of their contractors. To eliminate and mitigate these gaps, the Chamber suggested that the ISA could establish a trust fund that would compensate for damage that was not covered by the sponsoring State or contractor. This fund is established in the ISA draft regulations, in section 4. It is called the Environmental Liability Trust Fund. The main purpose of this fund includes the implementation of measures that are designed to

prevent or remediate any environmental damage in the Area that are a result of mining activities, where the sponsoring State or contractor cannot cover the cost; as well as the promotion of research of marine mining engineering that reduces the damage to the environment caused by activities in the Area.

Draft regulation 3 pertains to the duty to cooperate and exchange information. More specifically, it places the duty on States to cooperate with the ISA in establishing programmes that analyse the impacts of exploitation on the marine environment. These findings should then be shared with the ISA with the goal to implement and develop Best Environmental Practices with regards to activities in the Area. The Environmental Impact Statement (EIS) is the result of the EIA process, and identifies and mitigates the environmental effects of the planned mining operation. The draft regulation places an obligation on the applicant to draft an EIS. In draft regulation 103, the ISA reiterates the importance of States taking all necessary and appropriate measures to ensure that the contractors comply with their obligations, as previously discussed under "Advisory Opinion".

The majority of the Draft Regulations pertains to obligations on the contractor, with the State having to ensure that the contractor complies with these obligations. An important obligation that the State has to ensure the contractor complies with relates to pollution control and management of waste. This obligation requires a contractor to take the necessary measures to prevent or reduce pollution to the marine environment that may result from its activities in the Area. A contractor is also not allowed to dispose of its Mining Discharge into the Marine Environment, unless it is permitted by the Environmental Management and Monitoring Plan.

## 2.5 Summary & discussion of criteria

When considering the duties and obligations identified in UNCLOS III, the Advisory Opinion and the ISA draft regulations, it is clear that the environment is an important factor. There are many obligations that concern only the environment, namely the direct obligations mentioned in the Advisory Opinion, the EIA obligations in the draft regulations and the obligation in UNCLOS III relating to necessary measures to be taken with regards to the protection of the environment. There are also regulatory obligations that relate to environmental obligations. These entail that the sponsoring State should implement laws, rules and regulations to ensure that the contractor complies with its obligations, and that these laws are enforceable. The regulatory obligations go further to include environmental obligations, namely that the sponsoring State should implement legislation that governs and protects the marine environment. This legislation cannot be less effective than ones adopted in international rules and regulations. A State has an obligation to conduct marine scientific research according to the provisions set out in Part XIII of UNCLOS.

The regulatory obligations do not only pertain to environmental obligations, but obligations of due diligence as well. A State has a "responsibility to ensure" that the contractor complies with its obligations and must do this by implementing laws, regulations and administrative measures. A State Party has to fulfil its obligations in terms of Part XI, or it will become liable if a failure to do so results in damage. The transfer of technology and scientific research is an obligation that relates to cooperation between States.

The common heritage of mankind is a fundamental principle to the law of the sea. It is also an obligation placed on States by UNCLOS III, as it requires that the marine environment be preserved for future generations, as well as provide for the equitable sharing of benefits. There are other obligations that are administrative in nature, such as notifying a State in the event that resource deposits in the Area lie across its national jurisdiction. There is an obligation on States involved in deep seabed mining to accommodate other activities in the Area, with specific regard to installations used for deep seabed mining. In the event that archaeological objects are discovered during the course of deep seabed mining operations, a State has a duty to preserve or dispose of the object for the benefit of mankind as a whole.

## 2.6 Conclusion

In this chapter, the aim was to determine the obligations imposed on States that pertained to deep seabed mining. This aim was to be achieved by considering international instruments that contain deep seabed mining provisions and identify the obligations stated therein. UNCLOS III, the Advisory Opinion and the ISA Draft Regulations were analysed with this aim in mind. A set of criteria was identified that States have to comply with when conducting activities in the Area, including deep seabed mining. These obligations were of an environmental, regulatory and common heritage of mankind nature. Having established the relevant criteria, in the following chapter, the status of South Africa's current compliance with the identified criteria will be considered. This will be done by analysing the regulatory framework that applies to the mining industry.

## CHAPTER 3: CURRENT STATUS OF SOUTH AFRICA'S COMPLIANCE WITH IDENTIFIED CRITERIA

### 3.1 Introduction

In the previous chapter, the author set out to determine what obligations are placed on States by the various international instruments that regulate deep seabed mining. Certain elements were identified that pertained to environmental obligations, regulatory obligations and obligations that were for the common heritage of mankind. In this chapter, the current status of South Africa's compliance will be examined by considering the domestic legislation at three levels, namely the naturalistic level, the direct level and the indirect level. The identified elements from the previous chapter will serve as a background to establish South Africa's current compliance, but the exact level of compliance or non-compliance will be discussed later in the study.

### 3.2 Naturalistic level/spirit of the law

This section will mainly focus on the Constitution of the Republic of South Africa (Constitution). It is important to note the role of international law in South Africa's domestic legislation. The most fundamental level at which this is visible is section 39 of the Constitution. This pertains to the interpretation of the Bill of Rights, and states that when a court, tribunal or forum interprets the Bill of Rights, international law must be considered. Chapter 14 of the Constitution is also important in this regard. The national executive is responsible for negotiating and signing all international agreements. An international agreement is only binding on the Republic after its approval by resolution in both the National Assembly and the National Council of Provinces unless it is technical, executive or administrative in nature. An international agreement can also become law in the Republic in the event that it is enacted by national legislation. Lastly, section 233 determines that when a court interprets any legislation, it must prefer a reasonable interpretation of said legislation which is consistent with international law, rather than an alternative interpretation which is inconsistent with international law. John Dugard made a statement regarding the relationship between public international law and domestic law:

"Whatever the jurisprudential basis for the application of international law in municipal law may be, the undeniable fact is that international law is today applied in municipal courts with more frequency than in the past. In so doing courts seldom question the theoretical explanation for their recourse to international law."

From the above statement, as well as section 39 and the fact that South Africa is a signatory to UNCLOS III, the importance of South Africa's compliance with its international obligations can be inferred.

Section 24 of the Constitution relates to fundamental rights regarding the environment. It states that the environment should be protected for the benefit of not only the present, but future generations as well. This relates to the international law principle of the common heritage of mankind. It goes further to state that this be done with legislative and other measures that ensure the prevention of pollution and ecological degradation. These measures should also aim to promote conservation and secure ecologically sustainable development and use of natural resources. This should be done in a justifiable way that promotes economic and social development.

The "legislative and other measures" mentioned in section 24(b) requires a clarification. In the case of *Government of the Republic of South Africa v Grootboom*, the court made an observation that is relevant to this sub-section. It noted that legislation on its own would not be sufficient to achieve constitutional compliance. Accordingly, other measures would have to be present for compliance. The measures he referred to included appropriate policies and programs that would be implemented by the Executive. The provision in section 24(b) that relates to ecologically sustainable development is another discussion point. A case where this was considered is *Fuel Retailers Association of Southern Africa v Director General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province*. The court stated that the Constitution strives to integrate environmental protection and socio-economic development. A balance would have to be struck between socio-economic considerations and the protection of the environment. This would be achieved through sustainable development.

### 3.3 Direct level

There are mainly two acts that are directly applicable to the extractive industry in South Africa, namely the Mineral and Petroleum Resources Development Act (MPRDA) and the National Environmental Management Act (NEMA). These acts are overarching in nature, and will be discussed under separate headings.

#### 3.3.1 MPRDA

The MPRDA contains important provisions that relate to the principles and obligations of the Constitution, as well as UNCLOS III. It was partially amended by the MPRD Amendment Act 49 of 2008 which came into effect on 31 May 2013, except for a few provisions. The preamble contains the principles of the Act, which include:

- The acknowledgement that South Africa's mineral and petroleum resources belong to the people of South Africa, but the State is the custodian of these resources.
- The State affirms its obligation to protect the environment for the benefit of present as well as future generations, to ensure that mineral and petroleum resources are ecologically and sustainably developed, and the promotion of economic and social development.
- The State also reaffirms its commitment of reforming to bring equitable access to South Africa's mineral and petroleum resources.
- Lastly, the State emphasises the need for creating an administrative and regulatory regime that is internationally competitive.

The ownership of the mineral and petroleum resources is mentioned again in section 3, adding that they are the common heritage of the people of South Africa, and the State is the custodian for the benefit of all South Africans. The Minister of Mineral Resources must ensure that South Africa's mineral and petroleum resources are developed sustainably within a framework of national environmental policy, norms and standards. This has to be done while promoting economic and social development. Many of the principles that are mentioned in the preamble also fall under section 2 which list the objects of the Act. These include promoting equitable access of the nation's mineral and petroleum resources to all people of South Africa, promoting economic growth and the development of mineral and petroleum resources in the Republic of South Africa and advancing the social and economic welfare of South Africans through employment. The section also makes reference to section 24 of the Constitution, by stating that this Act should ensure the nation's mineral and petroleum resources are developed in an ecologically sustainable manner which should also promote justifiable social and economic development.

Chapter 4 of the Act is entitled "Mineral and Environmental Regulation". This deals with the process for application and granting of reconnaissance, prospecting and mining rights. The holder of a prospecting or mining right has to comply with the terms and conditions of the specific right, as well as the relevant provisions of this Act and any other relevant law. One of the prerequisites for being granted a prospecting right by the Minister of Mineral Resources is an assurance that the prospecting will not result in unacceptable pollution, ecological degradation or damage to the environment, as well as an environmental authorisation that is issued. The applicant should also submit an environmental management plan and relevant environmental reports in terms of Chapter 5 of NEMA. This prerequisite applies to the granting of a mining right. The application for a mining right is to be accompanied by an environmental impact assessment (EIA) and an environmental management programme (EMP), as well as relevant environmental reports that are required in terms of Chapter 5 of NEMA. NEMA contains principles that are set out in section 2. These principles apply to all prospecting and mining operations, and will be further discussed under the section "NEMA". The prospecting and mining operation should be carried out in accordance with accepted principles of sustainable development. This should be done by incorporating social, economic and environmental factors into the planning and consequent implementation of prospecting and mining projects, to ensure that the exploitation of these mineral resources benefit present and future generations.

#### 3.3.2 NEMA

NEMA is another act that expands on section 24 of the Constitution. It has various principles and objectives that are entrenched throughout the Act, and these form the basis of the environmental provisions. These principles should be considered when interpreting the MPRDA. In the preamble of the Act, it states that the environment is a functional area of concurrent national and provincial legislative compliance. Accordingly, all spheres of government as well as all the organs of the State must co-operate with and support one another. NEMA posits environmental management through certain principles, of which the most relevant to this study are:

- Polluter pays;
- the precautionary principle;

- cooperative governance;
- public participation;
- the public trust;
- the realisation of environmental justice;
- and
- transparency in decision making.

These principles all fall under the sub-section that pertains to sustainable development, and are also factors that should be taken into consideration with regards to sustainable development. The previous sub-section states that development should be economically, socially and environmentally sustainable. A problem that often arises with sustainable development is that there may be too much focus on one aspect, namely the economy, the society or the environment. The triple bottom line is also problematic and criticised as it leads to trade-off decision-making. This means that decisions that may result in the environment being damaged are justified, as long as the economic and social gains outweigh the cost to the environment.

Chapter 5 of NEMA relates to integrated environmental management and is referred to extensively in the MPRD Amendment Act. The purpose of Chapter 5 is to encourage the application of suitable environmental management tools in order to guarantee the integrated environmental management of activities. Integrated environmental management includes certain objectives, namely:

- Encouraging the incorporation of the principles of environmental management specified in section 2 into all decision-making that could have a substantial effect on the environment;
- ascertaining, predicting and evaluating the definite and possible impact on the environment, socio-economic conditions and cultural heritage, the risks, results and alternative options for mitigation in order to minimise negative impacts, maximise benefits and encourage compliance with the principles established in section 2;
- and
- ensuring the consideration of environmental qualities in management and decision-making that could have an effect on the environment.

An environmental management plan may be required when applying for an environmental authorisation. It should contain a description of how it intends to remedy or stop an activity that causes pollution, remedy the cause of the pollution and comply with the prescribed environmental practices.

Environmental authorisations are another important aspect of Chapter 5. They give effect to the general objectives of integrated environmental management, by investigating, assessing and reporting on the possible impacts on the environment from the listed or specified activities. The procedures by which the investigation, assessment and communication of the possible impacts of the listed activities on the environment are conducted must include:

- an investigation of the possible impacts of the alternatives to the activity on the environment;
- an investigation and evaluation of the impact of the planned activity on any national estate as referred to in section 3(2) of the National Heritage Resources Act, 25 of 1999;
- and
- reports on gaps in knowledge and any uncertainties with regards to compiling the information.

The section referred to in the National Heritage Resources Act pertains to the heritage resources of South Africa that have cultural significance for the present and future generations.

### 3.4 Indirect level

These are acts and codes that are not directly applicable to deep seabed mining, but contain some of the elements of the international instruments from the previous chapter, such as transparency, environmental and fiscal provisions. These acts and codes are some of what a company, including a mineral company, listed on the JSE have to comply with.

### 3.4.1 King IV

The King IV Report on Corporate Governance for South Africa 2016 (King IV Report) is a voluntary report or code that contains the values, practices and outcomes which serve as the point of reference for corporate governance in South Africa. Corporate governance is defined as exercising ethical and effective leadership by the governing body for the purpose of achieving certain outcomes, namely:

- Ethical culture
- Good performance
- Effective control
- Legitimacy

The King IV Report has certain fundamental principles, which include sustainable development. It is worded in much the same way as in the Constitution, the MPRDA and NEMA. It focuses more on organisations, however, in that it states that the success or failure of an organisation is linked to the context of the economy, society and the natural environment. The case where inequality in society is addressed through economic transformation, especially in South Africa, is an example of a challenge that has an impact on all three sub-systems where organisations are operational. Compliance is another fundamental principle of this report, and relates to the obligation on persons charged with governance to ensure that compliance is understood as an obligation as well as a source of rights and protection. It is necessary to understand how applicable laws, codes, standards and non-binding rules are all related.

The King IV Report also refers to corporate citizenship. An organisation that is part of society has corporate citizen status. This status places rights and responsibilities on the organisation that are to be carried out for society and the natural environment the society depends on. A recommended practice with regards to responsible corporate citizenship relates to the organisation's compliance with the law, leading standards as well as its own codes of conduct and other policies. The Report goes further by referring to section 7 of the Companies Act. These are the purposes of the act, which include promoting compliance with the Bill of Rights specified in the Constitution. The governing body of the organisation is also tasked with overseeing and monitoring the effects of the organisation's activities on its status as a responsible corporate citizen. There are specific areas that should be considered in this regard, namely:

- Economy, which includes a responsible and transparent tax policy.
- Society, which refers to community development.
- Environment, which includes the responsibilities with regards to pollution and waste disposal, as well as protection of biodiversity.

### 3.4.2 Companies Act

The Companies Act 71 of 2008 contains provisions regarding liability and transparency. This is related to some of the criteria identified in chapter 2. The purposes of this Act are set out in section 7. A purpose relevant to this study is promoting the South African economy's development by encouraging transparency and high corporate governance standards. The financial statements of a company are often an important factor when considering its level of accountability or transparency. This is also the case for a mining company. Section 29 of this Act contains the requirements and standards that are applicable to a company's financial statements. The financial statements of a company have to comply with the prescribed form and standard for financial statements, in the event that a person requests access to them. This is also applicable to annual financial statements, and the financial statements should contain the transactions of the company. When considering this provision in conjunction with the aforementioned purpose of the Act, the importance of transparency in a company becomes evident. The Act contains provisions regarding the liabilities of directors, including:

- Signing or authorising financial statements that are false;
- Being involved in an act that is fraudulent;
- The director is joint and severally liable with any other person who was involved in the same act.

The Companies Act pertains to the ethical and sustainable operation of a company and contains many of the same principles that are in the King IV Report. The Companies Act makes these principles enforceable with the goal to achieve better corporate governance.

### 3.4.3 National Environmental Management: Integrated

## Coastal Management Act

This Act applies to the Republic's coastal waters, as well as the Prince Edward Islands. The preamble contains important provisions regarding the enactment of the Act. It states that in order to conserve the coastal zone, as well as use it sustainably, an innovative legal and institutional framework is required which should clearly define the roles of the public, the State and other users of the coastal zone respectively. It goes further by stating that integrated coastal management is an evolving process that should take account of the operations of the coastal zone as a whole, including the coordination and regulation of the various human activities that occur in the coastal zone to ensure its conservation and sustainable use. Section 2 pertains to the objects of the Act, of which one is of particular interest. The object states that it is to give effect to the Republic's obligations with regards to international law that concerns coastal management and the marine environment. It is important to take note of this as it references the Republic's international law obligations, in other words, its obligations in terms of UNCLOS III. If it is to comply with its obligations in terms of coastal management and the marine environment, it will also have to comply with its obligations in terms of deep seabed mining.

This Act contains provisions regarding environmental authorisations that expand on the requirements set out in NEMA. These include having to consider whether:

- The development is situated within coastal public property and does not comply with the objective of conserving coastal public property for the benefit of current and future generations;  
And
- It is likely that the development will cause irreversible damage to the coastal environment that cannot be mitigated.

The abovementioned provisions make it clear that the requirements attached to obtaining an environmental authorisation are extensive, and therefore promote the conservation and sustainable use of the coastal zone.

### 3.4.4 Marine Spatial Planning Bill

This is referred to as a Bill as it is yet to be enacted by the President in the *Gazette*. The preamble sets out the reasons for implementing this Bill. One of the reasons is that the ocean is being used more than ever before, which means that there may be conflicts between the different usages. The objectives of this Bill include developing and implementing a combined marine spatial planning system to manage the changing environment of the ocean that can be accessed by different sectors and users; and facilitating good ocean governance. There are certain criteria that have to be taken into account which apply to marine spatial planning, such as a precautionary approach and relying on best scientific information. When developing a marine area plan, it is necessary to establish a knowledge and information system. This system should include the ecological processes involved and information regarding all sectors, including existing and future uses.

### 3.5 Conclusion

In this chapter, the author set out to determine South Africa's current level of compliance with the criteria identified in the previous chapter by analysing different domestic laws. These laws are applicable to the mining regime in South Africa. It was established that these laws contain similar themes as the criteria identified in the previous chapter. An example of this is the emphasis South African legislation places on the protection, management and conservation of the environment. This is evident when considering the sections NEMA and NEMA: ICMA. In the previous chapter, the extensive obligations regarding the environment were identified.

South Africa submitted comments to the ISA with regards to the draft regulations, which should be considered. In these comments, South Africa stressed the importance of conserving the marine environment. They went further by stating that exploration or exploitation of any kind on the international seabed should be conducted sustainably. They also suggested the ISA would need an environment protection work stream with clear and enforceable stands for environmental protection. South Africa also recommended that State Parties to UNCLOS and the ISA adopt a Code that promotes the principle of "common heritage of mankind". This principle determines that the international seabed should be commercially exploited in a manner that is both responsible and sustainable and it should be for the benefit of all mankind.

It has to be noted that South Africa is pushing for the expansion of off-shore oil & gas



development in terms of Operation Phakisa. At present, only 0,4% of South Africa's oceans are protected. Therefore, the environmental obligations with regards to deep seabed mining are of particular importance considering their argument for expansion. The above-mentioned comments are a contradiction to the current push by the Department of Mineral Resources to expand the blue economy. The department aims to make it easier for oil & gas companies to conduct surveys which include test drilling into the ocean beds until 2024. They are allowed to do this while not adhering to the critical clauses of NEMA and, for this reason, these contrasting actions should be taken into consideration.

In the following chapter, the current framework of South Africa's legislation will be compared with the criteria identified in the chapter 2 in order to determine the extent to which South Africa is compliant, or lacking, with regards to deep seabed mining regulations.

## CHAPTER 4: EXAMPLES IN DOMESTIC LEGISLATION AND OTHER MEASURES THAT HAVE BEEN USED TO ADDRESS THE IDENTIFIED CRITERIA

### 4.1 Introduction

In chapter 2, the author identified certain criteria that have to be in place with regards to deep seabed mining in UNCLOS III, the Advisory Opinion and the ISA Draft Regulations. There were elements that related to environmental obligations, regulatory obligations and obligations regarding the CHM. In the previous chapter, the current framework of South Africa was considered with particular emphasis on laws and other measures that regulate certain aspects of the mining regime. This was done to determine to what extent South Africa is currently compliant with the criteria identified in chapter 2. In chapter 4, the current compliance of South Africa will be further discussed by using the examples identified in the previous chapter and applying them to the criteria identified in chapter 2. This will establish the areas where South Africa is compliant. The areas where South Africa is non-compliant will also be established, along with recommendations to mitigate this. An example of foreign legislation that regulates deep seabed mining will be briefly discussed, as well as lessons to be learnt from it.

### 4.2 Existing compliance

#### 4.2.1 Environmental obligations

The international instruments analysed in chapter 2, namely UNCLOS III, the Advisory Opinion and the ISA Draft Regulations imposed certain environmental obligations on a State regarding deep seabed mining. When considering legislation in South Africa that pertains to the environment, the management and protection thereof, it can be concluded that South Africa is broadly compliant in this regard. This legislation includes section 24 of the Constitution, NEMA, NEM: ICMA as well as provisions in the MPRDA and the Marine Spatial Planning Bill which will now be discussed on a more detailed level.

The Constitution is the most sovereign law in the Republic, meaning that the other laws have to adhere to and promote the provisions stated therein. The section pertaining to the environment contains provisions that include the obligation to protect the environment, conserve it, as well as develop it sustainably by implementing legislation and other measures to ensure this. NEMA and its related laws can be seen as the legislation that was implemented to give effect to this. NEMA is the framework that integrates good environmental management into developmental activities, as well as the mechanism through which environmental laws are enforced. Some principles that are intrinsic to environmental management include polluter pays, the precautionary principle, environmental justice and transparency in decision making. The precautionary principle is listed as a direct obligation in the Advisory Opinion, and entails that States should take all possible measures to prevent damage from occurring as a result of the conduct of the sponsored entity. In this regard, it should be noted that South Africa is directly compliant with the obligation pertaining to the precautionary approach.

Chapter 5 of NEMA contains provisions regarding integrated environmental management, an environmental management plan and environmental authorisations. The duties imposed by this chapter are extensive. Integrated environmental management is important when implementing activities that could have a negative impact on the environment. It entails the evaluation of possible impacts the proposed activity could have on the environment as well as mitigation steps to minimise the negative impacts and maximise possible benefits. The environmental management plan requires an applicant to provide a solution in the event that the activity he is proposing causes pollution. This solution includes remedying this cause and complying with prescribed environmental practises. An environmental authorisation must include a report on any gaps in knowledge or uncertainties in compiling the information.

The environmental provisions contained in NEM: ICMA are narrower and pertain specifically to the coastal zone. It lists important factors to consider when granting an environmental authorisation for a development, including whether it will cause irreparable damage. The management of the coastal zone is also important, as it is necessary to regulate the various human activities active therein. The Marine Spatial Planning Bill aims to develop a marine spatial planning system that can manage the different sectors and activities active in the ocean. In order to do this, the precautionary principle has to be taken into consideration. Another example of domestic legislation that complies with the precautionary principle as stated in the Advisory Opinion.

The MPRDA acknowledges that the environment has to be protected and preserved for the benefit of present and future generations. It fulfils this obligation by implementing environmental provisions that have to be adhered to before certain rights can be granted, namely reconnaissance, prospecting and mining. The environmental provisions are regulated in terms of NEMA. These include a guarantee that prospecting will not cause unacceptable pollution or damage to the environment, and prospecting applications have to be accompanied by an environmental management plan and an environmental authorisation. An application for a mining right should be accompanied by the same documents, as well as an EIA. The environmental obligations comply with the obligations identified in the Advisory Opinion and the ISA Draft Regulations with regards to pollution and conducting EIAs. The legislation on minimising and mitigating pollution can thus be seen as extensive.

Although not mentioned under chapter 3, reference has to be made to the One Environmental System (OES) instituted by the government. The OES replaces the fragmented system that pertained to environmental assessments. The OES means that the Minister of Mineral Resources is responsible for issuing environmental authorisations (EAs) and waste management licences (WMLs), while the Minister of Environmental Affairs is the authority in charge of appeals for EAs and WMLs issued by the Minister for Mineral Resources. The reason for this is that all environmental applications pertaining to mining now fall under the jurisdiction of NEMA, as is evident from the discussion above. This means that the environmental application process would be streamlined as it would fall under one department. The result of this is shorter timeframes with regards to environmental assessments.

When all the environmental obligations imposed by South Africa's domestic legislation are taken into consideration, it is clear that the South African environmental legislation is stricter than the obligations imposed in terms of UNCLOS III, the Advisory Opinion and the ISA Draft Regulations.

## 4.2.2 Regulatory obligations

UNCLOS III and the Advisory Opinion place due diligence obligations on States, namely that a State has a responsibility to ensure the contractor complies with its obligations. This should be done by the implementation of laws, regulations and administrative measures. South Africa is compliant in this regard as it does have legislation and other measures that are applicable here, namely the MPRDA and the King IV report.

The MPRDA regulates the mining regime, including the application and granting of reconnaissance and mining rights. Once the requirements with regard to the application of a mining right are fulfilled, and the applicant is granted a prospecting or mining license, the applicant becomes a holder of a prospecting or mining right which awards him certain rights. These rights also come with obligations attached thereto. These obligations determine when the holder of a prospecting or mining right should commence with activities, namely 120 days and one year, respectively, after the right becomes effective. The obligations also require that the holder comply with the terms and conditions of either the prospecting or mining right, depending on which is relevant, the provisions of the MPRDA and any other

laws that may be relevant. This includes NEMA and its related acts, as it is relevant to the mining regime. The holder of a right thus has to comply with the relevant provisions in NEMA as well. In the preamble of this Act, the State emphasised the importance of creating an internationally competitive administrative and regulatory regime. This means that, if South Africa wants to compete internationally with regards to its regulatory regime, it has to promote the same principles as what is contained in international law. The responsibility on the State to ensure compliance is an important obligation with regards to UNCLOS III and the Advisory Opinion, and should be awarded the same status in the regulatory regime of South Africa.

The King IV Report addresses this obligation by highlighting the importance of corporate citizenship. In order to adhere to the principle of corporate citizenship, an organisation needs to implement practices with regards to compliance with the law and leading standards. Compliance is a fundamental principle that is discussed separately in the King IV Report. It entails that the persons responsible for governance has to ensure that compliance is understood as both an obligation as well as a source for rights and protection. In the context of UNCLOS III and the Advisory Opinion, if a State complies with its obligation of ensuring the compliance of the contractor, it will also be protected with regards to liability. In this way, compliance is both an obligation and a source. The Companies Act encourages transparency and corporate governance, and makes the principles of the King IV Report enforceable. In the Advisory Opinion, a concern was raised regarding a contractual obligation between a State and contractor. This would lead to a lack of transparency if there were not laws to ensure the contractor's compliance. The principles in the King IV report that pertain to monitoring the effects of the organisation's activities on the economy, society and the environment, read together with the Companies Act, would mitigate this situation to an extent.

UNCLOS III places an obligation on the sponsoring State to accommodate other activities in the Area. This includes specifically the erection of installations, and regulates where and how they should be erected. The Marine Spatial Planning Bill solve a similar problem. The Bill aims to implement a combined marine spatial planning system as there are conflicts between the different uses.

### 4.2.3 Obligations regarding the common heritage of mankind

The principle of the common heritage of mankind has its own set of obligations attached to it. These obligations are softer in nature, and more closely related to having similar principles enshrined in a country's legislation than an actual obligation. In UNCLOS III, this principle requires that the marine environment should be preserved for present and future generations and benefits should be shared equitably. Fortunately, this principle is present in South Africa's legislative framework as well.

The Constitution embodies this principle by stating in section 24 that the environment must be protected for present and future generations. The MPRDA contains a similar provision, including bringing equitable access to South Africa's mineral and petroleum resources. UNCLOS III determines that the rights of the resources in the Area are entrusted to mankind as a whole, while the ISA acts on behalf of mankind. The ownership with regard to the mineral rights in South Africa worded in much the same way. In this case, the mineral and petroleum resources belong to the people of South Africa with the State acting as custodian.

## 4.3 Gaps in compliance & recommendations

UNCLOS III imposes an obligation on a sponsoring State to conduct marine scientific research in order to determine the implications of deep seabed mining on the marine environment. This research should be conducted for peaceful purposes. At present, South Africa is not compliant with the obligation of marine scientific research. South Africa has made comments to the ISA related to marine scientific research, stating that issues such as noise impact on the marine environment should be studied. This, to the author's knowledge, is the extent of South Africa's involvement with this obligation. Accordingly, it is not compliant in this regard.

States are obliged to cooperate with regards to scientific knowledge and the transfer of technology pertaining to activities in the Area. A similar obligation is imposed by the Draft Regulations, whereby there is a duty imposed on States to cooperate and exchange information. In this case, States have to cooperate with the ISA to develop Best Environmental Practices by establishing programs that analyse the impacts of exploitation on the marine environment. These obligations relate to marine scientific research and, therefore, it can be accepted that South Africa is not compliant with these obligations either.

It is the author's recommendation with regards to the above-mentioned obligations, in which South Africa is non-compliant, that steps should be taken to improve the country's compliance. The possible establishment of a marine scientific research council should be investigated. The scope of their research, duties and powers should be clearly defined, for example the fact that their research pertains to the Area. This council could also theoretically cooperate with the ISA to establish Best Environmental Practices as determined in the Draft Regulations.

The Advisory Opinion recommended that sponsoring States implement provisions in their domestic legislation which would refer to a sponsored entity's financial viability and technical capacity. The Companies Act may assist with determining a company's financial viability by requesting access to its financial statements, but there are no provisions regarding the determination of a company's technical capacity in South Africa's domestic legislation.

To expand on the recommendation made in the Advisory Opinion, a State has to implement provisions regarding the required technical capacity of an entity. If it does not do this, it would not be complying with the due diligence obligation. This obligation entails exercising the best possible efforts to obtain this result, by implementing mechanisms in its legal system that would ensure compliance from the contractors. More importantly, the standard for due diligence is "reasonably appropriate" and would become stricter if the activity were riskier.

The failure of a State to implement this provision would mean that, in the event of damage occurring, the State would not be exempt from liability as it did not implement the necessary provisions regarding the technical capacity of the entity.

With regards to South Africa and its non-compliance to this recommendation, it is clear why this provision would need to be in place if it were to sponsor an entity to conduct activities in the Area. If South Africa were to sponsor an entity that lacked the necessary technical capacity and experience to conduct the activities in a manner that complies with the obligations identified in UNCLOS III and the ISA Draft Regulations, South Africa would be vulnerable to liability.

## 4.4 Example of foreign legislation

The Kingdom of Tonga enacted their *Seabed Minerals Act* in 2014. This Act is divided into parts and address matters such as the "Tonga Seabed Minerals Authority", "Duties and Responsibilities of Individuals", "Fiscal Arrangements" and "Marine Scientific Research".

In section 9 of the Act, the Tonga Seabed Minerals Authority is established. The authority has certain objectives, including:

- The compliance objective, which entails maintaining effective control of Seabed Mineral Activities by securing compliance of sponsored parties with their obligations in terms of this Act;
- The protection objective, which relates to the protection of the Marine Environment;
- The accountability objective, which aims to provide a transparent and accountable regime.

The Authority has specific functions, such as conducting due diligence enquiries into applicants and enforcing sanctions for non-compliance with this Act. Individuals have certain duties and obligations in terms of this Act, which include adhering to the Marine Pollution Prevention Act 2002, the EIA Act and the Environmental Management Act 2010.

Section 91 of the Act pertains to payments, and form part of Part 8 of the Act which contains fiscal arrangements. This section is extensive with regards to its provisions and refers to application fees, taxes and sponsorship payments. It determines that the holder of a sponsorship certificate will pay annual administrative fees in terms of the Kingdom's sponsorship of its Seabed Mineral Activities in the Area, and in the case where the sponsorship certificate relates to a contract for mining in the Area, these sums will be paid as a commercial recovery payment.

Marine scientific research is also referenced in the Act, as well as the specific duties when conducting marine scientific research. The precautionary approach should be applied when conducting marine scientific research, and marine scientific research should not be proceeded with if there are indications that doing so would cause serious harm to the environment.

This Act compiles the obligations referred to in UNCLOS III, the Advisory Opinion, the ISA Draft Regulations and other legislation pertaining to deep seabed mining into a consolidated

legislative instrument. It contains provisions that are specific to the licensing of seabed mineral activities within the Kingdom's national jurisdiction, as well as the sponsorship of activities in the Area, which fall outside the Kingdom's national jurisdiction. This Act is a good example of a way to implement the duties imposed by international instruments into domestic legislation, as it contains provisions that relate to both.

## 4.5 Conclusion

In this chapter, South Africa's current framework of domestic legislation was compared and applied to the criteria identified in UNCLOS III, the Advisory Opinion and the ISA Draft Regulations. South Africa's current framework goes above and beyond the obligations imposed by the international instruments in certain regards, namely with the environmental authorisations and assessments required in terms of NEMA and its related laws. It is also adequately compliant to a certain extent with regards to the regulatory obligations, meaning it can be improved on. This is in regards to transparency and accountability, as more obligations can be imposed by South Africa's legislation to make this a priority. There are gaps as well with regards to complying with the identified obligations, as is evident from the lack of marine scientific research and cooperation regarding scientific knowledge and transfer of technology.

The author recommends implementing a marine scientific council, or a body similar to the Seabed Minerals Authority referred to in the *Seabed Minerals Act 10 of 2014* to fulfil functions necessary for the management and conservation of the seabes.

## CHAPTER 5: SUMMARY & CONCLUSION

### 5.1 Summary & observations

This study was conducted in order to compile a list of criteria that contained the obligations placed on States with regards to deep seabed mining and compare this list of criteria with South Africa's current framework in order to determine its compliance. In chapter 2, international instruments that were analysed for this purpose included UNCLOS, the Advisory Opinion and the ISA Draft Regulations. Accordingly, after analysing these instruments, certain criteria were identified that pertained to the obligations States have to comply with in order to sponsor an entity to conduct deep seabed mining. These criteria contained environmental, regulatory and common heritage of mankind obligations, as well as others. Some of the criteria identified included the implementation of necessary and appropriate measures by the sponsoring State to ensure the sponsored entity complies with its obligations. These necessary and appropriate measures included adopting laws and regulations. Another obligation required a State to conduct marine scientific research in the Area.

Chapter 3 examined South Africa's current framework pertaining to mineral legislation and related regulatory documents in order to determine its compliance with the criteria identified in chapter 2. The legislation and related documents analysed in this chapter included the Constitution at the naturalistic level, the MPRDA and NEMA at the direct level and the King IV Report, Companies Act, NEM: ICMA and Marine Spatial Planning Bill at the indirect level. After analysing the legislation and relevant provisions therein, it was established that there were similar themes to the criteria identified in chapter 2. The extensive provisions relating to environmental management, conservation and protection can be used as an example, as well as the common heritage of mankind principle enshrined in the Constitution and the MPRDA. The comments that South Africa made to the ISA were also briefly discussed. These comments included the importance of conserving the marine environment and that exploration or exploitation should be conducted in a sustainable manner. The principle of sustainable development is a fundamental principle in South Africa. It is mentioned in the Constitution and expanded on under MPRDA and NEMA. Sustainable development should be sustainable with regards to the economy, society and the environment. To relate this back to South Africa's comments, the exploration and exploitation of deep seabed minerals should thus be developed in a way that is justifiable in all three aspects. At the same time, South Africa was pushing for the expansion of off-shore oil & gas development in terms of Operation Phakisa. This proposed action is in contradiction to South Africa's comments as this would make it easier for oil & gas companies to conduct surveys into ocean beds until 2024.

Accordingly, in chapter 4, the status of South Africa's current compliance with the identified criteria could be determined by comparing the relevant provisions in chapter 3 to the

identified criteria in chapter 2. The broad areas and specific obligations wherein South Africa were compliant were identified, as well as the obligations where South Africa were non-compliant. It was established that South Africa broadly complied with the environmental, regulatory and common heritage of mankind obligations. Areas of non-compliance included marine scientific research as well as the duty to cooperate with the ISA in a certain capacity. The author recommended certain actions that could be taken in order to improve South Africa's compliance with these obligations, including instituting a marine scientific research council. Lastly, the *Seabed Minerals Act* of the Kingdom of Tonga was briefly discussed and regarded as an example that could be referred to when implementing legislation that would entail both national and international obligations.

## 5.2 Recommendations

With regards to measures that can be taken to improve South Africa's compliance with the obligations identified in the international instruments, the author posited the following recommendations:

- With regards to lack of marine scientific research, implement a legislative body, similar to the Seabed Minerals Authority envisioned in the *Seabed Mining Act* to conduct marine scientific research
  - This council would also be involved in cooperating with the ISA to exchange information
  - This council would be involved in the transfer of technology and scientific knowledge
- The regulations need to be expanded on to ensure the technical capability of a sponsored entity
- The *Seabed Minerals Act* should be closely regarded as an example that can be followed in implementing domestic and international obligations into one document that pertains to deep seabed mining.

## 5.3 Conclusion

This study was conducted with the aim of establishing the responsibilities and obligations South Africa has with regards to sponsoring an entity active in the Area. The obligations that are placed on States by UNCLOS III, the Advisory Opinion and the Draft Regulations were analysed, after which certain criteria began to reveal itself. These criteria were divided into groups to some extent, to ease with identification of the obligations. A comprehensive list of criteria was assembled that pertained to deep seabed mining. In the following chapter, the current framework of South Africa was analysed, with the goal of providing a basis on which South Africa's compliance with the criteria could be established. After considering South Africa's legislation extensively, the applicable laws were identified and the applicable provisions in these laws. At this point, South Africa's possible compliance began to be realised as themes similar to those identified in chapter 2 were emerging. In the following chapter, the exact level of compliance would be established by using the framework, and finding the similar theme, principle or provision in the identified criteria. By following this method, the responsibilities and obligations of South Africa regarding sponsoring an entity active in the Area were identified, as well as the obligations South Africa was not compliant in. Accordingly, the author made recommendations to mitigate this, of which the most pertinent could be marine scientific research. This is because of the negative impacts deep seabed mining can have on the environment. A foreign legislative document was regarded, and provisions isolated as examples that could be followed and implemented by South Africa in its endeavours of sponsoring an entity active in the Area, and complying with the responsibilities and obligations imposed on it in this capacity.

aware of the Cabinet passing a document that would expand the Marine Protected Areas to 5% on 24-10-2018. This has not been implemented in the legislation. This is a positive development and will be regarded in future research.

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