



COLLEGE OF LAW AND MANAGEMENT STUDIES
SCHOOL OF LAW
UNIT OF MARITIME LAW AND MARITIME STUDIES

A Statutory Analysis of Ocean Governance in South Africa with a
Focus on the Marine Spatial Planning Act 16 of 2018.

BY:

THEMBALETHU NZIMANDE
(212506285)

LLM (UNIVERSITY OF KWAZULU-NATAL)

Mini Dissertation submitted to the School of Law in fulfilment of
the requirements of the degree of Master of Laws in Maritime
Law.

SUPERVISOR: ADVOCATE DUSTY-LEE DONNELLY

DECLARATION

I, *Themba lethu Nzimande*, declare that:

- (i) The research reported in this thesis, except where otherwise indicated, is my original work.
- (ii) This thesis has not been submitted for any degree or examination at any other university.
- (iii) This thesis does not contain other persons' data, pictures, graphs or other information, unless specifically acknowledged as being sourced from other persons.
- (iv) This thesis does not contain other persons' writing, unless specifically acknowledged as being sourced from other researchers. Where other written sources have been quoted, then: a) their words have been re-written, but the general information attributed to them has been referenced; b) where their exact words have been used, their writing has been placed inside quotation marks, and referenced.
- (v) Where I have reproduced a publication of which I am author, co-author or editor, I have indicated in detail which part of the publication was actually written by myself alone and have fully referenced such publications.
- (vi) This thesis does not contain text, graphics or tables copied and pasted from the Internet, unless specifically acknowledged, and the source being detailed in the thesis and in the References section.

Candidate: Themba lethu Nzimande

Signature: 

Date: 14 October 2020

ACKNOWLEDGEMENTS

In the name of the Father, the Son and the Holy Spirit. Without God on my side I would not have come this far. I wish to thank all the people whose assistance is greatly appreciated in the completion of this project.

From family and friends checking in on me, to library aid, in particular Kadephi who was always prompt in assisting with any queries and always available to help. I would also like to thank Dr Goodier for her professional and valuable assistance with this work. A special thanks to my editor Adrienne Pretorius for her assistance as well.

Finally, my family, thank you for putting up with my tantrums and bursts of frustrations caused by this study. I owe everything to my loving and supporting parents. I would not be where I am today had it not been for your love, support and guidance. I praise and give thanks to my ancestors and everyone that has wished me well on this journey and kept me in their thoughts and prayers.

DEDICATION

The maritime bug definitely got me in my final year of my undergraduate studies and has stuck with me since. I wish to dedicate this work to all young law students with a passion for the blue economy. There's a lot more work still to be done in ensuring sustainable methods are adopted and implemented. I hope this work helps in that conversation.

ABSTRACT

One of South Africa's greatest assets has been its ocean and the business it brings with. The economic opportunities presented by the ocean are noted by legislatures by all coastal States alongside the need to coordinate planning in said ocean space and optimise sustainable economic growth.

This is the focus of the Marine Spatial Planning Act, as it recognises that the ocean is being used more intensively than it has been in the past and has multiple usages that may conflict with one another.

This dissertation will discuss key concepts underpinning the blue economy. Thereafter, the dissertation will look at the Marine Spatial Planning Act 16 of 2018, which seeks to outline the use of the ocean space among all the ocean users in a sustainable manner. This dissertation will focus on a legal analysis of ocean governance policy and does not consider other work areas of Operation Phakisa, or the economic, social or political impact of the programme.

TABLE OF CONTENTS

DECLARATION		i
ACKNOWLEDGEMENTS		ii
ABSTRACT		iii
ABBREVIATIONS and ACRONYMS		viii
CHAPTER 1: INTRODUCTION		1
1.1	Background and Rationale	1
1.2	Problem Statement	3
1.3	Key Questions to be Answered	3
1.4	Structure of Dissertation	3
1.5	Research Methodology	4
1.6	Conclusion	4
CHAPTER 2: LITERATURE REVIEW		6
2.1	Introduction	6
2.2	Definition of the Blue Economy	7
2.3	Objectives of the Blue Economy	8
2.4	Benefits and Challenges of the Blue Economy	10
2.5	Sustainability	14
2.6	Africa and the Blue Economy	14
2.7	Operation Phakisa	16
2.8	Conclusion	20
CHAPTER 3: CURRENT OCEAN-GOVERNING LEGISLATION		21
3.1	Introduction	21
3.2	Ocean Governance	22
3.3	International Law on Ocean Governance	22
3.4	Legal Framework for Ocean Governance in South Africa	26
3.5	Existing Domestic Legal Framework	29

	3.5.1	Sea-Shore Act 21 of 1935	29
	3.5.2	Maritime Zones Act 15 of 1994	30
	3.5.3	Marine Fisheries Policy for South Africa: White Paper 1997	32
	3.5.4	Marine Living Resources Act 18 of 1998	33
	3.5.5	National Environmental Management: Integrated Coastal Management Act 24 of 2008	34
3.6	Green Paper on the National Environmental Management of the Ocean		35
3.7	White Paper on the National Environmental Management of the Ocean		36
3.8	South Africa's Ocean Governance Approach		38
3.9	Conclusion		41
CHAPTER 4: NEW PROPOSED LEGISLATION			43
4.1	Introduction		43
4.2	Enactment and Status of Marine Spatial Planning Act and MSP Framework		44
4.3	Objectives of the Act		45
4.4	Key terms in the Act		46
4.5	Principles of Marine Spatial Planning		47
4.6	Structures and Powers		52
4.7	Process of the Creation of Marine Area Plans		56
	4.7.1	Development of a marine spatial planning framework	56
	4.7.2	Development of a knowledge and information system referred to in section 7	56
	4.7.3	Development of marine area plans	58
	4.7.4	Effective implementation, monitoring and evaluation of marine area plans	58
	4.7.5	The review of the marine area plans in terms of section 14	58
	4.7.6	Consultation	58
4.8	Canada's Ocean Act and Ocean Strategy		60

	4.8.1	Background	60
	4.8.2	Enactment and status of Oceans Act and Canada's Oceans Strategy	60
	4.8.3	Objectives of Act and Strategy	61
	4.8.4	Key sections in the Act	62
	4.8.5	Principles of Oceans Act and Strategy	63
	4.8.6	Consultation	64
	4.8.7	Lessons to be learned from Canada's experience with Marine Spatial Planning	65
4.9	Conclusion		67
CHAPTER 5: CONCLUSION AND RECOMMENDATIONS			69
5.1	Summary of Chapters		69
5.2	Recommendations		70
5.3	Concluding Remarks		70
REFERENCES			71
<u>APPENDICES:</u>			
Appendix 1	Ethical Clearance Application letter		82
Appendix 2	Change of Dissertation Title form		85

TABLE

3.1	Domestic Legislation Listed in Annexure B to the Green Paper	27

ABBREVIATIONS AND ACRONYMS

AU	African Union
AIMS	Africa's Integrated Maritime Strategy
AMD	Africa's Maritime Domain
BFR	Big Fast Results (model or methodology)
CER	Centre for Environmental Rights
CPUT	Cape Peninsula University of Technology
CSIR	Council for Scientific and Industrial Research
DEA	Department of Environmental Affairs
ICZM	Integrated Coastal Zone Management
IOI SA	International Ocean Institute – South Africa
LDC	Least Developed Country
MPA	Marine Protected Areas
MSP	Marine Spatial Plan/Planning
NBSAP	National Biodiversity Strategy and Action Plan
NEMICMA	National Environmental Management: Integrated Coastal Management Act
NEMO	National Environmental Management of the Ocean (Green and White Papers)
NMMU	Nelson Mandela Metropolitan University
SDG	Sustainable Development Goal
SIDS	Small Island Developing States
TNPA	Transnet National Ports Authority
UNCED	United Nations Conference on Environment and Development
UNCHE	United Nations Conference on the Human Environment
UNCLOS	United Nations Convention on the Law of the Sea
UNCTAD	United Nations Conference on Trade and Development
UNECA	United Nations Economic Commission for Africa
UNEP	United Nations Environment Programme
WWF SA	World Wildlife Fund – South Africa

CHAPTER 1

INTRODUCTION

1.1 Background and Rationale

The relationship between states and the ocean goes back to the beginning of time. As will be set out briefly in chapter 2 the importance of the ‘blue economy’ to economic growth represents a policy position adopted in South Africa, and in the African Union. The importance of ensuring that laws facilitate the sustainable development of the blue economy is thus adopted as a starting premise for the current research.¹ In the same breath, it has been established that, ‘[o]ver 90% of world trade is carried out by the international shipping industry. Without shipping, the import and export of goods on the scale necessary for the modern world would not be possible.’² It is on this premise that there is a clear need to ensure that maritime activity is legislated and regulated with the highest level of expertise.

Colgan asserts that the term blue economy has spread rapidly around the world and is used to describe an integrated approach to economic development and environmental sustainability that is based on the resources of the oceans and coasts.³ One apparent benefit of exploiting the blue economy is that of economic gain, which for any country is measured by its contribution to the GDP. However, the fundamental challenge of the blue economy is to do both more and less simultaneously.⁴ Ntola and Vrancken submit that, not only does the Indian Ocean have a wealth of living and non-living resources, but it is the world’s pre-eminent seaway for trade and commerce.⁵ It is against this backdrop that the principles of the development of the blue economy in the Indian Ocean region need to be articulated.⁶ It is on these principles that

¹ T Potgieter ‘Oceans Economy, Blue Economy, and Security: Notes on the South African Potential and Developments’ (2018) 14(1) *Journal of the Indian Ocean Region* 49. It is beyond the scope of this dissertation to examine whether Potgieter’s views are valid as a scientific or economic fact.

² ‘Shipping and World Trade’ in *Overview of the International Shipping Industry*, available at <http://www.marisec.org/shippingfacts/keyfactsindex.htm>, accessed on 29 October 2017.

³ CS Colgan ‘The Blue Economy, Theory and Strategy’ chapter 2 in VN Attri & N Bohler-Mulleris (eds) *The Blue Economy Handbook of the Indian Ocean Region* (2018) 38.

⁴ *Ibid.* 39.

⁵ SY Ntola & P Vrancken ‘African Governance Perspectives of the Blue Economy in the Indian Ocean Rim’ chapter 7, in VN Attri & N Bohler-Muller (eds) *The Blue Economy Handbook of the Indian Ocean Region* (2018) 147.

⁶ *Ibid.* 147.

Operation Phakisa sets to seek guidance in attempting also to unlock the potential of the blue economy.⁷

Operation Phakisa is modelled on the success of the ‘Big Fast Results’ methodology adopted in Malaysia as it propelled that country’s economic growth.⁸ It centred on developing detailed plans through collaboration of multiple stakeholders.⁹

‘Operation Phakisa is a fast results delivery programme that was launched to help us implement the National Development Plan, with the ultimate goal of boosting economic growth and create jobs. Operation Phakisa is a cross-sector programme where various stakeholders engage to implement initiatives and concrete actions to address constraints to delivery in a prioritised focused area for public accountability and transparency.’¹⁰

The success of the blue economy, maritime regulation as well as ocean sustainability will be achieved only by cooperation of all users of the ocean. Owing to the ocean economy remaining largely untapped, there is a clear need for legislation, policies and strategies that will facilitate the exploitation of this national resource in a sustainable manner.

In order to analyse the current legislation dealing with ocean governance, there needs first to be some consideration of the international and regional legal framework created by UNCLOS (the United Nations Convention of the Law of the Sea).¹¹ Furthermore, there needs to be an analysis of the legal framework for ocean governance in South Africa, outlining current legislation and focusing on new developments, in particular, the Green¹² and White¹³ Papers on the National Environmental Management of the Ocean, and the Marine Spatial Planning Act.

⁷ K Findlay & N Bohler-Muller ‘South Africa’s Ocean Economy and Operation Phakisa’ chapter 10 in Attri & Bohler-Muller op cit note 3 231.

⁸ J van Wyk ‘Defining the Blue Economy as a South African Strategic Priority: Toward a Sustainable 10th Province?’ (2015) 11(2) *Journal of the Indian Ocean Region* 155.

⁹ Ibid.

¹⁰ Department of Planning, Monitoring and Evaluation (Republic of South Africa) Foreword to the Operation Phakisa home page, downloaded at, available at <http://www.operationphakisa.gov.za/Pages/Home.aspx>; accessed on 10 February 2018.

¹¹ UNCLOS (United Nations Convention on the Law of the Sea) (1982) and The AU Agenda 2063, AIMS 2050, Abidjan Convention and Nairobi Convention, available at http://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf, accessed on 15 May 2018. These will be further discussed in chapter 3.

¹² Green Paper on the National Environmental Management of the Ocean 2013.

¹³ White Paper on the National Environmental Management of the Ocean 2014.

The Marine Spatial Planning Act¹⁴ seeks to ‘promote a culture of good ocean governance and thereby achieve integration among different objectives and economic sectors and manage competing demands on its ocean space.’¹⁵

1.2 Problem Statement

The introduction of Operation Phakisa brought great hope and expectations of the possibilities offered by our oceans. However, since its initial launch, it seems to have been stagnant for the most part. This dissertation seeks to outline the challenge of ocean governance articulated in the literature at a national, regional and international level. The issue at hand is whether the legislative framework that South Africa has in place is adequate for achieving the goals of this new concept of the blue economy.

This dissertation will seek to analyse the legal framework of South Africa’s ocean governance policies and the role that Operation Phakisa plays in furthering the blue economy.

The purpose of the study is to assess the gaps in the current legislation concerning integrated management of the ocean and marine spatial planning and how the provisions of the Marine Spatial Planning Act seek to address these gaps.

1.3 Key Questions to be Answered

The dissertation will be centred on the investigation of the following questions:

- What is the blue economy and how is it influenced by ocean governance policies?
- How is the concept of the blue economy linked with Operation Phakisa?
- What is the existing legislative framework for South Africa’s oceans governance?
- What are the gaps in the current legislation concerning integrated management of the ocean and marine spatial planning?
- Why is there a need for a new legislative framework aimed at governing the ocean?
- How do the provisions of the Marine Spatial Planning Act seek to address these gaps?

1.4 Structure of the Dissertation

Chapter 1 will provide an introduction.

¹⁴ Marine Spatial Planning Act 16 of 2018 Government Gazette 42444.

¹⁵ Marine Spatial Planning Framework 2017 Government Gazette 40860 26.

Chapter 2 will define the term blue economy, explore the goals for the blue economy outlined in Operation Phakisa and examine the concept of sustainability.

Chapter 3 will seek to define ocean governance. The chapter refers to the international legal framework created by UNCLOS, as well as regional and national legislation. The focus for this chapter will be in setting out the existing legal framework that seeks to govern use of ocean spaces. Furthermore, the chapter will highlight why the current legislation is inadequate in achieving the goals of the blue economy.

Chapter 4 will deal with the Marine Spatial Planning Act and its objectives. This chapter will attempt to illustrate how the Act seeks to give answers to some of the shortcomings of existing ocean governance policies. The second part of chapter 4 will examine Canada's Ocean Act and Ocean Strategy and offer a comparative legal analysis of the approach taken in Canada and South Africa.

1.5 Research Methodology

This dissertation will be based on desktop research. The researcher has undertaken a legal analysis of the Marine Spatial Planning Act, with consideration of the legislative and policy background, and, in particular, the objectives of Operation Phakisa.

In the critical evaluation of proposed legislation, a comparative legal analysis is helpful, both to 'provide suggestions for future developments [and], providing warnings of possible difficulties.'¹⁶ The researcher has made a comparative analysis of the Marine Spatial Planning Act and the Marine Spatial Planning Framework with Canada's Ocean Act and Ocean Strategy. Canada was selected for comparison because the principles underpinning marine spatial planning are similar, the law was accessible and there are indications that Canada was one of the jurisdictions which influenced the development of South Africa's Marine Spatial Planning Act and Framework.¹⁷

¹⁶ G Wilson 'Comparative Legal Scholarship' at 87, in M McConville & WH Chui *Research Methods for Law* (2007).

¹⁷ The Minister of Environmental Affairs at the time of introduction of the Marine Spatial Framework (note 15) noted that Marine Spatial Planning is an emerging process that is being implemented by an increasing number of countries. The Centre for Environmental Rights (CER) also referred to several jurisdictions in their assessment of the proposed MSP Bill. For specific reference to the consideration of Canada see Operation Phakisa *Unlocking the economic potential of South Africa's oceans: Marine Protection Services and governance executive summary*, available at <https://www.operationphakisa.gov.za/operations/oel/pmpg/Marine%20Protection%20and%20Govenance%20Documents/Marine%20Protection%20and%20Govenance/OPOceans%20MPSG%20Executive%20Summary.pdf>, accessed on 16 December 2019, and the comments of Dr Mayekiso, then DDG of the DEA at a Maritime Spatial Planning Workshop held on 21 June 2017. Available at <https://pmg.org.za/committee-meeting/24667/>, accessed

1.6 Conclusion

The central focus of ocean governance seems to put value on the answer to the question of why we should value oceans. Five years after the initial launch of Operation Phakisa, there is still an ostensible need for legislation to ensure that it delivers on all the areas the President highlighted, and the immense possibilities that our oceans hold for South Africans if its use is regulated properly.

on 16 December 2019. For work by the Marine Spatial Management and Governance Programme (MARISMA) of the Benguela Current Commission (which is not analysed in this dissertation) see <https://www.benguelacc.org/index.php/en/marisma>, accessed on 16 December 2019.

CHAPTER 2

LITERATURE REVIEW

2.1 Introduction

Development of the ocean space is increasingly becoming seen as a means for developing countries to increase their economic growth.¹⁸ A global challenge facing most if not all nations is that of poverty. This is also one of Africa's biggest challenges. Governments around the world are strengthening their commitment to sustainable ocean management through proactive policies and programmes. This has been evident over the past decade as there have been annual summits held to alleviate this problem, in particular the African Union (AU) meetings which have yielded a number of positive policies, including principally, the AU Agenda 2063¹⁹ and the 2050 Africa's Integrated Maritime Strategy (2050 AIMS²⁰), which identify the 'significant contribution' that the blue economy holds for growth and development.²¹

The AU Agenda 2063 emphasises that 'Africa's Blue/ocean economy, which is three times the size of its landmass, shall be a major contributor to continental transformation and growth.'²² It is 'through knowledge on marine and aquatic biotechnology that the growth of an Africa-wide shipping industry; the development of sea, river and lake transport and fishing; and sustainable exploitation and beneficiation of deep sea mineral and other resources will be possible.'²³

In South Africa, Operation Phakisa was introduced in 2014 in an attempt to stimulate the country's blue economy. Operation Phakisa is now the 9th pillar in the Presidential Nine-Point Plan, announced in the 2015 State of the Nation address.²⁴ In line with global consensus on the importance of the blue economy, South Africa's Minister of International Relations and Cooperation, Maite Nkoane-Mashabane, described the blue economy as the 'next frontier of global economic growth.'²⁵ Dr Mayekiso, Deputy Director-General: Oceans and Coasts, commented: 'Much of our ocean remains unexplored and therefore there is a need to urgently

¹⁸ N Du Plessis The Blue Economy: A South African Perspective, available at <http://www.saeon.ac.za/enewsletter/archives/2016/october2016/doc04>, accessed on 10 October 2017.

¹⁹ African Union Commission African Union Agenda 2063, The Africa We Want, 2015.

²⁰ African Union Commission Africa's Integrated Maritime Strategy (2050 AIM Strategy) AU Version 1.0 (2012).

²¹ Potgieter op cit note 1 51. Also see op cit note 13 3 and op cit note 14 9.

²² Op cit note 19 3.

²³ Ibid 3.

²⁴ Presidential Nine-Point Plan, available at <https://www.gov.za/issues/nine-point-plan>, accessed on 28 January 2019.

²⁵ As cited in Van Wyk op cit note 8 153–154.

gather information and describe what resources are available and how they can be used sustainably.²⁶ There is thus a growing realisation of the importance of the sustainable use of the oceans.

Operation Phakisa is only one of many intersecting government policy and strategy documents that potentially impact upon the ocean sector. The Draft National Biodiversity Framework sets out in Chapter 3, Table 4, an overview of the policies that align with South Africa's National Biodiversity Strategy and Action Plan (NBSAP).²⁷

2.2 Definition of the Blue Economy

The concept of the blue economy may be understood to 'be aligned with economic and trade activities, which emerge from a need to integrate conservation and sustainability in the management of the maritime domain.'²⁸ A variety of definitions exists for the term blue economy. The Economist has defined it as follows:

'A sustainable ocean economy emerges when economic activity is in balance with the long term capacity of ocean ecosystems to support this activity and remain resilient and healthy'.²⁹

This is further supported by the United Nation's Blue Economy concept paper,³⁰ which states:

'Blue Economy is a marine-based economic development that leads to improved human wellbeing and social equity, while significantly reducing environmental risks and ecological scarcities'.³¹

Although the terms 'blue economy' and 'oceans economy' are sometimes used interchangeably, Potgieter differentiates between the blue economy and the oceans economy. In the former, much significance is placed on the economic potential of ocean resources, and

²⁶ 'SA Developing Blue Economy Strategy', quote from Dr Mayekiso, available at http://www.durban.gov.za/Resource_Centre/new2/Pages/SA-Developing-Blue-Economy-Strategy-.aspx, accessed on 15 May 2018.

²⁷ Available at https://www.environment.gov.za/sites/default/files/docs/publications/SAsnationalbiodiversity_strategyandactionplan2015_2025.pdf, accessed on 28 January 2019.

²⁸ S Smith-Godfrey 'Defining the Blue Economy' (2016) 12(1) Maritime Affairs: Journal of the National Maritime Foundation of India 59.

²⁹ C Goddard The Blue Economy: Growth, Opportunity and a Sustainable Ocean Economy. An Economist Intelligence Unit briefing paper for the World Ocean Summit (2015) 7, available at <http://www.greengrowthknowledge.org/resource/blueeconomy-growth-opportunity-and-sustainable-ocean-economy>, accessed on 27 May 2018.

³⁰ United Nations Conference on Sustainable Development. Blue Economy Concept Paper (2012), available at <https://sustainabledevelopment.un.org/content/documents/2978BEconcept.pdf>, accessed on 27 May 2018.

³¹ Ibid. 3.

this is balanced with principles of sustainability and ocean health. In the latter, focus is essentially on economic gain and not ocean health.³²

As indicated in the introduction to this dissertation, Colgan asserts that the term ‘blue economy’ has spread rapidly around the world and is used to describe an integrated approach to economic development and environmental sustainability that is based on the resources of the oceans and coasts.³³

It is clear from the definitions offered for the blue economy that it deals with the sustainable economic development of the ocean. Thus, although the term blue economy is a relatively new term and has not been given a single, universally accepted definition, ‘it is understood here as comprising the range of economic sectors and related policies that together determine whether the use of ocean resources is sustainable.’³⁴

A concise general definition of this new term is therefore that the blue economy refers to ‘the sustainable use of ocean resources for economic growth, improved livelihoods, jobs and ocean ecosystem health.’³⁵ Even though the different definitions of the blue economy are not exactly the same, they all express the importance of sustainability, which is measured on three grounds, namely: the economic activities, the ecological environment and the social environment (that is, the community).³⁶

2.3 Objectives of the Blue Economy

At the outset it can be understood that the promotion of the blue economy is directed at tackling the many socio-economic problems faced by states, which in South Africa’s case are articulated in the National Development Plan.³⁷ In addition to this, the blue economy model seeks to establish a sustainable development framework for developing countries in addressing equity ‘in access to, development of and the sharing of benefits from marine resources; offering scope

³² Potgieter op cit note 1 51.

³³ Colgan op cit note 3 in Attri & Bohler-Muller op cit note 3 38.

³⁴ World Bank and United Nations Department of Economic and Social Affairs *The Potential of the Blue Economy: Increasing Long-term Benefits of the Sustainable Use of Marine Resources for Small Island Developing States and Coastal Least Developed Countries* (2017) World Bank, Washington DC. [Note: This was a report which was produced through a collaborative effort among relevant bodies and agencies of the United Nations system and other stakeholders, which was led by the World Bank Group and United Nations Department of Economic and Social Affairs (DESA).], available at www.worldbank.org/en/news/infographic/2017/06/06/blue-economy, accessed on 15 January 2018.

³⁵ Ibid. read 1.

³⁶ Smith-Godfrey op cit note 28 59, 60.

³⁷ National Development Plan 2030, Our Future - Make It Work, available at https://www.nationalplanningcommission.org.za/Downloads/ndp-2030-our-future-make-it-work_0.pdf, accessed on 20 June 2018.

for re-investment in human development and the alleviation of crippling national debt burdens.³⁸

The blue economy approach recognises and seeks to address the importance of the involvement of the international community in the management of ocean resources on international waters by further developing international law and ocean governance.³⁹ The importance of sustainable development could be understood as making the oceans better and more efficient for everyone, without destroying the possibilities for the next generations. An easy test to establish whether a certain act or the use of the ocean is sustainable could be carried out by people asking themselves if they could perform that certain act over and over again without destroying that resource.

At its core, the blue economy endorses sustainable development of the seas and oceans and attempts to balance social, environmental and economic goals while promoting exploration and utilisation of oceanic resources.⁴⁰ The Sustainable Development Goals 2030⁴¹ adopted in 2015, in which Goal 14 relates to sustainable development of the ocean resources, provides:

‘Careful management of this essential global resource is a key feature of a sustainable future. However, at the current time, there is a continuous deterioration of coastal waters owing to pollution and ocean acidification is having an adversarial effect on the functioning of ecosystems and biodiversity. This is also negatively impacting small scale fisheries. Marine protected areas need to be effectively managed and well-resourced and regulations need to be put in place to reduce overfishing, marine pollution and ocean acidification.’⁴²

These goals succeeded the Millennium Development Goals⁴³ (MDGs) dating from 1 January 2016.

One of the overarching goals set by maritime nations and the maritime community at large is to develop the concept of the blue economy further through a definite framework which contributes to sustainable use of the ocean-based resources.

³⁸ Goddard op cit note 29 16.

³⁹ Op cit note 34 3.

⁴⁰ Smith-Godfrey op cit note 28 59, 60.

⁴¹ UNCITRAL Sustainable Development Goals 2030, adopted at the UN Sustainable Development Summit, New York, September 2015, available at <https://www.un.org/sustainabledevelopment/development-agenda/>, accessed on 19 June 2018.

⁴² Ibid. Goal 14.

⁴³ Millennium Development Goals, available at <http://www.un.org/millenniumgoals/>, accessed on 19 June 2018.

In summary, the principles of the blue economy are aimed at economic development of the ocean, which in turn contributes to the success and resilience of the economy. These principles provide a platform for the development of a blue economy that is inclusive and sustainable as well as universal.⁴⁴ Attri is in support of the blue economy principles,⁴⁵ and highlights four aims of the blue economy, in that it aims at:

- ‘i) reframing the oceans as developmental spaces;
- ii) decoupling socio-economic development from environmental degradation;
- iii) improving relevant international law and governance mechanisms; and
- iv) prioritising the use of the seas to benefit people, alleviate poverty, generate employment and promote equity.’⁴⁶

2.4 Benefits and Challenges of the Blue Economy

One of the fundamental challenges of the blue economy is to do both more and less at the same time. In essence this means that in order for a maritime nation to see an increase in the wealth it derives from its ocean and coastal resources, it may need to do less of many of the things it is already doing.⁴⁷ For this to be effected, there would need to be adjustments made by the different sectors involved in the blue economy in attempting to preserve the ocean resources for future generations.⁴⁸

The biggest challenge facing coastal states is harnessing the potential of this blue economy, to boost economic activity and improve living standards in a rapidly changing world. Van Wyk, referring to discussions taking place internationally, within the United Nations Conference on Trade and Development (UNCTAD), and regionally, within the AU, states that nations are in agreement on the potential and apparent economic benefits of the blue economy:⁴⁹

‘The United Nations Conference on Trade and Development (UNCTAD) estimated that, globally, almost 350 million jobs are linked to the oceans through fishing, aquaculture, coastal and marine tourism and research activities, with an additional one billion people relying on fish as their primary source of protein (UNCTAD, 2014 2). More than 200 million Africans, where 39 of the 54 states and islands are littoral, rely on the ocean

⁴⁴ VN Attri ‘The Blue Economy and the Theory of Paradigm Shifts’ chapter 1 in Attri & Bohler-Muller op cit note 3 33.

⁴⁵ These principles illustrate what the blue economy strives to achieve. See The Blue Economy Principles, available at <https://www.theblueeconomy.org/principles.html>, accessed on 31 October 2018.

⁴⁶ Attri op cit note 44 18.

⁴⁷ Colgan op cit note 3 39.

⁴⁸ Ibid.

⁴⁹ Van Wyk op cit note 8 153.

for food and nutrition, with the fish industry providing employment for more than 10 million Africans (African Union [AU], 2012 8). In 2010, for example, South Africa's oceans economy contributed approximately ZAR 54 billion to the country's gross domestic product (GDP), with approximately 316 000 people employed in the sector (South African Government News Agency 2014).⁵⁰

The importance of the blue economy has also been highlighted, not only as a source of jobs and food security, but for its contribution to the economy through the maritime transport and tourism industries:

'Oceans cover 72% of the surface of our blue planet and constitute more than 95% of the biosphere. Life originated in the oceans and they continue to support all life today by generating oxygen, absorbing carbon dioxide, recycling nutrients and regulating global climate and temperature. Oceans provide a substantial portion of the global population with food and livelihoods and are the means of transport for 80% of global trade. The marine and coastal environment also constitutes a key resource for the important global tourism industry; supporting all aspects of the tourism development cycle from infrastructure and the familiar 'sun, sand and sea' formula to the diverse and expanding domain of nature-based tourism.'⁵¹

In order for global trade and commerce to continue growing in a sustainable manner, particular attention must be paid to the blue economy and its use through national, regional and international legal and policy frameworks. This becomes an increasingly complex endeavour, as different stakeholders take part in daily business that deals 'with the ocean, and as new technologies make it feasible and economically viable to tap into more of the ocean's resources.'⁵²

The benefits of a successful ocean governance policy aimed at the furthering of the blue economy are clear, the main one being that sustainable use of the ocean would be able to provide minerals, marine life and its biodiversity for generations to come.

Smith indicates, with reference to the United Nations Environment Programme (UNEP) report 'Green Economy in a Blue World', that although there are many benefits to be reaped from the ocean, the two challenges are the 'compartmentalisation' of different ocean, coastal and marine industries from the ocean environment and, secondly, the 'harmonisation of traditional

⁵⁰ Ibid. These statistics give some insight into the benefits of this untapped resource and also show how South Africa could benefit from a diligent and sustainable use of the resource.

⁵¹ Goddard op cit note 29 2.

⁵² Smith-Godfrey op cit note 28 5.

economic activities with sustainable economic values.⁵³ These challenges speak to the issues also facing South Africa in that it is of great importance that there should be a system of integrated management of the ocean among the multiple users.

According to the World Bank and World Bank and United Nations Department of Economic and Social Affairs:

‘[t]he blue economy has diverse components, including established traditional ocean industries such as fisheries, tourism, and maritime transport, but also new and emerging activities, such as offshore renewable energy, aquaculture, seabed extractive activities, and marine biotechnology and bioprospecting.’⁵⁴

Amongst other ocean uses, there are numerous other usages provided by ocean environments, and some do not have existing markets as yet. This also contributes ‘significantly to economic and other human activity such as carbon sequestration, coastal protection, waste disposal and the existence of biodiversity.’⁵⁵

Depending on a country’s national position and vision adopted to reflect its promotion of the blue economy, the mix of oceanic activities vary for each country. However, the term blue economy indicates that those activities will have three distinct features:

- ‘provide social and economic benefits for current and future generations
- restore, protect, and maintain the diversity, productivity, resilience, core functions, and intrinsic value of marine ecosystems
- be based on clean technologies, renewable energy, and circular material flows that will reduce waste and promote recycling of materials.’⁵⁶

The concept of the blue economy draws upon the global development of principles for sustainable development in the previous decades. Prior to the rise of the term ‘blue economy’, focus was directed at the green economy. This concept looked at an economy that aimed at sustainable development without harming the environment or with a reduction of environmental risks.⁵⁷ In the 2011 United Nations Environment Programme (UNEP) Green

⁵³ Van Wyk op cit note 8 58.

⁵⁴ Op cit note 34 vi.

⁵⁵ Ibid.

⁵⁶ Ibid.

⁵⁷ Ibid.

Economy report, it was illustrated that this concept was closely related to ecological economics; however, it had a more political focus to it.⁵⁸ The report also demonstrated that

‘...to be green, an economy must not only be efficient but also fair. Fairness implies recognising global and country level equity dimensions, particularly in assuring a just transition to an economy that is low-carbon, resource efficient and socially inclusive.’⁵⁹

The blue economy and the advancement of it comes with some challenges linked to its international nature. The key challenge is ‘to understand and better manage the many aspects of oceanic sustainability, ranging from sustainable fisheries to ecosystem health to pollution.’⁶⁰

Furthermore,

‘A second significant issue is the realisation that the sustainable management of ocean resources requires collaboration across nation-states and across the public-private sectors, and on a scale that has not been previously achieved. This realisation underscores the challenge facing the Small Island Developing States (SIDS) and Least Developed Countries (LDCs) as they turn to better managing their blue economies.’⁶¹

By virtue of the geographical location of such places, surrounded by ocean, it is only logical that the importance of the blue economy is highlighted with relation to economic development of SIDS. The benefits of the successful development of the blue economy would see such areas being stakeholders in the global maritime sector. However, it is worth noting that the benefits of the blue economy would not be exclusive to SIDS, but would be equally important to coastal states. This would include South Africa as it is also a coastal state.

As seen above, in order to restore, protect and maintain the marine ecosystems, a discussion of sustainability is needed to illustrate the balance of the social, economic and environmental aspects of the concept.

2.5 Sustainability

The evident importance of the ocean has resulted in engagements of maritime states and ocean users in finding solutions or implementing policies that will see the ocean bear resources for the current users and future generations. The large number of ocean users has put the ocean

⁵⁸ United Nations Environment Programme Towards a Green Economy: Pathways to Sustainable Development and Poverty Eradication (2011), available at <http://www.uep.org/greeneconomy>, accessed on 20 January 2018.

⁵⁹ Ibid. 2.

⁶⁰ Op cit note 34 vi.

⁶¹ Ibid.

under strain in producing resources and staying ‘healthy’. The Johannesburg Declaration on Sustainable Development saw the participants, Heads of State and Government, agreeing to

‘...assume a collective responsibility to advance and strengthen the interdependent and mutually reinforcing pillars of sustainable development economic development and social development and environmental protection at local, national, regional and global levels.’⁶² This was echoed by SDG (Sustainable Development Goal) 14 which called on the international community to conserve and sustainably use the oceans, seas and marine resources for sustainable development.’⁶³

The summit held in Johannesburg was an important illustration of the elements which needed to be present in achieving sustainable development. The three elements of sustainable development are said to be divided into ‘three pillars’, namely economic, social and environmental. Kidd uses an interesting analogy in his book, in illustrating how these three pillars operate. He used an example of ‘an African three-legged cooking pot: unless all the legs are equal in length and strength, the pot will be unstable.’⁶⁴ This illustration complements the position of promoting all three ‘pillars’ in an equal manner for sustainable development in order to be successful. Kidd goes on to illustrate the importance of sustainable development in that, on the national scale, this is arguably the cornerstone of South Africa’s environmental law.⁶⁵

2.6 Africa and the Blue Economy

It is also important to note that it is not only maritime nations in isolation that need a policy governing the ocean. As seen by the work of the UNCLOS, discussed in chapter 3, ocean governance goes further than an individual state but also affects and influences the international maritime community. The question of how African states are protecting their ocean-based mineral resources must be answered by looking at any policies that Africa has in place in trying to protect such resources.

The African Union (AU) also recognised ‘the direct cumulative losses of revenue from illegal activities in Africa’s Maritime Domain (AMD) amounted to hundreds of billions of US

⁶² United Nations Johannesburg Declaration on Sustainable Development 1, available at <http://www.un-documents.net/jburgdec.htm>, accessed on 18 August 2018.

⁶³ Op cit note 42.

⁶⁴ M Kidd *Environmental Law* 2 ed (2011) 18. Also see the judgment in *WWF South Africa v Minister of Agriculture, Forestry and Fisheries and others* [2018] 4 All SA 889 (WCC). This case is useful to consider as it deals with both sustainable development and the precautionary principle at para 13, 14 and 31 within a marine governance (fisheries) context.

⁶⁵ *Ibid.* 18.

dollars.⁶⁶ The 2050 Africa's Integrated Maritime Strategy (2050 AIM Strategy) recognised that the African Union Member States face similar maritime challenges and opportunities. AIM has now identified that each nation has great responsibilities in developing a desirable political will and implementing the strategy.⁶⁷ The significance of the 2050 AIM Strategy is that it provides 'a broad framework' seeking both environmental protection and sustainable development within the AMD for wealth creation. It also recognises that there is an urgent need to;

'...develop a sustainable blue economy initiative which would be a marine version of the green economy, one that improves African citizens' well-being while significantly reducing marine environmental risks as well as ecological and biodiversity deficiencies.⁶⁸ The AU has played a 'crucial role' in enlarging an Africa-wide consensus regarding the critical role that the Blue Economy could play in fostering structural transformation in Africa during the next decade.'⁶⁹

Policy makers view the 2050 AIM Strategy as the road map crafted by African leaders to utilise Africa's ocean space effectively to meet the aspirations outlined in the Agenda (2063 Agenda).⁷⁰ The strategy is 'an African-driven long-term and reasonably comprehensive vision crafted to harness Africa's so called blue economy better, with the vision of using this to promote development in the continent.'⁷¹

Findlay and Bohler-Muller are of the opinion that through the AMD's contribution to 'social, economic and political stability', and safety and security, African countries will be able to promote sustainable development and wealth creation. Therefore, the AIM strategy delivers an extensive framework for both the protection and sustainable exploitation of the AMD through the integration of an operational Plan of Action of achievable goals, objectives and activities for increased wealth creation in a stable and secure AMD.⁷²

However, currently, there is no direct legal framework or policies which seek to regulate and protect the above resources. The continental goal of furthering the blue economy remains on

⁶⁶ Op cit note 20 7.

⁶⁷ Ibid. 7.

⁶⁸ Ibid. 9.

⁶⁹ United Nations Economic Commission for Africa. 2016. *Africa's Blue Economy, A Policy Handbook 7*, available at https://www.uneca.org/sites/default/files/PublicationFiles/blueeco-policy-handbook_en.pdf, accessed on 23 June 2018.

⁷⁰ AU Agenda 2063: The Africa We Want "is a strategic framework for the socio-economic transformation of the continent over the next 50 years. It builds on, and seeks to accelerate, the implementation of past and existing continental initiatives for growth and sustainable development", available at <https://au.int/documents/760>, accessed on 28 October 2018.

⁷¹ SY Ntola 'Convention on the Law of the Sea and Blue Economy' chapter 6 in VN Attri & N Bohler-Muller (eds) *The Blue Economy Handbook of the Indian Ocean Region* (2018) 150.

⁷² Op cit note 7 235.

the agenda of the AU, and even though this goal of furthering the blue economy has been incorporated into the AU's 2063 goals,⁷³ no enforceable continental policies have been developed as yet.

Therefore, the responsibility falls on individual maritime nations to develop their own legal frameworks and policies to govern and regulate the ocean space and its use. It is on this premise that 'Operation Phakisa' was born.

2.7 Operation Phakisa

Operation Phakisa was inspired by a Malaysian methodology which focused on fast results aimed at improving Malaysia's development.⁷⁴ This methodology was labelled the 'Big Fast Results' Methodology. It was defined as 'a holistic and granular transformation approach designed to deliver a specific goal within a stipulated period of time.'⁷⁵ This can be understood as a high-level detailed decision-making approach which ensures that decisions are economically, environmentally and socially sound.⁷⁶

The South African National Development Vision 2030 is a national socio-economic development blueprint aimed at eliminating poverty and reducing inequality by 2030.⁷⁷ Modelled on the Malaysian government's Big Fast Results (BFR) problem-solving methodology adapted for South African needs and requirements, the South African Government's Operation Phakisa is aimed at accelerating the execution of the National Development Plan.⁷⁸

According to Article 56 of UNCLOS, a coastal state has sovereign rights '...for the purposes of exploring and exploiting... the waters superjacent to the seabed and of the seabed and its

⁷³ African Union's Agenda 2063 (see note 71). The Agenda lists seven aspirations that it strives for, namely: "1. A prosperous Africa based on inclusive growth and sustainable development 2. An integrated continent, politically united and based on the ideals of Pan-Africanism and the vision of Africa's Renaissance 3. An Africa of good governance, democracy, respect for human rights, justice and the rule of law 4. A peaceful and secure Africa 5. An Africa with a strong cultural identity, common heritage, shared values and ethics 6. An Africa whose development is people-driven, relying on the potential of African people, especially its women and youth, and caring for children 7. Africa as a strong, united and influential global player and partner"

⁷⁴ LA Santos How Malaysia's Big Fast Results model is changing development in Africa (2015), available at <https://www.devex.com/news/how-malaysia-s-big-fast-results-model-is-changing-development-in-africa-87353>, accessed on 15 April 2018.

⁷⁵ Ibid.

⁷⁶ Ibid.

⁷⁷ National Development Plan note 37.

⁷⁸ Op cit note 7 236.

subsoil...'⁷⁹ Malaysia also being a coastal state is afforded 'the right to and exploit both living and non-living resources for economic exploitation in a zone adjacent to its territorial sea.'⁸⁰

The benefits and challenges of the blue economy lie in the interpretation and utilisation of the Exclusive Economic Zone (EEZ) areas. The management of these areas should aim at achieving a functional and co-operative system between all stakeholders and role players of these areas. The idea of these areas being ready for exploitation also leaves them vulnerable as the governance of role players goes a long way in the fair and sustainable use of the EEZ areas.

Former President Jacob Zuma announced the launch of Operation Phakisa, meaning 'hurry up' in Sesotho, in July 2014. At the inaugural speeches of Operation Phakisa, given by the President in 2014, he made note of the contribution of the blue economy to the nation's GDP. These figures show encouraging signs as to why coastal states should invest in the blue economy and develop policies and legal frameworks to govern this resource in order for it to be sustained for generations to come.

Operation Phakisa is a fast results delivery programme that was launched, 'to help us implement the National Development Plan, with the ultimate goal of boosting economic growth and create jobs.'⁸¹ Operation Phakisa is 'a cross-sector programme where various stakeholders engage to implement initiatives and concrete actions to address constraints to delivery in a prioritised focused area for public accountability and transparency.'⁸²

Similar to Malaysia's policy, Operation Phakisa is also results-driven approach, which involves the setting of plans and targets, the on-going monitoring of progress and making these results public. Operation Phakisa seeks multi-stakeholder co-operation in each of the following areas:

- 'detailed problem analysis;
- priority setting;
- intervention planning; and
- delivery.'⁸³

⁷⁹ Op cit note 11 Article 56.

⁸⁰ M.R. Othman 'A New Management Structure for Malaysian Economic Exclusive Zone' (2012) 4(1) *International Journal of Social Sciences* 47–63 47.

⁸¹ *Ibid.*

⁸² Department Planning, Monitoring and Evaluation (Republic of South Africa) Foreword to the Operation Phakisa home page, downloaded at note 10 <http://www.operationphakisa.gov.za/Pages/Home.aspx>; accessed on 10 February 2018.

⁸³ Operation Phakisa: Unlocking the Economic Potential of South Africa's Oceans. Marine Protection Services and Governance Executive Summary 6, available at <https://www.operationphakisa.gov.za/operations/oel/pmpg/Marine%20Protection%20and%20Govenance%20D>

One of the cornerstones of sustainable development is the concept of fairness exercised by all interested parties. The value of fairness is entrenched in the foundation of Operation Phakisa. This was evident in the work of Operation Phakisa focusing on six priority growth areas, as the Oceans Economy seeks to unlock the economic potential of South Africa's oceans, which will lead to significant GDP growth and job creation potential.⁸⁴

Operation Phakisa, although clearly inspired by the example of Malaysia, and grounded in the international and regional focus on the blue economy, must also be considered against the Constitution of South Africa, especially section 24 of the Constitution:

‘Everyone has the right—

- (a) to an environment that is not harmful to their health or wellbeing; and
- (b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that—
 - (i) prevent pollution and ecological degradation;
 - (ii) promote conservation; and
 - (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.’⁸⁵

This section of the Constitution would have been at the forefront of all the meetings leading up to the implementation of Operation Phakisa which commenced with an ‘oceans economy lab programme’ as the first phase of achieving this growth plan.⁸⁶ This programme was intended to navigate a course for Operation Phakisa through active workshops involving detailed problem analysis; priority setting; intervention planning; and consensus on deliverables.⁸⁷

Since 2014, there have been countless workshops aimed at unlocking the ocean economy. The goal of these workshops is to ‘stimulate economic growth of South Africa’s marine sectors to increase the ocean contribution to the national GDP (Gross Domestic Product), create jobs and

ocuments/Marine%20Protection%20and%20Govenance/OPOceans%20MPSG%20Executive%20Summary.pdf, accessed on 16 December 2019.

⁸⁴ Ibid

⁸⁵ Constitution of the Republic of South Africa, 1996, section 24.

⁸⁶ Operation Phakisa – Oceans Economy: Introduction and background, available at <https://www.environment.gov.za/projectsprogrammes/operationphakisa/oceanseconomy>, accessed on 23 May 2018.

⁸⁷ Sea Change – Operation Phakisa, available at <https://topempowerment.co.za/sea-change-operation-phakisa/>, accessed on 03 July 2018.

ultimately eradicate poverty.’⁸⁸ At the forefront of these meetings is the importance of sustainable development, discussed in the same breath as poverty eradication.

Operation Phakisa is divided up into different working groups. These are: Marine Transport and Manufacturing, Offshore Oil and Gas, Aquaculture, Small Harbour Development, Coastal and Marine Tourism and the Marine Protection Services and Ocean Governance working group. An Oceans Economy Lab, which constitutes a broad-based team of experts and government officials, was created to work on generating ideas for the implementation of the different aspects of the programme areas.⁸⁹

For purposes of this dissertation, the Marine Protection Services and Ocean Governance working group deals specifically with the issue of ocean governance and the promotion of the blue economy. Through the labs created, it was realised that some of the problems facing this working group are that:

‘...there is uncertainty around roles and responsibilities among the stakeholders and interested parties; there is no institutional framework to manage multiple users of the same ocean space; there is no direction as to how to coordinate departments that are active in the ocean; and lastly, there is a lack of adequate skills for ocean governance.’⁹⁰

These problems underscore the need for an Act on the National Environmental Management of the Ocean.

With regard to Marine Spatial Planning, the labs found that the issues facing the maritime bodies are that: there is ‘no system to manage multiple users in the same ocean space; there are many departments and multiple information sources; much of the ocean space has not been studied or surveyed; and there is a need to consolidate survey, research and monitoring programmes.’⁹¹ The labs on ocean governance concluded that there is a need for a single overarching policy framework for ocean governance that promotes capacity building.

2.8 Conclusion

The importance of the ocean is undeniable. This has led to nations forming groups such as SIDS, with the aim of exploring this resource and taking advantage of it as much as possible. The blue economy seeks to promote the economic development of nations such as these along

⁸⁸ Ibid.

⁸⁹ Op cit note 84.

⁹⁰ Operation Phakisa note 84 Executive Summary 10.

⁹¹ Ibid.

with coastal states. This is, however, to be done in a sustainable manner. Operation Phakisa aims at bringing together different stakeholders in the oceans economy and formulating sustainable policies for South Africa's blue economy.

Chapter 3 will discuss the legislation currently in place that governs the ocean.

CHAPTER 3

CURRENT OCEAN-GOVERNING LEGISLATION

3.1 Introduction

Fuggle and Rabie note that, in the context of South African legislation, the law relating to the deep sea marine environment has been shaped and influenced by the international law of the sea, while the law pertaining to the coastal zone has been re-written by the National Environmental Management: Integrated Coastal Management Act 24 of 2008, which repealed and replaced the outmoded Sea-shore Act 21 of 1935.⁹² As will be seen later in this chapter, there are various pieces of legislation that aim at promoting good ocean governance. What is clear from all the existing pieces of legislation governing ocean use and sustainability is that there is no single act that embodies fully the concept of ocean governance and its various facets. This chapter will argue that there is a need for a new single, comprehensive piece of ocean governance legislation.

The significance of the oceans and the maritime industry at large requires there to be a clear and concise legal framework that will govern this resource. This chapter will discuss both the international law relating to a country's rights in relation to its coastal waters and its exclusive economic zone (EEZ) and existing South African legislation. However, existing laws are regarded as inadequate to address all of the issues arising in relation to ocean governance:

‘Nowadays, the UNCLOS is not able to give an answer for all new questions arising in the law of the sea. Therefore, it would seem that there is a great need to provide more pragmatic approaches to global ocean governance by the international community as well as national governments, using the paradigm of sustainable development.’⁹³

This chapter will define ocean governance and its application in international law. Most importantly, the chapter will go through the existing legislative frameworks in place for ocean governance. Finally, it will introduce South Africa's ocean governance approach by illustrating the existing sectoral approach and a move to a co-ordinated planning system.

⁹² HA Strydom & ND King Fuggle & Rabie's Environmental Management in South Africa 2 ed (2009) 497.

⁹³ D Pyć 'Global Ocean Governance' (2016) 10 (1) TransNav, the International Journal on Marine Navigation and Safety of Sea Transportation 159–162.

3.2 Ocean Governance

Chapter 17 of ‘Agenda 21’ of the United Nations Conference on Environment and Development⁹⁴ focuses on the protection of the oceans and seas of all kinds and coastal areas. The chapter highlights the important role of oceans and coasts to the global life support system and the exceptional opportunity that these unique ecosystems offer for sustainable development. The chapter contains a recommendation that nations should outline new governance approaches for the management of its resources. Paragraph 17.6 of the Agenda makes a recommendation that coastal states should consider the establishment, or strengthening, of suitable ‘coordinating mechanisms (such as a high-level policy planning body) for the integrated management and sustainable development of their coastal and marine areas and resources, at both the local and national levels.’⁹⁵

Ocean governance can be understood as

‘...the coordination of various uses of the ocean and protection of the marine environment. Ocean governance is also defined as the process necessary to sustain ecosystem structure and functions. Effective ocean governance requires globally-agreed international rules and procedures, regional action based on common principles, and national legal frameworks and integrated policies.’⁹⁶

The classification of the ocean space infers that any ocean policy legislated by a state or international community is also a form of public policy. Any form of public policy can be expressed as laws, regulations, decisions or government actions which would be interpreted and executed by public and private entities. In order to achieve compliance with such policies, a framework that aligns and coordinates the management of all ocean-related sectors is needed to attain the protection of the economic, social and environmental values of the marine jurisdiction.

3.3 International Law on Ocean Governance

As South African law relating to the deep sea marine environment has been shaped and influenced by the international law of the sea, the relevant international law will be discussed

⁹⁴ United Nations Conference on Environment and Development (UNCED) ‘Agenda 21’ Rio de Janeiro, Brazil, Chapter 17, available at <https://sustainabledevelopment.un.org/content/documents/Agenda21.pdf>, accessed on 10 June 2018.

⁹⁵ Ibid.

⁹⁶ Pyc op cit note 93 159.

first. The primary international instrument concerning ocean governance is the United Nations Convention on the Law of the Sea, 1982 (UNCLOS):⁹⁷

‘UNCLOS establishes the legal framework for all activities in the oceans. According to its preamble, UNCLOS sets out a legal order for the seas and oceans to facilitate international communication and promote peaceful uses of the seas and oceans, equitable and efficient utilization of their resources, conservation of their living resources and study, protection and preservation of the marine environment.’⁹⁸

Over the years it has become evident that ‘our oceans and seas are threatened by climate change, natural disasters, environmental degradation, depletion of fisheries, loss of biodiversity and ineffective flag state control over shipping.’⁹⁹ UNCLOS strives for the rational use of maritime resources and the conservation of marine living resources:

‘The Convention on the Law of the Sea introduced to international law the obligation to protect and preserve the marine environment (Art. 192) as *ius cogens* – an imperative for the international community.’¹⁰⁰

Having previously signed the convention, South Africa later ratified the convention in December 1997.¹⁰¹ UNCLOS seeks to govern the extent of sovereignty and jurisdiction enjoyed by coastal states and island states over the sea adjoining their territories. These maritime zones are now outlined from an international-law perspective while the extent of their incorporation into South African law is set out in the Maritime Zones Act.¹⁰²

As already noted, South Africa is a coastal state, which leaves it with the great responsibility of exploring and utilising the waters that falls within its national jurisdiction. At times it has an interest beyond the national jurisdiction (see below). For purposes of the UNCLOS, South Africa is regarded as a ‘state party’ as it has ratified the Convention and is as a result bound by it.¹⁰³ The Convention makes provision for the legal status and limits of the territorial sea

⁹⁷ United Nations Convention on the Law of the Sea, 10 December 1982, 1833 U.N.T.S. 397 (UNCLOS).

⁹⁸ *Pyć* op cit note 93 160.

⁹⁹ *Ibid.*

¹⁰⁰ *Ibid.*

¹⁰¹ South Africa signed the Convention on 5 December 1984 and ratified it on 23 December 1997. Available at http://www.un.org/Depts/los/convention_agreements/convention_declarations.htm#South%20Africa%20Upon%20ratification, accessed on 25 November 2018.

¹⁰² Maritime Zones Act 15 of 1994 as cited in *Strydom & King* op cit note 92 499.

¹⁰³ The Republic of South Africa ratified UNCLOS on 23 December 1997 and is accordingly a party to the Convention. See note 101.

afforded to the state parties. What is important to note is that sovereignty over the territorial sea is exercised subject to the Convention and to other rules of international law.¹⁰⁴

In terms of the Convention, it states that ‘every state has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles’¹⁰⁵ As read in Article 2 of the Convention, ‘the sovereignty of a coastal State extends, beyond its land territory and internal waters...’¹⁰⁶ however, there is a limitation in section 3 of providing for a right of innocent passage.

The Convention goes a step further in setting out the limits of the territorial sea, as it also allows for a contiguous zone to be recognised. The Convention allows for the zone to run up to 24 nautical miles from the baselines, and

‘the coastal State may exercise the control necessary to:

- (a) prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea;
- (b) punish infringement of the above laws and regulations committed within its territory or territorial sea.’¹⁰⁷

This is not the only extension afforded to state parties as the Convention gives further rights in terms of the exclusive economic zone.

The exclusive economic zone is a zone¹⁰⁸ ‘beyond and adjacent to the territorial sea, under which the rights and jurisdiction¹⁰⁹ of the coastal State and the rights and freedoms of other States are governed by the relevant provisions of the Convention.’¹¹⁰ Article 57¹¹¹ illustrates the breadth of the exclusive economic zone, which according to the Convention can extend up to, but not beyond, 200 nautical miles from the baselines. The Convention notes that where it does not attribute rights or jurisdiction to the coastal State or any other States within the exclusive economic zone, and a conflict arises it should be resolved ‘on the basis of equity and

¹⁰⁴ Section 1, Article 2.3 of UNCLOS supra note 97.

¹⁰⁵ Section 2, Article 3.

¹⁰⁶ Section 1, Article 2.1.

¹⁰⁷ Section 4, Article 33.

¹⁰⁸ Exclusive Economic Zone.

¹⁰⁹ The rights, jurisdiction and duties of the coastal State in the exclusive economic zone are read in Article 56 of UNCLOS supra note 97. The rights and duties of the other states can be read in Article 58.

¹¹⁰ Part V, Article 55 of UNCLOS supra note 97.

¹¹¹ UNCLOS supra note 97.

in the light of all the relevant circumstances, taking into account the respective importance of the interests involved to the parties as well as to the international community as a whole.’¹¹²

The last important area bestowed upon the State parties by the Convention is the continental shelf. This area comprises,

‘...the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance.¹¹³ Furthermore, the continental shelf shall not exceed 350 nautical miles from the baselines from which the breadth of the territorial sea is measured.’¹¹⁴

South Africa has its own piece of legislation which articulates the zoning of maritime areas in the jurisdiction. In the Maritime Zones Act,¹¹⁵ the State’s territorial waters are clearly defined, as well as EEZs. The Act is thus central to South Africa’s ocean governance framework.

UNCLOS was one of the legal instruments at the forefront of regulating States’ jurisdictional rights and powers over their exclusive economic zone, as seen in Articles 61 and 62, where it deals with ‘conservation of the living resources’ and ‘utilization of the living resources’ respectively.¹¹⁶ On a continental level there has not been a single overarching legal instrument which is binding on countries with relation to how they use their territorial sea, EEZ and continental shelf. It is worth noting though that there have been statements emphasising common regional challenges and calling for a new global partnership involving continuous and constructive dialogue.¹¹⁷

A significant development was the endorsement of the 17 Sustainable Development Goals (SDGs)¹¹⁸, which went beyond the Millennium Development Goals and identified that our planet faces massive economic, social and environmental challenges. In an attempt to combat these challenges, the SDGs set out to define global priorities and aspirations for 2030. In

¹¹² UNCLOS Article 59 supra note 97.

¹¹³ Part VI. See also Article 56(2).

¹¹⁴ Article 76.6.

¹¹⁵ The Maritime Zones Act 15 of 1994

¹¹⁶ UNCLOS Article 61 and 62 supra note 97

¹¹⁷ UNCTAD Agenda 21 note 93 chapter 2 paragraph 2.1.

¹¹⁸ The 2030 Agenda for Sustainable Development, available at <https://sustainabledevelopment.un.org/content/documents/21252030%20Agenda%20for%20Sustainable%20Development%20web.pdf>, accessed on 15 May 2018.

particular, SDG 14¹¹⁹ aims to ‘[c]onserve and sustainably use the oceans, seas and marine resources for sustainable development, thereby giving renewed focus and urgency to existing international prescriptions on oceans and seas.’¹²⁰

Other international institutions also have an impact in the ocean governance sphere. The International Maritime Organisation (hereinafter referred to as the IMO) is a dedicated United Nations organisation established in 1948 and based in London. The mandate of the IMO is maritime safety and the protection of the marine environment. The IMO has played an active role in the development and implementation of many instruments that may affect ocean governance and environmental protection, including for example the marine pollution conventions.¹²¹

The United Nations Environment Programme (referred to hereinafter as UNEP) was established in 1972 by the United Nations General Assembly following the United Nations Conference on the Human Environment (UNCHE, or the Stockholm Conference). It is concerned with developing environmental conventions generally, including those concerned with the world's oceans and seas.¹²² Among these is UNEP's Regional Seas Programme, which in the African and South African context has developed into the Abidjan¹²³ and Nairobi¹²⁴ conventions.¹²⁵

¹¹⁹ S Schmidt ... et al ‘SDG 14 Conserve and Sustainably Use the Oceans, Seas and Marine Resources for Sustainable Development’, available at <https://www.icsu.org/cms/2017/03/SDGs-interactions-14-life-below-water.pdf>, accessed on 16 December 2019.

¹²⁰ Strydom & King op cit note 92 499.

¹²¹ More information on the work of the IMO may be found on the IMO website, available at <http://www.imo.org/en/About/Pages/Default.aspx>, accessed on 16 December 2019. Also see, the International Convention for the Prevention of Pollution from Ships (MARPOL) 1973; the Oil Pollution Preparedness, Response and Co-operation (OPRC Convention and its 2000 OPRC-HNS Protocol) to name just a few of the conventions under IMO aimed at preserving the marine environment. These conventions may also be accessed on the IMO website.

¹²² More information on UNEP's sea programmes may be found at Regional Seas Programmes, available at <https://www.unenvironment.org/explore-topics/oceans-seas/what-we-do/working-regional-seas/regional-seas-programmes>, accessed on 16 December 2019.

¹²³ The Convention for the Protection and Development of the Marine and Coastal Environment of the West and Central African Region, 1981 (Nairobi Convention). Also note that South Africa is a contracting state i.e. <http://abidjanconvention.org/>, accessed on 16 December 2019.

¹²⁴ Ibid.

¹²⁵ It is worth noting that a regional Integrated Coastal Zone Management (ICZM) protocol is being discussed under both the Abidjan and Nairobi Conventions. Under the Abidjan Convention in July 2019 four additional protocols were adopted and opened for signature. Under the Nairobi Convention (note 123) there was a fourth meeting in March 2019 to finalise the text of the ICZM protocol. See <https://www.abidjanconvention.org/index.php/about-signing-four-new-abc-protocols>, accessed on 16 December 2019. See also <https://www.unenvironment.org/nairobiconvention/news/news/states-agree-final-draft-integrated-coastal-zone-management-protocol-and-other-news>, accessed on 16 December 2019.

3.4 Legal Framework for Ocean Governance in South Africa

The existing South African marine domestic laws and policy documents to be discussed are:

- The Sea-Shore Act 21 of 1935;¹²⁶
- The Maritime Zones Act 15 of 1994;¹²⁷
- Marine Fisheries White Paper;¹²⁸
- The Marine Living Resources Act 18 of 1998;¹²⁹
- The National Environmental Management: Integrated Coastal Management Act 24 of 2008 (NEMICMA);¹³⁰
- Green Paper on the National Environmental Management of the Ocean;¹³¹
- White Paper on the National Environmental Management of the Ocean.¹³²

Table 1 below is provided to illustrate the complexity of the current legal framework, which is due to the high number of different Acts, regulating different sectors, with potential for overlap and conflict. The table is drawn from the researcher's literature review, and incorporates the domestic legislation listed in Annexure B to the Green Paper,¹³³ which the researcher has identified as impacting on marine spatial planning, and the legislation discussed in the comments made by the Centre for Environmental Rights (CER) in response to the draft Marine Spatial Planning Bill.¹³⁴

Table 3.1: Domestic Legislation Listed in Annexure B to the Green Paper

EXISTING ACTS	DEPARTMENTS	SECTORS
The Sea-Shore Act 21 of 1935	The provinces to the extent that they retain delegated powers under the Act	Seashore
The Maritime Zones Act 15 of 1994	Minister of Transport and SAMSA	Cross-sectoral application

¹²⁶ The Sea-Shore Act 21 of 1935.

¹²⁷ The Maritime Zones Act 15 of 1994.

¹²⁸ Marine Fisheries White Paper 1997.

¹²⁹ The Marine Living Resources Act 18 of 1998.

¹³⁰ The National Environmental Management: Integrated Coastal Management Act 24 of 2008.

¹³¹ Green Paper note 12.

¹³² White Paper note 13.

¹³³ Green Paper note 12 59. The Green Paper addresses the broader issue of national environmental management of the ocean (NEMO), and Annexure B is a comprehensive list of domestic legislation which may impact on NEMO. Selected Acts which will impact on marine spatial planning were included in Table 1.

¹³⁴ Marine Spatial Planning Workshop Report and Outcomes: The Role of Civil Society in Supporting Marine Spatial Planning, available at http://pmg-assets.s3-website-eu-west-1.amazonaws.com/170901CERAnnexure_C.pdf, accessed on 07 December 2018.

Marine Fisheries White Paper	Department of Environmental Affairs and Tourism	Marine Fisheries
*Marine Living Resources Act 18 of 1998	Department of Environmental Affairs and Tourism	Marine Living Resources
EXISTING ACTS	DEPARTMENTS	SECTORS
*National Environmental Management: Integrated Coastal Management Act 24 of 2008	Department of Environmental Affairs and Tourism	Conservation of the Coastal Environment
Green Paper on the National Environmental Management of the Ocean 2013	Department of Water and Environmental Affairs	Cross-sectoral
White Paper on the National Environmental Management of the Ocean 2014	Department of Water and Environmental Affairs	Cross-sectoral
National Environmental Management: Protected Areas Act 57 of 2003 ¹³⁵	Department of Environmental Affairs	South Africa's biologically diversified areas
*Draft Aquaculture Bill 2016 ¹³⁶	Department of Agriculture, Forestry & Fisheries	Aquaculture
*National Environmental Management Act 107 of 1998	Department of Environmental Affairs	Environment-related issues
*Small Scale Fisheries Policy for South Africa 2012 ¹³⁷	Department of Agriculture, Forestry and Fisheries	Fisheries
*Mineral and Petroleum Resources Development Act 28 of 2002	Minister of Minerals and Energy. The members of the Minerals and Mining Development Board appointed by the Minister in terms of s 59 of the Act.	Minerals and Energy
Marine Pollution (Prevention of Pollution from Ships) Act 2 of 1986	Minister of Transport & South African Maritime Safety Authority (SAMSA)	Marine Areas
South African Maritime Safety Authority Act 5 of 1998 ¹³⁸	Minister of Transport & South African Maritime Safety Authority (SAMSA)	Cross-sectoral

¹³⁵ As amended by the National Environmental Management Laws Amendment Act 14 of 2013, National Environmental Management: Protected Areas Amendment Act 1 of 2014 and Amendment of Schedule 2 (General Notice 2 of 2016 in Government Gazette 39728 of 25 February 2016).

¹³⁶ Published for comment in Government Notice 190 in Government Gazette 39723 of 23 February 2016 (and earlier version having been withdrawn and replaced by said notice).

¹³⁷ Published in Government Notice 474 in Government Gazette 35455 of 20 June 2012.

¹³⁸ In terms of the Schedule to the Act, the administration of the following Acts has been transferred to SAMSA: Merchant Shipping Act 57 of 1951, Marine Traffic Act 2 of 1981, Marine Pollution (Control and Civil Liability) Act 6 of 1981, Carriage of Goods by Sea Act 1 of 1986, Marine Pollution (Prevention of Pollution from Ships)

EXISTING ACTS	DEPARTMENTS	SECTORS
National Environmental Management: Biodiversity Act 10 of 2004 Draft National Biodiversity Framework ¹³⁹	Environmental Affairs	Cross-sectoral
Dumping at Sea Control Act 73 of 1980	Environmental Affairs	Environmental related issues
National Environmental Management: Air Quality Act 39 of 2004	Environmental Affairs	Cross-sectoral
National Environmental Management Act 107 of 1998	Environmental Affairs	Cross-sectoral
Hazardous Substances Act 15 of 1973	Department of Health & Department of Finance	Cross-sectoral
National Ports Act 12 of 2005	Transport	Cross-sectoral
National Water Act 36 of 1998	Water Affairs	Cross-sectoral

Source: Researcher, drawn from the researcher's literature review.

The following section will be an analysis of some of the listed pieces of legislation that deal with ocean governance in South Africa. The analysis will show the stance taken by the existing legal frameworks with regard to ocean governance and any existing lacunae.

3.5 Existing Domestic Legal Framework

3.5.1 *Sea-Shore Act 21 of 1935*

This Act, which has had several amendments,¹⁴⁰ declared 'the State President to be the owner of the sea-shore and the sea within the territorial waters of the Republic'¹⁴¹; and he is to 'provide for the grant of rights in respect of the sea-shore and the sea, and for the alienation of portions of the sea-shore and the sea and for matters incidental thereto.'¹⁴²

¹³⁹ Published under GN 1109 in GG 41982 of 19 October 2018. Also published under GN 1143 in GG 41996 of 26 October 2018.

NOTE: Items marked with an asterisk (*) in Table 3.1 are legislation and policy documents identified by the Centre for Environmental Rights (CER) in their comment on the Marine Spatial Planning Bill B9-2017 (19 June 2017) as requiring alignment with the MSP Framework (note 15). Available at http://pmg-assets.s3-website-eu-west-1.amazonaws.com/170901CER_comments1.pdf, accessed on 15 March 2019.

¹⁴⁰ The Sea-Shore Act (note 126) has been amended on five occasions: 1959, 1963, 1969, 1972 and finally in 1993.

¹⁴¹ As read in section 2(2) of the Sea-Shore Act (note 126), 'any portion of the sea-shore and the sea which was alienated before the commencement of this Act shall be deemed to have been lawfully alienated'.

¹⁴² Ibid. In particular, the long title of the Sea-Shore Act (note 126).

The powers of the President and the Minister of Environmental Affairs included powers to let the sea-shore and the sea for a number of purposes,¹⁴³ as well as transferring the sea-shore and sea to a local authority.¹⁴⁴ The Act also provided that ‘any alienation, letting or permission with regard to the sea-shore or the sea which is not authorised elsewhere in the Act or in any other law may take place only with the approval of the National Assembly.’¹⁴⁵ However, the Act did not create a sufficiently detailed or coherent framework of governance in relation to the blue economy. The Act focused on the powers of the President as ‘owner’ of the sea-shore but failed to set out any regulations or policies centred on sustainable development of South Africa’s ocean resources. The Act, promulgated in 1935, pre-dated the idea of a blue economy. Therefore, there was a lacuna in the Act in addressing sustainable development, which more recent legislation has attempted to address. The National Environmental Management: Integrated Coastal Management Act (NEMICMA), to be discussed later, moved towards describing the State’s power(s) not in terms of ownership but rather in terms of being custodians of the sea and coastal areas.¹⁴⁶

The Sea-Shore Act was repealed by section 98 read with Schedule 1 of NEMICMA, but only ‘to the extent that it has not been assigned to provinces.’¹⁴⁷ On this analysis, the sea and seashore areas falling within South African ports are now administered under NEMICMA, but the provinces retain authority over the remaining areas.

3.5.2 *Maritime Zones Act 15 of 1994*

The various coastal zones recognised in international law in the UNCLOS (discussed above) and referred to in NEMICMA have been given domestic effect in South Africa under the Maritime Zones Act (‘the Act’).

The Act commences by defining the baseline as including both the ‘low-water line’ and straight baselines, and provides for the following six zones, each of which has a different legal regime: internal waters, territorial waters, a contiguous zone, a maritime cultural zone, the EEZ, and the continental shelf. The significance of this is that the six zones listed above in the Maritime

¹⁴³ Under section 3(1) of the Sea-Shore Act (note 126), there is a list of all the purposes that the minister has to consider when letting the sea-shores or any portion of it.

¹⁴⁴ Sea-Shore Act note 126 section 4.

¹⁴⁵ Ibid. section 6.

¹⁴⁶ Strydom & King op cit note 92 504.

¹⁴⁷ In terms of section 98 read with Schedule 1 of NEMICMA, the repeal excluded areas assigned to the provinces except for the South African ports. The rules and regulations remain in force in terms of section 99(1) (subject to section 6) of Act 24 of 2008 and for ease of reference may be found under that Act. See Proclamation R27/16346/6 dated 7 April 1995 with regard to assignment of legislation to the provinces.

Zones Act are given effect on a domestic level but were first given significance in the UNCLOS. This illustrates that South Africa's law is in keeping with international regulation of these zones.

Commenting on the continental shelf, Rabie details how 'the physical continental shelf of South Africa is generally narrow off the East Coast, somewhat wider off the West Coast, and considerably wider off the South Coast, where it forms the Agulhas Bank.'¹⁴⁸

The definition of the continental shelf area provided in the UNCLOS is adopted in section 8 of the Act.¹⁴⁹ The maritime zone does not extend beyond the legal 200 nautical miles except to a small extent south-west of the Western Cape.¹⁵⁰

'The fact that the concept of the continental shelf became established in the Convention on the Law of the Sea in 1982 is, as a result of the activities which nations have been pursuing in recent decades, to exploit the resources of the seabed and subsoil and the superjacent waters, with their vast, rich reserves of natural resources.'¹⁵¹

Omo Ikirodah attributes the economic importance of the continental shelf to the fact that these areas are rich in minerals and organic matter. This in turn results in the exploitation of these seabed resources. Furthermore, other resources found in this area are easier to extract compared to those found deep in the ocean. Therefore, if there is no proper policing of this area, these resources could be wasted.¹⁵²

In relation to the exploitation of off-shore non-living resources, Rabie states:¹⁵³

'The Act specifically also applies to offshore installations, as it stipulates that all the laws of the Republic, including the common law, apply to such installations. An 'installation' is defined as any of the following situated within the internal waters, territorial waters or the exclusive economic zone or, on or above the continental shelf: a pipeline, which is used for the transfer of any substance to or from a ship, research, exploration or production platform off the coast of the Republic, any exploration or production platform or vessel used in prospecting for, or the mining of any substance, as well as the area above and below exploration and production platforms, any telecommunications line as defined in the Post

¹⁴⁸ Strydom & King op cit note 92 504.

¹⁴⁹ As provided in section 8 of the Maritime Zones Act (see note 127): 'The continental shelf as defined in Article 76 of the United Nations Convention on the Law of the Sea, 1982, adopted at Montego Bay on 10 December 1982, shall be the continental shelf of the Republic'.

¹⁵⁰ Strydom & King op cit note 92 504.

¹⁵¹ BBO Ikirodah 'The Legal Regime of the Continental Shelf, its Economic Importance and the Vast Natural Resources of a Coastal State' (2005) 23(1) *Journal of Energy & Natural Resources Law* 15–35.

¹⁵² Ibid. 25.

¹⁵³ Strydom & King op cit note 92 506.

Office Act 44 of 1958; any vessel or appliance used for the exploration or exploitation of the seabed; and any area situated within a distance of 500m measured from any point on the exterior side of an installation, exploration or production platform.¹⁵⁴

The ocean ecosystem relies on sustainable use of it and the exploitation of non-living marine resources will have a negative impact on the ‘maritime economy, marine resources, environmental integrity and ecosystem services.’¹⁵⁵ There is therefore ‘a need to ensure environmental practices which seek to minimise the risk of disaster, and have comprehensive response plans in place for all activities from the shoreline to the deep sea.’¹⁵⁶

The Act, which aligns with UNCLOS, plays a major role in defining how South Africa must proceed in the exploitation of the ocean without infringing other nations’ sovereignty and their rights in respect to the zones afforded to them.¹⁵⁷ However, this Act does not address the blue economy and contains no suggestions of any sustainable development principles which might be applicable to the realisation of the blue economy objectives.

3.5.3 Marine Fisheries Policy for South Africa: White Paper 1997

In describing the history of the institutional structures in South African sea fisheries, the legislature noted that the first comprehensive legislation framed to protect marine resources was the Sea Fisheries Act 10 of 1940, which was later superseded by a new Act in 1973 (Act 58 of 1973) and by the Sea Fishery Act 12 of 1988.¹⁵⁸ These pieces of legislation came before the Constitution and democracy and therefore failed to set rules and regulations with fishing policies that would be inclusive to all in South Africa.¹⁵⁹

The transformation of South Africa and its transition to a democratic State brought about change in all spheres of life, in particular the access and use of the State’s resources. This was evident in the Marine Fisheries White Paper (MFWP) of 1997.¹⁶⁰

‘The White Paper presented a new fishing policy aimed at fundamental political transformation of the fisheries sector. The key values underlying the White Paper were: the use of marine resources in a manner that optimises long-term social and economic benefits to the nation, the management and development of fisheries in compliance with

¹⁵⁴ Ibid. The definition provided for by the Maritime Zones Act, 1994 [No. 15 of 1994] at section 1(ii)

¹⁵⁵ Ibid.

¹⁵⁶ Ibid.

¹⁵⁷ Ibid. It is worth noting here that this Convention (see note 97) is not binding on nations that are not party to UNCLOS.

¹⁵⁸ Strydom & King op cit note 92 505.

¹⁵⁹ Ibid.

¹⁶⁰ White Paper: Marine Fisheries Policy for South Africa 1997, published on 5 May 1997.

the Constitution, and the promotion of fair and equitable access to marine resources. The White Paper expressly acknowledged that access to marine resources in South Africa had historically not been fair and equitable, noting that in the commercial sector in particular:... the present concentration of access may be elaborated by introducing the aspect of colour or ethnic group associated with the respective quota holders.’¹⁶¹

As evidenced by the above statement, the scope of this White Paper was to assist in the political transformation of the fisheries sector. The White Paper sought to address the injustices of the past and balance the injustices by exemplifying the spirit of the Constitution. The White Paper attempts to address the need for conservation of marine resources in section 3, as it sets out ‘The Fisheries Development Process’. The first two sub-headings of section 3 address sustainable development principles in that the first deals with the optimisation of long-term social and economic benefits to the nation and the second deals with the promotion of sustainable utilisation and the replenishment of living marine resources.

3.5.4 Marine Living Resources Act 18 of 1998

The long title of the Act states that its scope and purpose is as follows:

‘To provide for the conservation of the marine ecosystem, the long-term sustainable utilisation of marine living resources and the orderly access to exploitation, utilisation and protection of certain marine living resources; and for these purposes to provide for the exercise of control over marine living resources in a fair and equitable manner to the benefit of all the citizens of South Africa; and to provide for matters connected therewith.’¹⁶²

This particular Act seems to satisfy one aspect of the sought-after ocean governance framework, in that it is entrenched in the Act that any decisions taken by the appropriate Minister or organ of state will be carried out in a manner that aims at ‘achieving optimum utilisation and ecologically sustainable development of marine living resources.’¹⁶³ As will be shown in chapter 4, the issue of ocean sustainability is a more complex matter than just attempting to preserve the resources provided by the ocean for future generations. The issue of ocean sustainability is assessed on three legs, being the economic, social and environmental

¹⁶¹ Ibid.

¹⁶² This quote can be found in the long title of the Marine Living Resources Amendment Act 5 of 2014.

¹⁶³ Marine Living Resources Amendment Act 5 of 2014 505 relied on section 2 of the Act: ‘objectives and principles’.

legs, and this needs to be evident in the legislation which seeks to govern the ocean space and its resources.

Chapter 3 of the Act deals with the management of marine living resources. In this chapter, the legislature gives the different types of fishing recognised and regulated in South African maritime zones.

3.5.5 National Environmental Management: Integrated Coastal Management Act 24 of 2008

The National Environmental Management: Integrated Coastal Management Act 24 of 2008 (NEMICMA) came into operation, with some exceptions, on 1 December 2009,¹⁶⁴ and section 98, triggering the repeal of the Sea-Shore Act (as discussed above), came into operation on 5 February 2016.¹⁶⁵

In contrast to the Sea-Shore Act, NEMICMA makes the State the custodian of the sea and coastal area as defined in that Act.¹⁶⁶ This Act seeks to achieve sustainable coastal development promote through the use of secure scientific information in conjunction with the principles of cooperative governance. The purpose of the Act, set out in the long title, is as follows:

‘To establish a system of integrated coastal and estuarine management in the Republic, including norms, standards and policies, in order to promote the conservation of the coastal environment, and maintain the natural attributes of coastal landscapes and seascapes.’¹⁶⁷

The need for an Integrated Coastal Management Act was highlighted in its preceding White Paper, where it was noted that:

‘Past coastal management efforts were characterised by the fact that the value of the coastal ecosystem were not sufficiently acknowledged as a cornerstone for development. Coastal management was also resource-centred rather than people-centred, and attempted to control, rather than promote, the sustainable use of coastal resources. Furthermore, management of the coastal area was fragmented and uncoordinated, and was undertaken largely on a sectoral basis, with an emphasis on maximising single-purpose and exclusive use of areas and resources. Finally, coastal management were [sic] imposed in a ‘top-

¹⁶⁴ Proc R84 in GG 32765 of 1 December 2009.

¹⁶⁵ Proc 5 in GG 39657 of 5 February 2016.

¹⁶⁶ NEMICMA section 8(1).

¹⁶⁷ The long title also highlights that there is a duty on the State, inter alia, ‘to uphold such a system “to ensure that development and the use of natural resources within the coastal zone is socially and economically justifiable and ecologically sustainable; to define rights and duties in relation to coastal areas; and to determine the responsibilities of organs of state in relation to coastal areas”

down' manner and were [sic] focused on regulation and control. There was insufficient recognition of the diversity of our coast – biophysically, socially, economically and institutionally.’¹⁶⁸

The scope of this Act is to address some of the issues that the Sea-Shore Act could not, as the twelve chapters of the former cover a wider spectrum of coastal zone issues. It was upon review of these different frameworks that the legislature focused more on a singular piece of legislation that would cover all issues not dealt with by the above Acts.

3.6 Green Paper on the National Environmental Management of the Ocean

In 2013, the Department of Environmental Affairs (DEA) commenced a significant governance initiative by publishing a Green Paper on the National Environmental Management of the Ocean ('Green Paper') for discussion and comment. The manner in which this was done was through a consultation of national government departments that have a both a direct and indirect interest in South Africa's ocean space.¹⁶⁹ The DEA submitted before the Water and Sanitation National Assembly Committee 'that in drafting the policy, ocean governance failures and challenges had been observed in both developed and developing countries throughout the world.'¹⁷⁰

The minister in the executive summary of the Green Paper illustrated how 'South Africa's Constitution, 1996 requires the protection, conservation and sustainable use of the environment. The unique ocean current systems around the coast are highly productive and display rich biodiversity.'¹⁷¹ It is to this end that the Green Paper identified the need for a monitored and sustainable use of the ocean and its resources.¹⁷²

This Green Paper had a number of objectives set out in developing law to govern the ocean, one of them being 'the development of a policy framework for South Africa, where an ocean environmental information policy sought to enhance existing research and the monitoring of the ecosystems.'¹⁷³

¹⁶⁸ Celliers, L et al. *A User-friendly Guide to South Africa's Integrated Coastal Management Act*. Department of Environmental Affairs and SSI Engineers and Environmental Consultants. Cape Town, South Africa 4–5 (2009).

¹⁶⁹ Strydom & King op cit note 92 505.

¹⁷⁰ Ibid.

¹⁷¹ Op cit note 12 iv.

¹⁷² Ibid.

¹⁷³ Op cit note 12 v to xii.

3.7 White Paper on the National Environmental Management of the Ocean

The White Paper sets out the objectives and policy principles that deal with ocean management in South Africa.

Six ocean governance objectives were identified in the executive summary of the White Paper:

- ‘1. Coordinating and supporting the implementation of the relevant statutory and institutional frameworks;
2. Establishing mechanisms for sectoral data collection and sharing;
3. Creating and maintaining a shared national knowledge base on the human activities, status and functioning of the ocean;
4. Establishing integrated ocean sustainable development and conservation ocean plans by the undertaking of strategic environmental impact assessments and the use of spatial planning tools;
5. Enhancing national human and technical capacity to better understand and utilise ocean resources and opportunities; and
6. Pursuing regional and international cooperation and governance mechanisms.’¹⁷⁴

The White Paper provides that in the short term, the national environmental management of the ocean will make use of the statutory framework established by the National Environmental Management Act 107 of 1998 and the associated environmental legislation. Ultimately, ‘it is contemplated that new ocean legislation will set out a modern approach to ocean environmental management.’¹⁷⁵ The White Paper contends that South Africa will in the near future make a transition from following a sectorial approach to a coordinated cross-sectoral planning scheme.¹⁷⁶

‘The White Paper further represents a substantive response to the call in the National Development Plan for organs of state to reappraise the maritime sector in terms of both maximising economic potential and responding to growing ocean environmental challenges.’¹⁷⁷

South Africa has taken an approach to ‘ocean environmental management’ that seeks to ‘encourage and support sustainable development of the South African marine environment by focusing effort on methods which contribute to: habitat and biodiversity conservation, marine ecosystem management and maintaining earth system integrity.’¹⁷⁸ The Department of

¹⁷⁴ Op cit note 13. These objectives are read in the executive summary of the White Paper.

¹⁷⁵ Ibid. 10.

¹⁷⁶ Ibid. 2.

¹⁷⁷ Ibid.

¹⁷⁸ Ibid. 14.

Environmental Affairs has the primary responsibility for ‘protecting, conserving and improving the South African environment and its natural resources.’¹⁷⁹ Any framework implemented will have to be in line with environmental policies in general that seek to govern the use of the ocean and its resources.¹⁸⁰

In respect of South Africa’s ocean governance mandate, the minister noted that government has been mindful of its constitutional¹⁸¹, international law¹⁸² and domestic legislation.¹⁸³ In addition, ‘South Africa has embraced sustainable development and integrated planning when pursuing ocean environmental integrity. South Africa's Ocean Policy seeks to balance sustainable development and protection of the ocean environment for societal benefit.’¹⁸⁴

The White Paper then goes on to give an ocean governance strategy which is comprised of four sequential and interdependent strategic themes.¹⁸⁵ These themes are:

- ocean environmental information;
- ocean environmental knowledge;
- ocean environmental management; and
- ocean environmental integrity.

‘The four ocean policy strategic themes form a reinforcing sequence initiated by the collection of environmental information and extending to the generation of environmental knowledge providing information on improved environmental management approaches aimed at the protection and preservation of ocean environmental integrity.’¹⁸⁶

The White Paper concludes by saying that:

‘The successful implementation of the Ocean Governance Objectives and Priorities listed above will allow South Africa, in the next five years, to complete the move from sectoral ocean planning and management towards coordinated sectoral environmental management. This shift is made possible by building better understanding amongst role-

¹⁷⁹ Strydom & King op cit note 92 506.

¹⁸⁰ Ibid.

¹⁸¹ The most relevant section in the Constitution, 1996 dealing with the use and preservation of the environment is section 24, which has been discussed in note 85 above. The importance of this section is that it now also serves as an important factor in the development of ocean related legislation.

¹⁸² These are articulated clearly in the UNCLOS as this Convention (note 97) has been followed by domestic pieces of legislation (see, for example, the Maritime Zones Act (note 127 above).

¹⁸³ These are all the existing pieces of legislation which South Africa has set in place to govern the ocean and, most importantly, promote the blue economy in the most sustainable manner.

¹⁸⁴ White Paper note 13 18.

¹⁸⁵ Ibid. 19.

¹⁸⁶ Ibid.

players of the benefits of improved environmental information and knowledge to inform environmental and economic planning.’¹⁸⁷

The White Paper seeks to facilitate the move from a sector-based approach to an integrated management of the ocean. By engaging with the stakeholders and ocean users and highlighting their roles and duties, this approach will be effective in facilitating the new ocean governance approach.

3.8 South Africa’s Ocean Governance Approach

The intensified transition from exploiting land resources to channelling ocean resources effectively has made apparent the deficiency in South Africa’s approach to ocean governance. As already seen with the challenges facing sectorial management, ‘individual sector planning in the ocean is no longer viable and there is a need to coordinate planning in South Africa’s ocean space and optimise sustainable economic growth.’¹⁸⁸ This is because sectoral ocean management does not follow ‘a plan-based approach’ and there is very minimal, ‘or no consideration of the policies and plans of other users or sectors that may be conflicting or compatible, thereby requiring coordination.’¹⁸⁹

Following the introduction of Operation Phakisa in 2014, one of the key outcomes at Operation Phakisa (Ocean) was ‘the development of a Marine Spatial Plan (‘MSP’), and an integrated ocean governance institutional framework to ensure effective implementation.’¹⁹⁰

In an attempt to facilitate coordination across multiple sectors, the Marine Spatial Planning Bill was proposed. As it would create a system that promotes economic growth through the coordination of multiple sectors. This raises the problem of ensuring that these multiple sectors operate in a sustainable and integrated manner. The current position of South Africa’s approach to ocean governance is more of a sectoral approach, and the isolated approach of these actors have raised the need to adopt an integrated approach, coordinated cross-sectoral approach, to ocean governance as a means of promoting the sustainable use of the ocean.

‘The ocean is a single dynamic, inter-connected global ecosystem. Yet, ocean governance structures have largely developed and evolved on a sectoral basis and are not well suited to work effectively across sectors. Different bureaucracies are often responsible for

¹⁸⁷ Ibid. 27, still to be dealt with in more detail in chapter (4).

¹⁸⁸ Op cit note 86 13-16.

¹⁸⁹ Ibid.

¹⁹⁰ Ibid.

different ocean uses and users and often don't work to communicate or cooperate effectively.'¹⁹¹

This is the current problem and position of South Africa towards ocean governance. Having each sector with an interest in the ocean develop its own policies and systems rather than using a single framework to regulate all of the interaction that takes place in the ocean makes it more possible for there to be clashes between sectors.

The challenges faced by maritime nations and 'ocean sustainability require collective action across sectors and scales. In an effort to coordinate policymaking and measures, regional ocean partnerships should be developed to support activities'¹⁹² related to the implementation of the Goal for the Oceans. It is to this end that the integrated approach seems to be more appealing in implementing any sustainable policy as it includes,

'...comprehensive, integrated management of human activities based on the available scientific knowledge on ecosystems and their dynamics, origin and impact of the activities, which are essential for the health of the marine ecosystem, as well as achieving sustainable use of marine ecosystem assets and maintaining the integrity of the marine ecosystem.'¹⁹³

This definition can be understood to mean that this approach focuses on ensuring that all actors of the ocean space share all information and jointly develop regulations and systems that they all have to adhere to. The most important attribute is that marine information and knowledge is shared among all sectors, which will hopefully lead to a more coherent working environment.

The four areas identified by the minister in the White Paper¹⁹⁴ are Ocean Environmental Information, Ocean Environmental Knowledge, Ocean Environmental Management and Ocean Environment Integrity. Ocean Environmental Information deals with improving 'adherence with the ocean environmental reporting requirements contained in domestic legislation' and also enhancing 'existing research and monitoring' of ocean ecosystems. Ocean Environmental Knowledge deals with producing 'information tools to facilitate understanding of the natural functioning of ecosystems and human impact on the ocean environment'. Ocean Environmental Management looks at establishing ecosystem and biodiversity management plans in consultation with role-players. Lastly, Ocean Environment Integrity seeks to establish

¹⁹¹ P Holthus. *Ocean Governance and the Private Sector White Paper* (2018) in World Ocean Council. 6, available at <https://www.oceancouncil.org/wp-content/uploads/2018/06/WOC-White-Paper-Ocean-Governance-and-the-Private-Sector-final.pdf>, accessed on 15 August 2018.

¹⁹² Op cit note 13 2.

¹⁹³ Ibid

¹⁹⁴ It is important to note that these four areas of the ocean development are also associated with the creation of the Marine Spatial Planning Bill. These areas also signify how an integrated management system works.

cooperation ‘at a national, regional and international level in advancing sustainable ecosystem based management of the EEZ, High Seas and Antarctica.’¹⁹⁵

One of the key acknowledgements in the preamble to the Marine Spatial Planning Act is that the ocean is being used more intensively than it has ever been before.¹⁹⁶ The increased pressure faced by the ocean by the push for economic expansion has been due, among other reasons, to the development of multiple, new sectors of ocean exploration and exploitation such as oil, gas and mineral extraction and aquaculture alongside traditional sectors such as fisheries and tourism. When multiple sectors make use of the ocean it is bound to cause conflicts. It is against this background that there is recognition that it is problematic that currently, there is no singular framework which governs all sectors’ rights and duties over the usage of the ocean. Currently the approach is that of individual sector planning:

‘Regulation within sectors has little or no consideration of the policies and plans of other users or sectors that may be conflicting or compatible, thereby requiring coordination. Establishing boundaries for management and planning efforts are also most often based on political considerations and are not necessarily meaningful from an economic, ecological or social perspective.’¹⁹⁷

The rapid rise of people and industries competing for the use marine space has led to the protection of the marine environment becoming a priority in legislation. Another key acknowledgment in the preamble to the Marine Spatial Planning Act is that the ocean environment is ‘subject to change and variability’¹⁹⁸ and underscoring the earth system approach advocated in the Act¹⁹⁹ is a need for ongoing research to understand, manage and restore eco-systems.

In order to achieve the delicate balance between these objectives South Africa has now adopted a marine spatial planning approach:

‘Marine Spatial Planning (MSP) is a relatively new instrument designed to alleviate conflicts between human uses as well as between human uses and the marine environment. According to a popular description, MSP is “a process of analysing and allocating parts of three-dimensional marine spaces (or ecosystems) to specific uses or objectives, to achieve

¹⁹⁵ For a more detailed description of these four focus areas, see the White Paper 11–17.

¹⁹⁶ MSP Bill preamble.

¹⁹⁷ Intention to Introduce the Marine Spatial Planning Bill 2017 into Parliament and Explanation Summary of the Bill, Government Gazette No. 40726 5.

¹⁹⁸ MSP Bill preamble.

¹⁹⁹ MSP Bill section 5(1) (d) concerning the principles and criteria for marine spatial planning.

ecological, economic, and social objectives that are usually specified through a political process.’²⁰⁰

The UNESCO guide to marine spatial planning referred to in South Africa’s Marine Spatial Framework contains a similar definition but adds the dimension of time, and also expressly identifies it as a public process:

‘Marine spatial planning (MSP) is a public process of analysing and allocating the spatial and temporal distribution of human activities in marine areas to achieve ecological, economic, and social objectives that are usually specified through a political process. (Own emphasis.)’²⁰¹

The following chapter will deal with the Act, illustrating its status and the different versions that have been developed since its introduction.

3.9 Conclusion

The need for a single overarching policy framework for ocean governance that promotes capacity building has taken primacy over any other issue facing the maritime security and ocean governance working stream of Operation Phakisa.

South Africa’s existing domestic legislation do not create a sufficiently detailed or coherent framework of governance to permit ‘co-ordinated sectoral environmental management’ in relation to the blue economy.²⁰² It has been identified that; ‘there is no overall system to guide the development, implementation and monitoring in the marine space and this can lead to conflict, unsustainable use of ocean resources and failing to capitalise on development opportunities.’²⁰³

Until recently, the only legislative framework outlining an integrated approach to management of the marine sector was the NEMICMA Act. The principles in section 2 of NEMICMA, while broadly stated, do emphasise in section 2(4) (r) ‘coastal shores, estuaries, wetlands and similar systems’ and while section 2(4)(l) requires ‘intergovernmental coordination’ section 11(1) provides for each department to prepare its own environmental implementation plan.

²⁰⁰ N Soinen & D Hassan ‘Marine spatial planning as an instrument of sustainable ocean governance’ in D Hassan, T Kuokkanen & N Soinen (eds) *Transboundary Marine Spatial Planning and International Law* (2015) 3, 4.

²⁰¹ MSP Framework (note 15) endnote 1 referring to C Ehler, C & F Douvère *Marine Spatial Planning: a Step-by-Step Approach Toward Ecosystem-based Management* (2009) 24, available at <http://www.unesco-ioc-marinesp.be>, accessed on 17 December 2019.

²⁰² Op cit note 11 27.

²⁰³ Section 7.2.4.1 of the Environmental Management Plan for the Department of Mineral Resources 3rd ed (2016/2020).

The causes of ineffective ocean governance could be explained by gaps in the existing ocean governance framework and the inefficient use and implementation of the existing ocean governance frameworks and the lack of coordination of different actors and stakeholders.

What this chapter has illustrated is that ocean governance and its structures in South Africa are governed by numerous pieces of legislation, essentially relevant to one space. This is understood to be a sectoral approach. The introduction of the White Paper was a shift in the manner in which the governance approach was to be followed. Currently, the closest that South Africa has gone from shifting from a sectoral planning system to a coordinated planning system has been the introduction of the Marine Spatial Planning Framework. Chapter 4 will analyse the Marine Spatial Planning Act and indicate how it is to be implemented.

CHAPTER 4

NEW PROPOSED LEGISLATION

4.1 Introduction

The previous chapter dealt with the existing legal framework and concluded that there is a need for a single coordinated piece of legislation that addresses the gaps identified. This chapter will examine how the provisions of the Marine Spatial Act and the Marine Spatial Framework seek to address these gaps.

The challenge for South Africa is; ‘how best to encourage research, investment and use of our ocean resources in order to contribute to job creation and economic upliftment while at the same time protecting the ocean asset for present and future generations.’²⁰⁴ This suggests the need for a legal framework which balances ‘economic, ecological and social objectives.’²⁰⁵

The previous chapters highlighted the gap in the functionality of ocean governance in South Africa. This has led to the shift of the legislature identifying a need for a shift in the planning system related to the use of the ocean. A sectoral planning system seems to be problematic for ensuring that all users are considered when granting rights and responsibilities with regard to the use of the ocean. It is suggested that a single legal framework will seek to address this gap in the approach to ocean governance.

The first part of this chapter will analyse marine spatial planning as the new approach for ocean governance in South Africa. It will analyse the legislative process of the Bill,²⁰⁶ the objectives of the Act, the key terms in the Act, and the principles for marine spatial planning set out in the Marine Spatial Planning Act and Framework.²⁰⁷ It will then analyse the planning structures created and their powers under the Bill and the process outlined in the Act for the creation of marine area plans.

Finally, in the second part of this chapter, Canada’s principles on ocean-related matters will be discussed in relation to their Oceans Act²⁰⁸ and Oceans Strategy²⁰⁹. Canada was selected for comparison because the principles underpinning marine spatial planning are similar, the law

²⁰⁴ Op cit note 11 8.

²⁰⁵ Marine Spatial Planning Bill preamble.

²⁰⁶ Marine Spatial Planning Bill [B9D-2017].

²⁰⁷ MSP Framework note 15.

²⁰⁸ Oceans Act (SC 1996, c. 31)

²⁰⁹ Canada’s Oceans Strategy: Our Oceans, Our Future, available at <http://www.dfo-mpo.gc.ca/oceans/publications/cos-soc/index-eng.html>, accessed on 22 December 2018.

was accessible and there are indications that Canada was one of the jurisdictions which influenced the development of South Africa's Marine Spatial Planning Bill and Framework.²¹⁰

4.2 Enactment and Status of Marine Spatial Planning Act and MSP Framework

The Marine Spatial Planning Bill was introduced in the National Assembly on 13 April 2017.²¹¹ The Bill lapsed in terms of Rule 333 on 22 December 2017 and it was agreed by the National Assembly on 27 February 2018 to revive it.²¹² It was adopted with some amendments²¹³ by the Portfolio Committee on Environmental Affairs in the National Assembly.²¹⁴ Further amendments were proposed by the Portfolio Committee²¹⁵ and the Bill was adopted with those amendments²¹⁶ by the National Assembly on 24 April 2018. The Bill was passed by both Houses and sent to President for assent on 04 December 2018. The Bill has since been signed into law as of 29 April 2019.

It is worth noting for clarity in the discussion that follows that there are five versions of this Bill, with the first version being the initial Bill presented for public hearings; two of these versions were proposed amendments to the previous version and the other two versions were amended as per the proposed amendments. These versions are listed below:

- Version B9: Initial Bill introduced for public hearings;
- Version B9A: First set of proposed amendments to the Bill;
- Version B9B: First amended Bill as per B9A's submissions;
- Version B9C: Second set of proposed amendments to the Bill;
- Version B9D: Second and Final version of the Bill as per B9C's submissions.

The Bill was subject to comments from relevant stakeholders and government personnel tasked to promote the blue economy and ocean sustainability, including comments submitted in terms of the provincial negotiating mandates. On 30 October 2018, 'the Select Committee, comprised of Members from the National Council of Provinces (NCOP) on Land and Mineral Resources,

²¹⁰ See section 1.5 note 17.

²¹¹ The legislative history of the Bill is available at <https://pmg.org.za/bill/699/>, accessed on 16 December 2019. See also section 1.5 note 17.

²¹² Ibid. Furthermore, Rule 333 of the National Assembly Rules deals with the lapsing of bills on last sitting day of annual session or term of Assembly or when Assembly is dissolved. Available at https://www.parliament.gov.za/storage/app/media/Rules/NA/2016-09-28_NA_RULES.pdf, accessed on 16 December 2019.

²¹³ See Bill B9B-2017, the contents of the amendments will be discussed later.

²¹⁴ 29 November 2017, available at <https://pmg.org.za/bill/699/>, accessed on 16 December 2019.

²¹⁵ Version B9C of the Bill, still to be discussed.

²¹⁶ See Bill B9D-2017, to be discussed later.

met to discuss the negotiating mandates relating to the Bill on Marine Spatial Planning (MSP).²¹⁷

The negotiating mandates were a compilation of reports of comments and suggestions from different portfolio committees from different provinces with regard to the Marine Spatial Planning Bill (B9D-2017).²¹⁸ These committees comprised the Portfolio Committee on Economic Development designated by the Free State Provincial Legislature, the Economic Development, Environment, Agriculture and Rural Development Portfolio Committee designated by the Gauteng Provincial Legislature, the Portfolio Committee on Environmental Affairs designated by the KwaZulu Natal Provincial Legislature, the Portfolio Committee on Agriculture, Rural Development, Land and Environmental Affairs designated by the Mpumalanga Provincial Legislature, the Portfolio Committee on Tourism and Rural, Environment and Agricultural Development (READ) designated by the North West Provincial Legislature, and the Standing Committee on Environmental Affairs and Development Planning Reports designated by the Western Cape Provincial Parliament.

The comment process and the version of the Bill when the first public hearings were held date back to 2017. The Bill has undergone further processes of commentary under both the National Assembly and National Council of Provinces. After being passed by both houses, the amended Bill went to the President to be signed into law.

The current status of the legislation is that it has been signed into law by the President and is now the Marine Spatial Planning Act 16 of 2018.²¹⁹

4.3 Objectives of the Act

The objectives of the Act as set out in section 2 are to:

- ‘(a) develop and implement a shared marine spatial planning system to manage a changing environment that can be accessed by all sectors and users of the ocean;
- (b) promote sustainable economic opportunities which contribute to the development of the South African ocean economy through coordinated and integrated planning;

²¹⁷ Marine Spatial Planning Bill [B9D-2017].

²¹⁸ Negotiating Mandates from Different Provincial Delegations, available at <http://pmg-assets.s3-website-eu-west-1.amazonaws.com/181030mandates.pdf>, accessed on 15 December 2018.

²¹⁹ Publication of the Marine Spatial Planning Act 16 of 2018. GN 644 in GG 42444 of 6 May 2019. This information was extracted from the Parliamentary Monitoring Group website, available at <https://pmg.org.za/bill/699/>, accessed on 01 June 2019. See also Government Gazette No. 42444 The Marine Spatial Planning Bill was signed into law on 29 April 2019. Even though the Bill has been signed into law, it will only come into operation on a date determined by the President in a proclamation in the Gazette.

- (c) conserve the ocean for present and future generations;
- (d) facilitate responsible use of the ocean;
- (e) provide for the documentation, mapping and understanding of the physical, chemical and biological ocean processes and opportunities in, and threats to, the ocean; and
- (f) give effect to South Africa's international obligations in South African waters.²²⁰

With marine spatial planning being understood as the mapping of activities and the determining of the maritime space agreed for each activity, the inclusion of all stakeholders of the ocean is highly important in ensuring the most effective use of the ocean space.²²¹

4.4 Key Terms in the Act

The Marine Spatial Planning Act²²² contains no definition of the term 'marine spatial planning' but is clearly grounded in this approach. The Bill was preceded by the National Environmental Management of the Oceans White Paper, which referred to marine spatial planning in priority statement 3.3.2 in the following terms:

'Marine spatial planning seeks to integrate information across economic sectors. An integrated approach is best suited to displaying and understanding impact per sector and also the accumulated and aggregated impact across sectors over time.'²²³

The stakeholder comments led the researcher to the identification of key terms in the Bill. Section 1 of the Bill deals with the definitions of the Bill. The only stakeholder that made comments of dissatisfaction regarding the definition of "marine area plan" was the Cape Peninsula University of Technology (CPUT).

The definition prior to the recommendation was that a marine area plan meant:

'a bio-geographic marine area that will serve as a planning unit which is developed by analysing and allocating the spatial and temporal distribution of human activities in the South African waters to achieve ecological, economic and social objectives taking into account all relevant principles and factors set out in this Act.'²²⁴

CPUT proposed that this definition be divided into two parts and "marine area" be defined first as meaning 'a bio-geographic area that will serve as a planning unit for a marine area plan.'²²⁵

²²⁰ Ibid at section 2

²²¹ Op cit note 86.

²²² Op cit note 15.

²²³ Op cit note 14 16.

²²⁴ As read in the earlier versions of the Draft Bill.

²²⁵ This comment was incorporated into the later version of Bill B9B, B9C, and was retained without further changes until the final version, B9D.

Other key concepts defined in the Act²²⁶ were:

- ‘marine sector plan’,²²⁷ which is defined as ‘a plan as prescribed and which sets out priorities and potential use allocations for specific users within the ocean environment, developed by an organ of state responsible for such user group’;²²⁸
- ‘marine spatial planning framework’²²⁹ which is defined as ‘a document which sets out the goals, objectives, principles and framework for the development of marine area plans’;
- ‘South African waters’²³⁰ means the:
 - ‘(a) internal waters as referred to in section 3 of the Maritime Zones Act, 1994 (Act no. 15 of 1994), but excludes all freshwater bodies and estuaries as defined in section 1 of the National Environmental Management: Integrated Coastal Management Act...,
 - (b) territorial waters, the exclusive economic zone and the continental shelf as referred to respectively in sections 4, 7 and 8 of the Maritime Zones Act, 1994; and
 - (c) the zones referred to in paragraph (b) around the Prince Edward Islands as referred to in the Prince Edward Islands Act, 1948 (Act 43 of 1948)’.²³¹

It is also important to note that freshwater bodies and estuaries as defined in NEMICMA are excluded from the definition of internal waters and are thus not subject to the MSP Act.

4.5 Principles of Marine Spatial Planning

The Marine Spatial Planning Act takes a principle-based approach, setting out guiding principles that will inform the overarching Marine Spatial Planning (MSP) Framework, but which will also inform the creation of individual marine area plans. The MSP Framework sets out nine principles.²³² These are:

- sustainable development;
- spatial efficiency;
- collaboration and responsible ocean governance;
- justice, equity and transformation;

²²⁶ Section 1 of the MSP Act note 14.

²²⁷ Ibid.

²²⁸ Ibid.

²²⁹ Ibid.

²³⁰ Ibid.

²³¹ Ibid.

²³² Op cit note 15 3–5.

- ecosystem and earth system approach;
- precautionary approach;
- adaptive management;
- coherent planning and management, and;
- the use of the best available science and information.

The Act goes further than these nine principles set out in the Framework, as shown in section 5(1),²³³ which sets a total of 12 principles.

Section 5 of the Act reads as follows:

‘5. Principles and criteria for marine spatial planning

(1) The following principles apply to marine spatial planning and should be applied and considered having regard to the precautionary approach:

- (a) The sustainable use, growth and management of the ocean and its resources;
- (b) the identification of economic opportunities which contribute to the development of the ocean economy;
- (c) the promotion of collaboration and responsible use of the ocean through consultation and cooperation;
- (d) the advancement of an ecosystem and earth system approach to ocean management which focuses on maintaining ecosystem structure and functioning within a marine area;
- (e) adaptive management, which takes into account the dynamics of the ecosystems and the evolution of knowledge and of activities in South African waters;
- (f) the principle of spatial resilience and flexibility;
- (g) the promotion of equity between and transformation of sectors;
- (h) the reliance on the best available scientific information;
- (i) the equitable resolution of conflict scenarios including the implementation of trade-offs, relocations and other available resolutions;
- (j) the principle of efficiency, whereby decision-making procedures are designed to minimise negative financial, social, economic or environmental impacts;
- (k) the principle of good administration coherent and holistic planning and management; and
- (l) South Africa’s international obligations and cross-border cooperation.

(2) Where there is a conflict between existing uses, developing uses or activities, maximum co-existence of uses or activities should be preferred wherever possible but

²³³ MSP Act note 14 section 5.

where such co-existence is not possible, the principles in subsection (1) must be applied to resolve such conflict.²³⁴

The principles listed in section 5 are not defined in the Act. Thus reference must be made to the MSP Framework (which does supply definitions of the principles) and to scholarly literature to determine the ambit and meaning of the MSP principles set out in the Act.

What is worth noting here is that the principles listed in the MSP Framework are not included word for word in the Act. This is done in a more detailed explanation of the principles. The principles in the Act are set out in a more concise manner. Even though the principles set out in the Act are more concise in nature, they do not create any inconsistency as reference can always be made to the Framework where there is any confusion.

Soininen and Hassan contend that there are broadly four main principles of marine spatial planning, which they list as:

1. the principle of fit;
2. the principle of multiple use;
3. the principle of stakeholder involvement; and
4. the principle of adaptive management.²³⁵

By the ‘principle of fit’ the authors refer to the ‘management tools, which aim at avoiding or minimising conflicts or mismatches between biophysical systems, socioeconomic activities and governance practices.’²³⁶ This principle is not referred to in the Act. However, the principle is referred to in the MSP Framework in illustrating the benefits of MSP for the nation. In this document its objective is described as being,

‘to facilitate the unlocking of the ocean economy and sustainable ocean economic development, enhance the achievement of societal benefits and strengthen the level of society’s interaction with the ocean ... [and] contribute to good ocean governance among other benefits.’²³⁷

This principle is given effect in the MSP Act in the provisions and powers given to the different bodies in dealing with marine spatial planning issues, as seen in the National Working Group (section 9), Directors-General Committee (section 10) and the Ministerial Committee (section

²³⁴ MSP Act note 14 section 5.

²³⁵ Soininen & Hassan op cit note 200 4.

²³⁶ Op cit note 86 4.

²³⁷ Op cit note 15 1.

11). All three of these sections have subsections detailing the procedure to follow in dealing with conflicts which will be discussed further in section 4.6 of this chapter.

By referring to the principle of ‘multiple use’, the author acknowledges the idea that there should be a procedure, ‘that can mediate among different uses of marine resources and establish priorities when conflicts are unavoidable.’²³⁸ The principle of multiple use is referred to in section 5(1) (i) of the Act as ‘the equitable resolution of conflict scenarios including the implementation of trade-offs, relocations and other available resolutions.’²³⁹ Further reference to this principle can be seen in the long title of the Act and also in the annexed memorandum of the Bill,²⁴⁰ in particular section 3, both of which note that marine spatial planning aims at governance of the use of the ocean by multiple sectors.

The principle of stakeholder involvement is reflected in the annexed memorandum of the Bill, where it is illustrated that stakeholders ranging from government to general ones held conferences to consult further on the draft Marine Spatial Planning Act and its processing. Soininen and Hassan detail stakeholder involvement as ensuring that there is the best available information at the heart of decision-making. There must be involvement of ‘federal, state, local, tribal and other stakeholders’,²⁴¹ who will then work together to develop ‘marine spatial plans cooperatively, and this process is designed to decrease user conflict and improve planning and regulatory efficiencies.’²⁴² This can also be seen as being the position that the legislature takes, because in the Framework, it is illustrated in the ‘Characteristics of the South Africa’s MSP planning process’ that there needs to be active involvement of all relevant stakeholders in the process of MSP planning to ensure long-term and coordinated support for management. In addition to this, stakeholder involvement goes further than just providing comments on proposed Bills as the stakeholders in this case are also part of the process of the creation of marine area plans (still to be discussed further in this chapter).

The principle of adaptive management is defined as, ‘managing according to plan by which decisions are made and modified as a function of what is known and learned about the system, including information about the effect of previous management actions.’²⁴³ This principle is directly linked with the ‘Principles and Criteria for Marine Spatial Planning’ in section 5(1) (e)

²³⁸ Ibid page 2.

²³⁹ Ibid.

²⁴⁰ Memorandum of the Marine Spatial Planning Bill 9B-2017.

²⁴¹ Op cit note 18 5.

²⁴² Ibid.

²⁴³ Ibid.

of the Act. The Act's position of adaptive management is that it considers the dynamics of the ecosystems and the advancement of information and of activities in South African waters.

Another important principle listed in the Act but not highlighted by Soininen and Hassan is that of an 'ecosystem approach', referred to in section 5(1) (d).

'This principle implies a primary focus on maintaining and, where feasible, restoring ecosystem structure and functioning within a marine area. It includes the recognition that ecosystems are dynamic, changing and sometimes poorly understood.'²⁴⁴

However, the most recent published literature reviews suggest that government agencies have not always implemented the scientific information in their development of policies.²⁴⁵

Thus it can be concluded that the principles listed in the Act seem to be in line with the list suggested by Soininen and Hassan. The Act does not seem to have a hierarchy of principles as they are listed in the Act more succinctly and elaborated on in the Framework. The principles mentioned by Soininen and Hassan are the main principles as they keep in line with the values of MSP and highlight the importance of achieving ecological, economic and social objectives and this done by not compromising marine ecosystems.

As argued in the submission on the Bill by the KZN Subsistence Fishermen,²⁴⁶ the precautionary approach²⁴⁷ must be applied at all times. It is worth noting that the definition of a precautionary approach is found in the Framework and not in the Act:

'Precautionary approach

This principle suggests that if a decision could cause severe or irreversible harm to society or the environment, in the absence of a scientific consensus that harm would not ensue, the burden of proof falls on those who advocate taking the action, as much as the costs of potential

²⁴⁴ Op cit note 18 4.

²⁴⁵ KL Cochrane, WHH Sauer & S Aswani 'Science in the service of society: Is marine and coastal science addressing South Africa's needs?' (2019) 115 (1/2) South African Journal of Science 20–26 25. Also see AT Lombard 'Key challenges in advancing an ecosystem-based approach to marine spatial planning under economic growth imperatives' (2019) 6 Journal of Marine Science 146.

²⁴⁶ Comments by the KZN Fishermen, available at

<http://pmg-assets.s3-website-eu-west-1.amazonaws.com/170901kznfishermen.pdf> 2, accessed on 08 December 2018.

²⁴⁷ This term was first defined in the MSP Framework (note 15) under the principles that govern the MSP Act: "This principle suggests that if a decision could cause severe or irreversible harm to society or the environment, in the absence of a scientific consensus that harm would not ensue, the burden of proof falls on those who advocate taking the action, as much as the costs of potential pollution or damage to the environment should be paid by the party responsible for the action that caused the disturbance."

pollution or damage to the environment should be paid by the party responsible for the action that caused the disturbance.’²⁴⁸

It appears arguable that the precautionary approach overarches and informs other principles, as evidenced by the incorporation of this precautionary approach in section 5(1) at the outset of the principles, whereas in the first version of the Bill this was not the case.²⁴⁹

The only other change in the wording of the principles is the incorporation of the principle of resilience and flexibility as a stand-alone principle in the final version of the Bill, whereas in the first version of the Bill it fell under the principle of efficiency. The remaining principles of the first version of the Bill and the Act are identical.

4.6 Structures and Powers

It’s clear that the success of the Marine Spatial Planning will depend on it being effectively implemented and enforced. The key provisions of the Act are articulated in the roles of the National Working Group on Marine Spatial Planning (NWG), the Directors-General (DG Committee) Committee and the Ministerial Committee (MC), all of which have different roles in ensuring that all marine spatial plans are effected effectively.

Section 9(2) of the MSP Act establishes the NWG as a technical group it will develop draft marine area plans based in consultation with stakeholders in terms of section 8, considering all of the information that is now to be centralised as envisaged in section 7 and giving effect to the principles and criteria for Marine Spatial Planning set out in section 5 of the Act. The NWG will report and make recommendations on the MSP Framework and marine area plans to the DG Committee, which must then be finally approved by the Ministerial Committee for final approval.

The NWG is said to be comprised of competent²⁵⁰ officials who are nominated from ‘...the departments responsible for defence, energy, environmental affairs, fisheries, mineral resources, planning monitoring and evaluation, public enterprises, science and technology, telecommunications, tourism, transport, rural development and land affairs.’²⁵¹ The NWG was responsible for the development of South Africa’s draft Marine Spatial Planning Framework

²⁴⁸ Op cit note 15 4.

²⁴⁹ The precautionary approach was first mentioned in and defined in the MSP Framework (note 15), inserted in all versions of the Bill and later adopted in the Act.

²⁵⁰ The Bill makes no attempt to define the areas or standards of competency required by members of the NWG. See comments made at the meeting of the NCOP Land and Mineral Resources on 26 June 2018, available at <https://pmg.org.za/committee-meeting/27365/>, accessed 20 December 2018.

²⁵¹ Section 9(1) (a).

which complies with the objectives of the Act and the principles and criteria for marine spatial planning provided for in sections 2 and 5. In addition to this, the NWG must make a recommendation to the DG Committee:

- ‘(a) by submitting draft marine area plans, accompanied by a report detailing transitional provisions aimed at enabling the implementation of marine area plans within a reasonable period of time and how the recommendation was reached, including what factors were considered; and
- (b) on how to resolve user conflicts, including relocations, trade-offs or other resolutions as contemplated in section 5(2).’²⁵²

The DG Committee comprises of members of the same departments as listed in the NWG but in the capacity of Directors-General. The duties of this committee are to consider the marine area plans and accompanying reports referred to it by the NWG and approve and refer a marine area plan and accompanying report to the Ministerial Committee. As provided in section 10(4):

‘a decision of the Directors-General Committee must be made by consensus, and where no consensus is reached, all the proposed options must be presented to the Ministerial Committee for a final decision.’²⁵³

Furthermore, in section 10(6) of the Act, the legislature reserves the duty bestowed on the Director-General to consider the marine area plans and accompanying reports referred to it by the National Working Group. In this case, after consideration by the relevant personnel, the Director-General may either approve and refer a marine area plan and accompanying report to the Ministerial Committee²⁵⁴ or refer the marine area plan and accompanying report to the National Working Group for reconsideration, with specific instructions.

The Ministerial Committee comprises members of the same departments as listed in the NWG but in the capacity of Ministers. Among other duties, under section 11 this committee may:

- ‘(5)(a) approve any marine area plans and accompanying reports referred to it by the Directors-General Committee;
- (b) approve any marine area plans and accompanying reports with amendments; or

²⁵² Section 9(3) (a) and (b).

²⁵³ Section 10(4).

²⁵⁴ In this case the referral may include:

- “(i) recommendations to resolve user conflicts, including relocations, and trade-offs or other resolutions between sectors as contemplated in section 5(2); and
- (ii) recommendations on facilitating cooperation between sector departments.”

- (c) refer any marine area plans and accompanying reports back to the Directors-General Committee for reconsideration with specific instructions.’²⁵⁵

Further, under section 11:

- ‘(6) The Ministerial Committee *must*—
- (a) ensure cooperation between sector departments; and
 - (b) where necessary, resolve user conflicts, including relocations, and trade-offs or other resolutions between sectors as contemplated in section 5(2).
- (7) The Ministerial Committee *must* report to Cabinet on implementation of marine spatial planning at least every two years.’²⁵⁶ (own emphasis).

The above groups are the backbone of the functioning of MSP and the implementation thereof in South Africa. The Minister of Environmental Affairs cannot perform alone the duties delegated to the NWG, the DG and the Ministerial Committee.

Led by the DEA, four institutions, namely; the Centre for Environmental Rights (CER), the International Ocean Institute-Africa (IOI-SA), Nelson Mandela University (NMMU) and the World Wildlife Fund-South Africa (WWF-SA), took part in a two-day workshop to make comments and recommendations on the initial Bill.²⁵⁷ One of the comments made in this workshop was that ‘...a civil society institutional structure needs to be created. An MSP stakeholder forum was proposed which would be established alongside formal MSP institutional structures proposed by the Draft MSP Bill i.e. the National Working Group on MSP and Marine Area Planning Group.’²⁵⁸ The Marine Area Planning Group was not part of the Bill and is still not part of the Act as it was merely a proposal made at the workshop to have a body at a regional consultation level. The Bill and now the Act have only included the NWG, DG and Ministerial Committee as bodies set to work on the Bill and any amendments thereto.

²⁵⁵ “The Ministerial Committee on Marine Spatial Planning will give final approval for the Marine Area Plans.” In the case of any amendments, the Directors-General Committee will refer the marine area plan and accompanying report back to the National Working Group for reconsideration, with specific instructions. The same is done by the Ministerial Committee, where they seek any clearance or recommendations. In this case, the MC will send “...any marine area plans back to the DG for reconsideration with specific instructions. The Ministerial Committee on Marine Spatial Planning therefore has final authority over the adoption and implementation of Marine Spatial Planning in South Africa and will approve the Marine Area Plans and facilitate the resolution of any inter-departmental disagreements.”

²⁵⁶ Section 11(5), (6) and (7).

²⁵⁷ Marine Spatial Planning Workshop Report and Outcomes note 134.

²⁵⁸ Ibid.

It is submitted that it is unfortunate that this suggestion was not included in the final Act, considering the importance of the principle of stakeholder involvement in MSP. CER argued that:

‘An MSP Stakeholder Forum should be developed based on users and relevant authorities identified, with representatives from each group participating in the MSP Stakeholder Forum... A proposal is that the MSP Stakeholder Forum be established alongside formal MSP institutional structures proposed by the MSP Bill i.e. the National Working Group on MSP and Marine Area Planning Group.’²⁵⁹

By adopting the above position, there would be a shift in the manner stakeholder engagements and consultations are conducted. CER asserts that the consultation provision in the MSP Bill could be strengthened by not placing as much onus of consultation in the National Working Group and rather establish a Marine Spatial Planning Stakeholder Forum, ‘...comprised of stakeholders from government departments, community groups, the private sector, conservation management agencies, not-for-profit organisations, academia, the broader marine scientist community and other relevant stakeholders.’²⁶⁰ This allows for other experts besides government personnel to be part of the planning process and thus effect the essence of stakeholder engagement.

CER also noted how the appeal system used by the MSP Bill seems to fall short in ensuring that any recommendations made by other stakeholders are received by an independent body as opposed to referring to the NWG, DG and MC group. CER recommended that the MSP Bill makes provision for an independent appeal authority that would consider appeals lodged against decisions relating to marine spatial planning both by persons directly affected by such decisions and interested and affected parties. In particular, CER noted the tribunal regulating the National Water Act²⁶¹ as being a good model dealing with the establishment and functioning of an independent appeal authority.

With the illustration of the structures and powers granted by the MSP Act, it is also important to examine the process of the creation of marine area plans in respect of the MSP Act.

²⁵⁹ Marine Spatial Planning Workshop Report: CER comments (2017) note 134.

²⁶⁰ Ibid.

²⁶¹ National Water Act 36 of 1998. The establishment of the Water Tribunal is provided for in chapter 15 of the Act, sections 146–150.

4.7 Process of the Creation of Marine Area Plans

In order to achieve the implementation of Marine Spatial Planning and making it manageable, the Act set out that;

‘South Africa’s ocean space will be divided into smaller bio-geographic marine areas that will serve as planning units.²⁶² South Africa’s Marine Area plans will be prepared sequentially. This will allow effort to be focused on one Marine Area at a time, and also mean that the experience gained from preparing each plan can be used in improving the preparation (or review) of subsequent plans.’²⁶³

It is important to remember that the MSP Act is South Africa’s first piece of an integrated approach to ocean governance. Therefore, this plan will see future changes as it will be modified to keep in line with the relevant policies and practices at the time.

‘International experience suggests that a period of two to four years is needed for the preparation of a marine spatial plan. Sufficient time will be needed to ensure a robust process, particularly for the preparation of the first Marine Area plan. A period of two to three years should be anticipated for preparing the first plan, with a possible compression of plan preparation for the subsequent plans.’²⁶⁴

Section 6 of the Bill envisages ‘an iterative, phased process’²⁶⁵ consisting of five steps is the basis of South Africa’s marine spatial planning system:

4.7.1 Development of a marine spatial planning framework

The first step is the development of a marine area spatial planning framework. A draft Framework was published on 26 May 2017. The Act stipulates in section 8(1) that ‘...it is the duty of the National Working Group ensure that all relevant stakeholders are adequately consulted in the development of the Marine Spatial Planning Framework and the marine area plan.’ The last updated version of the framework was that published in 2017 and no changes have been made since the first draft.²⁶⁶

²⁶² Op cit note 14 20.

²⁶³ Ibid.

²⁶⁴ Ibid.

²⁶⁵ MSP Act note 14 section 6.

²⁶⁶ Available at <http://www.gov.za/documents/national-framework-marine-spatial-planning-south-africa-26-may-2017-0000>, accessed on 4 January 2020.

4.7.2 *Development of a knowledge and information system referred to in section 7*

The second step speaks of ‘the development of a knowledge and information system referred to in section 7.’²⁶⁷ In terms of the Act, ‘the Minister must establish a knowledge and information system to house information in order to develop marine area plans.’²⁶⁸ By virtue of the definition of ‘marine area plan’, it is imperative to obtain the best obtainable data indicating the spatial and temporal distribution of human activities.

‘This will be supplemented by other forms of data, such as ‘statistical information relating to environmental and socio-economic conditions and the economic value of maritime activities.’²⁶⁹

Spatial data will be harmonised and integrated as much as possible into a dedicated geodatabase. Datasets will then be incorporated into a geographic information system.²⁷⁰

4.7.3 *Development of marine area plans*

The second step deals with the development of marine area plans. The Department of Environmental Affairs is the lead authority for Marine Spatial Planning in South Africa, and therefore for the preparation of the marine area plans.²⁷¹ The Department of Environmental Affairs will coordinate the National Working Group that will oversee the Marine Area Planning process.²⁷²

‘The Marine Area plans will be prepared through a series of well-defined steps based upon international experience. Consideration will be given in particular to the adaptation of these steps to the governance and planning practices of South Africa.’²⁷³

These plans will be developed in line with the Framework and the Act, but as yet it appears that no plans have been published.

4.7.4 *Effective implementation, monitoring and evaluation of marine area plans*

As noted above this step deals with the effective implementation, monitoring and evaluation of marine area plans.²⁷⁴

²⁶⁷ MSP Act note 14 section 6(b) and (c).

²⁶⁸ Ibid.

²⁶⁹ Ibid.

²⁷⁰ Ibid.

²⁷¹ Ibid sections 7 and 8.

²⁷² MSP Framework note 15 22.

²⁷³ Ibid.

²⁷⁴ Op cit note 14 section 6.

‘To assess the extent to which the plan is successful in meeting its objectives and producing the desired results, the National Working Group will establish a process of monitoring the extent to which the plan’s proposed management actions are being implemented.’²⁷⁵

This will include an evaluation of whether the proposed regulation of marine activities is being carried out in accordance to the plan. This evaluation of the performance of the plans ‘will be carried out in the light of the monitoring results by the National Working Group, in collaboration with scientists and stakeholders as appropriate.’²⁷⁶

4.7.5 *The review of the marine area plans in terms of section 14*

The review of marine area plans centres around the principle of adaptability and once a Marine Area plan has been approved, and the MSP Act provides for plans to be amended at any stage. In addition to this Marine Area Plans should be revised on a regular basis to allow for data and new knowledge about the marine areas, in ensuring that they keep in line with changing priorities for the protection and use of marine resources.

‘The NWG will carry out any necessary analysis to support the proposed amendments and propose suitable changes to the Marine Area plan. The proposed amendment, with full reasoning, will be submitted to the Directors-General Committee on Marine Spatial Planning and the Ministerial Committee on Marine Spatial Planning for approval. Once approved, amendments will be incorporated into an amended version of the plan that will be publicised and made publicly available.’²⁷⁷

4.7.6 *Consultation*

Both the MSP Framework and marine area plans must be developed in consultation with multiple stakeholders. Section 8(1) gives a list of “relevant stakeholders” who must be ‘adequately consulted’²⁷⁸ in this process. As set out in section 8(1) (a) to (f), these stakeholders are listed as:

- ‘(a) sector departments;
- (b) affected organs of state;
- (c) institutional coastal planning bodies;
- (d) industrial representative bodies from the various affected sectors;
- (e) representative organisations of affected persons and institutions; and

²⁷⁵ Ibid

²⁷⁶ Ibid

²⁷⁷ See the MSP Act note 14 under sections 9, 10 and 11. Also see MSP Framework (note 15) 29.

²⁷⁸ MSP Act note 14 section 8(1).

(f) the general public.²⁷⁹

The Act again does not define what ‘properly consulted’ means but perhaps guidance will have to be drawn from administrative law on how sector departments implement the consultation mechanism.

At the negotiating mandates meeting held by the National Council of Provinces on Land and Mineral Resources, they noted that both the KwaZulu-Natal and Western Cape Provincial Legislatures raised concern in that in the appointment of the Directors-General Committee municipalities were not included.

The committee present at the negotiating mandates also noted the concerns of the provincial delegates on the issue of the National Working Group and the Directors-General Committee in that the personnel listed to be members of said delegations were exclusive in nature. In the former group, it was noted that ‘this group should not consist of government officials and representatives of government departments only.’²⁸⁰ Furthermore, the Bill was not clear as to who was tasked with drafting MSP Frameworks and:

‘...whether such frameworks must be national or drafted for certain regions or areas, to whom draft MSPFs must be submitted, how and by whom these draft MSPFs would be evaluated and reviewed and who would be responsible for the approval and implementation of these frameworks. MSPFs should be included as a separate clause, in which the process, from drafting to acceptance and review, be set out.’²⁸¹

As noted above, the Western Cape were concerned that the Committee created in terms of clause 10 did not provide for provincial or municipal representation on the committee. This was of great importance as the Act would have significant implications for provinces and municipalities that were by the coastline. In addition to this,

‘...the province did not agree that marine spatial planning could be done without the provincial and municipal input that was responsible for the terrestrial areas that would support the ocean-based activities. These terrestrial areas adjacent to the ocean would be directly affected by maritime spatial planning.’²⁸²

²⁷⁹ “In the development of the marine spatial planning framework and the marine area plans, the National Working Group must ensure that all relevant stakeholders are adequately consulted.” These stakeholders include but are not limited to the ones listed above.

²⁸⁰ Op cit note 218 (KZN contribution).

²⁸¹ Op cit note 218 (Western Cape contribution).

²⁸² Ibid.

There was a response from the Department through a Mr Popose Gcobani (who at the time of writing was the Director of Ocean Conservation Strategies, in the Department of Environmental Affairs). In response to the National Working Group issue, he responded by stating that:

‘NWG members would be appointed by their respective DGs who have the legislative mandate in terms of management of the ocean. Whatever those members do would still have to be reported back to the DGs. The DGs would need to take that information to the next level as proposed in the Bill, which was the Ministers.’²⁸³

The following section will take a look at Canada’s Ocean Act and Strategy. This jurisdiction was one of the many international influences in South Africa’s development of their MSP Framework.

4.8 Canada’s Ocean Act and Ocean Strategy

4.8.1 Background

South Africa acknowledges that a review of ocean governance policies in a few countries, including Canada, informed the development of South Africa’s approach to marine spatial planning²⁸⁴ and indicated the necessary capacities to pursue marine spatial planning.²⁸⁵

Significant similarities exist in the objectives and strategies being pursued, and all countries have adopted initiatives aimed at implementing marine spatial-planning and what is termed the ecosystem approach,²⁸⁶ which approach has been adopted in South Africa’s Draft National Marine Spatial Planning Framework.

4.8.2 Enactment and status of Oceans Act and Canada’s Oceans Strategy

On 31 January 1997, the Government of Canada enacted the Oceans Act,²⁸⁷ into force, which made Canada ‘the first country in the world to have comprehensive oceans management legislation.’²⁸⁸ The Act authorises the Minister of Fisheries and Oceans Canada to develop a

²⁸³ Op cit note 218.

²⁸⁴ Section 7 of the Green Paper (note 12) states that the Department of Environmental Affairs studied the laws of Canada, as well as Australia, Brazil, China, Colombia, India, Japan, Norway, Portugal, Russia and the United States of America. Furthermore, a case study on the approach of Norway was presented by the Department of Environment at a meeting of the NCOP select committee on Land and Mineral Resources held on 28 June 2018, and the minute records that this approach ‘informed South Africa’s approach to marine spatial planning.’ However, the researcher does not have access to the case study or the applicable legislation.

²⁸⁵ Op cit note 14 2.

²⁸⁶ Green Paper note 12 objective 5.

²⁸⁷ Oceans Act note 208.

²⁸⁸ Canada’s Oceans Strategy note 209.

national oceans management strategy, which is guided by three key principles; sustainable development, the precautionary approach and integrated management. In addition to this:

‘Canada's Oceans Strategy responds to the legislative and policy requirements outlined in the Oceans Act and sets the foundation for future management of Canada's estuarine, coastal and marine waters. The Government of Canada, on behalf of all Canadians, recognises its implementation as a priority.’²⁸⁹

As a policy framework, this Strategy has the overarching goal of ensuring a ‘healthy, safe and prosperous’ oceans environment ‘for the benefit of current and future generations of Canadians.’²⁹⁰ The Strategy expressly outlines that all ocean management decision making must be guided by the three principles of sustainable development, integrated management and the precautionary approach. These three principles should guide all ocean management decision making.²⁹¹

‘In summary, this Strategy is designed to set clearly defined objectives and stimulate partnerships among all those with a stake in oceans management. It is based on knowledge from a growing body of ocean management experiences both nationally and internationally.’²⁹² The national Strategy will continue to evolve over time. Its further evolution and implementation will involve active collaboration with partners, led by Fisheries and Oceans Canada, with a results-based management and accountability framework to measure progress relevance and effectiveness.’²⁹³

4.8.3 Objectives of Act and Strategy

Canada’s Oceans Act aimed to address ‘the fragmented jurisdictional approach to oceans management, both among federal agencies and between federal and other levels of government.’²⁹⁴ The Canadian Act thus provides for an ‘integrated management planning’ approach now stipulated in the Act.²⁹⁵

In collaboration with other ministers, boards and agencies of the Government of Canada and other stakeholders, the Minister has the duty to lead and facilitate the development and implementation of a national strategy for the ‘management of estuarine, coastal and marine

²⁸⁹ Ibid. 27.

²⁹⁰ Ibid. 10.

²⁹¹ Ibid.

²⁹² Ibid. 27.

²⁹³ Ibid.

²⁹⁴ Ibid. 47.

²⁹⁵ Ibid. See also Canada Oceans Act note 208 section 30(b).

ecosystems in waters that form part of Canada or in which Canada has sovereign rights under international law.²⁹⁶

The Act itself does not have a section listing or defining the objectives of its functions. However, this is rectified by the Strategy in that it has identified three policy objectives or outcomes for the advancement of oceans management activities: ‘Understanding and Protecting the Marine Environment; Supporting Sustainable Economic Opportunities; and International Leadership.’²⁹⁷

4.8.4 Key sections in the Act

Part II of Canada’s Oceans Act sets out its Oceans Management Strategy. In particular, section 30 sets out the principles of the Management Strategy. It is worth noting that there are three main principles noted in this section; dealing with sustainable development, the integrated management of activities in estuaries and the precautionary approach.

The provision for co-ordinating between departments can be found in sections 31 to 33 of the Act. The integrated management plans as set out in section 31 give powers to the Minister in collaboration with other ministers to, ‘lead and facilitate the development and implementation of plans for the integrated management of all activities or measures in or affecting estuaries, coastal waters and marine waters that form part of Canada.’²⁹⁸

Section 32 deals with the implementation of integrated management plans. For purposes of this section the Minister shall:

‘...develop and implement policies and programs with respect to matters assigned by law to the Minister,²⁹⁹ The Minister is also afforded powers to establish advisory or management bodies and appoint or designate, as appropriate, members of those bodies and recognise established advisory or management bodies.³⁰⁰ Furthermore, the Minister may, in consultation with other ministers, boards and agencies of the Government of Canada establish marine environmental quality guidelines, objectives and criteria respecting estuaries, coastal waters and marine waters.’³⁰¹

Section 33 of the Act deals with cooperation and agreements in two parts. The first part bestows duties on the Minister in the implementing of integrated management plans. The most

²⁹⁶ Canada Oceans Act note 208 Part II section 29.

²⁹⁷ Op cit note 254 12.

²⁹⁸ Op cit note 279 at section 31.

²⁹⁹ Ibid. section 32(a).

³⁰⁰ Ibid. section 32(c).

³⁰¹ Ibid. section 32(d).

important is the duty, ‘to cooperate with other ministers, boards and agencies of the Government of Canada, with provincial and territorial governments and with affected aboriginal organisations, coastal communities and other persons and bodies.’³⁰² Part two of this section deals with the consultation process of the implementation of these plans.

It is evident from the above that the structures and functions of Canada’s Ocean Strategy and that of South Africa’s Marine Spatial Planning bear similarities in their operation. Section 31 highlights how the ‘integrated management plans’ are to involve government bodies, the community and other interested stakeholders. Section 32 also strikes a similarity in that it is the Minister who has the responsibility of establishing marine environmental quality guidelines, objectives and criteria respecting estuaries, coastal waters and marine waters.

4.8.5 MSP Objectives and Principles of Oceans Act and Strategy

The objectives of the South African MSP Act are to:

- ‘(a) develop and implement a shared marine spatial planning system to manage a changing environment that can be accessed by all sectors and users of the ocean;
- (b) promote sustainable economic opportunities which contribute to the development of the South African ocean economy through coordinated and integrated planning;
- (c) conserve the ocean for present and future generations;
- (d) facilitate responsible use of the ocean;
- (e) provide for the documentation, mapping and understanding of the physical, chemical and biological ocean processes and opportunities in, and threats to, the ocean; and
- (f) give effect to South Africa’s international obligations in South African waters.’³⁰³

Interestingly, the objectives mirror Canada’s principles of strategy, to be discussed below. This highlights the similarities between the principles and objectives of each country’s policies as they are guided by each other in developing its structures and marine area plans.

The similarities in the principles entrenched by Canada and the development of their law and our own MSP can be seen below in that:

- ‘30. The national strategy will be based on the principles of–
- (a) sustainable development, that is, development that meets the needs of the present without compromising the ability of future generations to meet their own needs;

³⁰² Ibid. section 33(1) (a).

³⁰³ MSP Act note 14 section 2.

- (b) the integrated management of activities in estuaries, coastal waters and marine waters that form part of Canada or in which Canada has sovereign rights under international law; and
- (c) the precautionary approach, that is, erring on the side of caution.³⁰⁴

4.8.6 Consultation

The consultation process is set out in Part II, in section 33. As listed above, the Minister may consult with relevant stakeholders other persons and bodies, including those bodies established under land claims agreements.

One can note that like Canada's Ocean Strategy, South Africa's MSP Act is based on the three principles of sustainable development, integrated management and the precautionary approach, which 'should guide all ocean management decision making.'³⁰⁵ Both the Canadian and SA emphasise the decision must be based on sound scientific and traditional knowledge.

The Strategy further goes on to illustrate that the scientific knowledge required to make oceans management decisions includes 'both natural and social dimensions.'³⁰⁶ Such knowledge, 'is derived from sources inside and outside Canada and its governments', and the Government of Canada gives a commitment that the principles listed under section 30 (quoted above) will 'serve as guides and tests for assessing future oceans management decisions.'³⁰⁷

'Integrated Management is central to Canada's Oceans Strategy, as it contains commitments to the long-term objective of developing large-scale and local Integrated Management plans for all of Canada's oceans, starting with priority areas and building on experience as resources and capacity permit.'³⁰⁸

Canada's Oceans Strategy made great use of stakeholder involvement through the inclusion of a range discussions and consultations over four years.³⁰⁹ The participants of discussions and consultations all took an 'active part in designing, implementing and monitoring the effectiveness of coastal and ocean management plans, and partners enter into agreements on ocean management plans with specific responsibilities, powers and obligations.'³¹⁰

³⁰⁴ Oceans Act note 208 section 30.

³⁰⁵ Canada's Ocean Strategy note 209 10 and MSP Act (note 14) section 5(1).

³⁰⁶ Ibid. 10.

³⁰⁷ Ibid.

³⁰⁸ Ibid. 11.

³⁰⁹ Ibid. 1.

³¹⁰ Ibid. 19.

The manner in which stakeholder involvement was managed in Canada, as articulated in the Strategy, is an aspect of the approach from which South Africa and its MSP should draw inspiration when conducting consultations and developing their own marine area plans.

4.8.7 Lessons to be learned from Canada's experience with Marine Spatial Planning

In essence, this Strategy was created to clearly set out objectives and initiate dialogue and partnerships amongst all stakeholders in oceans management. This knowledge is said to be enhanced from 'a growing body of ocean management experiences both nationally and internationally.'³¹¹ The idea behind the creation for this national Strategy was that it would continue to evolve over time. This evolution and implementation would 'involve active collaboration with partners, led by Fisheries and Oceans Canada, with a results-based management and accountability framework to measure progress relevance and effectiveness.'³¹²

However, in 2011, Jessen noted that the progress made with shifting from a sectoral to an integrated approach since the coming into effect of the Oceans Act in 1997 had been rather modest and slow.³¹³ Jessen also noted that, 'at the time, over the past 13 years of implementation of the Act, a number of challenges were affecting the degree to which oceans management was actually changing.'³¹⁴ Coupled with other challenges, Canada's oceans continue to be managed on a sectorial approach that the Oceans Act was meant to replace.³¹⁵

A review of the Oceans Act showed that standing alone in oceans management, 'it cannot operate successfully without a strong institutional framework with clear and effective regulation and supportive constituencies.'³¹⁶ However, as noted by Jessen, 'the implementation of the Oceans Act and Canada's Oceans Strategy would not be easy and would likely be at least a decadal if not a generational task.'³¹⁷ It is to this end that the same mind-set should be adopted by South Africa's own policy makers in learning from Canada.

It is clear from the above that Canada's position in dealing with ocean governance is primarily aimed at facilitating the shift from a sectoral to an integrated approach.³¹⁸ This approach would

³¹¹ Ibid. 27.

³¹² Ibid.

³¹³ S Jessen A Review of Canada's Implementation of the Oceans Act Since 1997—From Leader to Follower?' (2011) 39(1) *Coastal Management* 48.

³¹⁴ Ibid. 20.

³¹⁵ Ibid. 20.

³¹⁶ Ibid. 48.

³¹⁷ Ibid.

³¹⁸ Jessen note 313 above.

be based on principles of sustainable development, the precautionary approach and integrated management. However, the implementation of the Oceans Act has been documented as being ‘a significant challenge in Canada; politically, financially, bureaucratically, and publicly.’³¹⁹

‘Coastal states and nations are conducting marine spatial planning (MSP) at an ever-increasing pace. Some MSP efforts are aimed at planning areas at a subnational level, whereas others extend as far as 200 nautical miles from shore, within national exclusive economic zones. For planning of all types, but especially for planning in the marine realm, integration has become a sought-after norm now that traditional sectoral, single-issue management has not succeeded.’³²⁰

An interesting observation has been the suggestion that we consider creating a tenth province in light of the importance of the blue economy. In an article³²¹ written to support this, the argument was made that, in order to accommodate the ocean being seen as a tenth province, there is no need to recreate the landscaping of the provinces, but it would be necessary rather to restructure how they are run. Some reference to changing the governance of the provinces should be made to allow for the functioning of this ‘tenth province’. This could be seen as a similar method as that used by Operation Phakisa in relation to the governance of the ocean, as this clearly illustrated how the shift from a cross-sectoral approach to an integrated approach would prove to be key in also facilitating the framework of marine spatial planning.

4.9 Conclusion

This chapter has discussed how the Act seeks to set the framework for ocean governance. At this stage it is premature to draw conclusions on the success or lack thereof of this Act as it has been signed into legislation only this year (2019) and will now be the point of reference for further policies and Acts for the ocean space. However, it is to be hoped that Operation Phakisa, in particular the marine protection services and governance working group, will seek to ensure that the policies are implemented in an effective manner and that frequent and regular ‘labs’ are conducted to ensure that the furthering of the blue economy is done in a sustainable manner.

Canada’s Ocean Strategy seems to have similar structures, functions and implementation measures to those in the MSP Act. There seems to be a consultation process with other stakeholders as well as other bodies of government and the coastal community. This is similar

³¹⁹ Ibid 48.

³²⁰ ME Portman ‘Marine Spatial Planning: Achieving and Evaluating Integration’ (2011) 68(10) ICES Journal of Marine Science 1.

³²¹ FD Deacon ‘The Governance of South Africa’s “Ocean Territory”: Some Further Thoughts’ (2003) 38(1) Journal of Public Administration 1–5.

to the consultation process of the Act, save for the consultations taking place provincially before being discussed by a national body.

Furthermore, it would appear that Canada's position in dealing with ocean governance is primarily aimed at facilitating the shift from a sectoral to an integrated approach, which is one of the driving factors of South Africa's marine spatial planning. It is submitted that the key lesson to be learned from the Canada is the importance of clearly defined objectives coupled with stimulating partnerships and stakeholder involvement in the development of ocean management.

CHAPTER 5

CONCLUSION AND RECOMMENDATIONS

5.1 Summary of Chapters

This dissertation has sought to give an analysis of ocean governance in South Africa through the introduction of Operation Phakisa and the analysis of the legal frameworks that seek to give effect to the use and preservation of the ocean and its resources. At the outset it was made clear that the concept of the blue economy is a relatively new one and it has not been articulated fully in legislation on an international level and a domestic level.

How do the provisions of the Marine Spatial Planning Act seek to address these gaps?

Chapter 1 sets the outline and gives key research questions which were answered in the body of this dissertation.

Chapter 2 discussed the concept of the blue economy and the challenges and benefits of it. This chapter also discussed Operation Phakisa and its role in relation to ocean governance. Operation Phakisa aimed at unlocking the economic potential of South Africa commenced with an ‘oceans economy lab’ programme as the first phase of achieving this growth plan. Herein lies the link between the blue economy and Operation Phakisa as the overall aim is understood to be to promote economic and trade activities, which emerges from a need to integrate conservation and sustainability in the management of the maritime domain.

Chapter 3 provided an analysis from which it was evident that the existing legislation governing the ocean that the current ocean governance frameworks are not effective enough in ensuring the sustainable use of the ocean and their resources for the future. A key problem is a sectoral approach adopted by the legislature and it is to this end that we have new proposed pieces of legislation seeking to govern the ocean using an integrated management approach.

Chapter 4 discussed the provisions of the Marine Spatial Planning Act. The chapter concluded that the Act being so young, only effective monitoring of it and its implementation will translate into its success or lack thereof. The chapter also considered Canada’s Oceans Act and Strategy, and the similarities between this approach and the objectives and principles in South Africa’s MSP Act. It is submitted that the key lesson to be learned from the Canadian experience is stakeholder involvement and an integrated approach to ocean management.

5.2 Recommendations

The need to have a coordinated approach to marine spatial planning has been recognised but there needs to be urgency in effectively implementing it.³²² This White Paper sets out an approach whereby South Africa can, in the short term, increasingly accommodate coordinated sectoral management within the existing statutory framework. This is then supported by one of the objects of the MSPA in that amongst other objects of the Act, they are to, ‘...promote sustainable economic opportunities which contribute to the development of the South African ocean economy through coordinated and integrated planning...’ Findlay and Bohler emphasise that if government departments are to carry out their responsibilities and achieve the objectives of MSP they ‘must be provided with a sound understanding of ocean governance and management matters’.³²³

The sustainable development of the blue economy can be achieved only if all three pillars of sustainability are present and equally effected: economic, social and environment. Supported by the White Paper, a coordinated cross-sectoral approach will promote and expand sustainable development in the ocean. Most importantly, the movement towards a coordinated cross-sectoral planning approach is required by the existing statutory framework established in terms of the National Environmental Management Act 107 of 1998 and will be further supported by the contemplated ocean environmental legislation.³²⁴ Furthermore, a single and overarching framework giving effect to this goal will see a more coherent and sustainable usage of the ocean by stakeholders and other actors of the ocean space. A comparative study would be useful in the future involving a detailed approach of other jurisdictions and an ongoing monitoring system of South Africa’s integrated management system of the ocean.

5.3 Concluding Remarks

An analysis of South Africa’s ocean governance legal framework highlighted a problematic system as different stakeholders could hide behind different pieces of legislation in order to advance their interests. Canada had already identified that in order for the oceans to be sustained for future generations, there need to be clearly defined objectives and partnerships among all stakeholders. This is what the Marine Spatial Planning Act 16 of 2018 seeks to address as South Africa keeps in line with the vision of Operation Phakisa and its goal of

³²² Findlay and Bohler-Muller note 7 above 202.

³²³ Ibid. 201.

³²⁴ White Paper, note 13 at page 10

furthering the blue economy in a sustainable manner. The Act is the first piece of legislation that all stakeholders will have to answer to and refer to as they seek to make use of the demarcated marine areas.

REFERENCES

PRIMARY SOURCES

LEGISLATION

South African Legislation

Acts

Carriage of Goods by Sea Act 1 of 1986

Constitution of the Republic of South Africa, 1996

Dumping at Sea Control Act 73 of 1980

Hazardous Substances Act 15 of 1973

Marine Living Resources Act 18 of 1998

Marine Living Resources Amendment Act 5 of 2014

Marine Spatial Planning Act 16 of 2018. GN 644 in GG 42444 of 6 May 2019

Marine Pollution (Control and Civil Liability) Act 6 of 1981

Marine Pollution (Intervention) Act 64 of 1987

Marine Pollution (Prevention of Pollution from Ships) Act 2 of 1986

Marine Traffic Act 2 of 1981

Maritime Zones Act 15 of 1994

Merchant Shipping Act 57 of 1951

National Environmental Management: Air Quality Act 39 of 2004

National Environmental Management: Biodiversity Act 10 of 2004

National Environmental Management: Integrated Coastal Management Act 24 of 2008

National Environmental Management: Protected Areas Act 57 of 2003

National Environmental Management: Protected Areas Amendment Act 21 of 2014

National Environmental Management Act 107 of 1998

National Environmental Management Laws Amendment Act 14 of 2013

National Ports Act 12 of 2005

National Water Act 36 of 1998

Sea Fisheries Act 10 of 1940

Sea Fisheries Act 58 of 1973

Sea Fishery Act 12 of 1988

Sea-Shore Act 21 of 1935

South African Maritime Safety Authority Act 5 of 1998

Wreck and Salvage Act 94 of 1996

White/Green Papers

Green Paper on the National Environmental Management of the Ocean GN 828 in *Government Gazette* No. 35783 of 3 October 2012

White Paper: Marine Fisheries Policy for South Africa 1997, published on 5 May 1997, available at https://www.gov.za/sites/default/files/gcis_document/201409/marinefisheries0.pdf, accessed on 4 January 2020.

White Paper on the National Environmental Management of the Ocean GN 426 in *Government Gazette* No. 37692 of 29 May 2014

South African Draft Legislation

Draft Aquaculture Bill 2016

The Marine Spatial Planning Bill, B9-2017

The Marine Spatial Planning Bill, B9A-2017

The Marine Spatial Planning Bill, B9B-2017

The Marine Spatial Planning Bill, B9C-2017

The Marine Spatial Planning Bill, B9D-2017

South African Framework Documents

Draft National Biodiversity Framework GN 1143 in *Government Gazette* No. 41996 of 26 October 2018

The Marine Spatial Planning Framework GN 451 in *Government Gazette* No. 40860 of 26 May 2017

South African Policy Documents

Environmental Management Plan for the Department of Mineral Resources 3 ed. (2016/2020) (GN 1192 GG 42010 of 2 November 2018).

Intention to Introduce the Marine Spatial Planning Bill 2017 into Parliament and Explanation Summary of the Bill (2017), *Government Gazette* 40726.

National Assembly Rules Rule 333, available at

https://www.parliament.gov.za/storage/app/media/Rules/NA/2016-09-28_NA_RULES.pdf, accessed on 16 December 2019.

National Development Plan 2030: Our Future – Make It Work, available at

https://www.nationalplanningcommission.org.za/Downloads/ndp-2030-our-future-make-it-work_0.pdf, accessed on 20 June 2018.

Presidential Nine-Point Plan, available at <https://www.gov.za/issues/nine-point-plan>, accessed on 28 January 2019.

Small Scale Fisheries Policy for South Africa Government Notice 474 in *Government Gazette* 35455 of 20 June 2012

South Africa's National Biodiversity Strategy and Action Plan (NBSAP), available at

https://www.environment.gov.za/sites/default/files/docs/publications/SAsnationalbiodiversity_strategyandactionplan2015_2025.pdf, accessed on 28 January 2019.

Canadian Legislation

Act

Oceans Act 1996 (SC 1996, c. 31)

Canadian Policy Document

Canada's Oceans Strategy: Our Oceans, Our Future Department of Fisheries and Oceans Canada, Government of Canada (2002), available at <http://www.dfo-mpo.gc.ca/oceans/publications/cos-soc/index-eng.html>, accessed on 17 December 2019.

International Conventions

Convention for the Protection and Development of the Marine and Coastal Environment of the West and Central African Region, (1981) (Abidjan Convention), available at http://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf, accessed on 15 May 2018; <http://abidjanconvention.org/>, accessed on 16 December 2019.

Convention for the Protection, Management and Development of the Marine and Coastal Environment of the Eastern African Region (2010) (Nairobi Convention) available at http://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf, accessed on 15 May 2018; <https://www.unenvironment.org/nairobiconvention/who-we-are/contracting-parties>, accessed on 16 December 2019.

United Nations Convention on the Law of the Sea (1982) (UNCLOS), available at http://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf, accessed on 15 May 2018.

International Policy Documents

African Union *Africa's Integrated Maritime Strategy* (2050 AIM Strategy) AU Version 1.0 (2012), available at http://cggrps.org/wp-content/uploads/2050-AIM-Strategy_en.pdf, accessed on 17 December 2019.

African Union *Agenda 2063: The Africa We Want*, available at <https://au.int/documents/760>, accessed on 28 October 2018.

United Nations Conference on Environment and Development (UNCED) 'Agenda 21' Rio de Janeiro, Brazil, Chapter 17, available at <https://sustainabledevelopment.un.org/content/documents/Agenda21.pdf>, accessed on 10 June 2018.

United Nations Economic Commission for Africa (UNECA) *Africa's Blue Economy, A Policy Handbook* (2016), available at

https://www.uneca.org/sites/default/files/PublicationFiles/blueeco-policy-handbook_en.pdf, accessed on 23 June 2018.

United Nations (UN) Johannesburg Declaration on Sustainable Development 1, available at <http://www.un-documents.net/jburgdec.htm>, accessed on 18 August 2018.

United Nations (UN) Sustainable Development Goals 2030, adopted at the UN Sustainable Development Summit, New York, September 2015, available at <https://www.un.org/sustainabledevelopment/development-agenda/>, accessed on 19 June 2018.

United Nations (UN) 2030 Agenda for Sustainable Development, available at <https://sustainabledevelopment.un.org/content/documents/21252030%20Agenda%20for%20Sustainable%20Development%20web.pdf>, accessed on 15 May 2018.

United Nations (UN) Millennium Development Goals, available at <http://www.un.org/millenniumgoals/>, accessed on 4 January 2020.

CASE LAW

WWF South Africa v Minister of Agriculture, Forestry and Fisheries and others [2018] 4 All SA 889 (WCC)

SECONDARY SOURCES

BOOKS

Attri, VN “The blue economy and the theory of paradigm shifts” in VN Attri & N Bohler-Muller (eds) *The Blue Economy Handbook of the Indian Ocean Region* (2018) Pretoria, ZA: Africa Institute of South Africa (AISA).

Attri V.N & Bohler-Muller N *The Blue Economy Handbook of the Indian Ocean Region* (2018) Pretoria, ZA: Africa Institute of South Africa (AISA).

Celliers L ... et. al. *A user-friendly guide to South Africa’s Integrated Coastal Management Act* (2009) Department of Environmental Affairs and SSI Engineers and Environmental Consultants. Cape Town, South Africa.

Colgan C.S, “The blue economy: Theory and strategy” in VN Attri & N Bohler-Muller (eds) *The Blue Economy Handbook of the Indian Ocean Region* (2018) Pretoria, ZA: Africa Institute of South Africa (AISA).

Ehler C & Douvère F *Marine Spatial Planning: A Step-by-Step Approach Toward Ecosystem-based Management* (2009) 24 Intergovernmental Oceanographic Commission: Paris, FR: UNESCO, available at <http://www.unesco-ioc-marinesp.be>, 17 December 2019.

Findlay K & Bohler-Muller N “South Africa’s ocean economy and Operation Phakisa” in VN Attri & N Bohler-Muller (eds) *The Blue Economy Handbook of the Indian Ocean Region* (2018) Pretoria, ZA: Africa Institute of South Africa (AISA).

Kidd M *Environmental Law* 2 ed (2011) Cape Town: Juta & Co Ltd.

Ntola S.Y “Convention on the Law of the Sea and blue economy” in VN Attri & N Bohler-Muller (eds) *The Blue Economy Handbook of the Indian Ocean Region* (2018) Pretoria, ZA: Africa Institute of South Africa (AISA).

Ntola S.Y and Vrancken P “African governance perspectives of the blue economy in the Indian Ocean rim” in VN Attri & N Bohler-Muller (eds) *The Blue Economy Handbook of the Indian Ocean Region* (2018) Pretoria, ZA: Africa Institute of South Africa (AISA).

Soininen N & Hassan D ‘Marine spatial planning as an instrument of sustainable ocean governance’ in D Hassan, T Kuokkanen & N Soininen (eds) *Transboundary Marine Spatial Planning and International Law* UK: Routledge (2015).

Strydom HA & King ND *Fuggle & Rabie’s Environmental Management in South Africa* 2 ed Cape Town: Juta & Co Ltd (2009)

Wilson G. “Comparative legal scholarship” in M McConville & WH Chui *Research Methods for Law* Edinburgh: Edinburgh University Press (2007) 87.

JOURNALS

Cochrane KL, Sauer WHH, Aswani S. “Science in the service of society: Is marine and coastal science addressing South Africa’s needs?” (2019) 115 (1/2) *South African Journal of Science* 20–26.

Deacon FD “The governance of South Africa’s “ocean territory”: Some further thoughts” (2003) 38(1) *Journal of Public Administration* 1–5.

- Ikirodah BBO “The legal regime of the continental shelf, its economic importance and the vast natural resources of a coastal state” (2005) 23(1) *Journal of Energy & Natural Resources Law* 15–35.
- Jessen S “A review of Canada’s implementation of the Oceans Act since 1997—from leader to follower?” (2011) 39(1) *Coastal Management* 48.
- Lombard AT ... et al. “Key challenges in advancing an ecosystem-based approach to marine spatial planning under economic growth imperatives” (2019) 6 *Journal of Marine Science* 146.
- Othman MR “A new management structure for Malaysian Economic Exclusive Zone” (2012) 4(1) *The International Journal of Social Sciences* 47–63.
- Portman ME “Marine spatial planning: Achieving and evaluating integration” (2011) 68(10) *ICES Journal of Marine Science* 1.
- Potgieter T, “Oceans economy, blue economy, and security: Notes on the South African potential and developments” (2018) 14(1) *Journal of the Indian Ocean Region* 49–70.
- Pyć D “Global ocean governance” (2016) 10 (1) *TransNav, the International Journal on Marine Navigation and Safety of Sea Transportation* 159–162.
- Smith-Godfrey S “Defining the blue economy” (2016) 12(1) *Maritime Affairs: Journal of the National Maritime Foundation of India* 58–64.
- Van Wyk J “Defining the blue economy as a South African strategic priority: Toward a sustainable 10th province?” (2015) 11(2) *Journal of the Indian Ocean Region* 153–169.

INTERNET SOURCES

- About IMO International Maritime Organization, available at <http://www.imo.org/en/About/Pages/Default.aspx>, accessed on 16 December 2019.
- Blue Economy Principles, The, available at <https://www.theblueeconomy.org/principles.html>, accessed on 31 October 2018.
- Comments made by KZN Fishermen 2, available at <http://pmg-assets.s3-website-eu-west-1.amazonaws.com/170901kznfishermen.pdf>, accessed on 08 December 2018.

Department of Planning, Monitoring and Evaluation (Republic of South Africa) Foreword to the Operation Phakisa home page, available at <http://www.operationphakisa.gov.za/Pages/Home.aspx>, accessed on 16 December 2019.

Du Plessis N *The Blue Economy: A South African Perspective*, available at <http://www.saeon.ac.za/enewsletter/archives/2016/october2016/doc04>, accessed on 10 October 2017.

Goddard C, *The Blue Economy: Growth, Opportunity and a Sustainable Ocean Economy*. An Economist Intelligence Unit briefing paper for the World Ocean Summit (2015), available at <http://www.greengrowthknowledge.org/resource/blueeconomy-growth-opportunity-and-sustainable-ocean-economy>, accessed on 27 May 2018.

Holthus P. *Ocean Governance and the Private Sector White Paper* (2018) Paris: World Ocean Council 6, available at <https://www.oceancouncil.org/wp-content/uploads/2018/06/WOC-White-Paper-Ocean-Governance-and-the-Private-Sector-final.pdf>, accessed on 15 August 2018.

International Chamber of Shipping, “Shipping and World Trade” in *Overview of the International Shipping Industry*, available at <http://www.marisec.org/shippingfacts/keyfactsindex.htm>, accessed on 16 December 2019.

Marine Spatial Planning Bill signed into law (29 April 2019) Parliamentary Monitoring Group, available at <https://pmg.org.za/bill/699/>, accessed on 16 December 2019.

Marine Spatial Planning Bill [B9-2017]: Call for comments, available at <https://pmg.org.za/call-for-comment/552/>, accessed on 31 November 2018.

Marine Spatial Planning Bill [B9D-2017]: Negotiating mandates. As facilitated by the NCOP Land and Mineral Resources, available at <https://pmg.org.za/committee-meeting/27365/>, accessed 20 December 2018.

Marine spatial planning workshop report and outcomes: The role of civil society in supporting marine spatial planning held on 6 and 7 March 2017 in Cape Town. Available at http://pmg-assets.s3-website-eu-west-1.amazonaws.com/170901CERAnnexure_C.pdf, accessed on 07 December 2018.

Negotiating Mandates from Different Provincial Delegations, available at <http://pmg-assets.s3-website-eu-west-1.amazonaws.com/181030mandates.pdf>, accessed on 15 December 2018.

Operation Phakisa – Oceans Economy: Introduction and background, available at <https://www.environment.gov.za/projectsprogrammes/operationphakisa/oceanseconomy>, accessed on 23 May 2018.

Operation Phakisa *Unlocking the economic potential of South Africa's oceans: Marine Protection Services and governance executive summary*, available at <https://www.operationphakisa.gov.za/operations/oel/pmpg/Marine%20Protection%20and%20Govenance%20Documents/Marine%20Protection%20and%20Govenance/OPOceans%20MPSG%20Executive%20Summary.pdf>, accessed on 16 December 2019.

“SA Developing Blue Economy Strategy”, quote from Dr Mayekiso, available at http://www.durban.gov.za/Resource_Centre/new2/Pages/SA-Developing-Blue-Economy-Strategy-.aspx, accessed on 15 May 2018.

Santos LA *How Malaysia's Big Fast Results model is changing development in Africa* (2015), available at <https://www.devex.com/news/how-malaysia-s-big-fast-results-model-is-changing-development-in-africa-87353>, accessed on 15 April 2018.

Schmidt S ... et al “*SDG 14: Conserve and Sustainably Use the Oceans, Seas and Marine Resources for Sustainable Development*” International Council of Scientific Unions (ICSU), available at <https://www.icsu.org/cms/2017/03/SDGs-interactions-14-life-below-water.pdf>, accessed on 16 December 2019.

Sea Change – Operation Phakisa, available at <https://topempowerment.co.za/sea-change-operation-phakisa/>, accessed on 03 July 2018.

UNEP (United Nations Environment Programme) *Regional Seas Programmes*, available at <https://www.unenvironment.org/explore-topics/oceans-seas/what-we-do/working-regional-seas/regional-seas-programmes>, accessed on 16 December 2019.

UNEP (United Nations Environment Programme) *Towards a Green Economy: Pathways to Sustainable Development and Poverty Eradication* (2011), available at <http://www.uep.org/greeneconomy>, accessed on 20 January 2018.

United Nations Conference on Sustainable Development. *Blue Economy Concept Paper* (2012), available at <https://sustainabledevelopment.un.org/content/documents/2978BEconcept.pdf>, accessed on 27 May 2018.

World Bank and United Nations Department of Economic and Social Affairs. *The Potential of the Blue Economy: Increasing Long-term Benefits of the Sustainable Use of Marine Resources for Small Island Developing States and Coastal Least Developed Countries*. World Bank, Washington DC (2017), available at <http://www.worldbank.org/en/news/infographic/2017/06/06/blue-economy>, accessed on 15 January 2018.

SECTION 1: PERSONAL DETAILS

- 1.1 Surname of Applicant : Nzimande
 1.2 First names of applicant: Themba lethu
 1.3 Title (Ms/ Mr/ Mrs/ Dr/ Professor etc.): Mr
- 1.4 Applicant's gender : Male
 1.5 Applicant's Race (African/
 Coloured/Indian/White/Other) : African
 1.6 Student Number : 212506285
 Staff Number : N/A
 1.7 School : University of KwaZulu Natal
 1.8 College : Law and Management Studies
 1.9 Campus : Howard College
- 1.10 Existing Qualifications : Bachelor of Laws (LLB)
 1.11 Proposed Qualification for Project : Master of Laws in Maritime Law
2. **Contact Details**
 Tel. No. : 031-740 1012
 Cell. No. : 063 527 3824
 e-mail : themba lethunzimande@gmail.com
 Postal address (in the case of
 Students and external applicants) : P.O Box 11015
Mariannahill
3610

3. **SUPERVISOR/ PROJECT LEADER DETAILS**

NAME	TELEPHONE NO.	EMAIL	SCHOOL / INSTITUTION	QUALIFICATIONS
3.1 Adv. Dusty-Lee Donnelly		donnelyd@uk zn.ac.za	College of Law and Management Studies	LLM
3.2				
3.3				

SECTION 2: PROJECT DESCRIPTION

2.1 Project title

An Analysis of The Legal Framework of South Africa's Ocean Governance Policy, And The Role of Operation Phakisa.

2.2 Questions to be answered in the research

- What is the blue economy and how is it influenced by ocean governing policies?
- How much of an influence is Malaysia's "Big Fast Results Methodology" in the introduction of Operation Phakisa?
- What is the status of the Marine Spatial Planning Bill and the White Paper on National Environmental Management of the Ocean and Operation Phakisa?
- What role can Operation Phakisa play in the effective implementation of the new legislation?

2.3 Research approach/ methods

This dissertation will be based on a review of the literature dealing with the issue of ocean governance in South Africa. The findings of this thesis will not be based on empirical studies, but rather, a study and review of relevant legislation, secondary sources and case law. The legal sources used will be set out in a chronological order, setting the state of ocean governance in South Africa. The focus will be on Operation Phakisa and the policies put in place to administer ocean governance.

The key issue of ocean sustainability will shape the research approach as it'll be researched in light of national and international ocean governing policies. The main approach will be looking at the blue economy and how proper legislation will ensure that the oceans economy is sustained over generations. The sources will then be contrasted with each other, especially those of different states and judicial systems

SECTION 3: FORMALISATION OF THE APPLICATION

APPLICANT

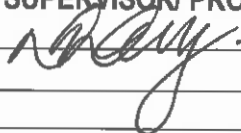
I have familiarised myself with the University's Code of Conduct for Research and undertake to comply with it. The information supplied above is correct to the best of my knowledge.

DATE: 05-10-2017 SIGNATURE OF APPLICANT: 

SUPERVISOR/PROJECT LEADER/DISCIPLINE ACADEMIC LEADER

DATE: 03-11-2017

SIGNATURE OF SUPERVISOR/ PROJECT LEADER/DISCIPLINE LEADER



RECOMMENDATION OF SCHOOL RESEARCH ETHICS COMMITTEE/HIGHER DEGREES COMMITTEE

The application is (please tick):

<input type="checkbox"/>	Recommended and referred to the Human and Social Sciences Ethics Committee for further consideration
<input type="checkbox"/>	Not Approved, referred back for revision and resubmission

NAME OF CHAIRPERSON:

SIGNATURE: _____

DATE

RECOMMENDATION OF UNIVERSITY RESEARCH ETHICS COMMITTEE (HUMAN AND SOCIAL SCIENCES)



The application for Exemption is (please tick):

<input type="checkbox"/>	Approved by Chairperson
<input type="checkbox"/>	Not Approved. Sent back for further clarity and resubmission

If approved, the Exemption Number to be recorded: _____

NAME OF CHAIRPERSON: _____ SIGNATURE _____

DATE.....

HUMANITIES AND SOCIAL SCIENCES RESEARCH ETHICS COMMITTEE ETHICAL CLEARANCE CHANGE OF DISSERTATION TITLE FORM	
School	Law
Student Name	Thembaletu Nzimande
Student Number	212506285
Supervisor	Dusty-Lee Donnelly
Co-supervisor	
Old Title	An Analysis of the Legal Framework of South Africa's Ocean Governance Policy, and the Role of Operation Phakisa in Furthering the Blue Economy
New Title	A statutory analysis of ocean governance in South Africa with a focus on the Marine Spatial Planning Act 16 of 2018.
Reason for Change	Changed after submitting for examination to more accurately reflect the focus of the dissertation. The change has no ethical implications.
Signatures	
Student:	 24 June, 2020
Supervisor:	 24 June 2020
Co-supervisor:	
ALR:	
HSSREC:	