PART II:

INTERNATIONAL AND

REGIONAL ENVIRONMENTAL LAW

Chapter 5: Introduction to International Environmental Law

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1 Introduction

This Chapter deals with several aspects of international environmental law with a focus on how these relate to the situation in Namibia. It must be stated beforehand that, especially with regard to the sources of international law, much has been written by internationally renowned jurists.[1] However, in order to give an overview of this field of the law as comprehensively as possible, but within the limits of this publication, this Chapter summarises the most basic features of international environmental law and opens with a brief introduction on how international law becomes applicable in Namibia.

2 The Application of International Law in Namibia

International law has developed rapidly over the past few decades, especially since the dawn of the UN, when rules and norms regulating activities carried on outside the legal boundaries of nations were developed. Numerous international agreements – bilateral, regional or multilateral in nature – have been concluded and international customary rules, as evidence of a general practice accepted as law, have been established. But how do these sources of international law apply domestically? In this regard, two approaches can generally be followed.[2] The first, the monist approach, assumes that international laws are automatically incorporated into domestic law; the second, the dualist approach, follows the rule that international laws are not automatically incorporated into domestic law and therefore require an act of legal transformation into domestic law.

Article 144 of the Namibian Constitution incorporates international law explicitly as law of the land and it needs no legislative act to become so.[3] International law is thus integrated into domestic law. National authorities and the judiciary, in particular can, therefore, apply international law directly on the national level, before cases are taken to regional or international judicial or quasi-judicial bodies.[4] However, international law has to conform to the Constitution in order to apply domestically. Whenever

1 See for example Sands / Peel (2018); Kiss (2004); Dugard *et al*. (2018).
2 Cf. Dugard (2018:57).
3 Erasmus (1991:94).
4 Bangamwabo (2008:168).

a treaty provision or other rule of international law is inconsistent with the Namibian Constitution, the latter will prevail.[5]

Article 144 also mentions two sources of international law that apply in Namibia: general rules of public international law and international agreements binding upon Namibia. General rules of public international law include rules of customary international law, supported and accepted by a representatively large number of states. The notion of an 'international agreement' primarily refers to a 'treaty' in the traditional sense, i.e. international agreements concluded between states in written form and governed by international law,[6] but it also includes conventions, protocols, covenants, charters, statutes, acts, declarations, concords, exchanges of notes, agreed minutes, memoranda of understanding, and agreements.[7] Notably, not only agreements between states, but also those with the participation of other subjects of international law, e.g. international organisations, are covered by the term 'international agreement'. In general, international agreements are binding upon states if the consent to be a party to a treaty is expressed by a signature followed by ratification; or by accession, where the state is not a signatory to a treaty; or by declaration of succession to a treaty concluded before such a state existed.

In Namibia, a treaty will be binding in terms of Article 144 if the relevant international and constitutional requirements have been met in terms of the law of treaties and the Namibian Constitution. International agreements, therefore, will become Namibian law when they come into force for Namibia.[8] The conclusion of or accession to an international agreement is governed by Articles 32(3)(e), 40(i) and 63(2)(e) of the Namibian Constitution. The Executive is responsible for conducting Namibia's international affairs, including entry into international agreements. The President, assisted by the Cabinet, is empowered to negotiate and sign international agreements, and to delegate such power. It is required by the Constitution that the National Assembly agrees to the ratification of or accession to an international agreement. However, the Constitution does not require the promulgation of an international agreement in order for it to become part of the law of the land.[9]

Further to Article 144, Article 96 of the Constitution promotes international cooperation, peace and security. It also exhorts respect for international law and treaty obligations as a principle of state policy.

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5 Erasmus (1991:94).

6 Definition in Article 1 of the Vienna Convention on the Law of Treaties of 1969, which entered into force in 1980.

7 Cf. the definition of 'treaty' proposed by the International Law Commission; Article 2(a) of the Draft Articles on the Law of Treaties, available at http://legal.un.org/ilc/texts/instruments/english/commentaries/1_1_1966.pdf, accessed 25 April 2021.

8 Erasmus (1991:102).

9 Hinz / Ruppel (2008b:8).

3 Sources of International Environmental Law

The sources of international environmental law are part of the sources of international law in general. Thus, the international legal regime must be consulted in order to trace the sources of international environmental law. International law, like national law, knows different types of law, namely hard law and soft law.[10] Hard law describes those provisions or agreements which are obligatory in nature and thus binding for those to whom these provisions are applicable. The opposite of this is the category of soft law, encompassing non-binding texts such as the Declarations resulting from the Rio and Stockholm Conferences. Soft law has an important influence in international law because acceptance and compliance often develops into international customary law. The major problem is to determine the point at which soft law becomes such law, i.e. hard law. This will be discussed below.

International environmental law comprises both hard law and soft law components. The sources of international law in general are listed in Article 38 of the Statute of the International Court of Justice (ICJ), the principal judicial organ of the United Nations:

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

a. international conventions, whether general or particular, establishing rules expressly recognised by the contesting states;

b. international custom, as evidence of a general practice accepted as law;

c. the general principles of law recognised by civilised nations;

d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary mean for the determination of rules of law (…).

Considering that Article 38 of the Statute of the ICJ was first drafted in 1920, these provisions no longer reflect all the sources of today's international law. New developments in respect of sources of law have to be considered in addition to those recognised in Article 38.[11] In the following paragraphs, however, only those four categories of sources of international law as outlined in Article 38 will be elaborated on, with a focus on their implications for environmental law-related concerns.

3.1 International Conventions: Multilateral Environmental Agreements (MEAs)

International conventions or treaties, as referred to in Article 38 of the ICJ, are defined by Article 2.1(a) of the 1969 Vienna Convention on the Law of Treaties as

10 Dugard *et al.* (2018:586).

11 The list of sources of international law can be supplemented by other sources of international law like duties *erga omnes* and *ius cogens*. *Estoppel* and acquiescence can be added to the list of sources of international law as well as unilateral legal acts. See Dugard (2018:28).

international agreements "concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation".

International environmental treaties or Multilateral Environmental Agreements (MEAs) as they are commonly referred to, regulate the relationships between states pertaining to the environment. Generally, the first objective of any MEA is the protection and conservation of the environment. However, MEAs will also be beneficial in economic, political or administrative regard. MEAs can, among others, protect public health, improve governance, empower the public to get involved, increase solidarity, enhance international political respect, and improve technical and financial assistance and networking.[12]

As a general rule, MEAs are of a binding nature and are thus to be distinguished from other non-binding international instruments (soft law), which cannot be enforced, but rather serve a guiding role. The binding nature of MEAs derives from the *pacta sunt servanda* principle, which has been reaffirmed by Article 26 of the Vienna Convention on the Law of Treaties.

Although international law typically focuses on obligations among states, it has the potential to influence environmental law at the national level. In some cases, the parties to such agreements are international governmental or non-governmental organisations instead of, or in addition to, states.

3.1.1 How MEAs are Made

International treaties come into being in a multi-stage process.[13] Usually, a draft is the first step and is drawn up by international organisations such as the United Nations, the African Union, or the Council of Europe. As a next step, this draft is negotiated by stakeholders including national delegations, government officials, scientists, and representatives of NGOs. The negotiation phase is closed by the adoption of an agreed text, which is subsequently signed by the representatives of the state who have been commissioned to this effect by their government. Certain treaties are signed after the closing session of the negotiations during a determined period. After the end of such period, non-contracting states can adhere or accede to the treaty. After the signature of a treaty follows the ratification, which takes place at the national level and according to domestic law. National law may then stipulate, that a treaty should be ratified by the head of the state after approval by parliament or accepted by the executive. How an MEA becomes applicable under national law depends on the constitutional provisions of the country in question. It follows either a monist or a dualist approach, as explained

12 UNEP (2006:44f.).
13 Cf. Sands / Peel (2018:106ff.); Dugard (2018:610ff.).

earlier in this chapter.[14] The ratification process is in most cases concluded by the deposit of an instrument of ratification,[15] approval or other communication to the secretariat of an international organisation and the treaty subsequently enters into force on a date determined by the treaty itself, in most cases after a certain number of instruments of ratification have been deposited or after a specific period of time has elapsed.

3.1.2 The General Scope of MEAs

International environmental law may be established on the global level, containing rules applicable for the entire, or at least almost the entire, international community.[16] At regional level, international law creates a legal framework for a specific region, such as European environmental law (e.g. EC guidelines) or similarly within the African Union.[17] A regional or continental scope may of course again be subdivided into smaller regional blocs, such as the legal framework of the Southern African Development Community (SADC), often referred to as the sub-regional level.[18] Bilateral environmental agreements are international treaties usually concluded between two states with shared natural resources such as rivers, lakes or parks.

As has been outlined, the geographic coverage of international agreements is one reason for the broad scope of international environmental law. Another reason is the variety of different sectors covered by this field of the law, such as water, land, biological diversity, air and climate, to name but a few. Thus, the number of international agreements directly or indirectly pertinent to the environment is extraordinarily high[19]

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14 For a more detailed discussion on the relationship between international and municipal law see Dugard (2018:57ff.). Namibia follows the monist approach by virtue of Article 144 of the Constitution as has been stated above.

15 Usually, a document issued by the respective state, which states that the treaty has been ratified.

16 MEAs with effectively whole world membership include the Convention of Biological Diversity (CBD) and its Protocol, the 2000 Cartagena Protocol on Biosafety; the 1971 Ramsar Convention on Wetlands of International Importance; or the 1973 Washington Convention on International Trade in Endangered Species of Wild Flora and Fauna (CITES).

17 The MEA most relevant for Africa is the African Convention on the Conservation of Nature and Natural Resources. For certain aspects of the implementation of AU law on national level see Dinokopila (2015:479ff.).

18 The SADC Protocols pertinent to environmental issues are such sub-regional environmental agreements.

19 As early as 2004, Kiss (2004:41) already speaks of more than one thousand. UNEP's 2005 Register of International Treaties and other agreements in the field of the environment has 272 environmental agreements, not including bilateral agreements or treaties, where the focus is on other issues, but which establish environmental obligations, such as the GATT/WTO or regional free trade agreements. As of April 2021, the International Environmental Agreements website (see https://iea.uoregon.edu, accessed 25 April 2021) lists over 1300 Multilateral Environmental Agreements, 2200 Bilateral Environmental Agreements, and 250 "Other" (non-multi, non-bi) Environmental Agreements.

and no other area of law has generated such a large body of conventions on a specific topic as international environmental law has in the past decades.

3.1.3 Typical Structure of MEAs

Many MEAs do have common characteristics, use the same legal techniques and often have a similar structure.[20] Like other international treaties, MEAs are typically arranged as follows: The Preamble, which can be helpful in interpreting the treaty, explains the motivations of the contracting parties but contains in itself no obligatory rules. The main part of an MEA includes substantive rules that define the obligations of the parties, measures of implementation, institutional provisions (e.g. to create treaty bodies such as the Conference of the Parties) and closing measures concerning the life of the treaty itself. Many MEAs have Annexes, which contain specific regulations concerning technical details such as lists of substances or activities, pollution standards, lists of protected species, etc.

3.1.4 Compliance and Enforcement of MEAs

Compliance with and enforcement of MEAs[21] are, as in other fields of the law, essential for ensuring that MEAs are not simply pieces of paper. Compliance, meaning the fulfilment by the contracting parties of their obligations under MEAs, is ensured by different legal means. Compliance measures can be adopted by states or the secretariats and conferences of parties of specific MEAs, and MEAs themselves do often contain provisions on compliance or non-compliance for that matter.[22] The competent body of an MEA[23] can, where authorised to do so, regularly review the overall implementation of obligations under the MEA and examine specific difficulties.

MEAs have to be implemented by parties to the agreement by enacting and promulgating relevant laws, regulations, policies, and other measures and initiatives to meet their obligations. International organisations have developed general guidelines on compliance and enforcement of MEAs.[24] Compliance with MEAs is *inter alia*

20 Cf. Kiss (2004:42).
21 For a detailed discussion on compliance and enforcement regarding MEAs see UNEP (2006).
22 See for example Article 34 of the Cartagena Protocol on Biosafety, or Article XII of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES).
23 Such as the Conference of Parties, with a secretariat, established under Articles 23-25 of the Convention on Biological Diversity.
24 In 2002, UNEP has adopted the Guidelines on Compliance with and Enforcement of Multilateral Environmental Agreements; other relevant guidelines include the 1999 Caribbean Guidelines for MEA Implementation; the 2002 Guiding Principles for Reform of Environmental

enhanced through national implementation plans, including monitoring and evaluation of environmental improvement; reporting and verification; establishment of compliance committees with appropriate expertise; and inclusion of compliance provisions and mechanisms within the MEA.[25]

The effectiveness of MEAs has to be subject to review. In this regard, monitoring, involving the collection of data, reporting, requiring parties to make regular, timely reports on compliance, using an appropriate common format, or verification of data and technical information in order to assist in ascertaining whether a party is in compliance, may be adequate measures in terms of strengthening compliance. State parties may be obliged to undertake to submit reports on the measures they have adopted which give effect to the rights recognised in the MEAs and on the progress made. Article 26 of the Convention on Biological Diversity (CBD) is one example for review under a MEA. Parties are thereby required to report to the Conference of the Parties (COP) on measures taken to implement the convention and their effectiveness in achieving the objectives of the convention. One problem regarding national reports under international agreements, in general, has been the issue of non-submission by the respective deadlines, due to various reasons, including limited human, technical, and financial resources. Taking again the CBD as an example, it can be observed that as of 25 April 2021,[26] 182 out of 196 CBD parties had submitted the sixth national report that was due on 31 December 2018 (of which 100 parties had submitted as per the Clearing House Machanism and 82 have submitted offline). Namibia has submitted all six national reports under the CBD.

Provisions for settlement of disputes complement the provisions aimed at compliance with an agreement. Several forms of dispute settlement mechanisms, including good offices, mediation, conciliation, fact-finding commissions, dispute resolution panels, arbitration and other possible judicial arrangements are available depending on the specific provisions contained in the applicable MEA. The primary judicial organ of the United Nations is one competent body to hear certain disputes on environmental issues. Other environmental judicial bodies include the Law of the Sea Tribunal, or the International Court of Environmental Arbitration and Conciliation.

While compliance generally applies to the international context, enforcement applies to the national context. Enforcement can be described as the range of procedures and actions employed by a state, its competent authorities and agencies to ensure that

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Enforcement Authorities in Transition Economies of Eastern Europe, Caucasus and Central Asia (EECCA), developed by EECCA Member States and the Organisation for Economic Co-operation and Development (OECD); or the 2003 Guidelines for Strengthening Compliance with and Implementation of Multilateral Environmental Agreements (MEAs) in the ECE (UN Economic Commission for Europe) Region.

25 Cf. the 2002 UNEP Guidelines on Compliance with and Enforcement of Multilateral Environmental Agreements.

26 See https://www.cbd.int/reports/, accessed 25 April 2021.

organisations or persons, potentially failing to comply with environmental laws can be brought or returned into compliance and/or punished through civil, administrative or criminal action.[27] Enforcement is essential to secure the benefits of MEAs, protect the environment, public health and safety, deter violations, and encourage improved performance.[28] Enforcement encompasses a set of legal measures which can be applied. Such measures include the adoption of laws and regulations, monitoring outcomes, and various enabling activities and steps that a state may take within its national territory to ensure implementation of an MEA. Furthermore, good enforcement programmes reinforce the credibility of environmental protection efforts and the legal system that supports them and ensures fairness for those who willingly comply with environmental requirements.[29]

Effective enforcement can *inter alia* be achieved by providing for responses in cases of contraventions of national environmental laws and regulations implementing multilateral environmental agreements (environmental law violations) or in cases of violations or breaches of national environmental laws and regulations that a state determines to be subject to criminal penalties under its national laws and regulations (environmental crimes).

3.2 Customary International Law

Customary international law encompasses norms and rules that countries follow as a matter of custom and they bind all states in the world.[30] It is, however, not clear-cut when exactly a principle becomes customary law and thus binding, a situation, which has led to, disputes among states.

Two criteria have, however, crystallised with regard to the requirements for a rule to become customary international law.[31] The prerequisite for the first criterion, namely that of settled practice (*usus*), is a constant and uniform usage or widespread acceptance of a rule. The acceptance of an obligation to be bound (*opinio juris sive necessitatis*) is the second criterion.[32]

Many customary international law rules relevant for the field of environmental law have been developed.[33] The principle that no state may use or permit to use its territory

27 UNEP (2006:294).
28 Ibid:289.
29 Ibid:33.
30 Sands (2003:143f.).
31 These criteria, which are being applied by national courts as well, have been developed by international jurisprudence inter alia in the following cases: *Asylum case* 1950 ICJ Reports 266; *North Sea Continental Shelf Case (West Germany v The Netherlands and Denmark)* 1969 ICJ Reports 3; *Nicaragua Case (Nicaragua v US)* 1986 ICJ Reports 14.
32 For a detailed discussion see Sands (2003:143ff.) or Dugard (2005:29ff.).
33 For further reference see Sands (2003: 147ff.) and Kiss (2004:49).

in such a manner as to cause injury to the territory of another state has for example become a principle of customary international law. This principle goes back to the Trail Smelter Arbitration in 1941[34] and was taken up by the Stockholm Declaration, repeated in the Rio Declaration and reaffirmed in the Nuclear Weapons Case.[35]

The duty to warn other states promptly about emergencies of an environmental nature and environmental damages to which another state or states may be exposed is contained in the 1978 Principles Concerning Shared Resources, drafted by UNEP, and also contained in Article 192 of the 1982 UN Convention on the Law of the Sea. This duty was neglected by the Government of the Soviet Union in the case of the Chernobyl disaster in 1986. As a consequence, the 1986 Convention on Early Notification of a Nuclear Accident was adopted, which in Article 2 explicitly imposes a duty upon states to notify those states which are or may be physically affected of a nuclear accident.

3.3 General Concepts and Principles of International Environmental Law

A wide range of general principles guide law and policy on issues pertaining the environment, on the national and international level. Most of these principles go hand in hand with many overlaps and in their entirety, they provide for the fundamental framework with regard to environmental protection.

Selected General Concepts and Principles of International Environmental Law

- State sovereignty
- Cooperation
- Preservation and protection of the environment
- Precaution
- Prevention
- Polluter pays principle
- Information and assistance in environmental emergencies
- Information and consultation in cross-boundary relations
- Good governance
- The rights of individuals: information, participation and access to justice
- Access and benefit sharing regarding natural resources
- Sustainable development, integration and interdependence
- Inter-generational and intra-generational equity
- Responsibility for trans-boundary harm
- Transparency, public participation and access to information and remedies
- Common concern for humanity
- Rights of future generations
- Common heritage of mankind
- Common but differentiated responsibilities

34 *Trail Smelter Arbitration* (1938/1941) 3 RIAA 1905 Arbitral Tribunal: US and Canada.
35 Advisory Opinion, ICJ Rep. 1996, 226 ff. at para 64 ff.

Several concepts provide the foundation of international environmental law.[36] The protection of **rights of future generations** can be seen as one of the key drivers of environmental protection and international environmental law and many international conventions express an obligation to protect the environment for present and future generations.

The single most important among the concepts framing international environmental law, not only for developing countries, is probably the concept of **sustainable development**, which has been defined in the 1987 Report of the World Commission on Environment and Development as "development that meets the needs of the present without compromising the ability of future generations to meet their own needs."[37] Sustainable development is thus composed of a variety of interrelated aspects, including economic and social development and environmental protection.[38] Closely related to the concept of sustainable development is the **concept of common concern of humanity**. To protect the common concern of humanity might impose obligation on states and can support or limit individual rights and freedoms. The common concern of humanity is materialised in the **concept of common heritage of mankind** with the underlying idea that the general concern of humanity should be safeguarded by special legal regimes applied to specific areas and sites such as the Antarctica or sites which can be considered forming essential parts of the cultural heritage of humanity.

One of the oldest principles of general international law is that of **state sovereignty**. This principle acknowledges that the state has exclusive jurisdiction on its territory, that the state is the only authority which can adopt obligatory legal rules for its territory, that the state has the executive power (administration, police), and that its tribunals are the only ones competent to judge litigation.[39] Especially with regard to environmental issues, the principle of state sovereignty faces several challenges, as, for example, pollution of the sea, rivers, lakes and the air and the migrating of species across territorial borders do not adhere to national territorial jurisdictions. It is therefore necessary that treaties and international customary law impose limitations on the sovereignty of states. In the so-called Sutherland Report,[40] sovereignty is described as one of the "most used and also misused concepts of international affairs and international law". Acceptance of almost any treaty involves a transfer of a certain amount of decision-making authority away from states, and towards some international institution. Generally, this is exactly why sovereign nations agree to such treaties: They realise that the benefits of cooperative action that a treaty enhances are greater than the circumstances that exist otherwise.[41] It is undeniable that discrete, territorially bound

36 See Sands / Peel (2018:197-251) for an in-depth discussion.
37 World Commission on Environment and Development (1987).
38 For a detailed analysis see Voigt (2009).
39 Sands / Peel (2018:201ff.).
40 Sutherland *et al*. (2005).
41 Ibid.

state units no longer have exclusive control over the process of governance pertaining to the societies that live in their respective territories. In this context, governance has come to be conceptualised in multilevel terms,[42] as power has become widely dispersed among a range of institutions and actors.

The general international **obligation to cooperate** with others in order to resolve problems concerning the international community is essential to conserve the environment entirely and globally.[43] This general principle is contained in and elaborated on in many MEAs, for example in Article 5 of the Convention of Biological Diversity (CBD), which emphasises the importance of this principle. Cooperation is essential in order to rationally use shared resources; to eradicate poverty as a requirement for sustainable development; to strengthen capacity building by transfer of knowledge, information and technology; and also, in order to secure funding and financial assistance.

The general **principle of prevention** can be considered the single most important intention of environmental law. The prevention principle dictates that action must be taken at an early stage, and if possible, before damage occurs. Legal mechanisms to meet the requirements of the prevention principle include the assessment of environmental harm (environmental impact assessment), licensing or authorisation, the adoption of national and international standards, or the adoption of preventative strategies and policies.

Like the prevention principle, the **precaution principle** seeks to avoid environmental harm, but it is to be applied when the consequences of non-action can be particularly serious or irreversible. The precautionary approach aims to provide guidance in the development and application of environmental law where there is scientific uncertainty and has been formulated in Principle 15 of the Rio Declaration on Environment and Development as follows:

> In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of a serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.

Another important principle with more economic background which has found its way into various MEAs and national environmental enactments is the **polluter pays principle** which seeks to impose the costs related to environmental harm on the person responsible for the pollution. The polluter pays principle is a means of allocating costs of pollution prevention and control measures to encourages the rational use of limited natural resources.

The principle of **common but differentiated responsibilities** as laid down in Principle 7 of the Rio Declaration is reflected in various environmental agreements, such as the United Nations Convention on Climate Change (Article 3(1)). The principle of

42 Cf. Winter (2006).
43 Sands / Peel (2018:213).

common but differentiated responsibilities is composed of the common responsibility of states for the protection of the environment and of the acknowledgement of difference in contributions of states to environmental degradation, and the different ability to address such degradation. The different responsibilities are translated into differential obligations for states.

At the international and national levels, there has been increased recognition of the special needs of indigenous communities for access to benefits of the natural resources on which they rely for their livelihood. Their participation in both decision-making and in management is of high importance for the protection of local ecosystems because of their traditional knowledge and environmental awareness. The **principle of access and benefit sharing of natural resources** has been taken up in Principle 22 of the Rio Declaration:

> Indigenous people and their communities, and other local communities, have a vital role in environmental management and development because of their knowledge and traditional practices. States should recognise and duly support their identity, culture and interests and enable their effective participation in the achievement of sustainable development.

The principle is also reflected in Article 8(j) of the Convention on Biological Diversity, which imposes on states the obligation to respect, preserve and maintain knowledge, innovations and practices of indigenous people and local communities, to encourage the equitable sharing of the benefits arising from the utilisation of indigenous knowledge, innovations and practices.

Transparency and **access to information** are both required in order to guarantee effective public participation and sustainable development. Public participation in the context of sustainable development requires, among others, the opportunity to hold and express opinions, and to seek, receive and impart ideas. And it also requires a right of access to the reported, comprehensible and timely information held by governments and industrial concerns, on economic and social policies regarding the sustainable use of natural resources and the protection of the environment, without imposing undue financial burdens on applicants for information, and with adequate protection of privacy and business confidentiality. Conducting environmental impact assessments, with broad public participation in terms of access to information, and the right to make submissions on environmental and impact statements, is one legal mechanism to ensure public participation rights.

Rio Declaration Principle 10 refers to participation rights as follows:

> Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.

3.4 Judicial Decisions and Teachings

International environmental law also incorporates the opinions of international courts and tribunals. While there are few such courts and tribunals and they have limited authority, their decisions carry much weight with legal commentators and are quite influential on the development of international environmental law. Such courts are the International Court of Justice (ICJ), the Law of the Sea Court, the World Trade Organisation's Dispute Settlement Body (DSB), as well as regional treaty tribunals.

Other sources of international law are texts by some of the best-qualified legal scholars. In the jurisprudence of international judicial bodies writings of jurists do also play a role. Examples of this are the Nuclear Test Case[44] and the Gabčíkovo-Nagymaros Project case,[45] which have without any doubt been influenced by academic and other writings.

4 Multilateral Environmental Agreements Relevant to Namibia

Namibia is a state party to a large number of MEAs.[46] This emphasises Namibia's strong environmental commitment. Every membership of a MEA brings about benefits as well as obligations for Namibia. Aside from the immediate benefits of advanced environmental protection, there are also long-term effects. For instance, environment-related public health problems with a bearing on development are dealt with proactively and internationally.[47] Many MEAs improve environmental governance and generally promote transparency, participatory decision-making, accountability, conflict resolution, and have an indirect positive influence in terms of democratisation processes in any given developing country context. In some cases, it is beneficial to become a party to a MEA in order to obtain financial assistance for addressing environmental problems, and, more importantly, MEAs may also facilitate technical assistance, for example through knowledge and technology transfer.

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44 ICJ Legality of the Threat or Use of Nuclear Weapons; Request for Advisory Opinion by the General Assembly of the United Nation, 8 July 1996. Another example is the case on maritime delimitation in the area between Greenland and Jan Mayden *Denmark v Norway* ICJ 14 June 1993 with separate opinion by Weeramantry available at https://www.icj-cij.org/en/case/78, accessed 25 April 2021.

45 ICJ *Gabčíkovo-Nagymaros Project* (Hungary/Slovakia), 25 September 1997. Judgement available at https://www.icj-cij.org/en/case/92, accessed 25 April 2021.

46 The information for this Section is based on UNEP's Register of international treaties and other agreements in the field of the environment UNEP (2005a) and the International Environmental Agreements Database at https://iea.uoregon.edu/country-members/Namibia, accessed 25 April 2021.

47 UNEP (2006:44).

There are also obligations. A significant amount of human, technical and financial resources is needed to ensure implementation of MEAs. In order for a MEA to have an impact on the ground, legislation, administrative measures, and capacity building for implementation and enforcement at the local and national levels are essential.

The following table (without claiming to be exhaustive) lists selected major international treaties and related instruments in the environment field, to which Namibia is a party,[48] and gives an overview of Namibia's obligations under international environmental law.

	Treaty/Agreement Particularities			**Namibian Participation**		
Treaty / Agreement	Place of Adoption	Date of Adoption	Entry into Force	Type[49]	Date	Entry into Force
International Plant Protection Convention	Rome, Italy	06.12.1951	03.04.1952	Ac	23.02.2007	23.02.2007
International Convention for the Conservation of Atlantic Tunas	Rio de Janeiro, Brazil	14.05.1966	21.03.1969	R	10.11.1999	10.11.1999
International Convention relating to Intervention on the High Seas in Cases of Oil Pollution Casualties	Brussels, Belgium	29.11.1969	06.05.1975	Ac	12.03.2004	10.06.2004
Convention on Wetlands of International Importance Especially as Waterfowl Habitat	Ramsar, Iran	02.02.1971	21.12.1975	Ac	23.08.1995	23.12.1995
Convention Concerning the Protection of the Worlds Cultural and Natural Heritage	New York, USA	16.11.1972	17.12.1975	At	06.04.2000	06.04.2000
Convention on International Trade in Endangered Species of Wild Fauna and Flora	Washington D.C., USA	03.03.1973	01.07.1975	Ac	18.12.1990	18.03.1991
Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships, 1973	London, UK	17.02.1978	02.10.1983	S	18.03.2003	18.03.2002
Convention on the Physical Protection of Nuclear Material	Vienna, Austria	26.10.1979	08.02.1987	Ac	02.10.2002	01.11.2002

48 For a more comprehensive and detailed list of MEAs to which Namibia has taken membership actions see the International Environmental Agreements (IEA) Database Project at https://iea.uoregon.edu/country-members/Namibia, accessed 25 April 2021.

49 Ratification (R); Accession (Ac); Acceptance (At); Signature (S); Consent to be bound (P).

	Treaty/Agreement Particularities			**Namibian Participation**		
Treaty / Agreement	Place of Adoption	Date of Adoption	Entry into Force	Type[49]	Date	Entry into Force
Convention on the Conservation of Antarctic Marine Living Resources	Canberra, Australia	20.05.1980	07.04.1982	Ac	29.06.2000	29.06.2000
Convention for Cooperation in the Protection and Development of The Marine and Coastal Environment of the West and Central African Region	Abidjan, Côte d'Ivoire	23.03.1981	05.08.1984	Ac	27.09.2016	26.12.2016
United Nations Convention on the Law of the Sea	Montego Bay, Jamaica	10.12.1982	16.11.1994	R	10.12.1982	18.04.1983
Protocol to Amend the Convention on Wetlands of International Importance Especially as Waterfowl Habitat	Paris, France	03.12.1982	01.10.1986	Ac	23.08.1995	23.08.1995
Vienna Convention for the Protection of the Ozone Layer	Vienna, Austria	22.03.1985	22.09.1988	Ac	20.09.1993	20.09.1993
Montreal Protocol on Substances that Deplete the Ozone Layer	Montreal, Canada	16.09.1987	01.01.1989	Ac	20.09.1993	20.09.1993
Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal	Basel, Switzerland	22.03.1989	05.05.1992	Ac	15.05.1995	15.05.1995
[London] Amendment to the Montreal Protocol on Substances that Deplete the Ozone Layer	London, UK	29.06.1990	10.08.1992	R	06.11.1997	06.11.1997
United Nations Framework Convention on Climate Change	New York, USA	09.05.1992	21.03.1994	S/R	12.06.1992	16.05.1995
Convention on Biological Diversity	Rio de Janeiro, Brazil	05.06.1992	29.12.1993	S/R	12.06.1992	16.05.1997
Protocol of 1992 to Amend the International Convention on Civil Liability for Oil Pollution Damage 1969	London, UK	27.11.1992	30.05.1996	Ac	18.12.2002	18.12.2003

	Treaty/Agreement Particularities			Namibian Participation		
Treaty / Agreement	Place of Adoption	Date of Adoption	Entry into Force	Type[49]	Date	Entry into Force
Protocol of 1992 to Amend the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1971	London, UK	27.11.1992	30.05.1996	Ac	18.12.2002	18.12.2003
[Copenhagen] Amendment to the Montreal Protocol on Substances that Deplete the Ozone Layer	Copenhagen, Denmark	25.11.1992	14.06.1994	At	28.07.2003	28.07.2003
Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and their Destruction	Paris, France	13.01.1993	29.04.2997	S/R	13.01.1993	24.11.1995
Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas	Rome, Italy	29.11.1993	24.04.2003	Ac	07.08.1998	07.08.1998
United Nations Convention to Combat Desertification in those Countries Experiencing serious Drought and/or Desertification, Particularly in Africa	Paris, France	17.06.1994	26.12.1996	S/R	24.10.1994	16.05.1997
Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982	New York, USA	28.07.1994	28.07.1996	S/P	29.07.1994	28.07.1995
Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks	New York, USA	04.08.1995	11.12.2001	S/R	19.04.1996	08.04.1998
Comprehensive Nuclear-Test-Ban Treaty	New York, USA	10.09.1996	Not yet	S/R	24.09.1996	29.06.2001

	Treaty/Agreement Particularities			**Namibian Participation**		
Treaty / Agreement	Place of Adoption	Date of Adoption	Entry into Force	Type[49]	Date	Entry into Force
Kyoto Protocol to the United Nations Framework Convention on Climate Change	Kyoto, Japan	11.12.1997	16.02.2005	Ac	04.09.2003	04.09.2003
Convention on the Law of Non-Navigational Uses of International Watercourses	New York, USA	21.05.1997	Not yet	S/R	19.05.2000	29.08.2001
Cartagena Protocol on Biosafety to the Convention on Biological Diversity	Montreal, Canada	29.01.2000	11.09.2003	S/R	24.05.2000	10.02.2005
Convention on the Conservation and Management of Fishery Resources in the South-East Atlantic Ocean	Windhoek, Namibia	20.04.2001	13.04.2003	S/R	20.04.2001	26.02.2002
Stockholm Convention on Persistent Organic Pollutants	Stockholm, Sweden	22.05.2001	17.05.2004	Ac	24.06.2005	24.06.2005
International Treaty on Plant Genetic Resources for Food and Agriculture	Rome, Italy	03.11.2001	29.06.2004	S/R	09.11.2001	07.10.2004
World Health Organisation Framework Convention on Tobacco Control	Geneva, Switzerland	21.05.2003	27.02.2005	S/R	29.01.2004	07.11.2005
African Convention on The Conservation of Nature and Natural Resources (Revised)	Maputo, Mozambique	11.07.2003	23.07.2016	S	09.12.2003	
Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity	Nagoya, Japan	29.10.2010	12.10.2014	Ac	15.05.2014	12.10.2014
Paris Agreement under the United Nations Framework Convention on Climate Change	Paris, France	12.12.2015	04.11.2016	R	22.04.2016	21.09.2016

The above table shows, that the list of MEAs to which Namibia is a party is long and it would go beyond the scope of this publication to discuss all the above-mentioned

agreements. However, some of the most important MEAs will be introduced briefly in the following section.

The 1971 Convention on Wetlands of International Importance Especially as Waterfowl Habitat (Ramsar) was adopted to stem the progressive encroachment on and loss of wetlands now and in the future, recognising the fundamental ecological functions of wetlands and their economic, cultural, scientific and recreational value. Parties to the Convention are required to designate at least one national wetland for inclusion in a 'List of Wetlands of International Importance' and to consider their international responsibilities for conservation, management and wise use of migratory stocks of wildfowl. Furthermore, parties establish wetland nature reserves, cooperate in the exchange of information and train experts for wetland management. Conferences on the conservation of wetlands and water-fowl are to be convened as the need arises.

The 1972 Convention Concerning the Protection of the World's Cultural and Natural Heritage intends to establish an effective system of collective protection of the cultural and natural heritage of outstanding universal value, organised on a permanent basis and in accordance with modern scientific methods. Each state party recognises that the duty of identification, protection, conservation and transmission to future generations of the cultural and natural heritage belongs primarily to state parties, which commit themselves to integrate the protection of their heritage into comprehensive planning programmes, to set up services for the protection of their heritage, to develop scientific and technical studies and to take necessary legal, scientific, administrative and financial steps to protect their heritage, and to assist each other in the protection of the cultural and natural heritage. The Convention establishes a World Heritage Committee, to which each party will submit an inventory of its national heritage and which will publish a 'World Heritage List' and a 'List of World Heritage in Danger'. A World Heritage Fund is established, financed by the parties and other interested bodies.

The 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) aims to protect certain endangered species from over-exploitation by means of a system of import-export permits. The Convention includes animals and plants whether dead or alive, and any recognisable parts or derivatives thereof. Appendix I to the Convention covers endangered species, trade in which is to be tightly controlled; Appendix II covers species that may become endangered unless trade is regulated; Appendix III covers species that any party wishes to regulate and requires international cooperation to control trade therein; and Appendix IV contains model permits. Permits are required for species listed in appendices I and II stating that export/import will not be detrimental to the survival of the species. The CITES Secretariat is administered by UNEP and is located in Geneva, Switzerland.

The 1980 Convention on the Conservation of Antarctic Marine Living Resources intends to safeguard the environment and protect the integrity of the ecosystem of the seas surrounding Antarctica and to conserve Antarctic marine living

resources. A Commission for the Conservation of Antarctic Marine Living Resources is established to inter alia facilitate research into and comprehensive studies of Antarctic marine living resources and the Antarctic marine ecosystems; to compile data on the status of and changes in populations of Antarctic marine living resources, and on factors affecting the distribution, abundance and productivity of harvested species and dependent or related species or populations; to ensure the acquisition of catch and effort statistics on harvested populations; to identify conservation needs and analyse the effectiveness of conservation measures; to formulate, adopt and revise conservation measures on the basis of the best scientific evidence available; and to implement a system of observation and inspection.

The 1982 United Nations Convention on the Law of the Sea (UNCLOS) was adopted to set up a comprehensive new legal regime for the sea and oceans and, as far as environmental provisions are concerned, to establish material rules concerning environmental standards as well as enforcement provisions dealing with pollution of the marine environment.

The 1985 Vienna Convention for the Protection of the Ozone Layer aims to protect human health and the environment against adverse effects resulting from modifications of the ozone layer. Parties undertake to cooperate in research concerning substances and process that modify the ozone layer and the effects on human health and the environment of such modifications, and on alternative substances and technologies; and in systematic observation of the state of the ozone layer. Furthermore, parties commit themselves to cooperate in formulation and implementation of measures to control activities that cause adverse modifications of the ozone layer, and, particularly, the development of protocols for such purposes, and to exchange scientific, technical, socio-economic, commercial and legal information relevant to the Convention, and cooperate in the development and transfer of technology and knowledge. The Convention has two annexes setting forth important issues for scientific research on and systematic observation of the ozone layer and describing the kinds of information to be collected and shared under its terms.

The 1992 United Nations Framework Convention on Climate Change (UNFCCC) was adopted to regulate levels of greenhouse gas concentration in the atmosphere, so as to avoid the occurrence of climate change on a level that would impede sustainable economic development, or compromise initiatives in food production. The parties are to protect the climate system for present and future generations. The Convention recognises that developing countries should be accorded appropriate assistance to enable them to fulfil the terms of the Convention. The parties should work in cooperation so as to obtain maximum benefit from initiatives in the control of the climate systems. National inventories on greenhouse gas emissions have to be prepared by the parties and programmes for the control of climate change have to be formulated and implemented. It is further provided to undertake cooperation in technology for the control of change in the climate system; incorporate suitable policies for the control of

climate change in national plans; and to undertake education and training policies that will enhance public awareness in relation to climate change. The developed country parties (and other parties listed in Annex I) commit themselves to take special measures to limit their anthropogenic emissions of greenhouse gases, and to enhance the capacity of their sinks and reservoirs for the stabilisation of such gases. The developed country parties (and other parties listed in Annex II undertake to accord financial support to developing country parties, to enable the latter to comply with the terms of the Convention. The Convention establishes a Conference of Parties to be the supreme body of the Convention and to oversee the implementation.

The 1992 Convention on Biological Diversity (CBD) aims at conserving biological diversity, promoting the sustainable use of its components, and encouraging equitable sharing of the benefits arising out of the utilisation of genetic resources. Such equitable sharing includes appropriate access to genetic resources, as well as appropriate transfer of technology, taking into account existing rights over such resources and such technology. The CBD confirms the principle of national sovereignty over domestic natural resources, subject to respect for the rights of other states, but places a duty on parties to conserve biological diversity within their jurisdiction, as well as outside their jurisdiction in certain cases. The CBD provides for the cooperation between state parties, in preserving biological diversity in areas out of national jurisdiction and confers on state parties the responsibility for the formulation and implementation of strategies, plans or programmes for the conservation and sustainable use of biological diversity. Furthermore, state parties are required to monitor the elements of biological diversity, determining the nature of the urgency required in the protection of each category, and in sampling them, in terms of the risks to which they are exposed. One further obligation on states by the CBD is to provide for research, training, general education and the fostering of awareness, in relation to measures for the identification, conservation and sustainable use of biological diversity and for environmental impact assessment of projects that are likely to have significant adverse effects on biological diversity. Further important provisions of the CBD relate to access to genetic resources; access to transfer of technology, for application in the conservation and sustainable use of biological diversity; and on financial resources. The CBD establishes a Conference of Parties, with a Secretariat, to keep the implementation of the Convention under review.

The 1994 United Nations Convention to Combat Desertification in those Countries Experiencing serious Drought and/or Desertification, Particularly in Africa intends to combat desertification and mitigate the effects of drought in the countries affected through effective action at all levels supported by international cooperation and partnership arrangements in the framework of an integrated approach which is consistent with Agenda 21, with a view to contributing to the achievement of sustainable development in those areas. This Convention ensures participation of the public in relevant decision-making processes, facilitates national and local action, improves

international cooperation and coordination, emphasises developing cooperation among various levels of actors in a country for sustainable use of land and water resources, and takes into full consideration the special needs and circumstances of affected developing countries.