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Namibia

Dunia P. Zongwe*

INTRODUCTION

This chapter restates the law that shapes maritime affairs in Namibia, focusing on its linkages to international law. The literature on maritime law in Namibia and how it connects to international law has gathered dust: That literature dates as far back as the mid-1990s.¹ Hence the necessity for a restatement of Namibia's maritime law.

Namibia has a long coastline, measuring 1,572 kilometres along the Atlantic Ocean. As a result of the Benguela Current wind-driven upwelling system, the country boasts one of the most productive fishing grounds in Africa. Its seas are used to harvest oysters, mackerel and hake, among others.

Namibia offers a favourable environment for sea mining and shipping. Experts think that Namibia's seabed is rich in minerals, for instance, copper, cobalt, manganese polymetallic nodules, and nickel. Since 2002, Debmarine Namibia, a joint venture between the Namibian government and De Beers Jewellers, has been dredging and mining diamonds in the shallow waters off the southwest coast. So far, that venture has mined 8 km² within Namibia's exclusive economic zone (EEZ) and produced more than 5 million carats.² However, researchers and activists have highlighted the fact that marine mining damages biodiversity and conflicts with other economic activities, such as fisheries.³

The Southwestern African nation also engages in shipping. As of 2020, it had a total of 48 seafarers and a fleet of 14 ships flying the national flag.⁴

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¹ See eg DJ Devine 'The agreement on mutual assistance in curbing and preventing illegal fishing between South Africa and Namibia 1991: possibilities and limits from a South African perspective' (1995) 10 *Southern African Public Law* 31 (explaining the mutual assistance agreement entered into by South Africa and Namibia in 1991 to combat illegal fishing); DB Hamman 'The single maritime boundary – A solution for maritime delimitation between Namibia and South Africa' (1995) 10 *International Journal of Marine and Coastal Law* 369 (identifying an existing boundaries between Namibia and South Africa to delimit the shelf and fishing zone between the two coastal states); DJ Devine 'Marine law developments in Namibia' (1993) 8 *International Journal of Marine and Coastal Law* 471 (describing the constitutional, legislative, and judicial marine law developments of the first three years after Independence in Namibia).

² H Vella *Marine Mining: Lessons From Namibia* (2020). Available at <https://www.mining-technology.com/features/marine-mining-lessons-from-namibia/> (accessed: 30.11.2021).

³ See eg A Benkenstein 'Seabed mining: Lessons from the Namibian experience' (2014) South African Institute of International Affairs Policy Brief 87.

⁴ United Nations Conference on Trade and Development *Maritime Profile: Namibia* (2021). Available at <http://unctadstat.unctad.org/countryprofile/MaritimeProfile/en-GB/516/index.html> (accessed: 30.11.2021)

Namibian marine law stems from several formal sources. The Constitution of Namibia,⁵ Acts of Parliament, international law, common law and case law. Statutes (for example, the Marine Traffic Act of 1981⁶ and the Territorial Sea and Exclusive Economic Zones of Namibia Act of 1990⁷) and ordinances (for example, the Sea-Shore Ordinance⁸) govern this vast field of Namibia's sophisticated legal system.

By the time Namibia achieved independence from South Africa in 1990, several foreign fishing vessels were known to fish in Namibia's EEZ without a permit. The illegal fishing activities by foreign (mostly European) vessels led to litigation, which often touched on the law of the sea and certain other aspects of international law. Indeed, the first international law cases that appeared before Namibian courts featured prominently this sort of illegal fishing. This happened in the *Redondo*⁹ and *Carracelas*¹⁰ cases.

The fisheries sector in Namibia involves significant foreign players. To address that issue, the government embarked on a number of initiatives to empower Namibians to start business in the fishing industries. These initiatives, which former Fisheries Minister Abraham Iyambo initially championed, are commonly referred to as the 'Namibianisation policy'.

However, in recent years, the fisheries sector has offered the public the sorry spectacle of the country's ugliest corruption scandal, dubbed the 'Fishrot Files'. That scandal, which is now unfolding before Namibian courts, has already led to five court judgments.¹¹ Specifically, the ongoing Fishrot trial involves a kickback scheme implicating prominent ministers, business people, lawyers and law firms, and members of the ruling party in Namibia as well as powerful fishing interests in Iceland.

PARTICIPATION IN GLOBAL INSTRUMENTS AND ORGANISATIONS

1. The legal framework for Namibia's international participation

The Constitution Act 1 of 1990¹² entered into force upon independence on 21 March 1990. The Constitution provides the framework for Namibia's participation in international instruments and organisations.

One currently pressing problem concerns the status of international maritime treaties in the Namibian legal system. While Article 144 of the Namibian Constitution expressly stipulates

⁵ (GG 2). The Namibian Constitution was published and came into force on the date of Independence: 21 March 1990 (Article 130).

⁶ The Marine Traffic Act 2 of 1981.

⁷ The Territorial Sea and Exclusive Economic Zones of Namibia Act 3 of 1990.

⁸ The Sea-Shore Ordinance 37 of 1958.

⁹ *S v Redondo* 1992 NR 133 (SC), 1993 (2) SA 528 (NmS).

¹⁰ *S v Carracelas and Others (1)* 1992 NR 322 (HC); *S v Carracelas and Others (2)* 1992 NR 329 (HC); and *S v Carracelas and Others (3)* 1992 NR 336 (SC). In this trilogy of cases, the court tried people for fishing within Namibia's EEZ without a permit.

¹¹ *The Law Society of Namibia v Namandje* (HC-MD-CIV-MOT-EXP-2020/00108) [2020] NAHCMD 355 (14 August 2020); *S v Van Wyk* 2020 (4) NR 1022 (HC); *Nghipunya v S* (2020/00077) [2020] NAHCMD 491 (28 October 2020); *Esau and Another v The State* (HC-MD-CRI-APP-CAL-2020/00082) [2021] NAHCM 84 (26 February 2021). On 15 December 2021, the High Court handed down its judgment, granting bail to Fishrot accused Ricardo Gustavo, but at the time of writing the judiciary had not yet officially published the written reasons for the judgment.

¹² (GG 2). The Namibian Constitution was published and came into force on the date of Independence: 21 March 1990 (Article 130).

that ratified treaties and the general principles of international law form part of the law of Namibia, the question as to whether this provision means that these treaties integrate Namibian law automatically has become uncertain. On the one hand, most scholars claim that Article 144 makes Namibia a monist jurisdiction; on the other hand, some practitioners¹³ and government institutions, such as the Directorate of Legislative Drafting within the Justice Ministry,¹⁴ assert that treaties require domestication before they can apply municipally (thereby qualifying Namibia as a dualist jurisdiction). Still others maintain that Namibia is neither monist nor dualist.¹⁵ This uncertainty has come to a head in the *SAPA* case, which is still pending in the High Court.¹⁶ The judgment will hopefully ventilate and clarify the actual position on the status of international treaties, including maritime treaties, in Namibian law.

Article 144 of the Constitution lays down that:

Unless otherwise provided by this Constitution or Act of Parliament, the general rules of public international law and international agreements binding upon Namibia under this Constitution shall form part of the law of Namibia.

2. Participation in global instruments

By virtue of Article 143, read together with Article 140(1) of the Constitution,¹⁷ Namibia succeeded to the treaties that South Africa had ratified prior to independence on 21 March 1990. Thus, the following treaties ratified by South Africa bind Namibia as well:¹⁸ the 1958 Convention on Fishing and Conservation of the Living Resources of the High Seas;¹⁹ the 1958 Convention on the Continental Shelf;²⁰ the 1958 Convention on the High Seas;²¹ and the 1958 Convention on the Territorial Sea and the Contiguous Zone.²²

¹³ See eg *South African Poultry Association and Others v Minister of Trade and Others* 2018 (1) NR 1 (SC) 13 (hereinafter the ‘*SAPA*’ case) (the lawyer representing the respondents argued that, before judges can even entertain claims about the domestication of ratified international treaties, they must acknowledge the fact that the principle of legality requires that the state publishes those treaties). See also L Hakweenda, ‘Invocation of International Trade Agreements by Private Parties Before Domestic Courts: A Namibian Perspective’, MCom dissertation, University of Cape Town, 2015, 46 and 49. Available at https://open.uct.ac.za/bitstream/handle/11427/20075/thesis_com_2015_hakweenda_lydia.pdf?sequence=1 (accessed on 30.11.2021) (Hakweenda conducted interviews with lawyers on the domestic application of international law in Namibia; they answered that Namibia is neither monist nor dualist, but a mixture of the two).

¹⁴ In 2019, the author interacted with that Directorate. The manual that the Directorate is developing to train legislative drafters affirms that Parliament must domesticate international treaties ratified by Namibia before those treaties can apply domestically.

¹⁵ For a detailed analysis of inconsistent court judgments in Namibia’s international law jurisprudence, see D P Zongwe ‘A chronicle of how judges have internalised international law in Namibia’ (2021) 44 *South African Yearbook of International Law* 1.

¹⁶ In *SAPA* (n), the Supreme Court of Namibia remitted the case to the High Court so that the High Court could act as a court of first instance on the question of where international law stands in Namibia’s legal system.

¹⁷ Article 143 of the Constitution provides that: “All existing international agreements binding upon Namibia shall remain in force, unless and until the National Assembly acting under Article 63(2)(d) hereof otherwise decides.” Article 140(1) of the Constitution provides that: “Subject to the provisions of this Constitution, all laws which were in force immediately before the date of Independence shall remain in force until repealed or amended by Act of Parliament or until they are declared unconstitutional by a competent Court”.

¹⁸ See Francken’s entry to this compendium: ‘South Africa’.

¹⁹ 599 UNTS 285. Adopted: 29.04.1958; EIF: 20.03.1966.

²⁰ 499 UNTS 311. Adopted: 29.04.1958; EIF: 10.06.1964.

²¹ 450 UNTS 82. Adopted: 29.04.1958; EIF: 30.09.1962.

²² 516 UNTS 206. Adopted: 29.04.1958; EIF: 10.09.1964.

Namibia has ratified a number of other key international treaties, including notably the 1982 United Nations Convention on the Law of the Sea (LOSC).²³ Namibia's ratification of, and participation in, the LOSC has a sinuous history. In 1983, before it joined the LOSC as a state party, Namibia could not ratify the LOSC on its own and in its own name. At the time, Namibia did not enjoy statehood and remained a territory occupied by South Africa – an occupation that the United Nations (UN) declared “illegal” in 1970.²⁴ Thus, in order to ratify that treaty, the United Nations Council for Namibia ratified the LOSC on Namibia's behalf on 18 April 1983. When the UN General Assembly revoked South Africa's mandate over South West Africa/Namibia in 1966, it placed Namibia under its direct responsibility.²⁵ Accordingly, in a special session, the Assembly created the ‘Council for Namibia’ to administer Namibia until independence.²⁶ The Assembly thus designed the UN Council for Namibia to sign and ratify the LOSC for or on Namibia's behalf.

Namibia also ratified or acceded to the agreements and the protocol that complement the LOSC, namely the 1994 Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982;²⁷ and the 1995 United Nations Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (Fish Stocks Agreement).²⁸

In addition, Namibia ratified many other key treaties pertaining to the law of the sea. These treaties include:

- the 2009 Food and Agriculture Organization (FAO) Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing;²⁹
- the 2001 FAO Convention on the Conservation and Management of Fishery Resources in the South East Atlantic Ocean;³⁰
- the 1980 Convention on the Conservation of Antarctic Marine Living Resources;³¹ and

²³ 1833 UNTS 3, (1982) 21 ILM 1261. Adopted: 18.04.1983.

²⁴ UN Security Council Resolution 276 (1970) para 2. The dispute that pitted South West Africa/Namibia against South Africa lasted four decades. The dispute produced four advisory opinions and two judgments handed down by the International Court of Justice (ICJ): *International Status of South West Africa, Advisory Opinion*, 1950 I.C.J. Reports 128 [advisory opinion]; *Voting Procedure on Questions Relating to Reports and Petitions Concerning the Territory of South West Africa*, 1955 I.C.J. Reports 67 [advisory opinion]; *Admissibility of Hearings of Petitioners by the Committee on South West Africa*, 1956 I.C.J. Reports 23 [advisory opinion]; *South West Africa, Ethiopia v. South Africa, Preliminary Objections, Judgment*, 1962 I.C.J. Reports 319 [judgment]; *South-West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa), Second Phase*, 1966 I.C.J. 6 [judgment]; and *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion*, 1971 I.C.J. Rep 16 [advisory opinion]. See also J Dugard, *The South West Africa/Namibia Dispute: Documents and Scholarly Writings on the Controversy Between South Africa and the United Nations* (1973).

²⁵ UN General Assembly Resolution 2145 (1966) para II(1)(a); UN General Assembly Resolution 2248 (1967).

²⁷ 1836 UNTS 3, (1994) 33 ILM 1309. Adopted: 28.07.1994; EIF: 16.11.1994; Namibia started to participate in this treaty through simplified procedure in 1995.

²⁸ 2167 UNTS 3, (1995) 34 ILM 1542. Adopted: 04.08.1995. EIF: 11.12.2001; ratified in 1998.

²⁹ (2016) 55 ILM 1157. Adopted: 22.11.2009. EIF: 05.06.2016; ratified in 2017.

³⁰ 2221 UNTS 189. Adopted: 20.04.2001. EIF: 13.04.2003; ratified in 2003.

³¹ 1329 UNTS 47, (1980) 19 ILM 837. Adopted: 20.05.1980. EIF: 07.04.1982; acceded to in 2000.

- the 1966 International Convention for the Conservation of Atlantic Tunas (ICCAT),³² as well as its 1984 Paris Protocol and its 1992 Madrid Protocol.

Namibia ratified 22 IMO treaties. Over and above the treaty that established the IMO, Namibia ratified:³³

- the 1974 International Convention for the Safety of Life at Sea (SOLAS)³⁴ and its 1978 Protocol;
- the 1966 International Convention on Load Lines (LL) and its 1988 Protocol;
- the 1969 International Convention on Tonnage Measurement of Ships;
- the 1972 Convention on the International Regulations for Preventing Collisions at Sea (COLREG);
- the 1978 International Convention on Standards of Training, Certification and Watchkeeping for Seafarers (STCW);
- the 1995 International Convention on Standards of Training, Certification and Watchkeeping for Fishing Vessel Personnel (STCW-F),³⁵
- the 1979 International Convention on Maritime Search and Rescue (SAR);
- Annexes I/II, III, IV, and V of the 1973 International Convention for the Prevention of Pollution from Ships (MARPOL), as modified by its 1978 Protocol;
- the 1969 International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties, and its 1973 Protocol;
- the 1992 Protocol to International Convention on Civil Liability for Oil Pollution Damage (CLC);
- the 1992 Protocol to the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage;
- the 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA) and its 1988 Protocol;
- the 1990 International Convention on Oil Pollution Preparedness, Response and Co-operation (OPRC); and
- the 2001 International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001.

Namibia is a party to a number of other global instruments that affect the law of the sea, but not as directly as those mentioned earlier in this section. These instruments include:

- the 1963 Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water;³⁶

³² 673 UNTS 63, (1992) 20 ILM 118. Adopted: 14.05.1966. EIF: 21.03.1969; ratified in 1999.

³³ These treaties are available on the official website of the IMO at <https://www.imo.org/en/About/Conventions/Pages/StatusOfConventions.aspx> (accessed: 24.12.2021).

³⁴ 1184-1185 UNTS 2. Adopted: 01.11.1974; ratified in 2021.

³⁵ Adopted: 07.07.1995. EIF: 29.09.2012.

³⁶ 480 UNTS 45, (1963) 2 ILM 889. Adopted: 05.08.1963; EIF: 10.10.1963; acceded to in 1963 (via South Africa).

- the 1973 Convention on the International Trade in Endangered Species of Wild Fauna and Flora (CITES);³⁷
- the 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal;³⁸
- the 1992 Convention on Biological Diversity³⁹ as well as its 2000 Cartagena Protocol on Biosafety to the Convention on Biological Diversity⁴⁰ and its 2010 Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilisation to the Convention on Biological Diversity;⁴¹
- the 1992 UN Framework Convention on Climate Change⁴² as well as its 1997 Kyoto Protocol;⁴³
- the 2000 UN Convention against Transnational Organised Crime⁴⁴ as well as its 2000 Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organised Crime,⁴⁵ and its 2000 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organised Crime;⁴⁶
- the 2001 Convention on the Protection of the Underwater Cultural Heritage;⁴⁷
- the 2003 United Nations Convention against Corruption;⁴⁸ and
- the 2009 Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing.⁴⁹

3. Participation in global organisations

After it achieved statehood on 21 March 1990, Namibia became a member of the UN one month later, on 23 April 1990.⁵⁰ By virtue of its membership in the UN, which evidences its statehood, Namibia could bring suits before the International Tribunal for the Law of the Sea (LOSC Tribunal) or the ICJ in disputes concerning the law of the sea. This occurred in the *Kasikili/Sedudu Island* case where Namibia and Botswana submitted to the ICJ their dispute over a fluvial island in the Chobe River that they both claimed.⁵¹ And this may happen again

³⁷ 993 UNTS 243, (1973) 12 ILM 1085. Adopted: 03.03.1973; EIF: 01.07.1975; acceded to in 1991.

³⁸ 1673 UNTS 126, (1989) 28 ILM 657, (1989) 14 LOSB 37. Adopted: 22.03.1989; EIF: 05.05.1992; acceded to in 1995.

³⁹ 1760 UNTS 79, (1992) 31 ILM 818. Adopted: 05.06.1992; EIF: 29.12.1993; ratified in 1997.

⁴⁰ 2226 UNTS 208, (2000) 39 ILM 1027. Adopted: 29.01.2000; EIF: 11.09.2003; ratified in 2005.

⁴¹ Doc: [UNEP/CBD/COP/DEC/X/1](#). Adopted: 29.10.2010; EIF: 12.10.2014; acceded to in 2014.

⁴² 1771 UNTS 107, (1992) 31 ILM 849. Adopted: 09.05.1992; EIF: 21.03.1994; ratified in 1995.

⁴³ 2303 UNTS 51, (1998) 37 ILM 22. Adopted: 11.12.1997; EIF: 16.02.2005; acceded to in 2003.

⁴⁴ 2225 UNTS 209, (2001) 40 ILM 353. Adopted: 15.11.2000; EIF: 29.09.2003; ratified in 2002.

⁴⁵ 2241 UNTS 480, (2001) 40 ILM 384. Adopted: 15.11.2000; EIF: 28.01.2004; ratified in 2002.

⁴⁶ 2237 UNTS 319, (2001) 40 ILM 377. Adopted: 15.11.2000; EIF: 25.12.2003; ratified in 2002.

⁴⁷ 2562 UNTS 3, (2002) 41 ILM 40, (2002) 48 LOSB 29. Adopted: 02.11.2001; EIF: 02.01.2009; ratified in 2011.

⁴⁸ 2439 UNTS 41, (2004) 43 ILM 37. Adopted: 31.10.2003; EIF: 14.12.2005; ratified in 2003.

⁴⁹ Adopted: 22.11.2009; EIF: 05.06.2016; acceded to in 2017. Available at http://www.fao.org/fileadmin/user_upload/legal/docs/037t-e.pdf (accessed: 18.01.2017).

⁵⁰ DP Zongwe *International Law in Namibia* (2019) 140.

⁵¹ *Kasikili/Sedudu Island, Botswana v Namibia*, Judgment, Merits, [1999] ICJ Rep 1045.

in the near future should Namibia decide to take its dispute with South Africa over the Orange River to the ICJ.

Namibia also became a member of the IMO in 1994, the FAO in 1977, the ICCAT in 1999 (where it participates in four panels)⁵², the International Labour Organisation (ILO) in 1978 (through the UN Council for Namibia), and the World Meteorological Organization in 1991.

Namibia does not have any membership in the International Hydrographic Organisation (IHO) or the International Whaling Commission (IWC).

PARTICIPATION IN REGIONAL INSTRUMENTS AND ORGANISATIONS

Namibia has ratified many regional instruments. Several of these pertain to the law of the sea. Namibia has ratified the Constitutive Act of the African Union, the Agreement Establishing the African Continental Free Trade Area (AfCFTA Agreement),⁵³ the Treaty of the Southern African Development Community, and the Southern African Customs Union (SACU) Agreement, among others. By ratifying these regional treaties, Namibia has joined their respective economic communities, namely the African Union, the African Continental Free Trade Area (AfCFTA), SADC,⁵⁴ and SACU.⁵⁵ On 14 August 2001, Namibia ratified the SADC Protocol on Fisheries. These international legal instruments and their respective communities do not address maritime law questions directly, they do govern cross-border maritime trade and the international aspects of the law of the sea in Namibia.

By ratifying these agreements, Namibia has committed itself to observing certain principles in the way it administers its maritime and fisheries resources. For example, Article 6(3) of the SADC Treaty prohibits a state from discriminating against other member states. This prohibition means that Namibia cannot treat a ship flying the flag of a SADC member state less favourably than Namibian ships.

Remarkably, Namibia is the country that came up with the idea to establish the South East Atlantic Fisheries Organisation (SEAFO). Indeed, in 1995, it put forth the idea of setting up a regional organisation that would oversee the management of fisheries in the South East Atlantic region.⁵⁶ Namibia's initiative received the backing of the coastal states of Angola, South Africa

⁵² See membership of the International Commission on the Conservation of Atlantic Tunas (ICCAT) available at <https://www.iccat.int/en/contracting.html#> (accessed: 14.03.2021).

⁵³ Namibia ratified the African Continental Free Trade Area (AfCFTA) Agreement in 2019.

⁵⁴ This association initially comprised Angola, Botswana, Lesotho, Malawi, Mozambique, Swaziland, Tanzania, Zambia, and Zimbabwe. These nine countries founded the SADC's ancestor, namely the Southern African Development Co-ordination Conference (SADCC). Today, SADC has 16 members: Angola, Botswana, Comoros, Democratic Republic of Congo, Eswatini, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Tanzania, Zambia and Zimbabwe. See D P Zongwe *An Introduction to the Law of the Southern African Development Community* (2014). Available at https://www.nyulawglobal.org/globalex/Southern_African_Development_Community1.html#TheCommunity1992Present (accessed: 15.03.2021).

⁵⁵ SACU, the world's oldest functioning customs union, has five members: Botswana, eSwatini, Lesotho, Namibia, and South Africa.

⁵⁶ South East Atlantic Fisheries Organisation *About* (2021). Available at <http://www.seafo.org/About> (accessed: 16.12.2021).

and the United Kingdom (on behalf of St. Helena and its dependencies of Tristan da Cunha and Ascension Islands).⁵⁷

In Windhoek, on 20 April 2001, Namibia, Angola, the European Community, Iceland, Norway,⁵⁸ the Republic of Korea, South Africa, the UK (on behalf of St. Helena and its dependencies), and the US signed the Convention on the Conservation and Management of Fisheries Resources in the South East Atlantic Ocean (SEAFO Convention).⁵⁹

The SEAFO Convention aims to “ensure the long-term conservation and sustainable use of the fishery resources in the Convention Area through the effective implementation of [the SEAFO] Convention.”⁶⁰ The Convention defines ‘fishery resources’ as “resources of fish, molluscs, crustaceans, and other sedentary species” in the South East Atlantic Ocean.⁶¹ These resources include sedentary and straddling species such as oreo dories, armourhead, sharks, and red crab.⁶² Since 2011, the SEAFO Secretariat is located in Swakopmund, Namibia.

BILATERAL AND TRILATERAL INSTRUMENTS

Both municipal law and international law empower Namibia to enter into bilateral or trilateral treaties with other nations. In *Carracelas*, a dispute before the High Court of Namibia regarding whether a foreign vessel was fishing illegally in Namibian waters, the core question of law came down to whether the vessel operated within Namibia’s or Angola’s jurisdiction.⁶³ To resolve this case, the court held that no article in the Namibian Constitution authorises the State to fix the line separating its EEZ from that of its neighbours. He observed that, by virtue of section 5 of the Territorial Sea and Exclusive Economic Zone of Namibia Act,⁶⁴ Namibia could fix the extent of its EEZ mainly by entering into a treaty with the neighbours concerned.

On 4 June 2002, Namibia and Angola signed an accord to draw their sea border line. The agreement established the maritime boundary between them.⁶⁵ That boundary follows a parallel of latitude from the mouth of the Kunene River to the 200 nautical miles limit of the States’ EEZ.⁶⁶ The two neighbouring countries also set up a joint commission which reportedly demarcated in 2005 the starting point of the maritime boundary.⁶⁷

However, Namibia has not yet concluded any agreement with South Africa to fix their maritime border. Nonetheless, the two States did reach an agreement on 28 February 1994 to grant

⁵⁷ Ibid.

⁵⁸ After ratifying the SEAFO Convention in 2003, Norway withdrew from the Convention on 30 October 2020.

⁵⁹ 2221 UNTS 189, (2002) 41 ILM 257. Adopted: 20.04.2001; EIF: 13.04.2003; ratified in 26.02.2002. Hereinafter ‘SEAFO Convention’.

⁶⁰ Article 2 of the SEAFO Convention.

⁶¹ Article 1(l) of the SEAFO Convention.

⁶² South East Atlantic Fisheries Organisation (n).

⁶³ *S v Carracelas and Others* (1) 1992 NR 322 (HC).

⁶⁴ Section 5 reads as follows: “If, in determining the extent of the territorial sea or exclusive economic zone of Namibia or after having so determined it, it infringes or overlaps with the territorial sea, exclusive economic zone or any other maritime zone, as the case may be, of any other State, the extent of the territorial sea or exclusive economic zone of Namibia may be determined or altered by agreement with the State concerned, and pending the conclusion of such an agreement or if no such agreement can be reached, the extent of the territorial sea or exclusive economic zone of Namibia, as the case may be, may be determined or altered by Namibia as it deems fit.”

⁶⁵ Accord on the Delimitation of the Maritime Border Between Angola and Namibia, 4 June 2002.

⁶⁶ Sovereign Limits ‘Angola-Namibia’. Available at <https://sovereignlimits.com/boundaries/angola-namibia-maritime#:~:text=The%20maritime%20boundary%20between%20Angola,States%20Exclusive%20Economic%20Zone%20entitlements>. (accessed on 15.03.2021).

⁶⁷ Ibid.

Namibia sovereignty over Walvis Bay and its offshore islands.⁶⁸ That Treaty integrated Walvis Bay and the offshore islands into the Republic of Namibia.⁶⁹

An agreement that has now become the object of ongoing investigations in the wake of the Fishrot scandal is the agreement sealed between Namibia and Angola regarding fishing quotas.⁷⁰ Around 2013, fisheries ministers of Namibia and Angola signed an agreement in terms of which they would exchange fishing quotas. The purpose of the deal was to foster development in both nations. However, as it turned out, the agreement was a stratagem for some high-ranking government officials in Namibia, including Justice Minister Sakeus ‘Sacky’ Shanghala (who actually designed the agreement) and Fisheries Minister Bernhardt Esau, to bypass municipal laws and profit personally from the exploitation of fishing resources.

On 18 March 2013, Namibia signed the Benguela Current Convention with Angola and South Africa. Signed in the Angolan city of Benguela, this trilateral agreement aims at promoting a “coordinated regional approach to the long-term conservation, protection, rehabilitation, enhancement and sustainable use of the Benguela Current Large Marine Ecosystem, to provide economic, environmental and social benefits”.⁷¹

ISLANDS, BASELINES AND MARITIME ZONES

1. Islands

The Constitution of Namibia indicates that certain islands form part of the territory of Namibia. Specifically, Article 1(4) marks out the territory of Namibia as consisting of “the whole of the territory recognised by the international community through the organs of the United Nations as Namibia, including the enclave, harbour and port of Walvis Bay, as well as *the off-shore islands of Namibia*, and its southern boundary shall extend to the middle of the Orange River.”⁷²

The “off-shore islands” that the Constitution alludes to comprise the Penguin Islands. The expressions ‘Penguin Islands’ and ‘off-shore islands’ refer to a group of 12 islands along the coast of Namibia, namely Albatross, Bird, Halifax, Hollandsbird, Ichaboe, Long Island, Mercury, Plum Pudding, Pomona, Possession, Roast Beef and Seal.⁷³

⁶⁸ [Treaty Between the Government of the Republic of Namibia and the Government of the Republic of South Africa With Respect to Walvis Bay and the Off-Shore Islands](#), 28 February 1994. See also Agreement Between the Government of the Republic of South Africa and the Government of the Republic of Namibia on Water Related Matters Pertaining to the Incorporation of Walvis Bay in the Territory of Namibia, 8 April 1994. Available at <http://gis.nacse.org/tfdd/tfddocs/archiveApril2010/383ENG.htm> (accessed: 24.12.2021); Namibia-South Africa: Agreement on the Joint Administration of Walvis Bay and the Off-Shore Islands (1993) 32 ILM 1152. Adopted: 09.12.1992; EIF: no longer in force. For a brief explanation of the negotiations that led to South Africa’s transfer of Walvis Bay and the Off-Shore Islands to Namibia, see Devine (n) 472.

⁶⁹ Article 2 of the [Treaty Between the Government of the Republic of Namibia and the Government of the Republic of South Africa With Respect to Walvis Bay and the Off-Shore Islands](#).

⁷⁰ See ‘Tailor-Made Agreement’. Available at <https://www.ruv.is/kveikur/fishrot/angola-namibia/> (accessed: 10.04.2021).

⁷¹ Article 2 of the Benguela Current Convention.

⁷² Emphasis added.

⁷³ See also Article 1 of the Treaty Between the Government of the Republic of South Africa and the Government of the Republic of Namibia With Respect to Walvis Bay and the Off-Shore Islands, 28 February 1994. Available at [chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/viewer.html?pdfurl=https%3A%2F%2Fwww.un.org%2Fdepts%2Flos%2FLEGISLATIONANDTREATIES%2FPDFFILES%2FTREATIES%2FZAF-NAM1994OI.PDF&cLen=70887&chunk=true](https://www.un.org/2Fdepts/2Flos/2FLEGISLATIONANDTREATIES/2FPDFFILES/2FTREATIES/2FZAF-NAM1994OI.PDF&cLen=70887&chunk=true) (accessed: 24.12.2021). See also Walvis Bay and Off-Shore Islands

2. Baselines

The baselines that Namibia utilises derive from the LOSC. Namibia has domesticated the provisions of the LOSC that provide for the maritime baselines, which forms part of Namibian law by virtue of Article 144. The Territorial Sea and Exclusive Economic Zone of Namibia Act ('the TSEEZ Act') measures baselines from the low-water mark along the coast⁷⁴ and extends seawards from those baselines..

3. Maritime zones

Before the Independence, the maritime zones were delimited in terms of South African law.⁷⁵ These laws applied until the international community (i.e., the UN) recognised Namibia as one of its members and as an independent state.

The maritime zones of Namibia follow closely those provided for in the LOSC.⁷⁶ Namibia incorporated those provisions in the Territorial Sea and Exclusive Economic Zones of Namibia Act 3 of 1990 ('the TSEEZ Act' or 'the Act').⁷⁷ Like the LOSC, the Act measures maritime zones seaward from the baselines as follows: the territorial sea, internal waters, the contiguous zone, the exclusive economic zone (EEZ), and the continental shelf. To put these zones in the broader context of Namibian law, Article 100 of the Constitution declares that:

Land, water and natural resources below and above the surface of the land and in the continental shelf and within the territorial waters and the exclusive economic zone of Namibia shall belong to the State if they are not otherwise lawfully owned.

Article 100 declare Namibia's ownership of land, water and natural resources within the 'territorial waters' and the EEZ of Namibia. Interestingly, Article 100 appears in Chapter 11 of the Constitution, suggesting – in terms of Article 101,⁷⁸ that declaration does not bind the state, though it can inspire judges and lawyers when construing laws based on that declaration.

Act 1 of 1994 (Namibian legislation); Transfer of Walvis Bay to Namibia Act 203 of 1993 (South African legislation); JM Kodisang, 'The Reintegration of Walvis Bay and its Penguin/Off-Shore Island Into Namibia', master's thesis, Department of Political Studies, Rhodes University, 1995. Available at <https://vital.seals.ac.za/vital/access/manager/PdfViewer/vital:2790/SOURCEPDF?viewPdfInternal=1> (accessed on 17.03.2021); and Benguela Current Commission, 'Namibian Islands'. Available at <https://www.benguelacc.org/index.php/en/activities/2016-12-13-09-13-15/ebsas-in-the-bclme/namibian-islands> (accessed on 17.03.2021).

⁷⁴ Article 5 of the LOSC. See Article 2(2)(determining the territorial sea), Article 3(2)(determining the contiguous zone), and Article 4(2)(determining the EEZ) of the Territorial Sea and Exclusive Economic Zone of Namibia Act 3 of 1990. Hereinafter 'the TSEEZ Act'. (GG 28). This Act was brought into force on 10 July 1990 by Proc. 6/1990 (GG 44); Article 5 of the LOSC.

⁷⁵ Devine (n) 473-474.

⁷⁶ See Article 2(2)(determining the territorial sea), Article 3(2)(determining the contiguous zone), and Article 4(2)(determining the EEZ) of the the TSEEZ Act'.

⁷⁸ Article 101 lays down that: "The principles of state policy contained in this Chapter shall not of and by themselves be legally enforceable by any Court, but shall nevertheless guide the Government in making and applying laws to give effect to the fundamental objectives of the said principles. The Courts are entitled to have regard to the said principles in interpreting any laws based on them." The three eminent South African lawyers (i.e., Arthur Chaskalson, Marinus Wiechers, and Gerhard Erasmus) who actually drafted the Namibian Constitution must have overlooked this lapse in logic and the self-defeating effect of placing Article 100 in Chapter 11, given the content of Article 101.

Moreover, from the perspective of international law, Namibia's ownership of resources within those zones should remain subject to right of innocent passage.⁷⁹

The TSEEZ Act defines the 'territorial sea' as covering the sea within a distance of 12 nautical miles from the baseline.⁸⁰ Namibia's sovereignty extends to the bed and subsoil, and to the airspace above the territorial sea.⁸¹

Unlike the territorial sea, 'internal waters' encompass the landward waters measured from the normal or any other baseline.⁸² Internal waters include any harbour or any fishing harbour.⁸³ As for the contiguous zone, it covers the sea outside the territorial sea but within 24 nautical miles from the territorial sea's baseline.⁸⁴ The TSEEZ Act entitles Namibia to exercise any powers necessary to prevent contraventions of laws relating to the fiscus, customs, immigration, or health within the contiguous zone.⁸⁵

Pursuant to the TSEEZ Act, the EEZ lies outside the territorial sea but within a distance of 200 nautical miles from the territorial sea's baseline.⁸⁶ Currently, the territorial sea and the EEZ extend over an area of 562,431 km², roughly two-thirds the size of Namibia's land territory.⁸⁷ Any areas beyond the EEZ constitute the high seas, which do not form part of Namibia's territory.

Within the EEZ, Namibia the right to exercise any powers necessary to prevent the contravention of laws relating to the natural resources of the sea.⁸⁸ Namibian courts have heard a number of court cases involving individuals fishing in Namibia's EEZ without a licence or permit.⁸⁹

To define Namibia's continental shelf, the TSEEZ Act refers to the LOSC definition.⁹⁰ In terms of the LOSC, the 'continental shelf' 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.⁹¹

⁷⁹ Devine (n) 480.

⁸⁰ Section 2(1) of the TSEEZ Act.

⁸¹ See Article 2 of the LOSC. See also Article 100 of the Namibian Constitution.

⁸² See section 3(1) of the TSEEZ Act. For the high-water mark baseline, see Sea-Shore Ordinance 37 of 1958, which provides for the position of the high-water mark. Section 1 of that Ordinance defines the 'higher-water mark' as "the highest line reached by the sea during ordinary storms occurring during the most stormy period of the year, excluding exceptional or abnormal floods."

⁸³ Section 1 of the Marine Traffic Act 2 of 1981, sv 'internal waters'.

⁸⁴ See section 3A(1) of the TSEEZ Act.

⁸⁵ Section 3(3) of the TSEEZ Act.

⁸⁶ Section 4(1) of the TSEEZ Act.

⁸⁷ G Finke et al 'Namibia's way to marine spatial planning – Using existing practices or instigating its own approach?' (2020) 121 *Marine Policy* 2.

⁸⁸ Section 4(3) of the TSEEZ Act.

⁸⁹ These cases include *S v Carracelas and Others (1)* 1992 NR 322 (HC), *S v Martinez* 1993 NR 1 (HC); *S v Pineiro* 1991 NR 424 (HC); *S v Curras* 1991 NR 208 (HC); and *S v Redondo* 1992 NR 133 (SC).

⁹⁰ Section 6(1) of the TSEEZ Act.

⁹¹ Article 76(1) of the LOSC.

The For the purposes of the exploitation of the sea's natural resources, the TSEEZ Act classifies the continental shelf as "State land."⁹² In 2009, Namibia made a submission to the UN to extend its continental shelf by more than one million square kilometres.⁹³

MARITIME BOUNDARIES

Article 1(4) of the Constitution delineates Namibia's territory as follows:

The national territory of Namibia shall consist of the whole of the territory recognised by the international community through the organs of the United Nations as Namibia, including the enclave, harbour and port of Walvis Bay, as well as the off-shore islands of Namibia, and its southern boundary shall extend to the middle of the Orange River.

Namibia shares maritime borders with two countries: South Africa and Angola. A maritime boundary issue arose between Namibia and South Africa over the Orange River. The parties have been negotiating and contesting each other's sovereignty over the river since Namibia's independence in 1990. Whereas article 1(4) of the Namibian Constitution fixes Namibia's southern boundary in "the middle of the Orange River", South Africa claims the northern high-water mark as agreed upon by Britain and Germany in the Anglo-German Treaty of 1890.⁹⁴ Although they established in 2014 a working group in 2014, the two riparian nations may end up calling upon the ICJ to mediate that issue.

On 12 May 2009, Namibia made a submission, through the UN Secretary-General, to the Commission on the Limits of the Continental Shelf.⁹⁵ That Commission dealt with Namibia's submission in its March-April 2010 session as follows:

78. The presentation of the submission to the Commission was made on 6 April 2010 by Alpheus !Naruseb, Minister of Land and Resettlement, and Lidwina Shapwa, Permanent Secretary, Ministry of Land and Resettlement. The delegation of Namibia also included Kaire M. Mbuende, Permanent Representative of Namibia to the United Nations, and a number of advisers.

[...]

80. [...] In the case of the southern boundary, there was a dispute between Namibia and South Africa with respect to the boundary constituted by the Orange River. However, in compliance with section 5 (a) of annex I to the rules of procedure, the two Governments had adopted a memorandum of understanding concerning the consideration of their respective submissions by the Commission without prejudice to their rights relating to future delimitation of their maritime boundaries.

⁹² Section 6(2) of the TSEEZ Act.

⁹⁴ See Article III(1) of the Anglo-German Treaty. This treaty, also known as Heligoland-Zanzibar Treaty, demarcated Germany's sphere of influence in the south of Southwest Africa by "the line that commences at the mouth of the Orange River and continues up its northern bank to its intersection point with the 20th degree of east longitude." The Anglo-German Treaty of 1890 is available at chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/viewer.html?pdfurl=https%3A%2F%2Fghdi.ghi-dc.org%2Fpdf%2Feng%2F606_Anglo-German%2520Treaty_110.pdf&cLen=72189&chunk=true (accessed: 17.12.2021)

⁹⁵ Namibia made the submission in terms of Article 76, paragraph 8, of the LOSC.

81. The Commission then continued its meeting in private. Addressing the modalities for the consideration of the submission, the Commission decided that, as provided for in article 5 of annex II to the Convention and in rule 42 of the rules of procedure, the submission would be addressed by a subcommission to be established in accordance with rule 51, paragraph 4 ter, of the rules of procedure, at a future session. The Commission decided to revert to the consideration of the submission at the plenary level when the submission was next in line for consideration as queued in the order in which it was received.

As stated in the submission, Namibia and South Africa entered into a memorandum of understanding (MoU) in 2009 “without prejudice for the future establishment of [Namibian and South African] maritime boundaries”. The MoU applies while the UN Commission on the Limits of the Continental Shelf examines and determines the claims submitted by Namibia and South Africa.

As mentioned above in the Bilateral and Trilateral Instruments section, Namibia and Angola signed an accord on 4 June 2002 to mark their sea border line. That boundary follows a parallel of latitude from the mouth of the Kunene River to the 200 nautical miles limit of the States’ EEZ.⁹⁶

MARITIME USES

1. Ports

Namibia has two ports, namely the Port of Walvis Bay and the Port of Lüderitz. Parliament has passed the Namibian Ports Authority Act, 1994,⁹⁷ which establishes the Namibian Ports Authority (Namport).⁹⁸ Namport’s mandate is to manage and control the operations of ports.⁹⁹ The Act also entrusts Namport with the management and control of lighthouses and other navigational aids.¹⁰⁰

The main port of Namibia is Walvis Bay, where most of the State’s maritime trade takes place. The port of Lüderitz, located at 254 nautical miles south of the Port of Walvis Bay, serves the southern part of Namibia and gives access to the Northern Cape province of South Africa.¹⁰¹ The port of Lüderitz is an important base for the fishing, offshore diamond, mining, and fruit industries.¹⁰²

2. Navigation

Navigation through Namibian waters may involve several types of activities. These include navigating for business or leisure. Business navigation or ‘merchant shipping’¹⁰³ comprises fishing, cruise shipping, parking, and mining. Navigation for leisure comprises notably using

⁹⁶ Sovereign Limits ‘Angola-Namibia’. Available at <https://sovereignlimits.com/boundaries/angola-namibia-maritime#:~:text=The%20maritime%20boundary%20between%20Angola,States%20Exclusive%20Economic%20Zone%20entitlements>. (accessed on 15.03.2021).

⁹⁷ Act 2 of 1994.

⁹⁸ Article 2(1) of the Namibian Port Authority Act 2 of 1994.

⁹⁹ Section 3(1)(a) of the Namibian Port Authority Act 2 of 1994.

¹⁰⁰ Section 3(1)(a) of the Namibian Port Authority Act 2 of 1994.

¹⁰¹ Namport, ‘Welcome to the Port of Lüderitz’. Available at <https://www.namport.com.na/ports/welcome-to-the-port-of-luderitz/523/> (accessed: 17.12.2021).

¹⁰² Ibid.

¹⁰³ See Merchant Shipping Act 57 of 1951 (SA GG 4684). This Act was brought into force in South Africa and South West Africa, with the exceptions of sections 68-72, on 1 January 1960 by SA Proc. 298/1959 (SA GG 6337); remaining sections brought into force in South Africa and South West Africa on 1 November 1961 by RSA Proc. 92 /1961 (RSA GG 94) (see section 3(1) of Act).

a private ship to sail around and across Namibian waters, subject to the regulations and instructions issued in terms of Namibian law. Leisure navigation includes marine tourism.

Navigation can also take place for research and scientific purposes. The University of Namibia (UNAM) has a campus in Walvis Bay that concentrates on marine sciences. The location of that campus is strategic given Walvis Bay's position as the country's main port.

The navigation of ships in the country's waters is regulated by statute. Those statutes partly come from the previous South African administration. The law that mainly regulates sea traffic in Namibian waters is the Marine Traffic Act 2 of 1981.¹⁰⁴ The Merchant Shipping Act 57 of 1951 also plays a significant role in regulating sea traffic. Other relevant laws and regulations governing navigation include:

The Marine Traffic Act 2 of 1981 ('the MTA') governs marine traffic holistically. Specifically, the MTA governs passage, the right of innocent passage, the showing of vessel flags, entry into and departure from internal waters, movement outside harbours, the prohibition on sinking or abandoning ships and wreckages, the suppression of illicit traffic in drugs on board ships, and proceedings in respect of foreign ships. However, the MTA does not apply to ships owned or used by the Namibian state for purposes other than commerce.¹⁰⁵

The Merchant Shipping Act 57 of 1951 (MSA) comes into the picture when a ship passes through Namibian waters for business reasons. Before a ship can be registered in Namibia, the Act requires that the whole of the ship be owned by the Namibian government, Namibian citizens, citizens of a treaty country (other than Namibia), or persons of a non-treaty country approved by the Transport Minister.¹⁰⁶ When a ship meets these requirements, its owners or the government may apply to the proper officer at one of the ports so that the officer can register the ship.¹⁰⁷

The MSA declares the Namibian flag as the national colours of all ships registered in Namibia.¹⁰⁸ The Act requires the master of a Namibian ship to hoist the Namibian flag whenever a ship in the naval service of Namibia or any other treaty country makes a signal to the Namibian ship.¹⁰⁹ The master must also hoist the Namibian flag whenever entering or leaving a port.¹¹⁰

With regard to internal waters, the standard principle is that ships must not enter or leave those waters other than a harbour or a fishing harbour.¹¹¹ The MTA creates an exception where regulations prescribe entry in or departure from internal waters other than a harbour.¹¹² The Act penalises any ship master who contravenes the aforementioned standard principle.¹¹³

Similarly, no person may – within the territorial sea or internal waters – intentionally sink or dispose of a ship, a wreck, or a hulk; neither can a person abandon a ship not in distress, a

¹⁰⁴ (RSA GG 7408) made applicable to South West Africa as of 7 June 1985 by RSA Proc. 93/1985 (RSA GG 9774).

¹⁰⁵ Section 16(a) of the Marine Traffic Act 2 of 1981. Hereinafter 'the MTA'.

¹⁰⁶ Article 11(1) of the Merchant Shipping Act 57 of 1951. Hereinafter 'MSA'.

¹⁰⁷ Article 13(1) of the MSA.

¹⁰⁸ Article 65(1) of the MSA.

¹⁰⁹ Article 65(2)(a) of the MSA.

¹¹⁰ Article 65(2)(b)-(c) of the MSA.

¹¹¹ Section 4(1) of the MTA.

¹¹² Section 4(1) of the MTA.

¹¹³ Section 4(2) of the MTA.

wreck, or any other object that may interfere with navigation.¹¹⁴ The MTA makes it an offence for persons to violate this prohibition.¹¹⁵

The MTA also allows ships to navigate or pass through Namibia's territorial sea. Where necessary, for example, when a ship needs to assist persons or aircraft in distress, this passage may entail stopping or anchoring the ship.¹¹⁶ However, the Transport Minister may temporarily suspend the passage of ships in certain areas of the territorial sea or forbid them from entering internal waters.¹¹⁷ A ship master who fails to obey such suspension or prohibition commits an offence.¹¹⁸

The MTA entitles all ships to innocent passage through Namibia's territorial waters, as long as they comply with its provisions.¹¹⁹ The MTA deems a passage innocent when it does not prejudice the peace, good order or security of Namibia.¹²⁰

On the other hand, the MTA does not consider passage innocent when a ship carries, in the territorial sea, cargo or any apparatus the use of which may threaten Namibia's sovereignty, territorial integrity, or political independence.¹²¹ In those circumstances, including where he reasonably suspects that a person or cargo on board a foreign ship is involved in drug trafficking,¹²² the Transport Minister may exercise a number of powers conferred on him by the Act.¹²³ The Transport Minister may require (or, if necessary, force)¹²⁴ the master to stop the ship,¹²⁵ declare shipping details (ship's official number, flag, tonnage, destination, cargo, and so forth),¹²⁶ move the ship to a place specified by the Minister,¹²⁷ or produce documents¹²⁸ or allow authorised persons on board the ship¹²⁹ for inspection.

The Minister may detain the ship or its cargo, in whole or in part.¹³⁰ He may also order the master to remove his ship from Namibia's territorial sea immediately.¹³¹ And the Act exempts from liability for losses or damage the Minister and any person exercising powers under the MTA in good faith.¹³²

The MTA contains provisions pertaining to foreign ships. First, the Act obliges the Transport Minister, if a master so requests, to notify the agents of a ship and the consular representative of the country whose flag the ship flies, of any action or proceeding against that ship.¹³³ In

¹¹⁴ Section 6(1) of the MTA.

¹¹⁵ Section 6(2) of the MTA.

¹¹⁶ Section 1 of the MTA, sv 'passage'.

¹¹⁷ Section 7(1) of the MTA.

¹¹⁸ Section 7(2) of the MTA.

¹¹⁹ Section 2 of the MTA.

¹²⁰ Section 1 of the MTA, sv 'innocent passage'.

¹²¹ Section 8 of the MTA.

¹²² Section 8A of the MTA.

¹²³ Note that, save the power to order the immediate removal of a ship from the territorial sea, these powers do not apply to foreign warships or foreign ship owned or used by a government for purposes other than commerce. See section 9(7) of the MTA.

¹²⁴ Section 9(2) of the MTA.

¹²⁵ Section 9(1)(a) of the MTA.

¹²⁶ Section 9(1)(b) of the MTA.

¹²⁷ Section 9(1)(c) of the MTA.

¹²⁸ Section 9(1)(d) of the MTA.

¹²⁹ Section 9(1)(e) of the MTA.

¹³⁰ Section 9(3) of the MTA.

¹³¹ Section 9(6) of the MTA.

¹³³ Section 10 of the MTA.

addition, the Act penalises¹³⁴ and forbids¹³⁵ the master of any foreign submarine or foreign underwater vehicle to cause it to navigate the territorial sea or internal waters otherwise than on the surface and with its flag shown.

3. Maritime search and rescue

Two statutes regulate search-and-rescue operations at sea in Namibia, namely the MTA and the Wreck and Salvage Act 5 of 2004 ('the WSA'). The MTA creates an exception to the non-stopping principle (that no person may – within Namibia's territorial sea or internal waters – stop a ship outside a harbour) when stopping or anchoring a ship becomes necessary to assist persons, ships, or aircraft in danger or distress.¹³⁶ The Act also provides for an exception to the rule prohibiting persons from abandoning a ship in the territorial sea or the internal waters when such ship is in distress.¹³⁷

Namibia ratified the 1979 International Convention on Maritime Search and Rescue in 2004.¹³⁸ Moreover, in interpreting the WSA, enables courts to have regard to "international law applicable to the salvage of ships, aircraft and life and the protection of the marine environment, including the International Convention on Salvage, 1989, and its preparatory texts."¹³⁹

The WSA¹⁴⁰ regulates specifically maritime search-and-rescue operations. It imposes a duty on masters of Namibian ships to assist persons in distress or in danger, and ships in collision. With respect to distressed persons,¹⁴¹ the Act stipulates that, when he receives at sea a distress signal or information from any source that ship is in distress, the master must proceed with all speed to the assistance of distressed persons. If possible, the master must inform the distressed persons of his salvage operation. However, the WSA releases masters from this duty when they are unable to salvage distressed persons or when they consider salvaging them unreasonable, unnecessary, or impracticable.¹⁴²

The WSA also obliges masters to assist persons in danger, as opposed to persons in distress. Masters must, in so far as they can do so without seriously endangering their ships or any person on their ships, assist every person found at sea in danger of being lost.¹⁴³ This obligation

¹³⁴ Section 3(2) of the MTA.

¹³⁵ Section 3(1) of the MTA.

¹³⁶ Section 1, sv 'passage', and 5(1) of the MTA.

¹³⁷ Section 6(1)(b) of the MTA.

¹³⁸ See International Maritime Organization, *Status of IMO Treaties: Comprehensive Information on the Status of Multilateral Conventions and Instruments in Respect of Which the International Maritime Organization or Its Secretary-General Performs Depositary or Other Functions* (2021) 431. Available at <https://wwwcdn.imo.org/localresources/en/About/Conventions/StatusOfConventions/Status%20-%202021.pdf> (accessed: 17.12.2021)..

¹³⁹ Section 40(2)(a) of the WSA.

¹⁴⁰ (GG 3244) brought into force on 1 November 2004 by GN 232/2004 (GN 3313).

¹⁴¹ Section 7(1) of the Wreck and Salvage Act 5 of 2004. Hereinafter 'the WSA'. The Act stipulates that, when he receives at sea a distress signal or information from any source that ship is in distress, the master must proceed with all speed to the assistance of distressed persons. If possible, the master must inform the distressed persons of his salvage operation.

¹⁴² Section 7(1)(a) of the WSA.

holds even if the person in danger is a national of a country at war with Namibia or with the country in which the ship is registered.¹⁴⁴

When a ship conducts search-and-rescue operations, the costs of such operations are to be borne by the vessel or ship searched for and rescued,¹⁴⁵ assuming that the authorities managed to find such vessel.

The WSA lays down that, when two or more ships collide, the master of each must, if and in so far as he can do so without endangering any person on the ship, assist the other ship or any person on that ship and save them the peril caused by the collision.¹⁴⁶ Each master must stay by the other ship until he ascertains that the other ship or any person on it no longer needs assistance.¹⁴⁷ Each master must also give to the master of the other ship certain information, to wit, the name of his ship, the country of the ship's registration, and the name of the port from which it has come or to which it is headed.¹⁴⁸

4. Submarine cables and pipelines

The authorities can allow private firms or SOEs to lay subsea cables and pipelines in Namibian waters. Part 5 of the Communications Act 8 of 2009 empowers the communications regulator, the Communications Regulatory Authority of Namibia (CRAN), to grant firms or, technically, 'carriers' the right to install telecommunications facilities, such as wires and fibres.¹⁴⁹ In particular, CRAN may permit firms to lay fibre optic submarine cables to expand and enhance international telecommunication. For instance, Namibia has authorised a private firm, Paratus Telecommunications (Pty) Ltd, to operate a branching unit landing along a submarine telecommunication cable system, the Equiano Cable System, that connects Africa with Europe.¹⁵⁰ The Namibian branching unit of that fibre optic cable lands at Swakopmund.

Installing submarine pipelines or cables, like the Equiano Cable System, requires that the Environment Minister issue an environmental clearance certificate beforehand. The Minister issues (or declines to issue) this certificate by virtue of the Environmental Management Act.¹⁵¹

Namibian authorities can also authorise the laying of pipelines for the transportation of hydrocarbons, chiefly oil. However, Namibia has not yet discovered oil in commercially viable quantities.

¹⁴⁵ Section 11(b), read together with section 20(1)(f) of the WSA. See also sections 19-20 (on rewards for salvage operations), section 21 (on the special compensation payable to salvors), section 22 (on salvage payable for saving life), and section 28 (on detention of ship or wreck until salvage is paid) of the WSA.

¹⁴⁶ Section 8(1)(a) of the WSA.

¹⁴⁷ Section 8(1)(a) of the WSA.

¹⁴⁸ Section 8(1)(b) of the WSA.

¹⁴⁹ Sections 59(3), 60 and 61 of the Communications Act 8 of 2009.

¹⁵⁰ See ACER (Africa) Environmental Consultants *Alcatel Submarine Network (SAN) Equiano Submarine Fibre Optic Cable System to Be Landed at Swakopmund, Namibia: Draft Environmental Impact Assessment Report* (2021). Available at http://eia.met.gov.na/screening/2171_20210215f_eia_equiano_cable_system_swakopmund.pdf (accessed: 08.04.2021).

¹⁵¹ Act 7 of 2007.

5. Exploitation of marine resources

The exploitation of marine resources is regulated by the Marine Resources Act 27 of 2000 ('MRA').¹⁵² The MRA defines 'marine resources' as encompassing "all marine organisms, including, but not limited to, plants, vertebrate and invertebrate animals, monerans, protists (including seaweeds), fungi and viruses, and also... guano and anything naturally derived from or produced by such organisms."¹⁵³ Given this definition, the MRA does not seem to apply to non-living resources.

In adopting this Act, the Namibian Parliament intended to provide for "the responsible utilization, conservation, protection and promotion of marine resources on a sustainable basis".¹⁵⁴ This overarching goal heavily rests on the principle of sustainable development. The Environmental Management Act 7 of 2007 defines 'sustainable development' as

[the] human use of a natural resource, whether renewable or non-renewable, or the environment, in such a manner that it may equitably yield the greatest benefit to present generations while maintaining its potential to meet the needs and aspirations of future generations including the maintenance and improvement of the capacity of the environment to produce renewable resources and the natural capacity for regeneration of such resources.¹⁵⁵

More specifically, Parliament passed the MRA to govern how businesses and individuals exploit Namibia's marine resources. It devoted Part VI of the Act to the 'commercial harvesting of marine resources'. As a general rule, the MRA forbids any person in Namibia or in Namibian waters from harvesting marine resources for commercial purposes.¹⁵⁶ The Act carves out an exception to this rule by allowing persons to harvest marine resources if they obtain a right or an exploratory right¹⁵⁷ from the Namibian government or if they enter into a fisheries agreement with the government.¹⁵⁸ And, when a marine resource has been made subject to a quota, a person may only harvest such a resource according to the terms of the quota or the permitted by-catch under a right or a fisheries agreement.¹⁵⁹

The MRA empowers the Marine Resources Minister to announce, from time to time, a period during which persons may apply for rights to harvest a marine resource commercially.¹⁶⁰ The Minister may not consider any applications he receives outside that period.¹⁶¹ The Fisheries

¹⁵² (GG 2458) brought into force on 1 August 2001 by GN 152/2001 (GG 2591).

¹⁵³ Section 1 of the MRA, sv 'marine resources'.

¹⁵⁴ Long title of the Marine Resources Act 27 of 2000. Hereinafter 'the MRA'.

¹⁵⁵ Section 1 of the Environmental Management Act 7 of 2007 (EMA)MA, sv 'sustainable development'. See also section 3(2)(f) of the EMA.

¹⁵⁶ Section 32(1) of the MRA.

¹⁵⁷ In this context, a 'right' means a right to harvest marine resources whereas an 'exploratory right' means a right to harvest those resources on an exploratory basis. See section 1 of the MRA, sv 'exploratory right' and 'right'.

¹⁵⁸ Section 32(1) of the MRA.

¹⁶⁰ Section 33(1) of the MRA.

¹⁶¹ Section 33(1) of the MRA.

Minister has the power to set the conditions, including quotas,¹⁶² on which any person may harvest the marine resource applied for.¹⁶³

When the Fisheries Minister considers an application for a right to harvest a marine resource, he may take into account many factors. Specifically, the Minister may have regard to:

- the Namibian citizenship of the applicant;¹⁶⁴
- whether beneficial control of the applicant company vests in Namibian citizens;¹⁶⁵
- whether the applicant owns the vessel he will use to harvest the resource;¹⁶⁶
- the ability of the applicant to exercise the right satisfactorily;¹⁶⁷
- the advancement of previously disadvantaged Namibians;¹⁶⁸
- regional development within Namibia;¹⁶⁹
- cooperation with other countries, especially SADC countries;¹⁷⁰
- the conservation and economic development of marine resources;¹⁷¹
- whether the applicant has successfully performed under an exploratory right in respect of the resource applied for;¹⁷²
- socio-economic concerns;¹⁷³ and
- the contribution of marine resources to food security.¹⁷⁴

These considerations confer on the Fisheries Minister a wide discretion to grant applications for rights, including exploratory rights,¹⁷⁵ or to enter into fisheries agreements¹⁷⁶ to harvest marine resources.

The abovementioned considerations also apply when the Minister determines whether to allocate a quota.¹⁷⁷ The MRA empowers the Fisheries Minister to subject the harvesting of a marine resource to a quota.¹⁷⁸ However, the aggregate of quotas allocated by the Minister in respect of a marine resource may not exceed the total allowable catch set for that resource.¹⁷⁹ In that fashion, the Act empowers the Fisheries Minister to regulate marine resources sustainably by granting rights, and issuing quotas and other authorizations to allow businesses and individuals to exploit marine resources without depleting them, thus realising the sustainable development principle embedded in the Act.

¹⁶² See section 39 of the MRA.

¹⁶³ Section 33(1) of the MRA.

¹⁶⁴ Section 33(4)(a) of the MRA.

¹⁶⁵ Section 33(4)(b) of the MRA.

¹⁶⁶ Section 33(4)(c) of the MRA.

¹⁶⁷ Section 33(4)(d) of the MRA.

¹⁶⁸ Section 33(4)(e) of the MRA.

¹⁶⁹ Section 33(4)(f) of the MRA.

¹⁷⁰ Section 33(4)(g) of the MRA.

¹⁷¹ Section 33(4)(h) of the MRA.

¹⁷² Section 33(4)(i) of the MRA.

¹⁷³ Section 33(4)(j) of the MRA.

¹⁷⁴ Section 33(4)(k) of the MRA.

¹⁷⁵ See section 34 of the MRA.

¹⁷⁶ See section 35 of the MRA.

¹⁷⁷ See section 39(3)

¹⁷⁸ Section 39(1) of the MRA.

¹⁷⁹ Section 39(6) of the MRA.

Nonetheless, the wide discretion that the Act endows the Minister with in allocating quotas has enabled the Minister to allocate fishing quotas without any competitive bids. The exploitation of marine resources has come under scrutiny in recent months following the fallout of the Fishrot scandal. The Fisheries Minister Albert Kawana announced an audit of the sector to find out how marine resources are exploited.

6. Marine scientific research and marine technology

The seas in Namibia are also used for scientific research. For example, the ECOFISH, funded by the European Union, is a joint project coordinated by the Benguela Current Commission and aimed at modernising and enhancing the management of key marine resources in Namibia, Angola, and South Africa.¹⁸⁰

The University of Namibia (UNAM), the country's leading institution of higher learning, has one of its 12 campuses in Walvis Bay. The Sam Nujoma Marine and Coastal Resources Research Centre (SANUMARC) has given that campus a clear vocation to specialise in marine sciences, which it did. UNAM, through its Walvis Bay campus, conducts considerable scientific research in the sea, including in the field of marine biology.

The National Heritage Council (see 'Protection of the marine cultural heritage' section below) may, by notifying the public in the *Gazette*, declare any area a conservation area on the basis of its scientific interest.¹⁸¹ After an area has been so declared, any person proposing to undertake within that conservation area certain development or construction must notify the National Heritage Council.¹⁸² For instance, that person must notify the Council if he or she intends to build within that area a pipeline exceeding 300 meters in length.¹⁸³ After receiving the notification, the Council must require him or her to obtain an 'environment impact assessment'.¹⁸⁴

7. Marine tourism

The Namibia Tourism Board (NTB), established by virtue of the Namibia Tourism Board Act 21 of 2000, regulates the country's tourism industry. It registers and grades accommodations.

Although the ongoing Covid-19 pandemic has decimated marine tourism and the tourism industry generally, marine tourism constitutes one of the main attractions of Namibia for both foreign and Namibian tourists.

In particular, Walvis Bay attracts many tourists who like sailing, cruises, and oyster culture. The neighbouring city of Swakopmund has several activities that tourists can engage in along the sea, including the dunes considered the world's highest.

¹⁸⁰ Benguela Current Commission, *Partners* (2021) <https://www.benguelacc.org/index.php/en/partners> (accessed: 23.12.2021).

¹⁸¹ Section 54(1) of the National Heritage Act 27 of 2004. Hereinafter 'the NHA'.

¹⁸² Section 54(6) of the NHA.

¹⁸³ Section 54(6)(b) of the NHA.

¹⁸⁴ Section 54(7) of the NHA.

In addition to Walvis Bay and Swakopmund in the Erongo region, tourists also visit the Lüderitz and the Penguin Islands.

8. Protection and preservation of the marine environment

International law and domestic statutes (on marine resources and the environment) protect the marine environment in Namibia. Both the MRA and the EMA derive from Section 5 of the LOSC, which obliges member states, such as Namibia, to adopt laws and regulations to prevent, reduce and control pollution of the marine environment.¹⁸⁵ For instance, the LOSC entitles Namibia to manage and conserve natural resources.¹⁸⁶ For its part, the MRA empowers the Fisheries Minister to oblige rights applicants to carry out environmental impact studies,¹⁸⁷ and to prescribe measures for the conservation of marine resources, the control of the harvesting of those resources, and the protection of the marine environment.¹⁸⁸

The Minister may declare an area as a marine reserve¹⁸⁹ and set conditions for accessing this reserve.¹⁹⁰ This declaration aims to protect and regenerate marine resources.¹⁹¹ Moreover, the Act makes it an offence for anyone, in a marine reserve, to disturb, alter or destroy the natural environment in any way.¹⁹²

The EMA constitutes the primary legislation for protecting the environment in Namibia. The principles that it lays down extend to Namibia's marine environment. As defined by the EMA, the 'environment' denotes

the complex of natural and anthropogenic factors and elements that are mutually interrelated and affect the ecological equilibrium and the quality of life, including the natural environment that is the land, *water* and air, all organic and inorganic material and all living organisms.¹⁹³

The Act pursues three distinct goals: to ensure that decision-makers and stakeholders consider timeously and carefully how certain activities affect the environment, that interested and affected parties participate timeously in the assessment of those activities, and that decision-makers take into account the findings of that assessment before they decide any matters related to those activities.¹⁹⁴

The EMA enshrines 12 principles for managing the environment. These comprise:

- using renewable resources sustainably;¹⁹⁵

¹⁸⁵ Section 5 comprises Articles 207-212 of the LOSC, which all deal with the prevention, reduction, and control of marine pollution.

¹⁸⁶ Article 56(1)(a) of the LOSC.

¹⁸⁷ Section 34(3) of the MRA.

¹⁸⁸ Section 47(3) of the MRA.

¹⁸⁹ Section 51(1) of the MRA.

¹⁹⁰ Section 51(2)(c) of the MRA.

¹⁹¹ Section 51(1) of the MRA.

¹⁹² Section 52(4)(d) of the MRA.

¹⁹³ Section 1 of the EMA, sv 'environment'. Emphasis added.

¹⁹⁴ Section 2 of the EMA.

¹⁹⁵ Section 3(2)(a) of the EMA.

- involving the community in managing natural resources and sharing their benefits;¹⁹⁶
- promoting the participation of all interested and affected parties and considering their interests;¹⁹⁷
- accessing environmental resources equitably;¹⁹⁸
- undertaking environmental impact assessments (EIAs);¹⁹⁹
- promoting sustainable development throughout;²⁰⁰
- protecting Namibia’s cultural and natural heritage;²⁰¹
- choosing the best practicable environmental option (BPEO);²⁰² (
- reducing and re-using (recycling) waste;²⁰³ applying the polluter-pays principle;²⁰⁴
- observing the precautionary principle;²⁰⁵ and
- preventing damage the environment (the prevention principle).²⁰⁶

These principles guide people and state organs in implementing the EMA²⁰⁷ and serve as a general framework for formulating environmental plans.²⁰⁸

The Constitution also contains principles that encourage the government to maintain ecosystems, essential ecological processes and biological diversity, and to utilise living natural resources sustainably for the benefit of all Namibians, both present and future.²⁰⁹ Although these principles do not legally bind the government, they can inform and guide the government in passing specific laws and in interpreting them.²¹⁰

9. Protection of the marine cultural heritage

The National Heritage Act 27 of 2004 (‘NHA’) defines ‘heritage’ as denoting ‘places and objects of heritage significance’,²¹¹ which in turn refers to the ‘aesthetic, archaeological, architectural, cultural, historical, scientific or social significance’.²¹²

¹⁹⁶ Section 3(2)(b) of the EMA.

¹⁹⁷ Section 3(2)(c) of the EMA.

¹⁹⁸ Section 3(2)(d) of the EMA.

¹⁹⁹ Section 3(2)(e) of the EMA.

²⁰⁰ Section 3(2)(f) of the EMA.

²⁰¹ Section 3(2)(g) of the EMA.

²⁰² Defined as “the option that provides the most benefit or causes the least damage to the environment as a whole, at a cost acceptable to society, in the long term as well as in the short term”. Section 3(2)(h) of the EMA.

²⁰³ Section 3(2)(i) of the EMA.

²⁰⁴ The principle that holds that “a person who causes damage to the environment must pay the costs associated with rehabilitation of damage to the environment and to human health caused by pollution”. Section 3(2)(j) of the EMA.

²⁰⁵ This principle arises where “there is sufficient evidence which establishes that there are threats of serious or irreversible damage to the environment”. In such circumstances, “lack of full certainty may not be used as a reason for postponing cost-effective measures to prevent environmental degradation.” Section 3(2)(k) of the EMA.

²⁰⁶ Section 3(2)(l) of the EMA.

²⁰⁷ Section 3(1)(a) and (c) of the EMA.

²⁰⁸ Section 3(1)(b) of the EMA.

²⁰⁹ Article 95(1) of the Namibian Constitution.

²¹⁰ Article 101 of the Namibian Constitution. See also N Ndeunyema *Re-Invigorating Water Through Ubuntu: A Human Right to Water Under the Namibian Constitution* (2021) 192-206 (discussing the non-justiciability of the principles contained in Chapter 11 of the Namibian Constitution vis-à-vis the right to water.).

²¹¹ Section 1 of the National Heritage Act 27 of 2004, sv ‘heritage’. (GG 3361) brought into force on 1 September 2005 by GN 105/2005 (GG 3490). Hereinafter ‘the NHA’.

²¹² Section 1 of the NHA, sv ‘heritage significance’.

Protecting Namibia's marine cultural heritage thus entails conserving a heritage place or object. A 'place' includes a site and the remains of a ship or part of a ship.²¹³ An 'object', on the other hand, an archaeological object, palaeontological and rare geological objects, meteorites, ethnographic art objects, military objects, objects of decorative or fine art, and objects of scientific or technological interest.²¹⁴

One of the 12 principles for managing the environment in Namibia urges the State and all persons to protect and respect Namibia's cultural and natural heritage, including its biological diversity.²¹⁵ This principle, set out in the Environmental Management Act, seeks to guarantee that present and future generations can benefit from this heritage.²¹⁶

Namibia has a rich cultural heritage, both pre-colonial and post-colonial (i.e., post-Independence). To protect and conserve places and objects of heritage significance,²¹⁷ the Namibian government implements several laws, principally the NHA. The Act has also instituted the National Heritage Council, whose mission consists in identifying, conserving, protecting, and managing places and objects of heritage significance across the country,²¹⁸ including those around or under the sea. The NHA specifies that the remains of all ships and all articles situated on the coast in the territorial waters or the contiguous zone for 35 years or more are historic shipwrecks and historic shipwreck objects, respectively.²¹⁹

The NHA mainly protects Namibia's marine cultural places and objects by declaring them heritage places or objects. The National Heritage Council may recommend to the Minister responsible for culture that he or she declare a place or an object a heritage place or object.²²⁰ After the Culture Minister so declares a heritage place or heritage object, the Council includes them as such in the Namibian Heritage Register.²²¹ The place or the object then becomes a 'protected place'²²² or a 'protected object'.²²³

The NHA prohibits anyone from conducting certain activities in protected places. It forbids them from engaging in those activities (for example, demolishing or altering a protected place; or despoiling or exporting a protected object) without a permit.²²⁴ It also forbids them from dealing with heritage resources (for example, listed buildings, conservation areas, sites and other heritage resources, and historic shipwrecks) in a manner contrary to the provisions of the NHA.²²⁵

²¹³ Section 1 of the NHA, sv 'place'. See also Article 303 of the LOSC, which stipulates that:

"1. States have the duty to protect objects of an archaeological and historical nature found at sea and shall cooperate for this purpose.

2. In order to control traffic in such objects, the coastal State may, in applying article 33, presume that their removal from the seabed in the zone referred to in that article without its approval would result in an infringement within its territory or territorial sea of the laws and regulations referred to in that article.

3. Nothing in this article affects the rights of identifiable owners, the law of salvage or other rules of admiralty, or laws and practices with respect to cultural exchanges.

4. This article is without prejudice to other international agreements and rules of international law regarding the protection of objects of an archaeological and historical nature."

²¹⁴ Section 1 of the NHA, sv 'object'.

²¹⁵ Section 3(2)(g) of the EMA.

²¹⁶ Section 3(2)(g) of the EMA.

²¹⁸ Section 5(1)(b) of the NHA.

²¹⁹ Section 57(1)-(2) of the NHA.

²²⁰ Sections 28(1) and 35 of the NHA.

²²¹ Section 36(1) of the NHA.

²²² Section 1 of the NHA, sv 'protected place'.

²²³ Section 1 of the NHA, sv 'protected object'.

²²⁴ Section 46 of the NHA.

²²⁵ Sections 53-58 of the NHA.

10. Maritime security

As a coastal state, Namibia has the power to police regulations pertaining to health, fiscal matters, security and customs in its territorial sea and the contiguous zone.²²⁶ The Marine Traffic Act 2 of 1981 does not allow any ship to pass through Namibia's territorial sea if that passage prejudices the security of Namibia.²²⁷ Furthermore, the Transport Minister may, after consulting the Defence Minister, suspend the passage of any ship in the territorial sea or prohibit them from entering internal waters if the Transport Minister considers it essential to protect the security of Namibia.²²⁸

Maritime security is ensured by specialised services, including the military, immigration officers, the police and the Namibian Central Intelligence Service. Alongside the army and the medical service, the Namibian military comprises an air force²²⁹ and a naval force.²³⁰ These two forces patrol and maintain security in Namibia's territorial sea,²³¹ the contiguous zone,²³² and the EEZ²³³ as well as the sky above them.

The Immigration Control Act 7 of 1993 allows immigration officers to board any ship that enters Namibia's territory and that reaches any port.²³⁴ The Act imposes a duty on masters that have entered any port to deliver, if so requested by an immigration officer, certain information to that officer.²³⁵ That information must consist of a list stating the names of all passengers on board the ship;²³⁶ a list of stowaways, if any;²³⁷ a list of the crew and all the persons employed or carried on the ship;²³⁸ and a return from a medical officer stating any disability or cases of diseases that have occurred on the voyage.²³⁹

When carrying out police functions, the naval force or any 'peace officer'²⁴⁰ can also intervene by boarding or searching a ship, or by detaining and arresting someone on the ship reasonably suspected or accused of having committed a crime in Namibia's territorial sea, the contiguous zone, or the EEZ.²⁴¹ Any crime committed within the territorial sea, the contiguous, or the EEZ

²²⁶ See Article 33 of the LOSC.

²²⁷ Section 1 of the Marine Traffic Act, sv 'innocent passage'.

²²⁸ Section 7(1) of the MTA.

²²⁹ See section 1, read with section 2(b), of the Defence Act 1 of 2000 (GG 2749), sv 'military'. This Act was brought into force on 15 July 2002 by GN 109/2002 (GG 2765).

²³⁰ See section 1, read with section 2(c), of the Defence Act 1 of 2000, sv 'military'.

²³¹ Section 2(3) of the TEEZ.

²³² Section 3A(3) of the TEEZ (empowering Namibia to prevent the contravention of any fiscal law or any law relating to customs, immigration or health). See also Article 33 of the LOSC.

²³³ See Section 4(3)-(4) of the TEEZ.

²³⁴ Section 14(1) of the Immigration Control Act 7 of 1993 (GG 690). This Act was brought into force on 29 July 1994 by GN 133/1994 (GG 895) Hereinafter 'the ICA'.

²³⁵ Section 15(1) of the ICA.

²³⁶ Section 15(1)(a)(i) of the ICA.

²³⁷ Section 15(1)(b) of the ICA.

²³⁸ Section 15(1)(c) of the ICA.

²³⁹ Section 15(1)(d) of the ICA.

²⁴⁰ Section 1 of the Criminal Procedure Act 51 of 1977 defines a 'peace officer' as including a magistrate, justice, police official, and correctional officer.

²⁴¹ See Sections 21, 23-29 (on searches and entry of premises); and 39-41, 43-46, 48-50, and 52 (on arrests) of the Criminal Procedure Act 51 of 1977. These provisions presumably apply to all armed forces personnel when carrying out police functions. See Legal Assistance Centre *Use of Force by Law Enforcement Officials in Namibia* (2019) 36.

zone falls under the jurisdiction of Namibian courts. As indicated earlier in the section on navigation, prosecutors in Namibia have prosecuted people for fishing in the EEZ without a licence or a permit.

11. Marine spatial planning and integrated coastal zone management

Namibia has adopted marine spatial planning (MSP) as a means to develop the ocean sustainably. MSP refers to the political process whereby a state allocates three-dimensional spaces (ecosystems) to particular uses and purposes. This enables the state to attain goals relating to the ecology, the economy, and society. The initiative to endorse MSP makes Namibia one of the first countries in the world to strategically manage when where people may carry out activities in the ocean.²⁴²

In terms of its MSP, Namibia has divided its ocean space into three sub-planning units: northern, central and southern. These three marine planning areas span Namibia's EEZ, including the territorial sea. The central marine area serves as pilot area for Namibia to develop its first marine spatial plan because the bulk of economic activities takes place in that area.²⁴³

Nonetheless, unlike South Africa, Namibia lacks legislation that specifically regulates MSP.²⁴⁴ The absence of legislative framework endangers the efficacy of implementing MPS in Namibia.

CONCLUSION

The law of the sea in Namibia has a modern, sophisticated legal framework. This framework consists of the Constitution, statutes (especially the Marine Resources Act, the Environmental Management Act, the Marine Traffic Act, and the Territorial Sea and Exclusive Economic Zone of Namibia (TSEEZ) Act), international law, common law, and case law. Notably, the TSEEZ Act incorporates the terms of the LOSC while the Environmental Management Act repeats and endorses 12 fundamental principles of international environmental law.

Namibia's maritime law deals with the baselines and the demarcation of maritime zones. It fixes the country's maritime boundaries and governs the different uses of the sea in the country.

The sea serves Namibia in more than one respect. The sea provides an environment for port activities, navigation, search-and-rescue operations, the laying of submarine cables, the commercial exploitation of marine resources, scientific and research efforts, tourism, the preservation of the marine cultural heritage, law-and-order activities, and planning.

All in all, the sea is one of the pillars on which Namibia has built its economy, prosperity, society, and cultures. That said, it can be a force for both good and evil. Indeed, the sea represents one of the biggest sources of income for the government and yet it was also the scene for the ugliest corruption scandal of the country, as demonstrated in the ongoing Fishrot trial.

²⁴² Finke et al (n) 1.

²⁴³ Finke et al (n) 4.

²⁴⁴ Finke et al (n) 9.

