NAMLEX APPENDIX
BACKGROUND INFORMATION

OVERVIEW

International agreements are referred to by various names – such as "treaties", "conventions", "covenants" and "accords". Such terminology is not used consistently, and the title given to the agreement generally has no particular legal effect. The term "treaty" is a generic term which is used for all such international instruments. The term "international agreements" is also used in this way.

How international agreements are negotiated and brought into force depends on the intention of the parties. Generally, the first step in the creation of an international agreement is the **negotiation of a text**, which can be a long and difficult process. In the case of multilateral treaties this usually takes place in an international forum, such as the United Nations.

Once consensus is reached, the text is adopted and authenticated as the genuine and definitive outcome of the negotiations by the negotiating states. ("**Adoption**" or "**authentication**" does not make the agreement binding, but indicates acceptance of the text for consideration by states.) Usually the agreement is then opened for signature by states.

Usually, "**signature**" of an international agreement by a state does not itself make it binding on the state or create an obligation to ratify, but expresses an intent to become bound by the treaty at a later stage – once constitutionally required domestic procedures, such as approval by the legislature, have been carried out.

When the appropriate internal procedures have been followed, a state can complete the process of becoming bound internationally by "ratifying" or "acceding to" the treaty.

"**Ratification**" is the act whereby a state formally indicates its consent to be bound by a treaty that it has previously signed. In the case of bilateral treaties, ratification is usually accomplished by exchanging the requisite instruments, while in the case of multilateral treaties the usual procedure is for the depositary to collect the instruments or letters of ratification of all states, keeping all parties informed of the situation. The treaty in question will often provide that it will come into force once a specified period of time has passed after a required number of ratifications have been deposited (such as 30 days from the date of the 15th ratification). This approach ensures that there is a minimum level of international support for the treaty before it becomes binding on any state. Provision for an interval between achievement of the requisite level of support and the date when the treaty comes into force internationally provides states with the necessary time to make preparations to give domestic effect to the treaty, where this is required by domestic law or the nature of the treaty.

"**Accession**" is the act whereby a state accepts the offer to become a party to a treaty which it did not previously sign. The conditions and procedure depend on the provisions of the international agreement, but it is usually done by depositing the instrument of accession with the depositary. While accession has the same legal effect as ratification, it only involves a one-step process unlike the two-step process needed for ratification (signature followed by

ratification). Accession usually occurs once an international agreement has entered into force and can no longer be signed. In contrast, an international agreement that was signed but not ratified by a state before it came into force can, in most cases, still be ratified later. Recent practice has also introduced the terms "acceptance" or "approval" to describe accession.

While ratification and accession are the most common means by which consent to be bound by a treaty may be expressed, they are not the only ones. Other means of becoming a party to an international agreement may be specifically agreed on.

The terminology for the various steps that lead to states becoming parties to international agreements can be confusing, and is not always used in technically-accurate ways. For example, a head of state may purport to "sign" an agreement that is no longer open for signature (this step therefore being merely a diplomatic indication that the state intends to accede to the treaty) or a legislature may approve the "ratification" of a treaty, when in fact the state is about to accede to it. Such inaccurate phrasing has no impact on the legal effect of the actual acts.

When and how a treaty **enters into force** depends on its provisions. Most commonly, a multilateral agreement will come into force on a set date or as soon as a minimum number of states have consented to be bound by it. A treaty can also apply provisionally between parties to it before it enters officially into force, if it so provides, or the negotiating States have in some other manner so agreed.

Sometimes a state will enter "**reservations**" to a treaty. This means that the state accepts the multilateral treaty in general, but refuses to bind itself to compliance with particular provisions. Reservations must not be incompatible with the overall object and purpose of the treaty. Some treaties do not permit reservations; this will always be specified in the text of the treaty.

States may also make "**declarations**" which clarify their understanding of particular provisions. Unlike reservations, declarations do not exclude the legal effect of such provisions but simply explain the state's interpretation of them.

After a treaty is concluded, the written instruments expressing the consent of the state to be bound by the treaty, along with any reservations or declarations, are placed in the custody of a depositary. In terms of international law, a state has not consented to be bound by a treaty until the **instrument of ratification or accession** has been **deposited with the appropriate institution.** The Secretary-General of the United Nations is the depositary of many multilateral treaties. Other examples of depositaries are international organizations or the government of the state where the treaty was signed.

Generally, the state parties have competence to interpret a treaty. The starting point for **interpretation** is the intention of the parties as expressed by the ordinary meaning of the text of the treaty. In case of ambiguity in a treaty text, consideration is often given to the context of the term and/or treaty in question, the object and purpose of the treaty and the rules of general international law. As supplementary means of interpretation, recourse may be had to the preparatory works (the record of negotiations which led to the acceptance of the text, sometimes referred to by the French term *travaux préparatoires*) and the circumstances of the conclusion of the treaty.

A treaty can be amended by agreement between the parties. Many treaties provide a procedure for amendment, which can replace parts of a previous treaty or add additional provisions. Such changes can take the form of protocols or other amendments, the main difference being that a **protocol** is in itself a treaty that supplements a previous treaty, while an amendment is not a treaty in itself. In case of **amendments which are not protocols**, the

treaty usually indicates the conditions and procedures for agreeing to an amendment and its entry into force, which can range from a process similar to the one for treaties to forms of tacit acceptance of amendments concluded by a treaty body such as a Conference of the Parties. Where an amendment to a multilateral treaty has been approved by some but not all of the parties, the terms of the original, unamended treaty continue to govern the relationship between the parties, except between the parties who have all approved the amendment.

RELEVANT CONSTITUTIONAL PROVISIONS

General

Article 144 states: "Unless otherwise provided by this Constitution or Act of Parliament, the general rules of public international law and international agreements binding on Namibia under this Constitution shall form part of the law of Namibia."

Post-independence procedure

Article 32(3)(e) empowers the President of Namibia to "negotiate and sign international agreements, and to delegate such power".

Article 40 gives Cabinet the function "to assist the President in determining what international agreements are to be concluded, acceded to or succeeded to and to report to the National Assembly thereon", and "to agree to the ratification of or accession to international agreements which have been negotiated and signed in terms of Article 32(3)(e)".

Article 63(2)(e) gives the National Assembly the power "to agree to the ratification of or accession to international agreements which have been negotiated and signed in terms of Article 32(3)(e) hereof".

Transitional provisions on applicability of pre-independence treaties

Article 143 states: "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 63(2)(d) of the Namibian Constitution gives the National Assembly the power "to consider and decide whether or not to succeed to such international agreements as may have been entered into prior to Independence by administrations within Namibia in which the majority of the Namibian people have historically not enjoyed democratic representation and participation".

Article 145, entitled "Saving", provides that nothing in the Constitution shall be construed as imposing upon the Government of Namibia "(a) any obligations to any other State which would not otherwise have existed under international law;" or "(b) any obligations to any person arising out of the acts or contracts of prior Administrations which would not otherwise have been recognised by international law as binding upon the Republic of Namibia." It also states that nothing in the Constitution "shall be construed as recognising in any way the validity of the Administration of Namibia by the Government of the Republic of South Africa or by the Administrator-General appointed by the Government of the Republic of South Africa to administer Namibia".

Non-binding provisions of the Namibian Constitution

Article 95, which contains non-binding principles of State policy, expresses the State's intention to become a member of the International Labour Organisation (ILO) and, where possible, to adhere to and act in accordance with the international Conventions and Recommendations of the ILO.

Article 96, which is a non-binding article on foreign relations, says that the State shall endeavour to ensure that it "fosters respect for international law and treaty obligations" in its international relations.

INTERNATIONAL LAW AS PART OF NAMIBIAN LAW

As provided in the Constitution, Namibia is a state where international law "binding on Namibia" is automatically part of domestic law. This applies to bilateral and multilateral treaties, as well as to "general rules of public international law". With respect to the exception contained in Article 144 ("Unless otherwise provided by this Constitution or an Act of Parliament…"), there is as yet no instance in Namibia where the Constitution or an Act of Parliament has expressly specified that international law binding on Namibia does not form part of the law of Namibia. In the case of a clear inconsistency between an Act of Parliament and an international obligation, courts may prefer to give effect to the domestic law in the spirit of Article 144 of the Namibian Constitution. However, this would not have any effect on Namibia's obligations at the international level. Namibia would remain bound by its international obligation towards other states.

As far as international agreements are concerned, it would appear that these become part of Namibian law once the constitutional requirements (most notably the approval of the National Assembly) have been complied with and they have become binding on Namibia as a matter of international law. In other words, once Namibia has completed the process of becoming a party to a treaty (whether the consent to be bound is expressed by signature followed by ratification or by accession or otherwise), and provided that the treaty has entered into force internationally (for example, because it has achieved the number of ratifications which it requires by its own terms in order to become effective).

However, O'Linn AJA of the Namibian Supreme Court expressed the view in *Government of the Republic of Namibia & Others* v *Mwilima & All Other Accused in the Caprivi Treason Trial* 2002 NR 235 (SC) (in *dicta* in a dissenting judgment at 269) that international agreements are binding as a matter of Namibian law as of the moment they are approved by the National Assembly. As noted above, Article 32(3)(e) of the Namibian Constitution gives the President of Namibia the power to "negotiate and sign international agreements, and to delegate such power", and Article 63(2)(e) of the Namibian Constitution gives the National Assembly the power "to agree to the ratification of or accession to international agreements which have been negotiated and signed in terms of Article 32(3)(e) hereof". However, neither of these statements would appear to make an international agreement "binding upon Namibia under this Constitution" in an instance where that treaty is not binding on Namibia under international law because the process of ratification or accession, including deposit, is not complete; the terms "ratification" and "accession" in Article 63(2)(e) must surely be understood to have their ordinary meaning in the context of international law. Thus, with respect, the viewpoint of O'Linn AJA in the *Mwilima* case seems to be in error.

According to Article 144, the "general rules of public international law" also form part of the law of Namibia. It is generally accepted that this term mainly comprises (a) customary international law and (b) general principles of law as recognized by the majority of domestic legal systems and international judicial bodies. Customary international law is created by the general and consistent practice of states followed by them from a sense of legal obligation (so-called *opinio iuris*). Even where there has been no specific acceptance of any particular rules by a particular state, rules of customary international law create international obligations for that state. A state may only exempt itself from the application of a new customary rule by way of clear and consistent objection. For example, Namibia has not yet expressed its consent to be bound by the *1969 Vienna Convention on the Law of Treaties* – the main instrument addressing the international law on treaties between states – but some provisions of this treaty still apply to Namibia as they constitute customary international law. When there is no provision in a treaty and no recognized principle of customary international law available for application in a dispute involving international law, the general principles of law as recognized by the majority of domestic legal systems and international judicial bodies can be

used to “fill the gap”. While the exact scope of these general principles is controversial, they include basic concepts of law such as the principle that a breach of an obligation results in a duty to make reparation, the principle of good faith, the principle of estoppel and formal principles relating to evidence, jurisdiction and procedure. This Appendix does not include “general rules of public international law” binding on Namibia, as to assemble an exhaustive list of such rules would constitute a near impossible task. In case one would like to rely on “general rules of public international law” an investigation would have to be conducted with respect to the specific question involved.

International law is in general binding only on states. Namibia has in some cases enacted specific legislation to clarify how an international treaty is to be considered to be part of domestic Namibian law (see, for example, Namibia Refugees (Recognition and Control) Act 2 of 1999, in particular section 2). In most cases it is left unspecified how provisions of a treaty intended in the first instance to be binding on states in their relations with each other are to be interpreted within the domestic legal sphere of Namibia.

PRE-INDEPENDENCE TREATIES

Under **Article 143**, treaties that were binding on Namibia prior to independence continue to be binding, unless and until the National Assembly decides otherwise. Apart from the Constitution, Namibia has made no general statements or declarations on which pre-Independence treaties would be accepted or rejected.

On 21 June 1971, the **International Court of Justice** issued an **advisory opinion** holding that the Mandate for South West Africa had been lawfully terminated, and that "the continued presence of South Africa in Namibia being illegal, South Africa is under obligation to withdraw its administration from Namibia immediately".[1] Paragraph 122 of this opinion stated that

> …member States are under obligation to abstain from entering into treaty relations with South Africa in all cases in which the Government of South Africa purports to act on behalf of or concerning Namibia. With respect to existing bilateral treaties, member States must abstain from invoking or applying those treaties or provisions of treaties concluded by South Africa on behalf of or concerning Namibia which involve active intergovernmental co-operation. With respect to multilateral treaties, however, the same rule cannot be applied to certain general conventions such as those of a humanitarian character, the non-performance of which may adversely affect the people of Namibia. It will be for the competent international organs to take specific measures in this respect.

In 1989, the **UN Institute for Namibia (UNIN)** published a comprehensive list of pre-independence treaties (up to year 1984).[2] This list divided pre-Independence treaties into five categories:

> *Category A:* Treaties presently in force in respect of Namibia. It includes agreements entered into or acceded to by the United Nations Council for Namibia; and multilateral conventions of a humanitarian character which were in force in respect of Namibia on 27 October 1966 when the mandate was terminated and which, according to the 1971 Advisory Opinion of the International Court of Justice, continue in force today.
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> *Category B:* Treaties extended to Namibia by South Africa before 27 October 1966, and which were in force on that day. Certain treaties containing continuing provisions or which have not been clearly terminated are included within this category, even though operations under the treaty may have ceased by 27 October 1966.
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> *Category C:* Treaties extended to Namibia by South Africa before 27 October 1966, but which had been terminated before that day.
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> *Category D:* Treaties which may be deemed to be in force in respect to Namibia as they are generally classified as dispositive, localized or territorial treaties.

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[1] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276* (1970). The full text of the court's opinion is available online at www.icj-cij.org/files/case-related/53/053-19710621-ADV-01-00-EN.pdf. See also John Dugard, ed, *The South West Africa/Namibia Dispute: Documents and Scholarly Writings on the Controversy between South Africa and the United Nations*, Berkeley/Los Angeles, California: University of California Press, 1973 at 447-ff.

[2] UN Institute for Namibia (UNIN), *Independent Namibia: Succession to Treaty Rights and Obligations,* Lusaka: 1989, Annex.

> *Category E:* These are treaties which South Africa, in violation of the relevant rules of international law, has expressly extended to Namibia after the termination of the mandate. The treaties are not internationally in force regarding Namibia.[3]

While Namibia's post-independence treaty practice with respect to treaties entered into prior to Namibian independence has not been consistent, it appears that **as a general rule (with some exceptions) the pre-independence treaties that were binding on Namibia at the time of independence, and as a result also continue to be binding thereafter, are those treaties that were entered into by the United Nations Council for Namibia (UNCN) under its powers granted by the UN General Assembly**. This is the position, for example, adopted by the UN Secretary General, who has entered in the UN Treaty Series the following general note regarding Namibia:

> Formerly: 'Namibia (United Nations Council for Namibia)' until independence (21 March 1990).
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> The legal status of the United Nations Council for Namibia for the purpose of its participation in treaties was an issue during the period prior to Namibia's assuming responsibility for its international relations and becoming a member State of the United Nations. The Council for Namibia was established as a subsidiary organ of the General Assembly by resolution 2248 (S-V) of 19 May 1967. As a subsidiary organ, it was responsible to, and under the authority of, the General Assembly in the same way as any other subsidiary organ. Unlike other subsidiary organs, however, the Council functioned in a dual capacity: as a policy-making organ of the General Assembly and as the legal Administering Authority of a Trust Territory. This latter characteristic of the Council distinguished it from other United Nations subsidiary organs and it could, therefore, be considered an organ sui generis for certain purposes. As the legal Administering Authority, the Council was expressly endowed by the General Assembly with certain competences and functions to be exercised on behalf of Namibia in terms comparable to that of a Government, inter alia, to represent Namibia internationally. Even though South Africa continued, at the time, to exercise de facto control over the Territory, the essential element was that the Council had the de jure competence, inter alia, to enact any necessary laws and recognitions. Indeed, the Council became a party to many treaties deposited with the Secretary-General, such as the International Convention on the Elimination of All Forms of Racial Discrimination, 1966; the International Convention on the Suppression and Punishment of the Crime of Apartheid, 1973; the Constitution of the United Nations Industrial Development Organization, 1979; and the United Nations Convention on the Law of the Sea, 1982.[4]

Treaties entered into on behalf of "South West Africa" by South Africa, whether before or after its Mandate to govern "South West Africa" (Namibia) was revoked in 1966, do not generally appear to be considered binding on Namibia either by Namibia or the other states parties to such treaties unless Namibia explicitly succeeded to them after independence (or unless the exception for "certain general conventions such as those of a humanitarian character" cited by the 1971 advisory opinion applies).

This general distinction between treaties entered into on behalf of Namibia by the UNCN and South Africa is also reflected in the indicated dates on which the treaties became binding on Namibia:

(i) **treaties entered into by the UNCN are indicated as binding from the date of accession by the UNCN** (thus, they continued to be binding after independence), with the following exceptions:

[3] Ibid at 57-58.
[4] Source: https://treaties.un.org/pages/HistoricalInfo.aspx.

- ***Constitution of the World Health Organization (WHO), 1946:*** For an unknown reason, Namibia decided to accede separately post-independence, making the Convention binding on Namibia from the date of its accession as opposed to continuing to be bound based on the UNCN accession; this may have been due to a specific request from the WHO.

- ***Geneva Conventions:*** Namibia appears to consider this a case of duplication of accession, that is both the UNCN and South Africa acceded to the *Geneva Conventions* on behalf of Namibia. As a result, Namibia decided to succeed.

- ***Protocols to the Geneva Conventions***: While these Protocols were entered into on behalf of Namibia by the UNCN and not South Africa (as confirmed by the depositary), the depositary surprisingly interpreted a declaration by Namibia citing Article 143 of the Namibian Constitution as a declaration of succession, even though this general notification differed from Namibia's explicit declaration of succession to the Geneva Conventions and is also generally not considered sufficient for purposes of succession. As a result, the Protocols are indicated as binding from the date of independence, as opposed to continuing to be binding as from the date of accession by the UNCN.

(ii) **treaties entered into by South Africa to which Namibia succeeded after independence are indicated as binding from the date of independence** These treaties are the ***Berne Convention for the Protection of Literary and Artistic Works, 1886, as revised at Berlin (1908)***; ***Geneva Convention on Road Traffic, 1949***; and ***General Agreement on Tariffs and Trade (GATT), 1947*** (while it is likely that South Africa entered into this treaty on behalf of Namibia, it is not entirely clear; see Notes on this treaty in the Appendix).

Namibia does not appear to have used the exception of "certain general conventions such as those of a humanitarian character" cited by the 1971 advisory opinion in its post-independence treaty practice regarding treaties entered into by South Africa on behalf of Namibia.

For additional discussion of these issues, see the following (in chronological order by date of publication):

- Paul C Szasz, "Succession to treaties under the Namibian Constitution", *South African Yearbook of International Law*, Vol 15, 1989/90 at 65-80
- Robert Jennings & Arthur Watts, *Oppenheim's International Law*, London/New York: Longman, 1996, 9th edition
- Mark E Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties*, Leiden/Boston: Martinus Nijhoff Publishers, 2009
- Yaël Ronen, *Transition from Illegal Regimes under International Law,* Cambridge, UK: Cambridge University Press, 2011 at 127-ff
- Olivier Corten & Pierre Klein (eds), *The Vienna Convention on the Law of Treaties: A Commentary*, Oxford, UK: Oxford University Press, 2011
- James Crawford, *Brownlie's Principles of Public International Law*, Oxford, UK: Oxford University Press, 2012, 8th edition at 20-47 ("The Sources of International Law"), 48-111 ("The Relations of International Law and National Law"), 367-394 ("The Law of Treaties"), 423-444 ("Succession to Rights and Duties")
- Anthony Aust, *Modern Treaty Law and Practice*, Cambridge, UK: Cambridge University Press, 3rd edition, 2013
- Malcom Shaw, *International Law*, Cambridge, UK: Cambridge University Press, 2017
- (forthcoming) Laura Halonen & Felix Lüth, "International Law under the Namibian Constitution" (working title).