

# **The Case of Transboundary Wetlands Under the Ramsar Convention: Keep the Lawyers Out!**

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## **ABSTRACT**

How does international environmental law work in practice? That is, not in International Court of Justice (ICJ) cases or on any other international level, but how does it work at a local, grass roots level? A complex pluralistic constellation of principles, rules, and regulations originating from various government institutions exists within the international environmental law domain. Taking those transboundary wetlands protected by the Ramsar Convention on Wetlands of International Importance as an example, this study illustrates the complexity watershed management. While similar principles, such as integrated river basin management, transboundary co-operation, and sustainable use, govern environmental conventions and their accompanying soft law at the international and regional levels, the

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greatest complexities in this genre of legal practice lie at the national level. Governments on both sides of national borders create legislation regarding, among others, water management, nature conservation, environmental protection, mining, fisheries, agriculture, and tourism. These laws often interfere with one another, as well as with their transboundary counterparts. This article highlights two case studies that indicate how national bodies—including public authorities, interest groups, and landowners—deal with international environmental law in this inherently complex legal context.

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## I. INTRODUCTION

### A. *Setting the Scene*

Imagine broad rivers flowing slowly through lowlands into the sea. The fresh river water has traveled hundreds of miles before finally reaching salt water. The estuary is buzzing with economic activity. Dozens of ships pass each day on their way to and from ports in the area, carrying everything from new cars, to oil and chemicals. Fishermen harvest the plentiful seafood. Tourists enjoy the calm of the river on their yachts and watch seals resting on sand banks and large flocks of birds searching for shellfish and shrimps on the river banks. Many of these birds prepare for their long journey to the south, where they will hibernate. Meanwhile, on the rich lands adjacent to the river, farmers harvest their crops. On the horizon, smokestacks of a large industrial site rise into the sky.

This is not an uncommon picture. The same sentences describe many of the world's estuaries. International law plays a major role in many of these locations as a particular estuary may straddle the territory of two or more states. The river itself—as well as the sea in which it ends—will almost always overlap with the territories of several states. The Convention on Wetlands of International Importance especially as Waterfowl Habitat (the Ramsar Convention), designates 1,396 wetlands, covering 122.7 million hectares worldwide.<sup>1</sup> Almost one third of these protected wetlands are transboundary river basins<sup>2</sup> and practically all major transboundary rivers and lakes in Europe and North America fall under the scope of the 1992 United Nations Economic Commission for Europe (UNECE) Helsinki Convention on the Protection and Use of Transboundary Watercourses and International Lakes.<sup>3</sup>

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1. See Final Act of the International Conference on the Conservation of Wetlands and Waterfowl: Convention on Wetlands of International Importance, Feb. 3, 1971, 11 I.L.M. 963 (1972) [hereinafter Ramsar Convention].

2. See Ramsar Convention Secretariat, *Ramsar Handbooks for the Wise Use of Wetlands*, Handbook 17: International Cooperation 13 (3d ed. 2007), available at [http://www.ramsar.org/lib/lib\\_handbooks2006\\_e17.pdf](http://www.ramsar.org/lib/lib_handbooks2006_e17.pdf) [hereinafter Handbook 17].

3. See UN Economic Commission for Europe Helsinki Convention on the Protection and Use of Transboundary Watercourses and International Lakes, 31 I.L.M. 1312 (1992), available at <http://www.unece.org/env/water/pdf/watercon.pdf>, [hereinafter 1992 UNECE Helsinki Convention]. See also HEATHER L. BEACH ET AL., TRANSBOUNDARY FRESHWATER DISPUTE RESOLUTION: THEORY, PRACTICE, AND ANNOTATED REFERENCES 13 (2000) (“Water not only ignores our political boundaries, it

International environmental conventions such as the Ramsar Convention and the 1992 UNECE Helsinki Convention require states to cooperate in order to achieve “integrated management” of an area.<sup>4</sup> However, managing specific sites is rather complicated for two reasons. First, the protected areas are quite large and have many competent authorities and many applicable legal norms on local and national levels, on both sides of the border, and sometimes on a transnational or regional level (e.g., European Union law). Different competent authorities govern the various issues involved (e.g., water, nature, environment, mining, fisheries, etc.) in a variety of ways, thereby creating a multi-level governance context.<sup>5</sup> The public agencies and government institutions involved depend more or less upon each other as they form a network of agencies that cooperates to perform a specific task. Their relationship is described as one of mutual influence in modern multi-level governance literature.<sup>6</sup> Even though the dispersal of power into a multiplicity of “nodes” in this heteroarchic network often leaves some nodes with more power than others, a clear hierarchic system does not exist.<sup>7</sup>

Second, the protected areas have important economic and ecological functions, including fisheries, transportation, and recreation, and each function is represented by its own interest group. Given the diversity of interests, interest groups are often in conflict. Parts of the areas may also be owned by private landowners. In addition to these inherent conflicts, varying international laws generate further conflicts. While international nature conservation law usually requires authorities to adopt a management system appropriate to the ecological requirements of the site, international water management law adds the perspective of integrated river basin management.

As a consequence, the application of international law in legal practice is extremely complicated. Such complex legal situations may be described as legal pluralism. In these circumstances the plurality consists of many different legal norms, both of state and non-state origin. The

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evades institutional classification and eludes legal generalizations.”).

4. See Ramsar Convention, *supra* note 1; 1992 UNECE Helsinki Convention, *supra* note 3.

5. See JAN GLAZEWSKI, ENVIRONMENTAL LAW IN SOUTH AFRICA 340 (2005) (Glazewski rightfully stating that political boundaries are often located at the worst possible location from an ecological point of view: rivers forming the heart of integrated catchment management areas but at the same time demarcating boundaries are prime examples).

6. E.g., NICK BERNARD, MULTILEVEL GOVERNANCE IN THE EUROPEAN UNION 9 (2002).

7. See *id.*

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many competing social actors will invoke a certain norm depending on which serves their self interest more effectively. Given the multitude of legal norms that may be applied depending on the actor and circumstance, it is unclear exactly which “law” governs a certain protected area. Some literature describes situations like these pluralities in terms of multi-level governance.<sup>8</sup> The term “governance,” however, is not without its own complexities as it is scattered over a multitude of governmental and non-governmental organizations on both sides of transnational boundaries. This article uses both concepts as a starting-point to analyze the actual application of international law in legal practice at a grassroots level.

### *B. Research Questions*

In pursuing this inquiry into conflicting law, several questions arise. What are the legal requirements for managing specially protected transboundary rivers and estuaries under international environmental law? Are these requirements workable in practice, since they are aimed at different integration matters (i.e., integrative water management and integrative nature conservation)? How do various authorities cooperate to reconcile their conflicting interests? What do actors such as public authorities, interest groups, and landowners consider “the law” on transboundary wetlands management?

Answering these questions will provide insight into how legal pluralism, in a multi-level governance context, works in practice in cases involving international environmental law. This will lead to a better understanding of the effect of international environmental law in day-to-day legal practice. Such understanding will help bridge the gap between the multilateral level, with its well-phrased norms such as “integrated management” or “wise use,” and ground level legal reality.

### *C. Approach*

Legal pluralism and multi-level governance are much-debated legal concepts. This article will not enter these debates on a theoretical level, but will examine actual transboundary wetland management situations as its primary approach. Findings will be analyzed in terms of legal pluralism and multi-level governance with two case studies making up the core of the analysis. The legal complexity of these cases makes a

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8. *See id.*

broader survey unfeasible but also highlights the importance of the two particular cases.

The Orange River Mouth area and the Scheldt River estuary were the two cases selected for this study. Both are transboundary wetlands protected under the Ramsar Convention.<sup>9</sup> They are located on the borders between South Africa and Namibia, and between the Netherlands and Belgium, respectively. Both the Orange River Mouth area and the Scheldt River estuary have similar habitats comprised of dynamic, combined salt-fresh water systems with mudflats and salt marshes that offer an important habitat for birds.<sup>10</sup> The nature of this unique habitat justifies their protection under the Ramsar Convention and also under various regional and national nature conservation laws. Harmonization of laws exists in both cases. Southern African Development Community (SADC) law applies to the Orange River Mouth, and European Union (EU) law is applicable to the Scheldt River estuary.<sup>11</sup> Both sites suffer from environmental degradation to the extent that they have been partially listed in the Ramsar Convention's Montreux record of degraded wetlands.<sup>12</sup>

Both areas also have great economic importance. The Scheldt River serves as the gateway to the Antwerp port facilities, one of the world's most important cargo ports, and is important for industry and agriculture. The Orange River Mouth is the center of diamond mining in Namibia and South Africa, plays a role in agriculture, and will likely be used in the future for eco-tourism.<sup>13</sup> Given the economic importance of these areas, both areas have suffered conflicts—sometimes for centuries. In consequence, the Orange River Mouth and the Scheldt River estuary have many resulting bilateral treaties and constitutional court decisions.

Despite their economic and natural similarities, these two areas have important differences. The Scheldt River estuary is a highly developed, densely populated area, with intensive industry and agriculture.<sup>14</sup> The Orange River Mouth is a scarcely populated, under-developed region, almost fully dependent on mining.<sup>15</sup> As far as the law is concerned, the

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9. See Ramsar Convention, *supra* note 1.

10. See the Ramsar Sites Information Service database, <http://www.wetlands.org/rsis/>. See also *infra* Part III(A–B).

11. See *infra* Parts III(A–B).

12. See Montreux Record of Degraded Wetlands, Recommendation 4.8: Change in Ecological Character of Ramsar sites, Fourth Meeting of Contracting Parties, Montreux, July 1990 [hereinafter Montreux Record].

13. See *infra* Part III(B).

14. See *infra* Part III(A).

15. See *infra* Part III(B).

differences between the areas are trivial; however, there may be crucial differences in the application of such laws. The fact that many of the transboundary wetlands protected under the Ramsar Convention are located in developing countries justifies inclusion of the Orange River Mouth case in this project. Given the economic potential of wetlands, developing countries will increasingly focus their attention on wetlands in the near future.

The data on these cases was obtained through various methods. Research was carried out in the four countries concerned: Belgium, The Netherlands, Namibia, and South Africa. Literature, policy documents, evaluation studies, minutes of relevant meetings, and case law formed the starting point for researching the cases. Moreover, I attended meetings, interviewed relevant parties in each of the concerned countries, and conducted site visits to supplement my research.<sup>16</sup>

Part II of this article offers an overview of the most important legal requirements for the management of transboundary rivers and estuaries under international law. It focuses primarily on nature conservation law and water management law, including pollution prevention law with regard to water. Given that international environmental law in practice interplays with regional and/or national law, attention will be given to regional and national law as well. The wetlands that form the center of these case studies are located in Belgian/Dutch and Namibian/South African territories. As a result of the transboundary nature of these cases, this article will focus on the international, regional, and national laws that applies to these countries. Although other fields of law (such as general environmental law, economic law, and mining law) may be relevant to these areas, they will not be examined in this article to minimize complication.

Part III addresses the matter of integrated management through the two case studies. It examines how the general requirements, as described in Part II, have been formulated in specific legal documents, such as bilateral agreements. Furthermore, it asks whether these requirements are workable in practice, since they are aimed at different integration matters (i.e., integrated water management and integrated nature conservation). Finally, Part III examines how the various authorities cooperate in order to reconcile various conflicting interests.

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16. A list of the 23 persons interviewed in 2005 and 2006 and the meetings attended is available from the author upon request. The author took various hikes along both rivers in 2005 and 2006 and visited the Alexkor mining company in Alexander Bay, South Africa, as well as the Namdeb mining company in Oranjemund (Feb. 7–11, 2005) [hereinafter Interviews].

Part IV further analyzes the findings of the case studies from the perspective of this article's central research question; i.e., how do legal pluralism and multi-level governance work in cases involving international law and, furthermore, what is the role of international law in these situations? Part V conveys four main conclusions.

## II. INTERNATIONAL LAW ON TRANSBOUNDARY WETLANDS

### *A. International Nature Conservation Law with Regard to Transboundary Wetlands*

The best-known international convention regarding wetlands, including transboundary wetlands, is the Convention on Wetlands of International Importance especially as Waterfowl Habitat (the Ramsar Convention), signed in Ramsar, Iran on February 2, 1971.<sup>17</sup> Compared to other relevant conventions on nature conservation—such as the 1992 Convention on Biological Diversity,<sup>18</sup> the 1979 Bern Convention on the Conservation of European Wildlife and Natural Habitats,<sup>19</sup> and the 1979 Bonn Convention on Migratory Species of Wild Animals<sup>20</sup>—the Ramsar Convention has engendered more intricate thoughts about managing protected areas. The 1979 Bern Convention, for instance, simply states that “[c]ontracting Parties in their planning and development policies shall have regard to the conservation requirements of the areas protected . . . , so as to avoid or minimize as far as possible any deterioration of such areas.”<sup>21</sup>

The 2003 (revised) African Convention on the Conservation of Nature and Natural Resources contains a detailed provision similar to that found in the Ramsar Convention.<sup>22</sup> The African Convention

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17. See Ramsar Convention, *supra* note 1.

18. See 1992 Convention on Biological Diversity, 31 I.L.M. 818 (1992).

19. See 1979 Bern Convention on the Conservation of European Wildlife and Natural Habitats, 1992 Europ. T.S. No. 104 [hereinafter Bern Convention].

20. See 1979 Bonn Convention on the Conservation of Migratory Species of Wild Animals, 19 I.L.M. 15 (1980).

21. Bern Convention, *supra* note 19, art. 4(2).

22. See African Convention on the Conservation of Nature and Natural Resources, art. XII, June 11, 2003, available at <http://www.africaunion.org/root/AU/Documents/Treaties/Text/nature%20and%20natural%20recesource.pdf> (This Convention will enter into force once it is ratified by 15 states.

specifically addresses transboundary wetlands, as Article VII(3) demonstrates:

Where surface or underground water resources and related ecosystems, including wetlands, are transboundary to two or more of the parties, the latter shall act in consultation, and if the need arises, set up inter-State Commissions for their rational management and equitable utilization and to resolve disputes arising of these resources, and for the cooperative development, management and conservation thereof.<sup>23</sup>

The African-Eurasian Waterbird Agreement (AEWA), concluded in 1995 within the framework of the Bonn Convention, is also relevant for the management of wetlands. In general terms, AEWA requires the parties to take measures to protect migratory water birds. Thirty-six Eurasian States and twenty-four African States have signed the AEWA Agreement, focusing on migratory water birds that breed in Europe and Asia and then migrate to Africa in the winter.<sup>24</sup> The 2003–05 Action Plan under the AEWA explicitly mentioned the need to control human activities within wetlands. It enabled wise and sustainable use of the wetlands, giving special attention to the use of agricultural chemicals, disposal of wastewater, hunting, and eco-tourism.<sup>25</sup> However, documents published under the Ramsar Convention framework include much greater detail concerning the management of protected sites.

Ramsar Convention Parties must formulate and implement their planning law so as to promote the conservation of “Ramsar sites” (wetlands designated under the Convention). They must also, to the extent possible, promote the “wise use” of wetlands inside their territories<sup>26</sup> without prejudicing their exclusive sovereign rights to use the wetland.<sup>27</sup> Note that the Convention differentiates between listed sites, which must be conserved, and non-listed wetlands which only require “wise use.”<sup>28</sup>

However, since the late 1980s, “wise use” has been thought to apply

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By Mar. 2007, only six countries had ratified it.).

23. *Id.* art. VII(3).

24. *See* African-Eurasian Waterbird Agreement (AEWA), Nov. 1, 1999, *available at* [http://www.unep-aewa.org/documents/agreement\\_text/eng/agree/agree\\_full.htm](http://www.unep-aewa.org/documents/agreement_text/eng/agree/agree_full.htm).

25. *See* African-Eurasian Waterbird Agreement, Nov. 1, 1999, Annex III, 2003-2005 Action Plan, *available at* [http://www.cms.int/species/aewa/aew\\_ap.htm](http://www.cms.int/species/aewa/aew_ap.htm).

26. *See* Ramsar Convention, *supra* note 1, art. 3(1).

27. *See id.* art. 2(3).

28. *See id.* art. 3(1).

to all wetlands, including those listed under the Convention.<sup>29</sup> Since then, “wise use” has been redefined several times, with the latest revision during the 9th Convention of the Parties (COP) in 2005. The following definition was adopted: “[w]ise use of wetlands is the maintenance of their ecological character, achieved through the implementation of ecosystem approaches, within the context of sustainable development.”<sup>30</sup> In addition, the 9th COP defined “ecological character” as “the combination of the ecosystem components, processes and benefits/services that characterize the wetland at a given point in time,” for listed wetlands being the time of designation of the wetland for the Ramsar list.<sup>31</sup> With these new definitions, Ramsar Convention terminology aligns more closely with language used under other important international conventions, such as the Convention on Biodiversity and several water agreements, such as the Helsinki Convention.<sup>32</sup>

Furthermore, the Convention stated that the establishment of nature reserves on wetlands should be promoted,<sup>33</sup> and any loss of wetland resources should be compensated to the extent possible by creating additional nature reserves for waterfowl and for the protection—either in the same area or elsewhere—of an adequate portion of the original habitat.<sup>34</sup> Deleting or restricting the boundaries of an already designated site is only allowed in situations of urgent national interest.<sup>35</sup> Finally, through management, Parties must endeavor to achieve an increase in waterfowl populations on appropriate wetlands.<sup>36</sup> For transboundary wetlands (“shared wetlands” or “international wetlands”), there is a specific provision in the Ramsar Convention stating that Parties must consult with one another about implementing obligations arising out of the agreement. They also must attempt to coordinate and support present and future policies and regulations concerning the preservation of

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29. See David Farrier & Linda Tucker, *Wise Use of Wetlands under the Ramsar Convention: A Challenge for Meaningful Implementation of International Law*, 12 J. ENVTL L. 21, 23 (2000) (describing the “wise use” process).

30. Ramsar Convention, Ninth Conference of the Parties, Resolution on A Conceptual Framework for the Wise Use of Wetlands and the Maintenance of their Ecological Character, Resolution IX.1, Annex A (2005) [hereinafter COP9 (2005)].

31. *Id.*

32. See *infra* Part II(B).

33. See Ramsar Convention, *supra* note 1, art. 4(1).

34. See *id.* art. 4(2).

35. See *id.*

36. *Id.* art. 4(4).

wetlands and their flora and fauna.<sup>37</sup>

A vast quantity of resolutions, handbooks, and guidelines have been adopted since 1971 that further define the general provisions cited above. The so-called “Ramsar Toolkit” is a set of no less than seventeen Handbooks about the wise use of wetlands. These Handbooks include tips on drafting national wetlands policies, wise use in general, the designation process, river basin management, and local community participation.<sup>38</sup> Since 2004, the second and third editions of the Handbook on the management of wetlands promulgate the concept of integrated management by stating that wetland management plans must be integrated into the public development planning system at the local, regional, or national level.<sup>39</sup> According to this Handbook, “the integration of site management plans into spatial and economic planning at the appropriate level will ensure implementation, public participation, and local ownership.”<sup>40</sup> In addition, the Handbook recommends that a multi-scalar approach to wise use planning and management should be adopted and “linked with broad-scale landscape and ecosystem planning, including at the integrated river basin. . .[scale], because policy and planning decisions at these scales will affect the conservation and wise use of wetland sites.”<sup>41</sup> The Handbook recites the part of Agenda 21 that recognized the multi-interest utilization of water resources.<sup>42</sup> It further states that integrated river basin management aims at bringing together stakeholders at all levels, from politicians to local communities, and also intends to consider water demands for different sectors within the basin. To be able to accomplish these goals and justify the required allocation, wetland benefits must be determined.<sup>43</sup>

The Handbook for transboundary wetlands gives more detailed

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37. *See id.* art. 5.

38. *See* Ramsar Convention Secretariat, *Ramsar Handbooks for the Wise Use of Wetlands*, Handbooks 1–17 (3d ed., 2007), available at [http://www.ramsar.org/index\\_key\\_docs.htm](http://www.ramsar.org/index_key_docs.htm).

39. *See* Ramsar Convention Secretariat, *Ramsar Handbooks for the Wise Use of Wetlands*, Handbook 8: Managing Wetlands 9 (2d ed. 2004) [hereinafter Handbook 8]; Ramsar Convention Secretariat, *Ramsar Handbooks for the Wise Use of Wetlands*, Handbook 16: Managing Wetlands 10, 12 (3d ed. 2007) [hereinafter Handbook 16] (largely consistent with 2d edition).

40. Handbook 16, *supra* note 39, at 12.

41. *Id.*

42. *See* Ramsar Convention Secretariat, *supra* note 38, at 14. *See also* Agenda 21, §§ 18.8, 18.9, UN Doc. A/CONF. 151/26/Rev.1 (June 14, 1992), available at <http://www.un.org/esa/sustdev/documents/agenda21>.

43. *See* Handbook 16, *supra* note 39, at 14.

advice on how to pursue international cooperation on the management of such areas. Referring to the 1992 Helsinki Convention,<sup>44</sup> the Handbook indicates that multi-state management commissions should be established to promote international cooperation,<sup>45</sup> and urges states to harmonize wetland management with the obligations arising from watercourse agreements.<sup>46</sup>

More generally, it can be observed that over the last few years, wetland management has been integrated into river basin management, recognizing the fact that wetlands usually are only a part of a bigger catchment area and, for their conservation, largely dependent on the quality of the entire catchment.<sup>47</sup> To achieve this integration, the Ramsar Convention Bureau and the Secretariat of the Convention on Biodiversity have joined hands in a River Basin Initiative.<sup>48</sup> In 2005, the 9th COP adopted a resolution that laid down practical guidelines for the integration of wetland management into river basin management.<sup>49</sup> The guidelines focus upon: (1) improving the communication between the wetland management sector and the water management sector; (2) improving the cooperation between the water sector and the wetlands sector through cooperative governance, for instance, by formally harmonizing policy and legislation or by other, less far-reaching forms of cross-sectoral cooperation; and (3) upgrading wetlands management to the river basin level.<sup>50</sup>

These three areas have been worked out in the “critical path” approach, originally developed in South Africa,<sup>51</sup> according to which

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44. *See infra* Part II(B).

45. *See* Handbook 17, *supra* note 2, at 12, 13.

46. *See id.* at 13.

47. *See* Ramsar Convention, Seventh Conference of the Parties, Guidelines for Integrating Wetland Conservation and Wise Use Into River Basin Management, Resolution VII.18 (1999), *reprinted in* Ramsar Convention Secretariat, *Ramsar Handbooks for the Wise Use of Wetlands*, Handbook 7: River Basin Management (3d ed. 2007).

48. *See* River Basin Initiative Portal, <http://www.riverbasin.org> (last visited Mar. 9, 2007).

49. *See* Ramsar Convention, Ninth Conference of the Parties, Resolution on River Basin Management: Additional Guidance and a Framework for the Analysis of Case Studies, Resolution IX.1, Annex C(i) (2005), *available at* [http://www.ramsar.org/key\\_guide\\_riverbasins\\_e.pdf](http://www.ramsar.org/key_guide_riverbasins_e.pdf) [hereinafter Resolution IX.1].

50. *Id.*

51. *See* CHRIS DICKENS ET AL., GUIDELINES FOR INTEGRATING THE PROTECTION, CONSERVATION AND MANAGEMENT OF WETLANDS INTO CATCHMENT MANAGEMENT PLANNING, REPORT TT220/044 OF THE SOUTH AFRICAN WATER RESOURCE COMMISSION (2004), *available at* <http://www.wrc.org.za>.

nine subsequent steps are to be taken, including:<sup>52</sup> participating with the stakeholders, setting the priorities and objectives for wetlands in the basin, and integrating the land and water management plans for the basin. The first step in this critical process involves reviewing and, if necessary, revising the policy, regulatory, and institutional arrangements so that they support efforts to integrate wetland management into river basin management. The Annex to the COP resolution acknowledges that this can be a lengthy process and that full harmonization may be impossible due to lack of political support. However, the Annex also recognizes that:

It is often sufficient to identify and analyze:

- i) policies and laws from various national sectors (such as water, agriculture, environment, economic development, social development) that positively support the integration of wetland management with river basin management, and that generally contain shared principles and objectives;
- ii) policies, laws and regulations from various national sectors that conflict with the objectives of integrating wetland management and wise use into river basin management, and where revision or reform may be necessary; and
- iii) policies, laws and regulations that can be used for sanctions or enforcement purposes during the implementation phase if necessary, such as pollution prevention, land use planning controls, resource exploitation limitations.<sup>53</sup>

The Annex continues:

41. Policies and laws can be formal and based in the statutory legal system of a country, or they can be customary and based in particular community systems of practice and law. The principles of identifying the supporting and conflicting elements of policy and law apply equally to statutory as to customary law, although the challenges of integrating statutory and customary systems, and providing for a *pluralistic* [emphasis added] legal environment, can be significant.

42. New institutional arrangements, at international, national or local levels, are likewise sometimes politically difficult to implement from scratch, and it is necessary and generally better to begin working with

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52. *See id.* at 22–85.

53. Resolution IX.1, *supra* note 49, ¶ 40.

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the existing range of responsible and interested institutions.

43. Memoranda of cooperation, or cooperative policy, can be used to formalize relationships when necessary. As relationships and understanding grow, the structure and function of new institutions that would be more appropriate to the task should emerge, and institutional reform and restructuring will then have more support.<sup>54</sup>

Each element concerning the integration of wetland management into catchment management is relevant to the cases presented below.

An additional aspect of the Ramsar Convention warrants discussion. Wetlands that become degraded, or that are likely to become degraded, are listed on the Montreux Record.<sup>55</sup> Aside from attracting the attention of the Convention Bureau that can intensify the monitoring of Montreux Record sites, this list also aims to gain the recognition of the Parties who can then discuss the sites at the COP.<sup>56</sup> Since the list is made public, other entities, such as non-governmental organizations (NGO), have the option to become involved as well. The Contracting Party in whose territory the site is located must take swift and effective action to prevent and/or remedy the ecological changes.

The Montreux Record is based upon Articles 3(2) and 8(2) of the Ramsar Convention. Article 3(2) states that each contracting state has the duty to inform the Convention Bureau of any changes to the ecological character of a protected wetland due to technological developments, pollution, or other human interference.<sup>57</sup> Article 8(2) stipulates that the Convention Bureau is informed of such changes, notifies all Contracting Parties, and arranges the matter to be discussed at the next COP.<sup>58</sup>

The procedure for site inclusion and removal from the Montreux Record was established in 1996.<sup>59</sup> Anyone may inform the Convention Bureau about the degradation of a site. However, the Contracting Party in whose state a site is located must approve the inclusion of the site on the list.<sup>60</sup> The Bureau investigates the report by interviewing both the Contracting Party in which the site is located and others entities, such as

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54. *Id.* at 41–43.

55. *See* Montreux Record, *supra* note 12.

56. *See id.*

57. Ramsar Convention, *supra* note 1, art. 3(2).

58. *Id.* art. 8(2).

59. *See* Ramsar Convention, Sixth Conference of the Parties, Guidelines for Operation of the Montreux Record, Resolution VI.1, Annex § 3 (1996), *available at* [http://www.ramsar.org/key\\_mr\\_guide\\_e.htm](http://www.ramsar.org/key_mr_guide_e.htm).

60. *Id.*

relevant NGOs. The Scientific and Technical Review Panel (STRP), another institution under the Ramsar Convention, advises the Contracting Party, through the Bureau, on the restoration of the degraded site. Within the STRP, an Expert Working Group on Wetland Restoration provides information on wetland restoration.<sup>61</sup>

### *B. Regional Nature Conservation Law: EU and SADC*

In Europe, the Wild Birds<sup>62</sup> and Habitats Directives<sup>63</sup> oblige EU Member States to designate special areas for bird protection and habitat conservation, respectively.<sup>64</sup> Together these areas form the “Natura 2000” network. Once these areas have been designated as such, several legal requirements arise. First, appropriate management plans have to be made for each area. The plans must be specifically designed for the sites or integrated into other development plans.<sup>65</sup> Plans must also list the necessary conservation measures corresponding to the ecological requirements of the sites. Secondly, Member States must take appropriate steps to avoid the deterioration of natural habitats and the habitats of species, as well as the significant disturbance of the species for which the areas have been designated.<sup>66</sup> This general provision applies to existing activities affecting a site, such as agriculture, fisheries, recreation, traffic, or military use. Such activities may continue as long as they do not deteriorate the area. Third, authorities must assess the implications of any plan or project likely to have a significant effect on the site and, if necessary, prohibit the plan or project.<sup>67</sup> The word “likely” indicates that the precautionary principle applies.

Plans or projects that have to be assessed include the construction of

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61. See The Ramsar Convention on Wetlands, *The STRP Expert Working Group on Wetland Restoration*, [http://ramsar.org/strp/strp\\_rest\\_index.htm](http://ramsar.org/strp/strp_rest_index.htm) (last visited Jan. 15, 2008).

62. See Council Directive 79/409/EEC, On the Conservation of Wild Birds, 1979 O.J. (L 103) 1 [hereinafter Wild Birds Directive].

63. See Council Directive 92/43/EEC, On the Conservation of Natural Habitats and of Wild Fauna and Flora, 1992 O.J. (L 206) 7 [hereinafter Habitats Directive].

64. See Jonathan Verschuuren, *Effectiveness of Nature Protection in the EU and the US: The Birds and Habitats Directives and the Endangered Species Act*, 3 Y.B. EUROP. ENVTL L. 305, 307 (2003).

65. See Wild Birds Directive, *supra* note 62, art. 4(1); see also Habitats Directive, *supra* note 63, art. 6(1).

66. See Habitats Directive, *supra* note 63, art. 6(2) (applies to Wild Birds Directive, *supra* note 62 as well, *cf.* Habitats Directive, art. 7).

67. See *id.* art. 6(3).

harbor facilities, the construction of roads, and the exploration for fossil fuels. In 2005, the European Court of Justice expanded the meaning of the words “plan or project” to cover any “intervention in the natural surroundings and landscape” that may have a significant negative impact.<sup>68</sup> This expanded definition also includes agriculture, fisheries, and other regular activities that may take place within a special protected area. All of these potentially degrading activities are subject to an assessment. If the assessment shows that the activity will likely have significant negative effects, the project cannot proceed. However, there is an exception to this rule. If there are imperative reasons of overriding public interest, including those of a social or economic nature, the project may proceed, provided that there are no alternative solutions and the necessary compensatory measures are taken.<sup>69</sup> By 2005, a total of 4,212 areas under the Birds Directive and 2,587 areas under the Habitats Directive, covering a combined 3.9 million square kilometers within the EU, had been designated.<sup>70</sup>

Wetlands are usually designated as Natura 2000 sites, pursuant to a non-binding 1995 European Commission Communication in which EU Member States were urged to give priority to the incorporation of all wetlands of EU importance within Natura 2000 and to integrate all Ramsar sites at a minimum.<sup>71</sup> For the Ramsar sites that do not qualify as Natura 2000 sites, the Communication suggested that Member States apply the relevant provisions of the Directives anyway.<sup>72</sup> In this lengthy Communication, the European Commission also formulated its ambition: to halt further wetland loss and degradation, promote sustainable wetland use, and restore former wetlands, to the extent feasible.<sup>73</sup>

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68. Case C-127/02, *Landelijke Vereniging tot Behoud van de Waddenzee and Nederlandse Vereniging tot Bescherming van Vogels v. Staatssecretaris van Landbouw, Natuurbeheer en Visserij*, 2004 E.C.R. I-7405; *see also* Jonathan Verschuuren, *Shellfish for Fishermen or for Birds? Article 6 Habitats Directive and the Precautionary Principle*, 17 J. ENVTL. L. 265, 270 (2005).

69. *See* Habitats Directive, *supra* note 63, art. 6(4) (also applies to Wild Birds Directive, *supra* note 62; *cf.* Habitats Directive, art. 7).

70. The European Commission regularly updates a “barometer” with this kind of information, not only on the EU as a whole, but also on each Member State. The barometer can be accessed through the Commission’s nature conservation website. European Commission, *Environment – Nature & Biodiversity*, <http://ec.europa.eu/environment/nature> (last visited Mar. 9, 2007).

71. *See Wise Use and Conservation of Wetlands: Communication from the Commission to the Council and the European Parliament*, at 45, COM (1995) 189 final (May 29, 1995) [hereinafter COM (1995)].

72. *See id.* at 46.

73. *See id.* at 43–44.

Like the Ramsar Toolkit discussed above, the Communication promotes integrated management from the perspectives of nature conservation policy, water policy, regional and territorial development policies, as well as specific sector policies (e.g., agriculture and aquaculture). The Communication also identifies the main goal of integrated management as the balancing of conflicting interests:

Integrated management means, above all, the synchronization of opposing interests related to a given wetland and its resources with a view to achieving a common goal of conservation and wise use. This implies that all parties with decisive or influential power over this wetland take part in the common process of reaching a consensus or finding a compromise. To this end, the interests, actors, competent authorities, and responsible bodies need to be identified and the necessary institutional and administrative arrangements to be made at Union, national, and regional level.<sup>74</sup>

Thus, the European Commission foresees a negotiation process among all stakeholders and in practice, such processes do take place. Parts III and IV of this article will elaborate upon these processes to help determine the actual role of the various sources of law discussed in this article.

Both the Wild Birds and Habitats Directives also contain provisions aimed at species protection, including provisions on hunting, trade, and the protection of individual nests.<sup>75</sup> Under the Wild Birds Directive, all European species of wild birds are protected,<sup>76</sup> while the Habitats Directive has a list of specially protected animal and plant species.<sup>77</sup> The most important provision that applies to wetlands is the prohibition of disturbing breeding or resting places.<sup>78</sup> Derogation can only be granted for specific reasons—such as public health protection, the prevention of serious damage to crops or waters, or for imperative reasons of overriding public interest of a social or economic character,<sup>79</sup> provided

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74. *Id.* at 44.

75. See Wild Birds Directive, *supra* note 62, arts. 5–9; Habitats Directive, *supra* note 63, at arts. 12–16. See also Jonathan M. Verschuuren, *Implementation of the Convention on Biodiversity in Europe: 10 Years of Experience with the Habitats Directive*, 5 J. INT'L WILDLIFE L. & POL'Y 251, 256–57 (2002).

76. See Wild Birds Directive, *supra* note 62, art. 1.

77. See Habitats Directive, *supra* note 63, Annex IV.

78. See Wild Birds Directive, *supra* note 62, art. 5; Habitats Directive, *supra* note 63, art. 12(1).

79. The latter reason only applies to the Annex IV species of the Habitats Directive and not to birds protected under the Wild Birds Directive. See Wild Birds Directive, *supra* note 62, art. 9(1)(a); Habitats Directive, *supra* note 63, art. 16(1)(c).

that there are no satisfactory alternatives and that the derogation is not detrimental to the maintenance of the species concerned at a favorable conservation status in their natural range.<sup>80</sup>

EU environmental law usually aims toward minimum harmonization, which implies that national authorities are allowed to introduce legislation that goes further than the minimum requirements laid down in the Directives. Therefore, national nature conservation or water laws often exist in addition to EU law. These laws will be discussed below.

For the southern African region, harmonization of laws is rapidly evolving within the SADC. As in the EU, harmonization efforts within SADC are being made in the field of nature conservation. The Protocol on Wildlife Conservation and Law Enforcement<sup>81</sup> obliges Member States to establish management programs for the conservation and sustainable use of wildlife. It also mandates that Member States integrate such programs into national development plans<sup>82</sup> in order to assess and control activities which may significantly affect the conservation or sustainable use of wildlife and in order to avoid or minimize negative impacts.<sup>83</sup> The Protocol requires that Member States promote cooperative management for transboundary areas,<sup>84</sup> for instance, by creating Transfrontier Conservation Areas (TFCAs).<sup>85</sup> By 2004, the SADC Member States had identified twenty existing or potential TFCAs that cut across major biomes and ecoregions of SADC countries and cover 470,000 square

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80. See Wild Birds Directive, *supra* note 62, art. 9.

81. See Protocol on Wildlife Conservation and Law Enforcement, Aug. 18, 1999, available at <http://www.tralac.org/scripts/content.php?id=460> (entered into force on Nov. 30, 2003).

82. See *id.* art. 7(1).

83. See *id.* art. 7(2).

84. See *id.* art. 7(5)(a).

85. See *id.* art. 4(2)(f). TFCAs are also known as peace parks, as the idea to create transboundary protected areas for conservation and tourism purposes originally came from WWF South Africa. There is a Peace Parks Foundation that facilitates the process of TFCA establishment and funding. See Peace Parks Foundation – The Global Solution, <http://www.peaceparks.org> (last visited Mar. 9, 2007). The PAA does not automatically protect TFCAs. Rather, the TFCA are not automatically protected under the PAA but must have to be designated under one of the categories of the PAA, usually as a national park. See Randy J. Tanner et al., *Transfrontier Conservation Areas of Southern Africa and International Law in the Context of Indigenous Community Involvement*, 11 SOUTH AFR. J. ENVTL L. & POL'Y 167, 169 (2004); Sist J. Mramba, *The Peace Parks Initiative: A Breakthrough towards Sustainable Natural Resource Management in Southern Africa?* 11 SOUTH AFR. J. ENVTL L. & POL'Y 213, 214–15 (2004).

kilometers—almost fifty percent of the combined size of the formally protected areas of the region.<sup>86</sup> Of the twenty TFCAs, eleven have already received a mandate from the participating countries which have entered into, or are in the process of entering into, formal collaborative agreements. These mandates will eventually result in bilateral or trilateral agreements between the states involved, which will in turn make way for the drafting of a memorandum of understanding (MOU). The MOU may

foster a joint management plan, as well as joint management decisions to be made by the respective authorities in the area.<sup>87</sup>

### *C. Implementing International and Regional Nature Conservation Law at a National Level*

#### *1. The Netherlands*

The Netherlands recorded law regarding protected areas in the Nature Conservation Act of 1998 (*Natuurbeschermingswet 1998*). After various courts found that this Act inadequately transposed the EU Wild Birds and Habitats Directives,<sup>88</sup> the Netherlands extensively amended the Act in 2005.<sup>89</sup> Prior to the amendment, the provisions of both Directives had directly applied in the Netherlands on the basis of the EU principle of “direct effect” for incorrectly transposed Directives.<sup>90</sup>

The basic provisions of the Nature Conservation Act of 1998 consist primarily of a careful, and often literal, transposition of the provisions of the Wild Birds and Habitats Directives.<sup>91</sup> Projects that may harm Natura

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86. See SADC Wildlife Programme of Action, <http://www.sadc.int> (last visited Mar. 9, 2007).

87. See Mramba, *supra* note 85, 216–25 (analyzing the content of these documents in the case of the Botswana-South African Kgalagadi TFCA).

88. See Case C–441/03, *European Commission v. The Netherlands*, 2005 E.C.R. I-3043.

89. See Netherlands Bulletin of Acts and Decrees 2005, No. 195. The amended Act came into effect in October 2005. See Netherlands Bulletin of Acts and Decrees 2005, No. 473.

90. See Jonathan Verschuuren, *Effectiveness of Nature Protection Legislation in the European Union and the United States: The Habitats Directives and the Endangered Species Act*, in *CULTURAL LANDSCAPES AND LAND USE* 42 (Martin Dieterich, Jan van der Straaten eds., 2004). See generally J.H. JANS, *EUROPEAN ENVIRONMENTAL LAW* 173–205 (2000).

91. See Nature Conservation Act of 1998, Stb. 2005, art. 19(a–l).

2000 areas are subject to a license, which provincial authorities have the power to grant.<sup>92</sup> However, in a small number of cases when a license is requested by a foreign authority, or when the 1839 Separation Treaty between Belgium and the Netherlands governs, the Minister of Agriculture, Nature, and Food Quality will be the appropriate authority.<sup>93</sup> Both of these examples apply in the Scheldt estuary case. The authorities of the Flemish Region have applied for a permit to deepen the Dutch portion of the Scheldt River estuary to enable larger vessels to reach the port of Antwerp and the 1839 Separation Treaty regulates access to this port over Dutch territory.<sup>94</sup>

All Ramsar sites in the Netherlands have also been designated as part of Natura 2000 under the Wild Birds Directive.<sup>95</sup> Therefore, the provisions of the Nature Conservation Act that apply to Natura 2000 also apply to Ramsar sites. Since the provisions of the EU Directives are much more detailed and also much stricter than those of the Ramsar Convention, it is generally thought that no further legislation is necessary to implement the Ramsar Convention in the Netherlands. Dutch Courts usually do not explicitly test decisions against the Ramsar Convention, but against the EU Wild Birds and Habitats Directives.<sup>96</sup>

Species protection in the Netherlands is governed by the Flora and Fauna Act (*Flora en faunawet*).<sup>97</sup> Again, this Act carefully implements the provisions on species protection of both EU Directives described above.<sup>98</sup> The derogation made possible by the Directives is either granted by the provincial authorities, or the Minister of Agriculture, Nature, and

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92. *See id.* art. 19(d).

93. *See* Netherlands Bulletin of Acts and Decrees 2005, No. 437, Regulations on Permits, art. 2(a), (b).

94. Treaty of London of April 19, 1839, Netherlands Bulletin of Acts and Decrees 1839, No. 26. After passage of the Act, Belgium was separated from the Netherlands officially as the State of Belgium. *See supra* Part III(C).

95. *See* Wild Birds Directive, *supra* note 62.

96. It is fixed case law in the Netherlands that the Ramsar Convention in itself is too vague to be invoked in Court. *See e.g., Natuur- en Vogelwacht Schouwen-Duiveland v. Gedeputeerde Staten van Zeeland*, Council of State Administrative Law Division, judgment of Feb. 10, 2000, 27 MILIEU EN RECHT No. 122 (2000). Hence, Dutch courts usually only test against the Wild Birds and Habitats Directives.

97. *See* Flora and Fauna Act [*Flora- en faunawet*], Netherlands Bulletin of Acts and Decrees 1998, No. 402. This Act only came into effect in 2002. *See* Netherlands Bulletin of Acts and Decrees 2001, No. 656.

98. However, the Act and its Regulations also contain rather complicated provisions on the protection of species that are not in Annex IV of the Habitats Directive, *supra* note 63.

Food Quality, depending on the reason for the derogation.<sup>99</sup>

## 2. Belgium: Flemish Region<sup>100</sup>

As in the Netherlands, the existing law on protected areas in Belgium's Flemish Region—the Decree on Nature Conservation and Natural Environment (*Decreet betreffende natuurbehoud en het natuurlijk milieu*)<sup>101</sup>—was amended in 2002 in order to fully implement the Wild Birds and Habitats Directives.<sup>102</sup> Again, the legislature opted for a precise implementation, using almost exactly the same wording as the Directives.<sup>103</sup> Instead of introducing a specific permit for projects that may harm protected areas under the Wild Birds and Habitats Directives, the Flemish Decree on Nature Conservation and Natural Environment integrated the obligations that arise from the Directives into existing project permits, such as a building or an environmental permit.<sup>104</sup> The consequence of such integration is that the competent authority varies according to the law that applies to the permit concerned. However,

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99. See Flora and Fauna Act, *supra* note 97, arts. 67, 68 (provincial authorities), 75 (Minister).

100. In Belgium, powers in the field of environmental law have, to a large extent, been conferred upon the three regions: the Flemish, Walloon, and Brussels-Capital Regions. See K. Deketelaere & M.G. Faure, *Environmental Law in Belgium*, in ENVIRONMENTAL LAW IN EUROPE 65 (N.S.J. Koeman ed., 1999). Since the Scheldt river estuary is on Flemish territory, I will only discuss the law of the Flemish Region.

101. See Decree on Nature Conservation and Natural Environment [*Decreet betreffende natuurbehoud en het natuurlijk milieu*] in Belgian Official Journal, Jan. 10, 1998, available at <http://www.ejustice.just.fgov.be/cgi/article.pl>.

102. See Amended Decree on Nature Conservation and Natural Environment [*Gewijzigd Decreet betreffende natuurbehoud en het natuurlijk milieu*] in Belgian Official Journal, Aug. 31, 2002 [hereinafter Belgian Official Journal 2002]; K. Deketelaere & B. Vanheusden, *Belgium*, 4 Y.B. EUROP. ENVTL. L. 537, 543 (2005). These adaptations came too late to prevent the European Court of Justice from judging that Belgium had failed to meet its obligations under the EC Treaty, Case C-415/01, *European Commission v. Belgium*, 2003 E.C.R., I-2081.

103. See Amended Decree on Nature Conservation and Natural Environment, *supra* note 102, art. 36. It has recently been reported that although there has been a correct transposition of the EU Directives in the Flemish Region, the actual application of the laws in practice remains unsatisfactory. See Hendrik Schoukens, Peter Desmedt & An Cliquet, *The Implementation of the Habitats Directive in Belgium (Flanders): Back to the Origin of Species?* J. EUR. ENVTL. & PLAN. L. 51, 62 (2007).

104. See Royal Decree on measures to protect certain animal species in the wild in the Flemish Region, Sept. 22, 1980 in Belgian Official Journal, Oct. 31, 1980; Royal Decree on the protection of birds in the Flemish Region, Sept. 9, 1981 in Belgian Official Journal, Oct. 31, 1981; Amended Decree on Nature Conservation and Natural Environment, *supra* note 102, art. 36(4).

when the derogation clause “imperative reasons of overriding public interest” is invoked, the Flemish Cabinet, especially the Minister of Public Works, Energy, Environment, and Nature, has to grant permission as well.<sup>105</sup>

All Belgian-Flemish wetlands of international importance under the Ramsar Convention have been designated as protected areas under the Wild Birds Directive.<sup>106</sup> As a result, the strict rules that apply to Wild Bird Directive areas also apply to wetlands.<sup>107</sup>

The Decree on Nature Conservation and Natural Environment also regulates species protection in the Flanders Region. Nevertheless, this regulation does not cover all elements of the EU Directives.<sup>108</sup> Various regulations offer additional rules on species protection.<sup>109</sup>

Integration and modernization of Flemish Region conservation law is expected in the near future. The first draft for a Flemish Nature Code was published in 2005.<sup>110</sup>

### 3. South Africa

The main piece of legislation on the conservation of important natural areas in South Africa is the National Environmental Management: Protected Areas Act (PAA).<sup>111</sup> Together with the National Environmental Management: Biodiversity Act,<sup>112</sup> it forms the new heart of South African nature conservation law.<sup>113</sup> The PAA protects various

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105. Belgian Official Journal 2002, *supra* note 102, art. 26(3).

106. See THE RAMSAR CONVENTION ON WETLANDS: NATIONAL REPORT BELGIUM FOR COP9 7 (2005), available at [http://ramsar.org/cop9/cop9\\_nr\\_belgium.pdf](http://ramsar.org/cop9/cop9_nr_belgium.pdf) (last visited Oct. 26, 2007).

107. See *id.*

108. Belgian Official Journal 2002, *supra* note 102, art. 51.

109. Such as the Royal Decree on measures to protect certain animal species in the wild in the Flemish Region of September 22, 1980, and the Royal Decree on the protection of birds in the Flemish Region of September 9, 1981.

110. See G. VAN HOORICK, ET AL., VOORONTWERP VAN VLAAMS NATUURWETBOEK (2005).

111. See National Environmental Management: Protected Areas Act, No. 57 of 2003 (S. Afr.).

112. See National Environmental Management: Biodiversity Act, No. 10 of 2004 (S. Afr.). It entered into force on November 5, 2005 after an Amendment Bill had made some necessary insertions into the PAA. The Biodiversity Act mainly focuses on the specific ecosystems and species that are threatened or in need of protection and is not specifically relevant to wetland protection.

113. The new legislation brings some order to the confusing number of ways in which an area could be protected. See GLAZEWSKI, *supra* note 5, at 325 (listing 32

areas such as: (1) special nature reserves, national parks, national reserves (including wilderness areas), and protected environments, (2) world heritage sites designated under the World Heritage Convention Act,<sup>114</sup> and (3) marine protected areas. All PAA protected areas (including those protected under provincial law) are to be listed in a national Register of Protected Areas.<sup>115</sup> Provincially protected areas are brought under the protection of PAA and gain the status of either a nature reserve or a protected environment.<sup>116</sup> The PAA mainly focuses on special nature reserves, national parks, national reserves, and protected environments, leaving other protected areas to other legislation.

The purpose of the PAA is not just to conserve biodiversity in the protected areas and protect threatened or rare species.<sup>117</sup> It also aims at rehabilitating and restoring degraded ecosystems and promoting the recovery of endangered species.<sup>118</sup> In addition, the PAA has several additional anthropocentric purposes. For instance, it promotes assistance in ensuring a sustained supply of environmental goods and services, guaranteeing the sustainable use of natural biological resources, and creating or increasing destinations for nature-based tourism.<sup>119</sup> Not all of these purposes, however, apply to all protected areas. The human activities allowed in an area depend upon the legal status of that area. Some areas are designated for scientific research and environmental monitoring, while others can be used for all kinds of economic purposes, so long as these activities are sustainable.<sup>120</sup>

Once a site is declared a protected area, several obligations arise.<sup>121</sup> First, the competent management authority (to be appointed by the Minister or a Member of the Executive Council (MEC) of the Province

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designations, from national park, mountain catchment area, and natural forest to local-authority nature area, private nature reserve, and conservation area (and he does not even list the term "wetland"!)).

114. *See* World Heritage Convention Act 49 of 1999 (S. Afr.).

115. *See* Protected Areas Act, *supra* note 111, § 10 (S. Afr.).

116. *See id.* § 12.

117. *See id.* § 17(a-f).

118. *See id.* § 17 (l).

119. *See id.* § 17(g-k).

120. *See* Protected Areas Act, *supra* note 111, §§ 18, 20, 23, 26, 28 (discussing the five categories: special nature reserves, nature reserves, national parks, wilderness areas, and protected environments).

121. *See* Jeannie van Wyk, *Development in Protected Areas*, 17 SA PUBLIC L. 163–77 (2002) (providing an overview of the legislation to be followed for projects in protected areas before the enactment of the PAA).

for provincial areas) must draw up a management plan for the area.<sup>122</sup> The management authority can do this with the help of other organs of the state, the local communities, or even with individuals and other parties such as NGOs (“co-management”).<sup>123</sup> The management plan must contain a program for the implementation and pricing, procedures for the public participation of any local community or other interested party, a zoning of the area indicating what activities may take place in different sections, and the conservation objectives of those sections.<sup>124</sup> The Minister can even acquire or cancel mineral rights by way of expropriation if the Minister for Mineral and Energy Affairs concurs.<sup>125</sup>

There is not a single reference in the PAA to wetlands. However, as the St. Lucia system case indicates, the PAA has designated most wetlands falling under the Ramsar Convention as nature reserves.<sup>126</sup> Those that have not been designated under the PAA, such as the Orange River Mouth, are not legally protected under the PAA.<sup>127</sup> South Africa signed the Ramsar Convention and the South African Parliament later ratified and approved it. Therefore, South Africa is, in an international context, obliged to follow the provisions of the Convention. However, the Ramsar Convention is not part of South African law, pursuant to the National Environmental Management Act<sup>128</sup> and the Constitution,<sup>129</sup> since no specific act has made it an explicit part of domestic law. However, this does not mean that the Convention is meaningless in a national context. According to the South African Constitution, courts must consider international law when interpreting the Bill of Rights (which, as stated *supra*, includes the right to have the environment protected). In addition, self-executing provisions form part of domestic law as long as they are consistent with national law. Furthermore, the courts, when interpreting any legislation, “must prefer any reasonable

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122. *See* Protected Areas Act, *supra* note 111, § 41.

123. *See id.* § 42.

124. *See id.* § 41(2).

125. *See id.* § 84.

126. *See id.*

127. Author interview with Ishaam Abader, Geoff Cowan, John Dini, and Edward Netshithole at the South African Department of Environment and Tourism, Pretoria, South Africa, May 17, 2006 [hereinafter DEAT].

128. *See* National Environmental Management Act of 1998, § 25 (S. Afr.); S. AFR. CONST. 1996 § 231.

129. *See* S. AFR. CONST. 1996 § 231(4). Any international agreement becomes law in the Republic of South Africa when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.

interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.”<sup>130</sup> There is at least one case in which a court directly applied the Ramsar Convention.<sup>131</sup> The fact that national legislation does not offer specific rules for the protection of wetlands is often criticized.<sup>132</sup>

What cannot be ignored is *provincial* nature conservation law. Since nature conservation is a matter of concurrent national and provincial competence in South Africa, provincial legislation applies as well even though the PAA has provided the framework for provincial nature conservation law since 2000.<sup>133</sup> The provinces have the power to designate protected areas on a provincial level. The Northern Cape Environmental Conservation Act of 1989, for instance, opens the possibility for the province to declare a site either a “protected natural environment” or “special nature reserve.”<sup>134</sup> Many wetlands are located

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130. *Id.* § 233.

131. See *Van Huyssteen NO and Others v. Minister of Environmental Affairs and Tourism and Others*, 1995 (9) BCLR 1191 (C) (S. Afr.) (the decision was rendered by the Cape of Good Hope Provincial Division on June 28, 1995). There are more cases on wetlands, but none of these involved wetlands that are listed under the Ramsar Convention. See, e.g., *Director, Mineral Development, Gauteng Region and Another v. Save the Vaal Environment and Others*, 1999 (8) BCLR 845 (SCA) (S. Afr.).

132. See GLAZEWSKI, *supra* note 5, at 447 (“Although [SA] has listed these wetlands under the Convention, its domestic legislation is haphazard and uncoordinated in this regard. South-Africa lacks a dedicated wetland protection Act.”) Paradoxically, the importance of wetlands is stressed in the 2002 Environmental Management Implementation Plans and Environmental Management Plans Under Section 15(1) of the National Environmental Management Act in Government Gazette 23232. The potential wealth from biodiversity is not safeguarded in South Africa. Wetlands are of significant value to the country, for instance they mitigate floods by slowing rapid water runoff and release water during droughts. However, South Africa is thought to have lost about half of its wetlands through agriculture, industry, roads, or other developments. According to the United Nations, 90% of South Africa falls within a desertification risk area. Approximately 25% of this land is already severely degraded with 5% percent of South African land being so badly over-cultivated, overgrazed, and eroded that it shows up as bedrock in satellite pictures. See Government Gazette 23232 of Mar. 28, 2002, Notice No. 354, § 1.5.2. “The [Ramsar] convention addresses one of the most important issues in South Africa, namely the conservation of the country’s water supplies, for both the use of natural and human environments.” *Id.* § 3.2.1.2. The plan also states that a Wetlands Conservation Bill has been proposed to help meet the aims of the Convention. *Id.* § 3.4.3.1. However, this Bill has been withdrawn and will not be sent to Parliament, following the decision to implement the Convention through the PAA. DEAT, *supra* note 127.

133. See GLAZEWSKI, *supra* note 5, at 342.

134. The Northern Cape Environmental Conservation Act of 1989, Act 73, pt. III §§16, 18 (S. Afr.).

in provincially protected areas.<sup>135</sup> As stated above, the rules that apply to these provincial areas have been partially transferred to the national PAA. At the national level, policymakers hope that the provinces will mainly apply the new PAA, rather than adding provincial legislation, so that the existing overlap will be reduced.<sup>136</sup> Few provinces explicitly refer to areas designated under the Ramsar Convention in their legislation.<sup>137</sup> In August 2005, the boundaries were set for an envisaged provincial nature reserve comprising the Orange River Mouth wetland, plus an additional portion of the river upstream.<sup>138</sup> The latter shows that the provinces, because of their concurring powers, have the ability to follow up on the Ramsar Convention, as long as they do not issue provisions that conflict with national legislation. Cooperation and coordination is important to avoid conflicts between the two spheres of government in the implementation of the Ramsar Convention.<sup>139</sup>

The lack of government officials to administer, monitor, and enforce all of the above pieces of legislation is probably the main reason why—despite the large amount of sophisticated legal norms—environmental degradation continues to be an important factor in South Africa.<sup>140</sup> The fact that the Northern Cape Province, which is roughly the

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135. DEAT, *supra* note 127.

136. *See id.*

137. The Eastern Cape Provincial Parks Board Act, Act No. 12 of 2003, § 44 (S. Afr.) (recognizing the duties attached to the designation of a Ramsar site, such as the duty to have a management plan that reflects the status of the area as a Ramsar site). In its Environmental Implementation Plan of 2003, the Northern Cape Department of Agriculture, Land Reform, Environment, and Conservation pays attention to the Orange River Mouth. *See* Provincial Gazette No. 789, Notice No. 40 (July 25, 2003). The plan states that the Ramsar Convention addresses one of the most important issues in South Africa, i.e., the conservation of the country's water supplies, but that the only Ramsar site now has been degraded. The plan then goes on to state that the department will progress in ensuring sound environmental management of the site once necessary personnel limitations have been addressed, without forgetting to mention the other stakeholders involved in the management of this area (§ 2.4.2). *See infra* Part III. The plan also states that the province wants to give the area a provincial conservation status, without setting a timeframe for that (§ 3.2.1). This province designated seven provincial reserves, until November 2006, excluding the Orange River Mouth wetland.

138. *See* Interviews, *supra* note 16 (Minutes of the 17th ORMIMC Meeting); *infra* Part III.

139. *See* John Janks, Deon Govender & Berna Claassen, *Legal Scan Underpinning the Development and Conservation Planning for the Orange River Mouth (Phase 3)*, in ORM DEVELOPMENT PROGRAMME 6 (2006).

140. *See* GLAZEWSKI, *supra* note 5, at 117. *See* RONALD VERNON KIRBY, A COMPARATIVE STUDY OF THE ENFORCEMENT OF ENVIRONMENTAL LAW WITH REGARD TO THE CONSERVATION OF FAUNA AND FLORA IN THE RSA 296 (dissertation UNISA, Pretoria

size of California, has one nature conservation officer in the Department of Agriculture, Land Reform, Environment, and Conservation speaks for itself.<sup>141</sup> New initiatives were taken at the national level in 2005 and 2006 to improve the situation. Changes included the training and appointment of environmental police officers (“environmental management inspectors,” publicly known as “green scorpions”).<sup>142</sup> However, it is generally acknowledged that the size of the country, the lack of funds, and the fact that national enforcement priorities are centered on violent crime rather than with environmental issues, necessitate voluntary compliance.<sup>143</sup> Creating awareness through stakeholder approaches, education, and national attention for the World Wetlands Day,<sup>144</sup> as well as through involving local communities in the rehabilitation and protection of wetlands in programs such as Working

for Wetlands<sup>145</sup> are the principal ways in which the government wants to encourage this compliance.<sup>146</sup>

#### 4. Namibia

In general, Namibian environmental law is not well developed compared to that of South Africa. A legislative program exists to develop new environmental laws, but this program progresses slowly.<sup>147</sup> Relevant to wetland conservation are the Parks and Wildlife Management Bill and the Environmental Management Bill. After pending for several years, neither of the new pieces of legislation was in force as of late 2007. As a result, legal protection of wetlands is currently limited to the rules laid

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2002); Tanner, *supra* note 85, at 180.

141. See GLAZEWSKI, *supra* note 5, at 381.

142. See Environmental Management Inspectorate, <http://www.emi.gov.za> (last visited September 28, 2007).

143. DEAT, *supra* note 127.

144. See Environmental Days and Weeks Celebrated in South Africa, <http://www.environment.gov.za/Enviro-Info/env/dates.htm> (last visited Mar. 9, 2007).

145. This government-sponsored program is run by the South African National Biodiversity Institute. See Working for Wetlands Programme, <http://www.sanbi.org/research/wetlandprog.htm> (on file with COLO. J. INT'L ENVTL. L. & POL'Y).

146. DEAT, *supra* note 127.

147. See Ministry of Environment & Tourism, Namibia: *Programmes – Environmental Legislation*, <http://www.met.gov.na/programmes/legislation/legislation.htm> (last visited Feb. 19, 2008)).

down by the Nature Conservation Ordinance of 1975.<sup>148</sup> This Act deals with the protection of animals and plants in nature reserves, mainly by giving detailed rules on hunting. Further legislation that applies to coastal wetlands—such as the Orange River Mouth—is the Seashore Act and the Sea Fisheries Act. Through the Seashore Act, the Seashore Ordinance regulates marine pollution control. The use of nets inside the Orange River mouth is prohibited on the basis of the Inland Fisheries Act.<sup>149</sup>

The Environmental Management Act of 1998<sup>150</sup> grants standing to every person and NGO dealing with environmental matters<sup>151</sup> and endorses the precautionary principle.<sup>152</sup> The Environmental Assessment is the main legal instrument. The goal of the Environmental Assessment is to identify, predict, and evaluate the actual and potential biophysical, social, and other relevant effects that development or planning projects may have on the environment. It also weighs the risks and consequences of projects, their alternatives, and their options for mitigation, which it balances with the overall goal of minimizing negative environmental impacts.<sup>153</sup> On the basis of the Assessment, the Sustainable Development Commission<sup>154</sup> must give environmental clearance for the project. The Commission can then clear the project as long as it meets certain conditions.<sup>155</sup> The competent authority may only allow the project to proceed after such clearance has been obtained. The Act contains a long list of projects that are subject to an environmental assessment, including the alteration of wetlands, the diversion of the normal flow of water in a river bed, the construction of dams and reservoirs, and mining.<sup>156</sup>

Implementation of these laws in practice is limited due to a severe

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148. See Ordinance No. 4, Nature Conservation Ordinance (1975) (Namib.) (enacted by the Territory of SouthWest Africa – present day Namibia).

149. See Inland Fisheries Resources Act, No. 1 of 2003, § 16(a), Government Gazette No. 2962 of April 23, 2003 (Namib.).

150. See Environmental Management Act of 1998, *supra* note 128, act X (draft), version August 17, 2001 (S. Afr.). Although the Act has not yet entered into force, Environmental Assessments are sometimes carried out on a voluntary basis. THE RAMSAR CONVENTION ON WETLANDS: NATIONAL REPORT NAMIBIA FOR COP7 (1999), available at [http://www.ramsar.org/cop7/cop7\\_nr\\_namibia.htm](http://www.ramsar.org/cop7/cop7_nr_namibia.htm).

151. See Environmental Management Act of 1998, *supra* note 128, pt. 7, § 32(2).

152. See *id.* pt. 2, § 6.

153. See *id.* ch. 5.

154. This is an expert commission with representatives of various ministries, local governments, industries, and environmental NGOs that plays an important part in the Environmental Assessment process. *Id.* ch. 2, pt. 2, § 8, ch. 3, § 16.

155. See *id.* pt. 4 § 25.

156. See *id.* sched. 1.

lack of funding and staff.<sup>157</sup> Therefore, wetland protection in Namibia largely depends on voluntary compliance and self-regulation by landowners and potential polluters. For example, the Namdeb Mining Company, active in and around the Orange River Mouth wetland, has an extensive environmental program in place.<sup>158</sup>

#### *D. International Water Management Law*

The principle that states have the obligation to prevent serious damage to the environment of other states has long since been accepted as a principle of customary law.<sup>159</sup> Treaty law also elaborates upon this principle. Protection of international waters is probably the single most regulated issue in international law. The 1992 UNECE Helsinki Convention on International Watercourses and Transboundary Lakes (UNECE Convention) is the most important document, at least for Europe, concentrating on transboundary freshwater resources.<sup>160</sup> The 1997 UN New York Convention on the Law of the Non-navigational Uses of International Watercourses (UN Convention)<sup>161</sup> addresses the same topic at a global level. However, the UN Convention still has not entered into force<sup>162</sup> and contains weaker protection terms than the UNECE Convention.<sup>163</sup> From a substantive point of view, however, the

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157. Interview with Patrick Lane and Holger Kolberg of the Namibian Ministry of Environment and Tourism, Oranjemund, February 8, 2005; THE RAMSAR CONVENTION ON WETLANDS: NATIONAL REPORT FOR THE 8TH COP OF THE RAMSAR CONVENTION (2002), [http://www.ramsar.org/cop8/cop8\\_nrs\\_namibia1.pdf](http://www.ramsar.org/cop8/cop8_nrs_namibia1.pdf) (last visited Mar. 9, 2007).

158. See *infra* Part III.

159. See PATRICIA BIRNIE & ALAN BOYLE, INTERNATIONAL LAW & THE ENVIRONMENT 109 (2d ed. 2002).

160. See 1992 UNECE Helsinki Convention, *supra* note 3.

161. See The 1997 Convention on the Law of the Non-Navigational Uses of International Watercourses, May 21, 1997, 36 I.L.M. 700 (1997) [hereinafter UN International Watercourses Convention].

162. As of September 2007, only 16 countries have ratified the Convention, including Namibia, South Africa, and the Netherlands. The Convention will enter into force after ratification by 35 countries. See UN Treaty Collection database, <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXXVII/treaty43.asp> (last visited September 28, 2007) (on file with COLO. J. INT'L ENVTL. L. & POL'Y).

163. See BIRNIE & BOYLE, *supra* note 159, at 305; ATTILA TANZI, THE RELATIONSHIP BETWEEN THE 1992 UNECE CONVENTION ON THE PROTECTION AND USE OF TRANSBOUNDARY WATERCOURSES AND INTERNATIONAL LAKES AND THE 1997 UN CONVENTION ON THE LAW OF THE NON NAVIGATIONAL USES OF INTERNATIONAL WATERCOURSES 15 (2000), available at <http://www.unece.org/env/water/publications/documents/conventiontotal.pdf> (last visited Mar. 9, 2007).

two conventions have many similarities—most notably the establishment of a joint body—in order to achieve a common management of the international watercourse.<sup>164</sup> Even states that are not a party to either of the Conventions have created joint bodies, for instance, the US–Canadian International Joint Commission.<sup>165</sup> Both Conventions support an ecosystem approach, or an approach in which all human impacts over the entire ecosystem are considered and the integrity of the ecosystem as a whole is respected.<sup>166</sup> Again it must be noted that the obligation is more strictly formulated in the UNECE Convention than in the UN Convention.<sup>167</sup>

The UNECE Convention elaborately defines the measures necessary to protect transboundary water systems. These include: (1) the prevention and control of pollution, (2) ecologically and rationally sound water management, conservation of water resources, and environmental protection, (3) reasonable and equitable use<sup>168</sup> taking into account the transboundary character; and, (4) conservation and, where necessary, restoration of ecosystems.<sup>169</sup> Several legal principles, such as the precautionary principle and the polluter-pays principle, apply as well.<sup>170</sup>

Joint bodies have a wide range of tasks under the UNECE

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164. However, the wording of the UN Convention is much weaker. The UNECE Convention requires riparian states to establish a joint body, whereas the UN Convention only requires the states to consider the establishment of a joint body. *See* 1992 UNECE Helsinki Convention, *supra* note 3, art. 9(2), and UN International Watercourses Convention, *supra* note 161, art. 8(2).

165. *See* 1909 Boundary Waters Treaty, Can.-U.S., *available at* <http://www.epa.gov/fedrgstr/EPA-AIR/1998/December/Day-11/a32914.htm> (the UN Convention was established as a consequence of this treaty).

166. *See* J. Brunnée & S.J. Toope, *Environmental Security and Freshwater Resources: A Case for International Ecosystem Law*, 5 Y.B. INT'L ENVTL. L. 41, 55 (1994).

167. *See* Owen McIntyre, *The Emergence of an 'Ecosystem Approach' to the Protection of International Watercourses under International Law*, 13 REV. EUROP. COMMUNITY INT'L ENVTL L. 1, 13 (2004).

168. Using both the principle of equitable use and the principle of prevention of harm has been criticized for their inherent upstream/downstream conflict; some authors advocate a “needs based” approach, rather than a “rights based” approach, *see* BEACH ET AL., *supra* note 3, at 74.

169. *See* 1992 UNECE Helsinki Convention, *supra* note 3, art. 2(2) (Again, from an environmental protection point of view, the UN Convention is much weaker. There, equitable and reasonable utilization is the only principle in which the ecological factor only seems to be a minor one.). *See* UN International Watercourses Convention, *supra* note 161, art. 6(1).

170. *See* 1992 UNECE Helsinki Convention, *supra* note 3, art. 2(5). These principles are absent in the UN Convention.

Convention, including elaborating monitoring programs concerning water quality and water quantity, exchanging information, elaborating emission limits for waste water and joint water-quality objectives, developing concerted action programs for the reduction of pollution loads, and implementing environmental impact assessments.<sup>171</sup> The UN Convention has only a short provision on management stating that consultations between watercourse states may include the establishment of a joint management mechanism. The task of such a mechanism is to plan the sustainable development of an international watercourse, provide for the implementation of any plans adopted, and otherwise promote the rational and optimal utilization, protection, and control of the watercourse.<sup>172</sup>

Many guidelines are available for the application of the UNECE Convention, such as the Guidelines on Monitoring and Assessment of Transboundary Rivers. Again, these Guidelines stress the need for an integrated approach. The state of the river and its related ecosystem should be assessed in an integrated manner, based on criteria that include water quality and quantity for different human uses as well as for flora and fauna.<sup>173</sup> The Guidelines also identify three sources of conflicts: (1) the competition for water (consumptive use vs. non-consumptive use), (2) conflicts between human intervention and nature, and (3) different interests of riparian countries.<sup>174</sup> These potential conflicts have to be acknowledged when formulating an integrated management plan.

Since 1992, various agreements for specific rivers including the Rhine, Meuse, Scheldt, Elbe, Danube, and Rhone, have been reached under the umbrella of the UNECE Convention.<sup>175</sup> Taking the 2002 Scheldt Convention between France, Belgium, and the Netherlands as an example, this Convention aims to establish an integrated management system for the international river basin district of the Scheldt River in order to achieve sustainable and integrated water management.<sup>176</sup> An

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171. *See id.* art. 9(2). *See also* MALGOSIA FITZMAURICE & OLUFEMI ELIAS, WATERCOURSE CO-OPERATION IN NORTHERN EUROPE: A MODEL FOR THE FUTURE (2004).

172. *See generally*, 1992 UNECE Helsinki Convention, *supra* note 3, art. 24.

173. *See* UNECE TASK FORCE ON MONITORING & ASSESSMENT, GUIDELINES ON MONITORING AND ASSESSMENT OF TRANSBOUNDARY RIVERS 10 (2000).

174. *See id.* at 14.

175. For an overview and links to relevant documents and international commissions with regard to these rivers can be found at the United Nations Economic Commission for Europe, *Convention on the Protection and Use of Transboundary Watercourses and International Lakes*, <http://www.unece.org/env/water> (last visited Feb. 19, 2008).

176. *See* Scheldt Convention, preamble ¶ 3, Dec. 3, 2002 (replacing the Convention

international commission, called the International Scheldt Commission, has formed to take on the aforementioned tasks.<sup>177</sup> The composition and functioning of the Commission is further regulated in the Scheldt Convention. This Convention—as most others that concern rivers within the EU—has been aligned with the EC Water Framework Directive.<sup>178</sup>

In addition, several bilateral treaties on the Scheldt River exist between Belgium and the Netherlands. The 1839 Treaty of Separation between the two countries already states that the Netherlands shall keep the Scheldt River accessible for ships, especially to and from the port of Antwerp.<sup>179</sup> In 2005, more specific treaties on the Scheldt River were concluded, one in which agreements on co-operation in the management of the Scheldt estuary have been laid down,<sup>180</sup> another on deepening the fairway to Antwerp on Dutch territory and on simultaneous development of nature conservation projects.<sup>181</sup> Details on each of these agreements will be discussed later in this article.<sup>182</sup>

For coastal wetlands, numerous other conventions may be applicable as well. They include conventions on maritime pollution and protection of seas and coastal areas such as the UN Convention on the Law of the Sea (UNCLOS) and the Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR). In order to avoid complicating the matter too much, this article does not address these Conventions except to note that they usually have a broad scope that includes ecosystem and biodiversity conservation.<sup>183</sup> It also will not go into various conventions and declarations on land-based sources of pollution that may apply.<sup>184</sup>

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on the Protection of the Scheldt River, April 26, 1994, 34 I.L.M. 851 (1995)) (signed at Charleville-Mézières).

177. See International Scheldt Commission, <http://www.isc-cie.com> (last visited Mar. 9, 2007).

178. See *infra* Part II(E).

179. See Treaty of London, *supra* note 94, art. IX.

180. See Convention of Middelburg of December 21, 2005, Netherlands Treaty Series 2005, No. 316.

181. Also signed at Middelburg on December 21, 2005, Netherlands Treaty Series 2005, No. 310.

182. See *infra* Part III.

183. See, e.g., 1992 OSPAR Convention, Annex V: The Protection and Conservation of the Ecosystems and Biological Diversity of the Maritime Area, 1998-15.1, available at [http://www.ospar.org/eng/html/convention/ospar\\_conv10.htm](http://www.ospar.org/eng/html/convention/ospar_conv10.htm) (added to the OSPAR Convention in 1998).

184. Eighty percent of the pollution of the seas originates from land-based sources. See DAUD HASSAN, PROTECTING THE MARINE ENVIRONMENT FROM LAND-BASED SOURCES OF POLLUTION: TOWARDS EFFECTIVE INTERNATIONAL COOPERATION (2006).

Finally, a few words regarding international soft law on water conservation are required. Agenda 21 contains detailed chapters on marine and coastal protection and on the protection of freshwater resources.<sup>185</sup> The latter chapter focuses primarily on integrated water resources management at the level of catchment basin or sub-basin.<sup>186</sup> One of Agenda 21's principal objectives is to promote a "dynamic, interactive, iterative and multisectoral approach to water resources management."<sup>187</sup> According to Agenda 21, the multisectoral approach is necessitated by "the multi-interest utilization of water resources for water supply and sanitation, agriculture, industry, urban development, hydropower generation, inland fisheries, transportation, recreation, low and flat lands management and other activities."<sup>188</sup>

### *E. Regional Water Management Law: EU and SADC*

The EU Water Framework Directive<sup>189</sup> is based on the UNECE Convention and, like the UNECE Convention, primarily focuses on river basin management.<sup>190</sup> River basin districts must be formed and, for each river basin, a management plan must be drawn up in order to adopt an integrated approach towards water management, i.e., integrating all water-related issues (surface waters, ground waters, coastal waters, water quality, water quantity, drinking water, protected areas, etc.).<sup>191</sup> For transboundary rivers within the EU,<sup>192</sup> international river basin management plans are to be adopted.<sup>193</sup> The Directive opens the possibility to use existing structures stemming from international agreements such as the UNECE Convention.<sup>194</sup> According to Annex VII

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185. See AGENDA 21, *supra* note 42, chs. 17, 18.

186. See *id.* chs. 18.8, 18.9.

187. *Id.* ch. 18.9.

188. *Id.* ch. 18.3.

189. See European Union, Directive of the European Parliament and of the Council Establishing a Framework for Community Action in the Field of Water Policy, Oct. 23, 2000, 2000/60/EC, OJ L 327/1 (establishing a framework for Community action in the field of water policy) [hereinafter EU Water Framework Directive].

190. See Marleen van Rijswick, *EC Water Law in Transition: The Challenge of Integration*, 3 Y.B. EUROP. ENVTL. L. 249, 304 (2003).

191. See EU Water Framework Directive, *supra* note 189, art. 13.

192. For international rivers that extend beyond the boundaries of the EU, Member States must endeavor to produce a single river basin management plan. *Id.* art. 13(3).

193. See *id.* art. 13(2). When no agreement can be reached, each Member State has to cover its part of the river in its national plan.

194. See *id.* art. 3(4).

of the Directive, these management plans must describe, inter alia, the significant pressures of human activity on the status of surface and groundwater and of the protected areas and list the environmental objectives for surface waters, ground waters, and protected areas.<sup>195</sup> Protected areas under the Directive are basically areas designated under either the Wild Birds or the Habitats Directives.

There are only a few references to wetland protection in the Directive. One of the instrument's main purposes is to prevent further deterioration and to protect and enhance the status of wetlands directly depending on aquatic ecosystems.<sup>196</sup> According to Annex VI, measures to recreate and restore wetland areas can be included in river basin management plans, although this is not obligatory.<sup>197</sup> The Directive's preamble references the 1995 European Commission's Communication on Wise Use and the Conservation of Wetlands.<sup>198</sup> With regard to wetlands protection, the policy targets should be achieved through the existing legal instruments, mainly the Wild Birds and Habitats Directives, and through integration of water and wetland management.<sup>199</sup> Given the rather limited and weak references to wetlands in the Water Framework Directive, it must be concluded that this policy target was not adequately followed in drafting the Framework Directive.

There is a Shared Watercourse Systems Protocol<sup>200</sup> within SADC which is based upon both the UNECE and UN Water Conventions. The Protocol requires the parties to the Protocol individually and, where appropriate, jointly protect and preserve the ecosystems of a shared watercourse on the basis of the principles of "equitable and reasonable utilization" and prevention of significant harm to other states.<sup>201</sup> The Protocol also promotes harmonization of policies and legislation on the prevention, reduction, and control of pollution.<sup>202</sup> States have to enter into consultations on the management of a shared watercourse, which

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195. *See id.* Annex VII.

196. *See id.* art. 1(a).

197. *See id.* Annex VI, pt. B (setting forth "supplementary measures" as required under Art. 11(4) of the Directive).

198. *See id.* Part II(B).

199. *See* COM(95) 189 final, *supra* note 71.

200. *See* Protocol on Shared Watercourse Systems in the Southern African Development Community (SADC), Aug. 7, 2000, *available at* [http://webworld.unesco.org/water/wwap/pccp/cd/pdf/educational\\_tools/course\\_modules/reference\\_documents/internationalregionconventions/revisedprotocol2000.pdf](http://webworld.unesco.org/water/wwap/pccp/cd/pdf/educational_tools/course_modules/reference_documents/internationalregionconventions/revisedprotocol2000.pdf). This Protocol replaces the 1995 version. It entered into force on Sept. 22, 2003.

201. *Id.* arts. 3(7), 3(10), 4(2)(a).

202. *See id.* art. 4(2)(b)(ii).

may include the establishment of a joint management mechanism, if one of the states so requests. A shared watercourse agreement which provides for the establishment of a shared watercourse institution—such as a shared water commission—will likely result from such consultations.<sup>203</sup> The states also have to cooperate, where appropriate, to respond to needs or opportunities for regulation of the flow of the waters of a shared watercourse.<sup>204</sup>

The basis for a joint management system was already in place on both the bilateral and multilateral levels before the adoption of the SADC Shared Watercourse Systems Protocol. In 1992, Namibia and South Africa established a Permanent Water Commission (PWC),<sup>205</sup> to act as a technical advisor for the competent authorities in both countries on transfrontier water-related issues. At the same time, the Vioolsdrift and Noordoewer Joint Irrigation Authority was established<sup>206</sup> to administer a joint irrigation scheme. This scheme allowed both countries to divert water from the Orange River for irrigation purposes.<sup>207</sup> A multilateral agreement on the management of a transboundary river basin in southern Africa is the 2000 treaty through which all Orange River riparian states (Botswana, Lesotho, Namibia, and South Africa) established the Orange-Senqu River Commission (ORASECOM).<sup>208</sup> Like the PWC, the Council of this Commission serves as a technical advisor to the authorities of the states involved on matters relating to the development, utilization, and conservation of the water resources of the river system.<sup>209</sup> This agreement was based on both the SADC Protocol before its ratification as well as on the UN Convention on the Law of the Non-Navigational Uses of International Watercourses. The Parties to the agreement agree to, *inter alia*: “. . .utilise the resources of the River System in an equitable and reasonable manner with a view to attaining optimal and sustainable

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203. *See id.* arts. 5(3), 6.

204. *See id.* art. 4(3)(a).

205. *See* Agreement between the Government of the Republic of Namibia and the Government of the Republic of South Africa on the Establishment of a Permanent Water Commission, Sept. 14, 1992, 32 I.L.M. 1147, *available at* <http://www.internationalwaterlaw.org/regionaldocs/nambia-southafrica.html>.

206. *See* Agreement on the Vioolsdrift and Noordoewer Joint Irrigation Scheme Between the Government of the Republic of Namib. and the Government of the Republic of S. Afr., Sept. 14, 1992.

207. *See id.* art. 3(2), 3(3).

208. *See* Agreement Between the Governments of the Republic of Bots., the Kingdom of Lesotho, the Republic of Namib. and the Republic of S. Afr. on the Establishment of the Orange-Senqu River Commission, Nov. 3, 2000 [hereinafter ORASECOM].

209. *See id.* art. 4.

utilisation thereof, and benefits therefrom, consistent with adequate protection of the River System,”<sup>210</sup> “. . .take all appropriate measures to prevent the causing of significant harm to any other Party,”<sup>211</sup> and “. . .individually and jointly take all measures that are necessary to protect and preserve the River System from its sources and headwaters to its common terminus.”<sup>212</sup> This includes the “. . .estuary of the River System, including the marine environment, taking into account generally accepted international rules and standards,”<sup>213</sup> and “. . . individually and jointly prevent, reduce and control pollution of the River System that may cause significant harm to one or more of the Parties, including harm to the environment, or to human health or safety, or to the ecosystem of the River System.”<sup>214</sup> Important terms in the agreement, such as “equitable and reasonable” and “significant harm,” have to be interpreted in line with the SADC Protocol.<sup>215</sup> Disputes have to be resolved by the SADC Tribunal, which was formally instituted in November 2005 in Windhoek, Namibia.

#### *F. Implementing International and Regional Water Management Law at a National Level*

##### *1. The Netherlands*

Water law in the Netherlands is dispersed over a series of Acts and Regulations.<sup>216</sup> The Water Resources Management Act (*Wet op de waterhuishouding*)<sup>217</sup> implements most provisions of the EU Water Framework Directive’s provisions and serves as the most important Dutch Water Act for the protection of transboundary wetlands. River basin management plans must be adopted for each of the four river

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210. *Id.* art. 7(2).

211. *Id.* art. 7(3).

212. *Id.* art. 7(12).

213. ORASECOM, *supra* note 208, art. 7(14). The latter part may refer to the Ramsar Convention, since the Orange River estuary is a Ramsar site (*see infra* Part III), but there is no explicit mentioning of the Convention in the Agreement.

214. *Id.* art. 7(13).

215. *Id.* art. 7(2), 7(3).

216. However, a first draft of an integrated Water Act was published in 2005. This integrated Act is expected to replace eight existing Acts by 2008.

217. *See* Water Resources Management Act, Netherlands Bulletin of Acts and Decrees 303 of 2005 (revised as a consequence of the EU Water Framework Directive; original *in* Netherlands Bulletin of Acts and Decrees 285 of 1989).

basins in the Netherlands, of which the Scheldt river basin is one,<sup>218</sup> stating the functions of the waters within the basin and containing a program of measures aimed at protecting the waters and the environment.<sup>219</sup> The first plan is not due until 2009.<sup>220</sup> For international river basins, such as the Scheldt River basin, the Minister of Transport, Public Works, and Water Management is the competent authority, not just for the adoption of the plan, but also for carrying out necessary measures. The competent authority may apply decisions regulating the water level<sup>221</sup> and authorize permits that are required for the extraction of surface water<sup>222</sup> and for any discharge of substances into surface water.<sup>223</sup> The conclusion of so-called water covenants with other competent authorities can influence the water level in the river basin.<sup>224</sup> There is no specific reference to wetlands in any of the water statutes.

## 2. Belgium: Flemish Region

In the Flanders Region, the EU Water Framework Directive has been implemented in the Decree on the Integrated Water Policy (*Decreet betreffende het integraal waterbeleid*).<sup>225</sup> Again, the wording of this Decree closely resembles that of the Directive. The Scheldt River basin is one of the four river basins in the Flemish Region. Remarkably, power over this river is partly ceded to the International Scheldt Commission, which is now the competent authority for coordinating policies within the river basin, such as the adoption of river basin management plans.<sup>226</sup> The most important instrument in the Decree is the water assessment. Any competent authority that prepares a decision must assess the consequences of the decision: no harm to water course systems may be inflicted. Derogation is only possible when imperative reasons of overriding public interest so demands it.<sup>227</sup>

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218. *See id.* art. 2.

219. *See id.* art. 5.

220. *See* Netherlands Parliamentary Papers II, 30 300 XII, No. 2, at 36 (2005–06).

221. *See* Water Resources Management Act, *supra* note 217, art. 16.

222. *See id.* art. 24.

223. *See* Pollution of Surface Water Act, Netherlands Bulletin of Acts and Decrees 536 of 1969, art. 1 (regularly amended since).

224. *See* Water Resources Management Act, *supra* note 217, art. 17.

225. *See* Decree on the Integrated Water Policy [*Decreet betreffende het integraal waterbeleid*], Belgian Official Journal, Nov. 14, 2003 (Err. Dec. 5, 2003).

226. *See id.* art. 19(1).

227. *See id.* art. 8(1).

### 3. South Africa

In South Africa, there is a potential scarcity of water for basic socioeconomic needs. In the past, the apartheid regime denied vast sectors of the population access to basic resources such as water.<sup>228</sup> Therefore, modern water legislation is mainly aimed at these needs. The Constitution of 1996 even recognizes the fundamental right of access to water,<sup>229</sup> to live in a healthy environment, and to have the environment protected.<sup>230</sup>

South African water legislation is mainly delineated in the National Water Act (NWA).<sup>231</sup> The NWA is aimed at water management in a broad sense and, like the EU Water Framework Directive, introduces Catchment Management Agencies as the competent authorities for an entire river basin. The Act distinguishes between various types of waters, such as watercourses, surface waters, aquifers, and estuaries.<sup>232</sup> A watercourse is defined “as a river or spring . . . or a wetland.”<sup>233</sup> The quantity and quality of the water that is needed to satisfy basic human needs *and* to protect the aquatic ecosystem of river and wetland is

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228. See GLAZEWSKI, *supra* note 5, at 509.

229. See S. AFR. CONST. 1996 § 27. (“(1) Everyone has the right to have access to . . . (b) sufficient food and water. . . (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights. . .”).

230. See *id.* § 24 (“Everyone has the right (a) to an environment that is not harmful to their health or well-being; and (b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that i. prevent pollution and ecological degradation; ii. promote conservation; and iii. secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.”).

231. See National Water Act 36 of 1998 (S. Afr.) [hereinafter NWA]. See also Water Services Act No. 108 of 1997 (S. Afr.), in Republic of S. Africa Government Gazette No. 18522, Dec. 19, 1997 [hereinafter WSA] (the other main water statute). Both Acts replace over one hundred previous statutes dealing with water. See also GLAZEWSKI, *supra* note 5, at 427. The WSA provides the regulatory framework for local authorities to supply water and sanitation services in their area and is not so relevant for wetlands management.

232. See NWA, *supra* note 231, § 1(1)(ix) (estuaries “partially or fully enclosed bodies of water that are open to the sea permanently or periodically and within which the seawater can be diluted, to an extent that is measurable, with fresh water drained from land.”).

233. *Id.* § 1(1)(xxix). (explicitly defines wetlands as “land which is transitional between terrestrial and aquatic systems where the water table is usually at or near the surface, or the land is periodically covered with shallow water, and which land in normal circumstances supports or would support vegetation typically adapted to life in saturated soil.”)

specified in the “Water Reserve.”<sup>234</sup> Once the Water Reserve has been determined, its thresholds must be observed when exercising any power or performing any duty in terms of the NWA.<sup>235</sup> Authorities must honor the requirements when granting licenses for the use of water. Licenses may be required for such uses as: water consumption, substance discharge, alteration of the bed, banks, course, or characteristics of a watercourse, recreational use, or other various applications.<sup>236</sup> This means that other allocations, such as the use of water for irrigation purposes or for domestic use beyond the basic human need, can only be granted to the extent that water remains after the Water Reserve has been set aside. In a country where there is a constant water shortage, this theoretical starting point is often described as being “rather optimistic” and as a source of conflict.<sup>237</sup>

Some water uses do not need prior authorization because they are regulated under a general authorization.<sup>238</sup> These include the taking of surface or groundwater, the discharge of industrial wastewater that meets certain chemical requirements, and the disposal of domestic or biodegradable industrial wastewater into evaporation ponds.<sup>239</sup> Precautionary measures must be taken, such as “all reasonable measures to prevent wastewater overflowing from any wastewater disposal system or wastewater storage dam.”<sup>240</sup> The latter is relevant for tidal wetlands and wetlands with seasonal flooding such as the Orange River Mouth. A landowner or person in control of land where pollution or disturbance takes place or has taken place may be forced to stop the pollution, to remedy the effects of the pollution, and to remedy the effects of any disturbance to the bed and banks of a watercourse.<sup>241</sup> If the polluter or landowner does not comply, the catchment management agency may take the measures it considers necessary to remedy the situation and to

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234. *Id.* pt. 3.

235. *See id.* § 18.

236. *See id.* § 21.

237. Interview with Leo van den Berg and Peter Pyke, South African Department of Water Affairs and Forestry, May 18, 2006 [hereinafter DWAF]. However, in theory, the creation of a “reserve” is considered to be a formidable innovation. *See* Robyn Stein, *Water Law in a Democratic South Africa: A Country Case Study Examining the Introduction of a Public Rights System*, 83 TEXAS L. REV. 2167, 2181 (2005).

238. *See* NWA, *supra* note 231, § 39.

239. *See* Revision of General Authorisations in Terms of Section 39 of the National Water Act, 1988, 36 of 1998, South African Government Gazette, No. 26187, Notice 399 (Mar. 26, 2004).

240. *Id.* § 4.15(2).

241. *See* NWA, *supra* note 231, § 19.

recover the costs from the polluter.<sup>242</sup> Similar provisions apply to persons who do not comply with a condition in a license or in a general authorization.<sup>243</sup>

Other pieces of legislation that may cover wetlands in South Africa are the Conservation of Agricultural Resources Act<sup>244</sup> and the Sea-Shore Act.<sup>245</sup> The Conservation of Agricultural Resources Act enables the Minister to regulate a variety of agricultural use activities that may harm wetlands. Such activities include the utilization of vleis, marshes, water sponges, water courses, and water sources, regulating the flow pattern of run-off water, and protection of water sources against pollution on account of farming practices and land irrigation.<sup>246</sup> The Sea-Shore Act defines sea as “the water and the bed of the sea below the low-water mark. . .including the water and the bed of any tidal river and of any tidal lagoon,” whereas seashore is defined as “the water and the land between the low-water mark and the high-water mark.” Glazewski concludes from these definitions that they include estuaries.<sup>247</sup> The Orange River Mouth estuary, where seawater flows into the river, definitely falls under the definition of the Act. Although the Act is outdated, it still applies and gives the Minister the power to issue regulations banning or regulating virtually any activity within any portion of the sea shore.<sup>248</sup>

#### 4. Namibia

Namibia is a drought-stricken country. Extremely low averages of rainfall (thirty millimeters annually in the south), no perennial rivers, and periodic extreme droughts render water the most valuable asset in this country. Although the Namibian Constitution does not guarantee a right

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242. *Id.*

243. *Id.* § 53.

244. Conservation of Agricultural Resources Act 43 of 1983 (S. Afr.) [hereinafter Agricultural Resources Act].

245. Sea-Shore Act 21 of 1935 (S. Afr.) [hereinafter Sea-Shore Act].

246. Agricultural Resources Act, *supra* note 244, § 6(2). The most important regulation under this Act is a 1984 Regulation in which, inter alia, the cultivation of virgin soil is prohibited as well as the utilization of the vegetation in a vlei, marsh or water sponge, within the flood area of a water course, or within ten meters horizontally outside such flood area in a manner that causes or may cause the deterioration of, or damage to, the natural agricultural resources. Regulation GNR.1048 of May 25, 1984.

247. GLAZEWSKI, *supra* note 5, at 447.

248. Sea-Shore Act, *supra* note 245, § 10. Regulations on the use of vehicles or the dumping of refuse have been issued, such as GNR. 2466 of Oct. 18, 1991. With the new National Water Act explicitly covering estuaries and wetlands, it is unlikely that further regulations to protect estuaries under the Sea-Shore Act will be issued.

to safe water, the new Water Resources Management Act of 2004<sup>249</sup> states as a general principle that safe drinking water is a basic human right.<sup>250</sup> In this situation, the Act logically deals with allocation of water for human use. However, the new Act also introduced river basin management and the establishment of Basin Management Committees.<sup>251</sup> Once these are set in place, it is thought that Namibian and South African water management in the Orange River basin can be better aligned.<sup>252</sup> The differences between Namibian and South African water legislation are considered obstacles for water management cooperation in the Orange River basin.<sup>253</sup> The Water Resources Management Act forms the basis for joint water management in line with the SADC Protocol on Shared Watercourses.<sup>254</sup> It has comparable provisions to the South African National Water Act, mainly because achieving maximum protection of species and ecosystems is one of its principal goals.<sup>255</sup> According to the Water Resources Management Act, water has to be reserved to meet domestic household needs and to protect aquatic and wetland ecosystems.<sup>256</sup> The abstraction of water can be subject to environmental impact analysis,<sup>257</sup> and the impact on aquatic ecosystems has to be taken into account when granting licenses to abstract and use water.<sup>258</sup>

### G. Conclusion

This brief overview of some of the relevant international and regional laws shows that the legal requirements for the management of transboundary rivers all argue for a common integrated management.

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249. Water Resources Management Act 24 of 2004 (Namib.), Government Gazette of the Republic of the Republic of Namibia, No. 3357 of Dec. 23, 2004 [hereinafter Namibia Water Resources Management Act].

250. *Id.* § 3(c).

251. *Id.* § 12. See also Maria Amakali & Loise Shixwameni, *River Basin Management in Namibia* (Oct. 30–31, 2002), available at <http://www.waternetonline.ihe.nl/aboutWN/pdf/Amakali&Shixwameni.pdf> (last visited Aug. 1, 2007) (paper presented at 3rd WaterNet/Warfsa Symposium “Water Demand Management for Sustainable Development,” Dar es Salaam).

252. DWAF, *supra* note 237.

253. *Id.*

254. Namibia Water Resources Management Act, *supra* note 249, § 54(b).

255. *Id.* § 3(d).

256. *Id.* § 27(1).

257. *Id.* § 33(3)(c).

258. *Id.* § 35(b).

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They take all relevant issues and often-conflicting functions of the water into account, with due regard to an “ecosystem approach.” Nature conservation law—especially the Ramsar Convention—follows this same approach, opting for integration of wetlands protection into the work of the joint bodies formed under both the UNECE Water Convention and the EU Water Framework Directive. However, it is clear that nature conservation law—especially the EU Wild Birds and Habitat Directives—does not leave as much discretion for balancing all interests involved in a specific wetland but instead regulates that the nature conservation interests must prevail over other interests. Since international and regional water law is focused on catchments—of which specific wetlands form only a small part—in specific cases, it may be difficult to fully satisfy these obligations in nature conservation law. In general, however, it can be concluded that international and regional water and nature conservation laws with regard to wetlands have developed in such a way that both sets of rules may be combined quite easily.

The situation gets more complicated under national law. The legal systems of the countries highlighted in this study integrate legislation within the fields of environmental management, nature conservation, and water management. However, these three sectors themselves are predominantly separated policy fields with separated pieces of legislation and, more importantly, different competent authorities at different levels of government. This conclusion can be reached even without taking economic legislation that may also be relevant for activities within a wetland (such as legislation on mining, tourism, fisheries, or agriculture) into account. In practice, this will prove problematic when nations pursue an integrated approach to wetland conservation, as will be shown in the next section.

### III. INTEGRATED MANAGEMENT IN TWO CASES

Integrated management of protected areas such as wetlands and river basins is the basic concept of the Ramsar Convention and various multi- and bilateral conventions on international watercourses. This section will detail two cases to illustrate how these international law obligations are dealt with in practice.

### *A. Background of the Scheldt River Estuary Case*

#### *1. The Ecosystem and its Biodiversity*

The Scheldt River originates in northern France and flows through Belgium before reaching the North Sea through its estuary in the Netherlands. The entire river basin covers more than 20,000 square kilometers.<sup>259</sup> The estuary is one of the last remaining large estuaries in Europe that still has highly dynamic tidal movements, a sixty kilometer long freshwater tidal area, and a remarkably large undisturbed raised salt marsh (The Submerged Land of Saefthinghe).<sup>260</sup> Numerous sand banks, mudflats, salt marshes, and shallow waters play host to tens of thousands of shore birds during both the breeding season and especially during migration season (when peak populations exceed 130,000 birds).<sup>261</sup> They also provide habitat for large populations of seals, shellfish, and various species of flat fish.<sup>262</sup>

#### *2. Ramsar Site and Other Protected Areas*

Parts of the Lower Scheldt River in Belgium were designated under the Ramsar Convention (“Schorren van de Beneden Schelde”) in 1984.<sup>263</sup> In 1987, Belgium deleted a small part (twenty-eight ha) of the area from the list for reasons of urgent national interest (the construction of a container terminal). In 1990, the remaining area in Belgium was placed in the Montreux Record of degraded wetlands because of severe nutrient enrichment and the lowering of the area’s water table as a consequence of agricultural intensification that caused a decline in invertebrate

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259. See The Ramsar Sitelist for Belgium and the Netherlands, *available at* <http://ramsar.org/sitelist.pdf> (last visited Nov. 16, 2007). The Dutch part of the estuary has been designated in its entirety (19,500 square kilometers), whereas the Belgian part has been partly designated (450 square kilometers). However, an even bigger area has been designated under the EU Wild Birds and Habitats Directives.

260. Wetlands International, on behalf of the Ramsar Convention secretariat, keeps information on each site. See Westerschelde en Verdrongen Land van Saeftinge Information Sheet, (3NL017) (Sept. 12, 2002), *available at* <http://www.wetlands.org/reports/ris/3NL017en.pdf>.

261. *Id.*

262. *Id.*

263. See Schorren van de Beneden Schelde Information Sheet, (3BE002) (Dec. 4, 2002), *available at* <http://www.wetlands.org/reports/ris/3BE002en.pdf> (last visited Nov. 16, 2007). There is some confusion on the date of designation as a Ramsar site: the information sheet states Sept. 27, 1984, whereas the Site Directory Report mentions Mar. 4, 1986 as the designation date, *available at* [http://ramsar.org/sitelist\\_order.pdf](http://ramsar.org/sitelist_order.pdf).

populations.<sup>264</sup> In addition, the Ramsar database mentions possible future degradation as a consequence of the construction of several container terminals and the further deepening of the Scheldt River towards Antwerp.<sup>265</sup> The Belgian part of this area remains listed in the Montreux Record.<sup>266</sup> The salt marshes in the Scheldt estuary in the Netherlands were designated as a Ramsar site in 1995. The designation of the remaining portions of the estuary followed in 2000.<sup>267</sup>

Large portions of the transboundary Scheldt River area have also been designated under both the EU Wild Birds Directive and the Habitats Directive by Belgium and the Netherlands. Belgium designated several areas around the northern part of the Scheldt River as a protected area under the Birds Directive.<sup>268</sup> It also designated numerous areas along the Scheldt River between the Dutch border and the Belgian city of Ghent as special areas of conservation under the Habitats Directive.<sup>269</sup> The areas partly overlap. The Netherlands designated practically the entire estuary on its territory, including salt marshes, under both Directives.<sup>270</sup>

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264. See The Ramsar Convention of Wetlands, *The Annotated Ramsar List: Belgium*, available at [http://www.ramsar.org/profile/profiles\\_belgium.htm](http://www.ramsar.org/profile/profiles_belgium.htm) (last visited Feb. 19, 2008) [hereinafter *Annotated Ramsar List*].

265. See Schorren van de Beneden Schelde Information Sheet, *supra* note 263. Interviews have shown that the latter must be regarded as the main cause for degradation, along with the effluent of untreated sewage water from the city of Brussels. See interviews with Paul Post, Scheldt Estuary Project Management "ProSes", Bergen op Zoom, Oct. 5, 2006, Peter Symens, Belgian environmental NGO "Natuurpunt," Antwerp, Oct. 6, 2006, and Vincent Klap, Dutch environmental NGO "Zeeuwse milieufederatie," Goes, Oct. 5, 2006.

266. See THE SECRETARIAT OF THE CONVENTION ON WETLANDS: THE LIST OF WETLANDS OF INTERNATIONAL IMPORTANCE, NOV. 13, 2007 VERSION, at 8, <http://ramsar.org/sitelist.pdf> (on file with COLO. J. INT'L ENVTL. L. & POL'Y).

267. The Dutch Ministry for Agriculture, Nature and Food Quality's, <http://www.synbiosys.alterra.nl/natura2000> (last visited Mar. 9, 2008) (the website has detailed information on each wetland, including maps). See also Information Sheet on Ramsar Wetlands, available at <http://www.wetlands.org/reports/ris/3NL017en.pdf> (last visited Mar. 9, 2008).

268. See Flemish Geographic Information Center, <http://geo-vlaanderen.agiv.be/geo-vlaanderen/natura2000> (last visited Mar. 9, 2008). The protected areas include salt marshes and polders of the Lower Scheldt River (more than 7,000 hectares), and border similar areas in the Netherlands. This site contains information on all areas protected under the Wild Birds and Habitats Directive.

269. See *id.* Scheldt and Durme estuaries between the Dutch border and Ghent (6,000 hectares), designated as such on May 24, 2002, Belgian Official Journal Aug. 17, 2002 (containing maps of the areas).

270. Ramsar site called "Westerschelde en Verdrongen Land van Saeftinghe" (42,840 hectares). Information on the protected area under the Wild Birds and Habitats Directives is available at the websites of the Dutch Ministry for Agriculture, Nature and

### 3. Gateway to Antwerp

The Port of Antwerp is the world's fifth most important port in terms of total cargo turnover.<sup>271</sup> The port facilities can only be reached through the Dutch part of the Scheldt estuary. In 1585, the Dutch authorities barricaded the Scheldt River in order to cross the southern provinces that were then occupied by Spain. This barricade lasted for more than two centuries and, in the early nineteenth century, was revived for a few years after the Belgian rebellion against the Netherlands. In 1839, a treaty formally separating the two countries was signed, in which Belgium was granted the right of passage for ships to and from Antwerp.<sup>272</sup> However, conflicts continued to erupt, especially with regard to the depth of the river.<sup>273</sup> Belgium claimed that the Netherlands should deepen and widen the shipping channel to allow bigger container ships to reach the port. The Netherlands only reluctantly did so, arguing that the 1839 treaty does not stipulate how deep the river should be, and that the natural ecosystem suffers too much damage as a consequence of deepening the fairway. Today, continuous dredging takes place in order to keep the fairway at the agreed depth.<sup>274</sup>

### 4. Bilateral Treaties

As already stated above, a series of bilateral treaties was concluded between Belgium's Flemish region and the Netherlands on the Scheldt estuary—especially with regard to deepening the fairway to the port of Antwerp—in order to allow bigger ships to reach the port facilities. In 1995,<sup>275</sup> the nations concluded a treaty on deepening the fairway that paid little attention to nature conservation.<sup>276</sup> This led to various legal

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Food Quality as well, *supra* note 267.

271. *See generally* Port of Antwerp, <http://www.portofantwerp.be> (last visited Feb. 19, 2008).

272. Treaty of London, *supra* note 94, art. IX. Another provision in the Treaty is on the right of transit over Dutch territory of a railway line between the Antwerp port and the German industrial Ruhr area (Art. XII). This provision has recently been the subject of a Permanent Court of Arbitration decision in a conflict between Belgium and the Netherlands on the reactivation of a historic railway in several now-protected areas. Iron Rhine (“Izjeren Rijn”) Railway (Belg. v. Neth.) (Perm. Ct. Arb. 2005), *available at* <http://www.pca-cpa.org/upload/files/BE-NL%20Award%20corrected%20200905.pdf>.

273. S.V. MEIJERINK, CONFLICT AND COOPERATION ON THE SCHELDT RIVER BASIN 88 (1999) (the first conflict emerged in the middle of the 19th century).

274. *Id.*

275. *See generally* MEIJERINK, *supra* note 273, at 93–221 (this Convention marked the end of a thirty-year period of negotiations on draft conventions).

276. Convention of Antwerp, Jan. 17, 1995, Netherlands Bulletin of Treaties 1995,

procedures, both within the Netherlands and at the European level. In the Netherlands, an administrative court nullified an environmental decision by the Minister of Public Works and Water Management to deepen the fairway.<sup>277</sup> To prevent further delay, the Westerscheldt Permits Act (*Vergunningenwet Westerschelde*)—containing only one Article and stating that all necessary permits for the deepening of the fairway were herewith granted—was successfully sent through Parliament.<sup>278</sup> This special Act met a great deal of criticism,<sup>279</sup> but the project had already been carried out before further legal action could be taken. The European Commission started an infringement procedure, especially focusing on bird habitat loss, because provisions of the EU Wild Birds and Habitats Directives had not been met.<sup>280</sup> One of the resulting legal questions was whether the 1839 Treaty could be used as a reason not to apply these EU Directives. Two opposing views can be heard in the two countries:<sup>281</sup>

1) The 1839 Treaty is an international treaty between EU and non-EU member states dating back before 1958, so its obligations are not affected by EU law. This argument is based on Article 307 of the EC-

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No. 51.

277. Administrative Law Division of the Council of State, Judgment of June 14, 1996, reprinted in 23 MILIEU EN RECHT No. 130 (1996).

278. The Westerscheldt Permit Act, Netherlands Bulletin of Acts and Decrees 1997, No. 258.

279. See MEIJERINK, *supra* note 273, at 199; P.J.J. van Buuren, *Vergunningenwet Westerschelde niet voor herhaling vatbaar*, 24 MILIEU EN RECHT 122–24 (1997) (Neth.); J. Verschuuren, *De formele wetgever als uitvoerder: de Vergunningwet Westerschelde en het streven naar een integrale afweging*, 35 BOUWRECHT 361, 363–65 (1998) (Criticism was raised by the legal advisor of new legislation in the Netherlands, the Council of State, as well as in literature).

280. See The European Commission, Secretariat General, *Decisions of the Commission for Dec. 12, 2005*, [http://ec.europa.eu/community\\_law/eulaw/decisions/dec\\_05\\_12\\_13.htm](http://ec.europa.eu/community_law/eulaw/decisions/dec_05_12_13.htm) (last visited Mar. 10, 2008) (Complaint 95/4564. After almost ten years of negotiations between the European Commission and the Netherlands, the Commission decided to close the case on December 13, 2005); See also Netherlands Parliamentary Papers II, 2005–2006, Appendix of Minutes, No. 1204 (Apr. 6, 2006) (Although, for the time being, the Commission is satisfied with the compensation program that is currently being carried out to restore habitat, it did warn the Netherlands that a new infringement procedure will be initiated if the restoration program was not carried out adequately).

281. See Jonathan Verschuuren, *Towards a Trilateral Convention on the Wadden Sea: The Relationship between International Treaties and EC-Directives and the Westerschelde Case*, in TRILATERAL OR EUROPEAN PROTECTION OF THE WADDEN SEA? 195–202 (C. Lambers et al. eds., 2003). In 2005, the same question arose in the dispute between Belgium and the Netherlands on the reactivation of the Iron Rhine railway, but unfortunately, the Court did not come to a judgment on this issue. See Iron Rhine Railway, *supra* note 272.

Treaty.<sup>282</sup>

2) Since 1839, both Belgium and the Netherlands have engaged in international law-making with regard to environmental protection—such as the 1992 Helsinki Convention and the Wild Birds and Habitats Directive. These later agreements should be taken into account when interpreting the 1839 Treaty.

This second argument is based on Article 31(3) of the Vienna Convention on the Law of Treaties.<sup>283</sup> A related argument is that the 1995 Convention is a more specific convention on one of the topics of the 1839 Treaty and thus takes precedence over Article 31(3) of the Vienna Convention on the Law of Treaties. Since the 1995 Convention was concluded between two EU member states that were both already bound by the 1979 Wild Birds Directive and the 1992 Habitats Directive, this Convention cannot overrule those directives. The latter argument is based on Article 10 of the EC Treaty.<sup>284</sup>

On December 21, 2005, four new bilateral conventions on the Scheldt River were concluded between the Flemish Region of Belgium and the Netherlands, two of which are especially relevant.<sup>285</sup>

The Convention on Cooperation on Policy and Management of the Scheldt Estuary<sup>286</sup> aims at a common and sustainable management of the estuary in which there is (1) maximum flood defense, (2) optimal port accessibility, and (3) a healthy and dynamic ecosystem.<sup>287</sup> A common monitoring system aimed at monitoring these three elements will be established. In addition, the parties agree to apply speedy and efficient

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282. Treaty Establishing the European Community, art. 307, Nov. 10, 1997, 1997 O.J. (C340) 3 [hereinafter EC Treaty]. EC law only takes precedence over international agreements between Member States, not between Member States and non-Member States. Depending on what side they are on, people either argue that this is the case (besides Belgium and the Netherlands, other parties to the Separation Treaty are Austria, France, Great-Britain, Prussia, and Russia), or that the other parties were only signatories because the bilateral Treaty was signed during an international conference on other issues with these states present. In the latter view, all agreements in the Treaty only encompass rights and obligations of either Belgium or the Netherlands.

283. Vienna Convention on the Law of Treaties, 8 I.L.M. 679 (1969), art. 31(3).

284. EC Treaty, *supra* note 282, art. 10.

285. The Conventions on Common Nautical Management (Netherlands Treaty Series 2005, No. 312) and on Pilot Vessel Fares (Netherlands Treaty Series 2005, No. 328) will not be addressed.

286. Convention of Middelburg, Dec. 21, 2005, Netherlands Treaty Series 2005, No. 316.

287. *Id.* art. 3.

procedures regarding any decisions that are necessary to achieve the three goals of the Convention. Finally, a Flemish-Dutch Scheldt Commission was instituted for cooperative management of the estuary.<sup>288</sup>

The Convention on the Execution of the Scheldt Estuary Development Outline 2010<sup>289</sup> sets forth specific agreements on the deepening of the fairway. For example, ships with a draught of 13.1 meters have to be able to sail to the port of Antwerp regardless of the tide. The Convention also contains agreements on the creation of more space of estuarine environments; more than 1,000 hectares of new estuarine ecosystems will be developed on both sides of the border and some cross-border, for instance, by creating new intertidal areas.<sup>290</sup> These specific agreements had already been published earlier in 2005 in the Scheldt Estuary Development Outline 2010, a joint Flemish-Dutch program on the future of the Scheldt Estuary that was published after several years of consultations of all stakeholders involved in both countries and after joint assessments had been carried out.<sup>291</sup> These assessments included a joint strategic environmental impact assessment, a joint cost-benefit analysis, and a joint preliminary test against the most important provisions of the EU Wild Birds and Habitats Directives.<sup>292</sup> A precise division of costs between the two countries<sup>293</sup> and the concrete

decisions that have to be taken by the various institutions involved—i.e., the Flemish government, the Dutch government, and the Technical Scheldt Commission (see below)—are listed in the Convention.<sup>294</sup>

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288. *Id.* art. 4. The institution of such a management commission for a sub-basin is allowed under both the EU Water Framework Directive (art. 13(5)) and the 2002 Scheldt Convention (art. 4(5)).

289. Convention of Middleburg, Dec. 21, 2005, Netherlands Treaty Series 2005, No. 310.

290. *Id.* art. 3.

291. See Ontwikkelingsschets 2010 Schelde-estuarium [The Scheldt Estuary Development Outline 2010], <http://www.ontwikkelingsschets2010.nl> (last visited Feb. 19, 2008). Flemish-Dutch Project Directorate 'ProSes', Scheldt Estuary Development Outline 2010, Bergen op Zoom 2005. An English summary of the outline is available. [hereinafter Estuary Development Outline 2010].

292. *See id.*

293. *Id.* art. 7.

294. *Id.* art. 4 (providing that the Netherlands guarantees that the necessary permits to deepen the fairway will be granted, whereas the Flemish Region is responsible for carrying out the actual dredging of the river).

### 5. Docks

Many court procedures have been initiated on decisions to construct new docks in the estuary. After the Supreme Administrative Court of Belgium held the decision to allow the construction of the so called "Deurganck dock"<sup>295</sup> on the left bank of the river north of Antwerp to be contrary to the EU Wild Birds Directive,<sup>296</sup> the Belgian national state legislature passed a special Act invoking the exemption clause of the Habitats Directive and granting the necessary permits, by passing regular environmental legislation and following the Dutch example of the Westerscheldt Permits Act described above.<sup>297</sup> The Act also regulates compensation for the loss of habitat by restoring previously lost wetland. As in the Netherlands, the special Act received a great deal of criticism, but it survived a series of challenges in court.<sup>298</sup> The dock opened in 2006.<sup>299</sup>

The decision to allow the construction of a container terminal in the Dutch part of the estuary was annulled by the Dutch Council of State in 2003 because the decision was contrary to the EU Wild Birds and Habitats Directives.<sup>300</sup> In 2006, a new environmental impact assessment showed that the negative impact of the dock on the wetland could be greatly reduced by constructing a smaller terminal, which made the provincial authorities decide to restart decision making on this terminal.<sup>301</sup> Since NGOs remain critical of the project, further legal procedures are expected.

### 6. Cooperative Institutions

Until 1995, the history of Belgian-Dutch relations concerning the management of the Scheldt River could be characterized by conflict and distrust rather than by cooperation.<sup>302</sup> In recent years, however, all actors

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295. *See generally* Port of Antwerp, <http://www.deurganckdok.be> (last visited Feb. 19, 2008).

296. Wild Birds Directive, *supra* note 62; Supreme Administrative Court of Belgium, judgment of Mar. 7, 2001, No. 93,767.

297. Belgian Official Journal (Dec. 14, 2001).

298. Court of Arbitration of Belgium, Judgments of June 26, 2002, No. 116/2002, Nov. 27, 2002, No. 174/2002, July 2, 2003 No. 94/2003.

299. Wild Birds Directive, *supra* note 62.

300. Administrative Law Division of the Council of State, judgment of July 16, 2003, *reprinted in* 30 MILIEU EN RECHT No. 124 (2003).

301. *See* Westerschelde Container Terminal, Hoofdstuk Natuur MER WCT tevens Passende Beoordeling, May 16, 2006, at 54.

302. MEIJERINK, *supra* note 273, at 234.

involved in decisionmaking with regard to the Scheldt River have made many efforts to improve cooperation. As already mentioned, there is an International Scheldt Commission (ISC) on the basis of the UNECE Water Convention, the Scheldt Convention, and the EU Water Framework Directive.<sup>303</sup> The ISC deals with the entire river basin and consists of representatives from various government institutions in France, Belgium, the Walloon Region, the Brussels Capital Region, the Flemish Region, and the Netherlands.<sup>304</sup> Environmental NGOs, as well as the European Commission, are allowed to act as observers. For more specific matters concerning the Scheldt estuary, bilateral commissions of the Flemish Region and the Netherlands are considered to be better suited than the slow and ponderous ISC.<sup>305</sup>

First of all, there is the new Flemish-Dutch Scheldt Commission that has yet to be instituted pursuant to the 2005 Convention on Co-operation on Policy and Management of the Scheldt Estuary mentioned above.<sup>306</sup> The Commission will initiate and supervise monitoring and research on the estuary, draw up and carry out plans and projects, and promote cooperative management of the transboundary part of the Scheldt River basin.<sup>307</sup> It will consist of a political council with decision making power, and an administrative council to prepare decision making.<sup>308</sup>

Once established, the administrative council will take over the tasks of the Flemish-Dutch Technical Scheldt Commission (TSC),<sup>309</sup> that has existed since 1948 and specifically deals with issues concerning the improvement and maintenance of the navigation channel in the Lower Scheldt River. The TSC mainly consists of government officials of ministries of the Netherlands and the Flemish Region. Besides discussing technical issues, this commission also initiates research and was the initiator of the important Scheldt Estuary Development Outline 2010 and its predecessor, the Long Term Vision on the Scheldt Estuary.<sup>310</sup> As mentioned above, the Commission was granted some decision making power in the 2005 Convention on the Execution of the Scheldt Estuary

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303. See generally Internationale Schelde Commissie [International Schelde Commission], <http://www.isc-cie.com> (last visited Feb. 19, 2008).

304. *Id.*

305. See Post Interview, *supra* note 265; Interview with Klap, *supra* note 265.

306. Convention of Middelburg, *supra* note 286, art. 4.

307. *Id.*

308. *Id.*

309. Convention on Co-operation on Policy and Management of the Scheldt Estuary art. 7(3) (on file with COLO. J. INT'L ENVTL. L. & POL'Y).

310. See Estuary Development Outline 2010, *supra* note 291.

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Development Outline 2010.<sup>311</sup> The TSC established the bilateral Project Management of the Scheldt Estuary Development Plan (ProSes) “to promote political and socially supported decisions on the projects” in the development plan—i.e., deepening of the fairway, nature conservation projects, and flood defense projects.<sup>312</sup> Its formal tasks are to direct the projects in such a way that “coherence and progress” will be guaranteed, to advise the TSC, to assure the contribution of governments, interested parties, and NGOs and to handle communications.<sup>313</sup>

The Project Management strongly advised the ministers in both countries to institute an Advisory Parties Committee (Overleg Adviserende Partijen, OAP).<sup>314</sup> The advice was heeded and, as a result, all other involved parties—i.e., parties other than central Dutch and Flemish ministries—are now organized under this body. The body consists of representatives of decentralized governments, agricultural organizations, business organizations, port organizations, and environmental NGOs—all from both countries—and is regularly consulted by the competent ministers on issues relating to the Scheldt Estuary Development Outline 2010.<sup>315</sup> Most people involved in decision making with regard to the Scheldt estuary consider this body to have been very influential. The initial Belgian threat to institute court procedures, including one before the International Court of Justice, to enforce the 1839 Separation Treaty was averted by this Committee.<sup>316</sup> Once the various conflicts of interests had been overcome, and stakeholders such as the Antwerp port authorities and Dutch environmental NGOs were able to identify common goals, the competent Dutch and Flemish ministers had no choice but to follow the unanimous opinion of the Committee.<sup>317</sup> Many consider the common ground that was developed within the Committee as a huge success, not only for the short term—for example the drafting of the Scheldt Estuary Development Outline 2010—, but also for any future policy-making.<sup>318</sup> The environmental NGOs involved in the Committee have already joined forces. Seven environmental NGOs in both countries—including the

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311. *See id.*

312. *See id.*

313. *See id.*

314. *See* interview with Post, *supra* note 265.

315. *Id.*

316. *Id.*

317. *Id.*

318. This conclusion was reached in the 2005 evaluation of ProSes, KLINKERS PUBLIC POLICY CONSULTANTS, EVALUATIE VAN PROSES 49. All persons interviewed in 2006 acknowledged this conclusion.

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Dutch division of BirdLife International and WWF Belgium—joined to create the Scheldt Naturally to influence public opinion on the Scheldt estuary.<sup>319</sup> They also prepared a common position within the Committee.

Finally, several other commissions with less relevance to the case exist as well. First, since 1839, the bilateral Permanent Commission for Supervising Navigation on the Scheldt has dealt with such issues as piloting and marking.<sup>320</sup> It has a limited scope and does not include nature conservation or water management in the estuary. Then there is a Sub Basin Management Committee under the EU Water Framework Directive that drafts water quality plans for the Flemish region.<sup>321</sup> Since October 2006, local competent authorities dealing with the Scheldt River have been organized within the newly created Scheldt Landscape Park.<sup>322</sup> Finally, there are national stakeholder commissions, such as the Westerscheldt Administrative Consultation Body in the Netherlands, in which authorities at all levels—national, provincial, and municipal, as well as business organizations and NGOs—are represented. These stakeholder commissions also allow involved parties to consult each other on issues concerning the Dutch part of the Scheldt estuary.<sup>323</sup> This consultation body initiated the joint Dutch-Belgian Scheldt Information Center, which offers a wide variety of web-based information on the Scheldt estuary to the general public in the Flemish region and the Netherlands.<sup>324</sup>

### 7. Adverse Factors for the Wetland

The overall condition of the wetland is not good. Part of the area on Belgian territory is on the Montreux record because of severe contamination.<sup>325</sup> Meanwhile, impoldering and draining of former wetland, deepening and widening of the fairway, and dock construction

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319. See Vogelbescherming Nederland, <http://www.descheldenatuurlijk.be> (last visited Feb. 19, 2008) (common website for the mentioned organizations).

320. See VTS-Scheldt - Permanent Committee, *The Permanent Committee on Supervision on Scheldt Navigation*, [http://www.vts-scheldt.net/default.aspx?path=Content/Organisaties/Permanente%20Commissie\\_en](http://www.vts-scheldt.net/default.aspx?path=Content/Organisaties/Permanente%20Commissie_en) (last visited Feb. 19, 2008).

321. See Lower Scheldt Management Commission (Belgium), <http://www.volvanwater.be/benedenschelde.html> (last visited Nov. 16, 2007) (in Dutch).

322. See Schelde-Landschapspark, <http://www.schelde-landschapspark.be> (last visited Nov. 16, 2007) (in Dutch).

323. See KLINKERS PUBLIC POLICY CONSULTANTS, *supra* note 318, at 50.

324. See Schelde InformatieCentrum (The Scheldt Information Center), <http://www.scheldenet.nl> (last visited Nov. 16, 2007) (in Dutch).

325. See *Annotated Ramsar List*, *supra* note 264.

have resulted in a dramatic decrease of mudflats, salt marshes, and shallow waters. The most important adverse factors for the area are the following:<sup>326</sup>

1) Impoldering and the construction of dykes to protect newly claimed land has reduced the size of the wetland by half since 1800. This has caused the natural process of the development of new mudflats and tidal marshes to come to a halt, and has limited the breeding and resting places for birds and seals.

2) Deepening the shipping channels in the river and the constant dredging that is necessary to keep the fairway at a constant depth have caused severe erosion of the mudflats and alterations in the natural morphological system of the river, again reducing the number of suitable breeding and resting places for birds and seals.

3) Construction of docks has reduced the size of the area and altered the natural flowing patterns of the river.

4) Large-scale industry along the river banks has threatened the water quality, especially around Antwerp and to a much lesser extent in the Netherlands where a large Dow Chemical plant is located. Most damage to the water quality, however, is caused by untreated sewage that is released by the city of Brussels into tributaries of the Scheldt River. This has resulted in river death over a long stretch towards the city of Antwerp, which is the main reason why the site is listed site on the Montreux record.

5) As a consequence of climate change, the rising sea level will submerge the remaining mudflats and salt marshes in the near future.

#### *8. Redressing the Adverse Factors*

Some of the factors mentioned above are currently being redressed.<sup>327</sup>

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326. Estuary Development Outline 2010, *supra* note 291; RAMSAR SITE DIRECTORY REPORTS, available at <http://www.wetlands.org/rsis> (last visited Feb. 19, 2008); THE RAMSAR CONVENTION ON WETLANDS: NATIONAL REPORTS FOR THE RAMSAR COP9, available at <http://ramsar.org> (last visited Feb. 19, 2008); Interviews with representatives of environmental NGOs in Belgium and the Netherlands, Peter Symens of "Natuurpunt," Antwerp, Oct. 6, 2006; Interview with Klap, *supra* note 265.

327. See generally Estuary Development Outline 2010, *supra* note 291. See also Interviews, *supra* note 16. Netherlands Parliamentary Papers II Nos. 26,980 and 30,244 (1999–2006) (Dutch Parliament heavily debates these actions because of the fragile relationship with Belgium, and because of pressure from local rural communities that are

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Tidal influence in reclaimed polders, controlled flooding, and other methods to develop new wetland areas are currently being introduced. This process evolves slowly, mainly because of intense public distrust as to the safety of such developments (there is a fear that the risk of flooding will increase) especially with the general public in the Netherlands, which has not been involved in the stakeholder processes described above.<sup>328</sup>

Further deepening of the fairway has been agreed upon, under the condition that wetland restoration projects will be carried out simultaneously. Also, a new strategy of dredging, which may limit the negative impacts on the ecosystem by using the morphological system of the river when deciding where and when to dredge and dump the sand that has been dredged, is being researched.

Wetland restoration projects (Belgium) and plans to construct a smaller dock that apparently only will have a minimal impact on the ecosystem (the Netherlands) are underway.

The water quality has greatly improved over the years as a consequence of successful EU water quality legislation which requires the city of Brussels to treat its sewage before dumping it into the Scheldt river basin. As of late 2006, however, the untreated sewage from a substantial part of Brussels's population continues to be discharged.

Concrete actions have yet to be taken to limit the negative impact of the rise in sea level as a consequence of climate change, although the wetland restoration plans mentioned under number one will enlarge the area, thus giving more space to water in high water situations and creating new mud flats at higher elevations.

### *9. Future Development*

The future development of the Scheldt estuary has been extensively discussed within the Technical Scheldt Commission that in 2001 came up with a Long Term Vision on the Scheldt Estuary. The main target for 2030 is a healthy and multifunctional estuary that can be sustainable for human needs.<sup>329</sup> Shortly after this 2001 Vision, the Technical Commission started to work on the Scheldt Estuary Development Outline 2010. In 2005, this outline resulted in the signing of the bilateral

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against some of the measures, especially the development of new wetlands on agricultural grounds that, in the past, had been reclaimed from the sea).

328. Richard H.M. Eertman et al., *Restoration of the Sieperda Tidal Marsh in the Scheldt Estuary, The Netherlands*, 10 RESTORATION ECOLOGY 438, 438–39 (2002).

329. See Estuary Development Outline 2010, *supra* note 291.

conventions above.<sup>330</sup> The future common Belgian-Dutch policy with regard to the estuary states maximum flood defense, optimal port accessibility, and a healthy and dynamic ecosystem as its main goals.<sup>331</sup> Deletion of the Belgian part of the wetland from the Montreux record is not an issue.<sup>332</sup> Since all parties involved consider the EU Wild Birds and Habitats Directives to have much stronger legal obligations than the Ramsar Convention, all discussions are held in the light of these Directives, rather than in regard to the Ramsar Convention.<sup>333</sup> The same applies to the discussions regarding wetland restoration projects, especially the re-creation of 600 and 4,000 hectares of new wetland in the Netherlands and Belgium, respectively.<sup>334</sup> All stakeholders involved consider the reintroduction of tidal influence in reclaimed polders, controlled flooding, and other ways to develop new wetland areas to be measures necessary to allow intensive economic use of the estuary to continue.<sup>335</sup> The general public remains skeptical because of its fear of an increase in flood risks.<sup>336</sup>

### *B. Background to the Orange River Mouth Case*

The Orange River originates in the Lesotho highlands some 2,300 kilometers away from the Atlantic coast. The Orange River basin is by far the largest catchment in South Africa, also covering a large part of Lesotho and parts of Namibia and Botswana.<sup>337</sup> It has been divided into several parts: Vaal River, Upper Orange (*Senqu*), Middle Orange, and

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330. *Id.*

331. *Id.*

332. This was acknowledged by all persons interviewed. The fact that the area is on the Montreux record is hardly ever mentioned. Only in the 1999 and 2005 reports of the Research Institute for Nature and Forest for the Flemish Region government on the condition of nature in the Flemish Region, reference is made to the Montreux record. See Research Institute for Nature and Forest, [http://www.inbo.be/content/homepage\\_en.asp](http://www.inbo.be/content/homepage_en.asp) (last visited Feb. 19, 2008). The most recent Ramsar National Report for Belgium simply states that the Montreux record remains unchanged "for 1 or 2 sites." THE RAMSAR CONVENTION ON WETLANDS: NATIONAL REPORT BELGIUM FOR COP9 84 (2005), available at [http://ramsar.org/cop9/cop9\\_nr\\_belgium.pdf](http://ramsar.org/cop9/cop9_nr_belgium.pdf) (last visited Feb. 19, 2008) (the report does not even explicitly mention the site itself).

333. Interviews, *supra* note 16 (all interviewed parties agree on this point).

334. See Estuary Development Outline 2010, *supra* note 291.

335. *Id.*

336. Interviews, *supra* note 16 (all interviewed parties agree on this point).

337. The total river basin area comprises approximately one million km<sup>2</sup> with a population of 14.27 million.

Lower Orange.<sup>338</sup> The final thirty kilometers of the river in the Lower Orange Catchment is a dynamic estuary ecosystem. During high tide, water from the Atlantic Ocean enters the river mouth; when in flood, the Orange River transports fresh water far into the ocean.<sup>339</sup> The water level of the river varies with seasonal changes. Sometimes, the water level is so low that the mouth closes. Shifting sandbanks and mudflats, small islands, channel bars, and littoral salt marshes are the result of a rhythmic tidal inundation.<sup>340</sup> The Orange River Mouth is the only wet and green area in the arid environment on both the Namibian and South African sides of the river. The nearest coastal wetlands are 400 and 500 kilometers to the south and north, respectively. Therefore, the area is important for waterfowl, including several rare and endangered species, for both migration and breeding.<sup>341</sup> The same is true for fish and amphibians.<sup>342</sup>

Since the early 1990s, the area has degraded.<sup>343</sup> The salt marshes have dried up as a consequence of the construction of a road that cuts off the salt marshes from the river and as a result of a general scarcity of water.<sup>344</sup> The river lost its seasonal water level changes due to several upstream dams that control the amount of water in the river.<sup>345</sup> The number of birds dropped from around 25,000 in the mid-1980s to 6,200 in 2001. The population of the Cape Cormorant (*phalacrocorax capensis*) nearly disappeared.<sup>346</sup> In 2004, part of the salt marsh was

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338. See Department of Water Affairs and Agriculture (DWAF): Orange River Project, <http://www.dwaf.gov.za/orange> (last visited Feb. 19, 2008) (Map of the Orange River Basin).

339. Northern Cape Province (NDEC), 3rd Draft Orange River Mouth Management Plan 1 (2004).

340. *Id.*

341. LINCOLN D.C. FISHPOOL & MICHAEL EVANS, IMPORTANT BIRD AREAS IN AFRICA AND ASSOCIATED ISLANDS. PRIORITY SITES FOR CONSERVATION 820 (2001); A. Abrahams, *Orange River Mouth Transboundary Ramsar Site: Green Scene*, 55 AFRICAN WILDLIFE 46 (2001).

342. *Orange River Mouth Ecology Examined*, 16 SA WATERBULLETIN 1, 26 (Jan. 1990).

343. G.I. COWAN & G.C. MARNEWECK, DEP'T OF ENVTL. AFFAIRS AND TOURISM, SOUTH AFRICAN NATIONAL REPORT TO THE RAMSAR CONVENTION, 7-8 (1996).

344. See HANS BEEKMAN ET AL., VULNERABILITY OF WATER RESOURCES TO ENVIRONMENTAL CHANGE IN SOUTHERN AFRICA 32 (2003) available at <http://iodweb1.vliz.be/odin/bitstream/1834/352/1/1unep55.pdf> (The Orange River water is intensively controlled and exploited to its optimum).

345. *See id.*

346. M.D. Anderson, H. Kolberg et al., *Waterbird Populations at the Orange River Mouth from 1980-2001: A Re-assessment of its Ramsar Status*, 74 OSTRICH 159, 159-65 (2003).

restored. The number of water birds present in the area is now stable at around 7,000 birds.<sup>347</sup>

### *1. Ramsar Site and Other Protected Areas*

The Orange River Mouth was the first transboundary wetland in southern Africa. It had already been designated as a Ramsar site under the Ramsar Convention by South Africa in 1991.<sup>348</sup> After Namibia ratified the Ramsar Convention in 1995, the designated area was enlarged and the Namibian part of the wetland was immediately designated as well.<sup>349</sup> This was not the result of a formal international agreement between Namibia and South Africa; both countries simply proposed their respective parts of the area under the Ramsar Convention. Part of the area was even proposed twice as a consequence of a border dispute.<sup>350</sup> In the same year, the area was put on the Montreux record because part of it had been seriously degraded.<sup>351</sup> The area comprises the estuary of the Orange River before it reaches the Atlantic Ocean, between the river mouth and the bridge between the border towns of Oranjemund and Alexander Bay. There are plans to come to a formal agreement declaring the area a true transfrontier Ramsar site so that an integrated management of the area by both states will have a formal basis.<sup>352</sup>

The wetland is on the Namibian side is part of a huge protected area—Sperrgebiet National Park (NP)—excluding only the town of Oranjemund.<sup>353</sup> This is a huge former no-go diamond area that was

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347. Data provided by Mark Anderson of the Department of Tourism, Environment and Conservation of South Africa's Northern Cape Province, Mar. 2006 (on file with author).

348. Ramsar Area No. IZA010, designation date June 28, 1991. *See* Information Sheet in the Ramsar Sites Information Service Database, <http://www.wetlands.org/RSDB> (click on IZA010) (last visited Feb. 19, 2008).

349. Ramsar Area No. INA003, designation date July 24, 1995. *See* Information Sheet in the Ramsar Sites Information Service Database, <http://www.wetlands.org/RSDB> (click on INA003) (last visited Feb. 19, 2008).

350. Part of the wetland is claimed by both states and hence considered to be part of their respective wetland, see further below.

351. *See* The Ramsar Convention of Wetlands, *The Annotated Ramsar List: South Africa*, [http://www.ramsar.org/profile/profiles\\_southafrica.htm](http://www.ramsar.org/profile/profiles_southafrica.htm) (last visited Feb. 16, 2008).

352. Author phone interview with Dewald Badenhorst, Department of Tourism, Environment and Conservation of South Africa's Northern Cape Province, Potchefstroom, May 24, 2006.

353. *See* Namibian Ministry of Environment and Tourism, *Registered Communal Conservancies*, [http://www.met.gov.na/maps/conservancies\\_2006.pdf](http://www.met.gov.na/maps/conservancies_2006.pdf) (last visited Feb.

transferred to the Namibian government after restoration to its original condition. It is desert wilderness with no human population.<sup>354</sup> To the east, Sperrgebiet NP borders Ai-Ais NP, still north of the Orange River. There is a series of protected unfenced areas almost to the Angolan border to the north.<sup>355</sup>

South of the Orange River, the wetland remains unprotected under national or provincial South African law. The ownership of the area by the Alexkor diamond mining company, reluctance of the Northern Cape Province because of a lack of capacity and funds, a land claim case, and a border dispute with Namibia provides reasons for this lack of protection.<sup>356</sup> However, the process to declare the area a provincial nature reserve was well underway in 2006. The Northern Cape Province, under the new Protected Areas Act, has set the boundaries of a new nature reserve to include the Ramsar site as well as a further twenty-five kilometers of the river upstream to function as a buffer for the actual site.<sup>357</sup> Formal designation is still pending, but the Department of Environmental Affairs and Tourism has announced that it will gladly cooperate in this process.<sup>358</sup>

To the east of the wetland is Richtersveld NP, which was established in 1991.<sup>359</sup> Following the signing of a treaty in 2003 by the presidents of Namibia and South Africa, Richtersveld NP was enlarged and connected to Ai-Ais NP in Namibia. This connection formed the Ai-Ais/Richtersveld Transfrontier Park (ARTP), a TFCA under the SADC Protocol on Wildlife Conservation and Law Enforcement.<sup>360</sup> Even though the Orange River Mouth wetland is relatively close to this TFCA, it has not been included in the TFCA.<sup>361</sup> The TFCA could possibly be further enlarged towards the Atlantic coast to include the Orange River Mouth wetland in the future.<sup>362</sup> The Joint Management Board of the TFCA advises the authorities on issues relating to the ARTP, whereas

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19, 2008).

354. *Id.*

355. *See id.*

356. DEAT, *supra* note 127.

357. Interviews, *supra* note 16 (Minutes of the 17th ORMIMC Meeting); Interview with Dewald Badenhorst, *supra* note 353.

358. DEAT, *supra* note 127.

359. Instituted as such on Aug. 16, 1991, Government Notice No. 1969 (S. Afr.).

360. Signed in Windhoek on Aug. 1, 2003.

361. *See* Peace Parks Foundation, *The Global Solution*, <http://www.peaceparks.org> (last visited Feb. 19, 2008).

362. Expressed as a desired future situation by Walter van Peet, coordinator with SANParks of the Ai-Ais/Richtersveld TFCA, Feb. 8, 2005, Alexander Bay.

Management Committees deal with specific topics, such as community development and security and customs.<sup>363</sup>

## 2. Namibia-South Africa Border

The Orange River forms the border between Namibia and South Africa. According to the Namibian Constitution, the Namibian-South African boundary is in the middle of the river.<sup>364</sup> According to South Africa, the boundary is on the northern bank of the river following an 1890 treaty between Germany and the United Kingdom.<sup>365</sup> Either way, the exact location of the border is difficult to pinpoint because the estuary is a dynamic ecosystem with sandbanks, mudflats, and small islands in the river mouth form and disappear over time.<sup>366</sup> The exact location of the border also determines the ownership of offshore diamond and fishing areas, as well as areas where oil and gas prospects may be explored. Although promises to the contrary were made in the past,<sup>367</sup> South Africa does not seem to be prepared to change the border because it fears that a Pandora's Box will be opened; it seems to prefer to a continued adherence to colonial era borders.<sup>368</sup> Namibia is concerned with settling its border along the river and its rights to the water<sup>369</sup> and

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363. SA National Parks Organization (SANParks), *Conservation at the South African National Parks*, <http://www.sanparks.org/conservation/transfrontier/Ai-Ais-Richtersveld.php> (last visited Feb. 19, 2008).

364. THE CONSTITUTION OF THE REPUBLIC OF NAMIBIA, art. 1(4) (Feb. 1990), available at <http://209.88.21.55/opencms/export/sites/default/grnnet/AboutNamibia/constitution/constitution1.pdf>.

365. Anglo-German Treaty [Heligoland-Zanzibar Treaty], July 1, 1890, available at [http://ghdi.ghi-dc.org/sub\\_document.cfm?document\\_id=782](http://ghdi.ghi-dc.org/sub_document.cfm?document_id=782); South African Treaties art. 3, G81-98, 390.

366. Gerhard Erasmus & Debbie Hamman, *Where Is the Orange River Mouth? The Demarcation of the South African/Namibian Maritime Boundary*, AFR. Y.B. INT'L L. 49, 49-71 (1987-88) (discussing the location of the Namibian-South African maritime boundary); HEIDI CURRIE, THE NAMIBIAN-SOUTH AFRICAN BOUNDARY QUESTION IN TERMS OF THE MODERN LAW OF EQUITABLE MARITIME BOUNDARY DELIMITATION 24 (2005).

367. ANTHONY RICHARD TURTON, THE POLITICAL ASPECTS OF INSTITUTIONAL DEVELOPMENTS IN THE WATER SECTOR: SOUTH AFRICA AND ITS INTERNATIONAL RIVER BASINS 206 (2003); CURRIE, *supra* note 366, at 22.

368. This preference is typified by a decision in the 1960s of the Organization of African Unity to honor all colonial borders in Africa.

369. A.H. Conley & P.H. van Niekerk, *Sustainable Management of International Waters: The Orange River Case*, 2 WATER POL'Y 131, 138 (2000).

does not seem to be prepared to change its Constitution on this point.<sup>370</sup> A status quo has been reached, however, in which South Africa accommodates the use of Orange River water by Namibia.<sup>371</sup> Both countries cooperate on a friendly basis within various commissions—such as the Permanent Water Commission, Orange River Mouth Interim Management Committee, ORASECOM, and Vioolsdrift-Noordoewer Joint Irrigation Authority—and on a ministerial level.<sup>372</sup> As both countries are in the same catchment area, which makes cooperation inevitable, it is found that water in this respect is a stabilizing force.<sup>373</sup>

### 3. *Diamonds*

The area adjacent to the wetland, on both sides of the border, is almost entirely restricted because of the presence of diamond mines. On the South African side, the area is owned by the partially state owned diamond-mining company Alexkor. The area is a no-go area with the exception of the town of Alexander Bay, which is adjacent to and partly located inside the wetland. Entering the town is only possible with permission of Alexkor security. On the Namibian side, the area is owned by Namdeb, a private company of the international De Beers Group. The area, including the town of Oranjemund, adjacent to and partly located inside the wetland, can only be entered after a permit has been obtained from Namdeb and the permit must be requested six weeks in advance. Both towns are connected by the Oppenheimer Bridge which crosses the Orange River. Border patrols are located on each side of the bridge.<sup>374</sup>

Both companies have an environmental officer who is responsible for the environmental management of the mining sites and of their respective portion of the wetland.<sup>375</sup> Namdeb has extensive environmental and conservation programs in place under which, for instance, it voluntarily carries out environmental impact assessments on all activities that may have a significant impact on the environment and it

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370. Interview with Wessel Mulder at the South African Department of Foreign Affairs, Pretoria (May 18, 2006) [hereinafter DFA].

371. *Id.*

372. The Namibian and South African ministers of water affairs agreed to initiate studies in improving the water management of the river so as to protect the fragile environment at the Orange River estuary. Christof Maletsky, *Namibia and South Africa to Agree on Use of Orange River*, THE NAMIBIAN, May 15, 2006, available at <http://www.namibian.com.na/2006/May/national/0621F7F445.html>.

373. DWAf, *supra* note 237; DFA, *supra* note 371.

374. Interviews, *supra* note 16 (site visits to Alexkor and Namdeb in Alexander Bay, South Africa, and Oranjemund, Namibia, respectively, Feb. 8–9, 2005).

375. *Id.*

rehabilitates all areas affected by mining activities.<sup>376</sup> Its facilities have been certified under the ISO 14001 environmental management scheme. Interestingly, De Beers is one of the financial donors of the Peace Parks Foundation, the organization that partly finances the Ai-Ais/Richtersveld TFCA.<sup>377</sup> Information on Alexkor's environmental policy could not be obtained, but the differences between the totally rehabilitated and preserved area around Oranjemund and the polluted area around Alexander Bay are remarkable.<sup>378</sup>

#### 4. Co-operative Institutions

In South Africa, cooperative government has been laid down as a basic principle in the Constitution. All spheres of government and all organs of the state are required to cooperate with one another in mutual trust and good faith by: fostering friendly relations; assisting and supporting one another; informing one another of, and consulting one another on matters of common interest; coordinating their actions and legislation with one another; adhering to agreed-upon procedures; and avoiding legal proceedings against one another.<sup>379</sup> This cooperative theme has been further elaborated in the National Environmental Management Act (hereinafter NEMA) and in the Intergovernmental Relations Framework Act.<sup>380</sup> The latter Act provides for the establishment of all kinds of intergovernmental forums to discuss and consult on matters of mutual interest. NEMA also has provisions to expand governmental cooperation to include non-state entities. NEMA contains provisions for environmental management cooperation agreements between organs of the state and any person, legal entity, or community to improve standards, set targets for fulfilling their undertaking, and provide for monitoring and the measures to be taken in

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376. See generally Namdeb Diamond Corporation, *Environmental Overview*, <http://www.namdeb.com/Namdeb.Web/Environment/Policy/> (last visited Feb. 19, 2008).

377. Peace Parks Foundation, *Peace Parks Foundation's Fundraiser Activities*, <http://www.peaceparks.org/pdf.php?mid=11&pid=6> (last visited Feb. 19, 2008).

378. Interviews, *supra* note 16 (author site visits to Oranjemund and Alexander Bay and surrounding areas, Feb. 7–11, 2005).

379. S. AFR. CONST. 1996 § 41(1)(h). See WILLEMEN DU PLESSIS, LEGAL MECHANISMS FOR COOPERATIVE GOVERNANCE IN SOUTH AFRICA: SUCCESSSES AND FAILURES (2004), available at [http://web.fu-berlin.de/ffu/akumwelt/bc2004/download/du-plessis\\_f.pdf](http://web.fu-berlin.de/ffu/akumwelt/bc2004/download/du-plessis_f.pdf) (last visited Feb. 19, 2008) (Paper for 2004 Berlin Conference on the Human Dimensions of Global Change).

380. Intergovernmental Relations Framework Act 13 of 2005 [hereinafter Relations Framework Act].

the event of non-compliance.<sup>381</sup> All relevant stakeholders must be involved in the negotiations. In addition, there are numerous committees, working groups, expert groups, and commissions in which issues for which more than one government institution is responsible are discussed.<sup>382</sup> The Steering Committee addresses national issues concerning agriculture, water, and the environment. The Department of Agriculture, Water Affairs and Forestry, the Department of Environment and Tourism, working groups on biodiversity or environmental legislation, and the Northern Cape province serve as examples of such groups.<sup>383</sup>

The most important cooperative institution in this case is the Orange River Mouth Interim Management Committee (hereinafter ORMIMC), an informal committee that meets twice a year. All stakeholders involved in the area are represented in the Committee—i.e., various divisions of the Namibian Ministry of Environment and Tourism, the Namibian Department of Water and Agriculture, the Namibian Ministry of Fisheries and Marine Resources, various divisions of the South African Department of Environmental Affairs and Tourism, the South African Department of Water Affairs and Forestry, the Northern Cape Provincial Department of Tourism, Environment and Conservation, the Alexkor and Namdeb mining companies, as well as the Namibian zinc mining company Skorpion Zinc, the Richtersveld community, the Richtersveld municipality, the South African Coastal Working Group NGO, the South African National Biodiversity Institute's Working for Wetlands Programme, and estuarine researchers of South Africa's University of Port Elizabeth. The Committee serves as an advisory body to the respective competent authorities. The Committee has no formal legal basis, although it is frequently mentioned in policy documents, such as the South African National Environmental Management and Implementation Plan.<sup>384</sup> The ORMIMC is considered to be the driving force behind current initiatives at the central government level in South Africa to rehabilitate the area, to remove it from the Montreux record, to get the area protected under South African law,<sup>385</sup> and to draft a

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381. Relations Framework Act, *supra* note 381, § 35. See DU PLESSIS, *supra* note 380, at 10; Werner Scholtz, *Introduction of Environmental Management Co-operation Agreements in South Africa*, 11 S.AFR. J. ENVTL L. & POL'Y 31, 39 (2004).

382. DEAT, *supra* note 127.

383. *Id.*

384. South African National Environmental Management and Implementation Plan, General Notice 354 of 2002 § 3.2.1.6.

385. DEAT, *supra* note 127 (Interviewees stated that "The ORMIMC picks us up and drives us. Without them, probably nothing would have happened." and "We rely on

management plan for the Ramsar site to be used by Alexkor and the Richtersveld community. When the area has been formally declared a provincial nature reserve, the ORMIMC will likely be replaced by a formal management organization.<sup>386</sup>

### 5. Richtersveld Community

Over the past few years the Richtersveld community has filed several lawsuits against Alexkor on the basis of the Restitution of Land Rights Act.<sup>387</sup> Following the discovery of diamonds in the area in the 1920s, the British colonial authorities drove the Nama people of the Richtersveld community—who used to graze their livestock on the green plains of the Orange River Mouth—into the surrounding desert, where they continue to live. The land where the diamonds have been found has been in the possession of Alexkor since 1927. In 2003, the South African Constitutional Court found this to be a dispossession of a right in land as a result of racially discriminatory laws and restituted the right to ownership of the land, including its minerals and precious stones, to the exclusive beneficial use and occupation thereof to the Richtersveld community.<sup>388</sup> This landmark Constitutional Court judgment was followed by a 2004 judgment of the Land Claims Court which also ordered Alexkor and the State to compensate the local community for the loss of diamonds over more than seventy years, as well as to repair and compensate for the environmental damage to the repossessed land.<sup>389</sup> Proceedings to establish the amount of damages started in April 2005

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IMCs because they are our eyes and ears at a local level.”).

386. *Id.*

387. Restitution of Land Rights Act, S. AFR. CONST. 1996 § 25(7) (resulting from § 25, the property clause, in the Bill of Rights: “A person or community dispossessed of property after June 19, 1913 as a result of past racially discriminatory laws or practices is entitled to the extent provided by an Act of Parliament either to restitution of that property or to equitable redress.”). *See also* GLAZEWSKI, *supra* note 5, at 188, 335.

388. *Alexkor Ltd. & Another v. Richtersveld Cmty. & Others* 2003 (12) BCLR 1301 (CC) (S. Afr.), available at <http://www.constitutionalcourt.org.za/Archimages/758.PDF>. The claim originally had been dismissed by the Land Claims Court, *Richtersveld Cmty. & Others v Alexkor Ltd & Another* 2001 (3) SA 1293 (LCC) (S. Afr.), available at <http://www.law.wits.ac.za/lcc/files/richtersveld2/richtersveld2.pdf>. Later the Supreme Court of Appeal granted leave to appeal and overturned the decision of the Land Claims Court. *Richtersveld Cmty. & Others v Alexkor Ltd. & Another* 2003 (6) SCA 104 (SCA) (S. Afr.) available at <http://www.law.wits.ac.za/sca/files/48801/48801.pdf>. *See generally* Hanri Mostert & Peter Fitzpatrick, *Law Against Law: Indigenous Rights and the Richtersveld Cases*, 2 LAW, SOC. JUST. & GLOBAL DEV. J. 1, 1–17 (2005).

389. *Richtersveld Cmty. v Alexkor Ltd. & Another* 2004 (3) SA 244 (LCC) (S. Afr.), available at <http://www.law.wits.ac.za/lcc/files/richtersveld4/richtersveld4.pdf>.

and have lasted until October 2007.<sup>390</sup>

The Richtersveld Community already owned the land in the Richtersveld NP—part of the Ai-Ais/Richtersveld TFCA—although this park is contractually managed by South African National Parks.<sup>391</sup> The process of reverting part of the diamond area west of the TFCA—e.g., Alexander Bay town—to the Richtersveld community started in 2005.<sup>392</sup> Because this community now owns land within the Ramsar site, the management plan that has been drafted by the Northern Cape province in close cooperation with the ORMIMC, is no longer solely aimed at Alexkor, but at the Richtersveld community as well.<sup>393</sup>

#### *6. Adverse Factors for the Wetland*

As already mentioned, the wetland has seriously degraded since its listing as a Ramsar site. Its most vulnerable parts are the salt marshes, which completely dried up in the early 1990s. This resulted in listing the Orange River Mouth on the Montreux record. A marked decline in bird population has also been noted. Overall, the area is most affected by the following central adverse factors:<sup>394</sup>

1) A scarcity of water in the river as a consequence of upstream dams for hydro-electricity and upstream water uses for agriculture and

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390. The Community claimed 2.5 billion Rand (USD 350 million). In Nov. 2005, a legal expenses claim by the community was awarded to them. See South African Press Association, *Richtersvelders Win Land Claim Expenses Bid*, Nov. 11, 2005, available at <http://www.sals.org/?id=articles&action=showonearticles&articlesid=14> (last visited Mar. 9, 2008). In October 2007, the claim was finally settled. The state will hand over to the community 194,600ha, including an 84,000ha coastal strip currently being mined by Alexkor, and it will pay 190 million Rand to a community-owned investment company, as well as 50 million Rand in the form of a development grant. In addition, Alexkor's farming operations will be transferred to the community. Alexkor and the community will enter into a joint mining venture. The town of Alexander Bay will be transferred to the community. See *Tears of Joy as Richtersveld Land Claim is Settled*, MAIL & GUARDIAN ONLINE, Oct. 9, 2007, available at [http://www.mg.co.za/articlepage.aspx?area=/breaking\\_news/breaking\\_news\\_\\_national/&articleid=321523&referrer=RSS](http://www.mg.co.za/articlepage.aspx?area=/breaking_news/breaking_news__national/&articleid=321523&referrer=RSS) (last visited Nov. 16, 2007).

391. Interviews, *supra* note 16 (interviews with participants to the 16th ORMIMC Meeting in Oranjemund (Feb. 8, 2005) and author observations during a field trip to the area Feb. 7–11, 2005).

392. *Id.*

393. *Id.*

394. Anderson et al., *supra* note 346, at 160–61; Interviews, *supra* note 16 (interviews with participants to the 16th ORMIMC Meeting in Oranjemund (Feb. 8, 2005) and author observations during a field trip to the area (February 7–11, 2005)).

households.

2) The construction of a road on a dyke through the salt marshes near Alexander Bay that prevents water from reaching the area beyond the dyke.

3) The closing of a natural canal feeding the salt marsh for use as a sewage depot in Alexander Bay (oxidation ponds). This use limits the amount of water that reaches the salt marsh. These oxidation ponds are below the high water mark of the river and in a high water situation, water may enter the wetland, which is contrary to regulations under the National Water Act. Since the ponds were in place before the enactment of the regulations, however, they may be approved for current use.<sup>395</sup>

4) Agricultural uses of the river banks, turning wetland into agricultural lands, and the use of fertilizers and pesticides.

5) Dust blowing into the area from mining areas adjacent to the wetland.

6) Illegal fishing.

7) Waste dumping.

8) Upstream pollution.

9) Lack of monitoring and enforcement.

The first six factors are present in the South African part of the wetland, whereas factor number seven is present on both sides, but mainly in South Africa. Factors eight and nine are present on both sides with most pollution originating from Lesotho territory.<sup>396</sup>

### *7. Redressing the Adverse Factors*

Most of the nine factors mentioned above are currently being redressed by the following methods.<sup>397</sup>

Reservation of water for the wetland by the dam operators, especially by the new Violsdrift dam. However, the water flow remains constant—not allowing for seasonal changes—and scarce, due to other necessary uses. There are promises to increase the amount of water released upstream and plans to further open the mouth, allowing more

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395. Interviews, *supra* note 16 (Minutes of the 17th ORMIMC Meeting).

396. Interviews, *supra* note 16 (interviews with participants to the 16th ORMIMC Meeting in Oranjemund (Feb. 8, 2005)).

397. Most of these actions are suggested in R. Heath & M. Lourens, *Orange River Mouth Development Plan Phase 2*, 6–12 (2001), included in the ORM Development Programme (2006). Interviews, *supra* note 16 (all of the actions were discussed during the 2005 and 2006 interviews held by the author and some of them were witnessed by the author during the 2005 field trip to the area).

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seawater into the wetland.<sup>398</sup> However, a danger of further disrupting seasonal changes still exists, as does the danger of the area becoming totally flooded; there must be tidal flows in the salt marsh for successful retention. The focus is on this issue.

The road has been closed and part of the dyke has been destroyed so water can now reach a part of the salt marsh again. Regeneration of this part was clearly visible a few years after the road closure and dyke destruction.

Reopening the canal is a possibility, but has not been carried out. The polluted content of the oxidation ponds would flow into the salt marsh and the river, as would the Alexander Bay sewage, perhaps causing more damage than good. Relocating the sewage ponds has been considered, but appears to be too costly.<sup>399</sup> Furthermore, additional expansion of agricultural activities within the conservation area will be prohibited once the area is declared as such.<sup>400</sup>

Alexkor has promised to restore former mining areas, but this had not been carried out by 2006. It appears that the company did not budget for this restoration because Alexkor filed for bankruptcy in 2006.<sup>401</sup> Since the area was polluted before the current mining law came into effect, Alexkor has no obligation under administrative law to clean up. However, a court case between the Richtersveld community and the company on damages and a rehabilitation claim was still pending in 2006.

Inspectors of the South African Marine and Coastal Management Division of the Department of Environmental Affairs and Tourism regularly remove illegal fishing nets from the mouth.<sup>402</sup>

Monitoring and enforcement are still problematic. Both companies do some of this work. The Namibian Ministry of Environment and Tourism, the authority in the national parks, suffers from deficits and has little capacity. Nature conservation in Namibia depends almost totally, and in South Africa partially, on foreign aid such as the Global Environment Fund. The South African authorities are in a somewhat less desperate situation, but still only a few persons are assigned for the entire

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398. Artificially opening or closing the estuary mouth, if carried out injudiciously, may have a detrimental effect on the estuary. Hence, there now are guidelines for the process. LARA VAN NIEKERK & PIET HUIZINGA, GUIDELINES FOR THE MOUTH MANAGEMENT OF THE ORANGE RIVER ESTUARY (CSIR Stellenbosch 2005).

399. Interviews, *supra* note 16 (Minutes of the 17th ORMIMC Meeting).

400. Northern Cape Province (NDEC), *supra* note 339, at 35.

401. DEAT, *supra* note 127.

402. *Id.*

province. There is no permanent staff present in the area. South Africa also suffers from a lack of legal resources because that the area is not protected under national or provincial law.

#### *8. Future Development*

With diamond mining gradually being transferred to offshore sites, additional economic activities are being investigated. The development of ecotourism in the area seems to be the most viable option. The Orange River Mouth could be used as a stepping-stone for tourists traveling to and from the bigger national parks, such as the Ai-Ais/Richtersveld NP. Ecotourism generates income for the local people and forms an impetus for the conservation of the area.<sup>403</sup> Also, the (further) development of agriculture is being discussed. Both initiatives should take place on both sides of the border, making local economies less dependent on diamond mining.<sup>404</sup>

#### *C. The Role of International Law in the Two Cases*

Most relevant legal documents that apply to the area were discussed above.<sup>405</sup> The legal situation is complex to say the least. Besides the Ramsar Convention, which forms the central focus of this study, other international and regional nature conservation and water management laws apply;—specifically the UN and UNECE watercourses conventions, the SADC Protocols on Wildlife Conservation and Law Enforcement on Shared Watercourses, and the EU Wild Birds and Habitats Directives. These conventions and protocols stimulate states to adopt an integrated perspective in protecting areas by encouraging the integration of wetland

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403. A 2001 Tourism Development Plan is included in the ORM Development Programme 2006, but in the latter program it is acknowledged that it will take another 10 to 20 years to establish the ORM in the tourist market, ORM DEVELOPMENT PROGRAMME: SYNTHESIS REPORT 26 (2006).

404. Interviews, *supra* note 16 (discussions with participants of the 16th ORMIMC meeting in Oranjemund (Feb. 8, 2005)).

405. Part II only dealt with public law. Companies in or near protected areas may very well be subject to private environmental rules, such as rules that are part of a system of “self-regulation.” Dow Chemical Co. operations in the Scheldt estuary and Namdeb Diamond Co. mining installations in the Orange River Mouth are both examples of environmental self-regulation. See Dow Chemical Co., *2015 Sustainability Goals*, <http://www.dow.com/commitments/goals/index.htm> (last visited Feb. 19, 2008); see also Namdeb, *Environmental Policy*, <http://www.namdeb.com/Namdeb.Web/Environment/Policy/Environmental+policy.htm> (last visited Feb. 19, 2008).

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management and general water management.<sup>406</sup> They also offer a framework for close cooperation of bordering states in the management of transboundary sites.<sup>407</sup> Problems particularly arise at the national level where different legal systems on each side of the border exist, and more importantly, where a variety of competent authorities have their own specific legal domains.

To illustrate this, take a closer look at the Orange River Mouth case.<sup>408</sup> On paper, the Namibian side of the Ramsar site is better protected than the South African side because the site, plus all surrounding areas, has been designated a protected area under Namibian law.<sup>409</sup> Such a designation has not taken place in South Africa, although the designation process was apparently set in motion in 2006.<sup>410</sup> Both countries struggle with entirely new legislation, both on nature conservation and on water management. The most important pieces of legislation take the ecological requirements as a starting point, and most of them emphasize cooperative governance. On a more detailed level, however, national legislation in both countries is still vastly different, which makes it difficult to manage the area in an integrated manner.<sup>411</sup> The Namibian Water Resources Management Act, for instance, does not contain a distinction between a river and an estuary, whereas the South African National Water Act does. Another example is the important role that the provinces play in nature conservation matters in South Africa in addition to that of the national authorities whereas in Namibia, nature conservation is completely centralized at the national level.

In addition, systematic differences exist between water legislation and nature conservation legislation within each country. The South African National Water Act explicitly recognizes wetlands as a type of water for which specific requirements are set, whereas the South African Protected Areas Act does not recognize this habitat type. Under the Protected Areas Act, Ramsar sites are only protected after they have been explicitly designated as protected areas. Therefore, from a strictly legal point of view, the Orange River Mouth remains largely unprotected in South Africa. Fortunately, the SADC Protocols, especially the one on

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406. *See infra* Part II.

407. *See id.*

408. Similar conclusions on the legal situation can be reached for the Scheldt estuary case.

409. *See infra* Part III(B).

410. Interviews, *supra* note 16 (Minutes of the 17th ORMIMC Meeting); Interview with Dewald Badenhorst, *supra* note 353. *See also infra* Part III(B).

411. DWAF, *supra* note 237.

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shared watercourses, enable cross border cooperation on these issues although this is a slow process.<sup>412</sup>

In practice, the Ramsar Convention's role is mainly limited to the overarching concepts. More specific obligations from the Convention, or soft law documents such as the Handbooks, hardly play a role.<sup>413</sup> In the Scheldt estuary case, the Convention's role has almost entirely been taken over by the EU Wild Birds and Habitats Directives. In the Orange River Mouth case, the listing in the Montreux record is an important impetus for the South African national authorities to be involved in the management of the area. Therefore, it must be concluded that the presence of international environmental conventions and their implementation in national law are only part of the picture. In each case, an advisory committee without any legal status and made up of all relevant stakeholders—i.e., the Orange River Mouth Interim Management Committee and the Advisory Parties Committee—plays a crucial role in the decision-making process concerning the management of the Ramsar site. Especially in the Orange River Mouth case, the lack of financial and human resources to put a proactive and powerful conservation scheme in place is also a dominant factor. Finally, there are complicated and sensitive “big” legal issues that dominate discussions on the management of the area—i.e., the land claims issue on the South African side of the Orange River Mouth wetland, the border dispute between Namibia and South Africa, and the centuries-long struggle between Belgium and the Netherlands on access to the port of Antwerp.

#### IV. EVALUATION

Both cases can be analyzed in terms of legal pluralism and multi-level governance. Usually, the two terms are not used at the same time, or for the analysis of a single issue. In my view, both concepts are necessary to make a good assessment of the legal situation concerning the management of transboundary wetlands. The concept of legal pluralism is used to describe the applicable rules and regulations, while the concept of multi-level governance is used as a starting point for the analysis of the people involved deal with these legal norms.

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412. *Id.*

413. See Royal C. Gardner & Kim Dana Connolly, *The Ramsar Convention on Wetlands: Assessment of International Designations Within the United States*, 37 ENVTL L. REP. 10089, 10097 (2007) (study showing similar results in the United States).

### *A. Legal Pluralism*

When taking the perspective of the legal norms, the law that applies to both wetlands proves to originate at a great number of levels, territorially and functionally. First, there is the international level. The Ramsar Convention, the starting point of our journey, is a global Convention in which 150 states participate. Through the mechanisms of the Convention, all participating states have a say in the management of the wetlands protected under the Convention; for instance by discussing the sites that are on the Montreux record such as (parts of) the two sites discussed above. Besides this nature conservation convention, global applicable international law is also to be found in the conventions on water management. Although the scope of these conventions differs, it was shown that the concept of integrated river basin management, which originates from international water law, now also strongly influences the Ramsar Convention. This enables an integration of policies with regard to water management and to wetland management.

Regional international law applies to the sites as well—EU law in Europe and SADC law in southern Africa. Within this territorial level, legal norms again have various functions such as nature conservation, water management, and environmental protection. Obligations under the Ramsar Convention can be carried out relatively easily under EU or SADC nature conservation law; for instance, by designating Ramsar sites as Special Protection Areas under the EU Wild Birds Directive. The concept of river basin management has been laid down in water law in both regions and provides an opportunity to integrate wetland management into the management of the entire river basin. In both cases, bilateral agreements have been concluded, either to regulate the use of transboundary wetlands or to determine the exact location of the border.

It was also shown that these international legal instruments strongly influence national law. All of these influences can be described as top down pressures on the national state, leading to declining autonomy of national legal systems.<sup>414</sup> At the same time, the international legal instruments provide a common legal ground for states that have to deal with transboundary wetlands. The overarching legal concepts have been harmonized, enabling an integrated management of the sites on both sides of national borders.

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414. Eric A. Posner, Professor of Law, University of Chicago Law School, Globalization and Legal Scholarship, Speech at the Opening of the Hague Institute for the Internationalization of Law (Sept. 13, 2005), *available at* <http://d1956615.u74.tritac.net/files/Speech%20Posner.pdf> (last visited Feb. 19, 2008).

However, problems still arise because of national law. It is true that the overarching concepts are more or less the same, but national legislation within each country is dispersed over a great number of detailed laws. Water legislation, nature conservation, and environmental legislation at the national level have systematic differences and are applied by different governmental institutions at different levels of government. This makes it very difficult to carry out overarching concepts like “wise use” through the application of national law. The presence of strong private actors in the wetlands, such as the mining company Namdeb and the Port of Antwerp, further complicates the legal situation, because these entities have their own rules and standards.

Whether the coexistence of all of these norms is seen as various manifestations of a single basic phenomenon (i.e., law) or as manifestations of different phenomena all labeled by the name of law—depending on what each individual actor involved in the management of these areas perceives as law—is not relevant here.<sup>415</sup> The cases clearly show that, from any position—be it that of a government official responsible for water management, of a company employee responsible for the environmental management of a plant, or of an active member of an NGO interested in preserving an area—the situation is extremely complicated regardless of the view each person has on what the law on the area actually is.

Interestingly, the cases also show that most actors involved try to overcome this inherent complexity by abstracting or withdrawing from the law. Many enter into talks and negotiations in order to discover together the best way to manage the area, taking into account the interests of all parties involved. In my observations, everyone had the best intentions regarding area conservation. During negotiations actors did not want to be overly bothered with legal details. This became most notable during one of the ORMIMC meetings I attended for this study. After I explained my interest in the meeting, someone cried “[k]eep the lawyers out!” Although anecdotal, this heartfelt reaction made it immediately clear that the people present at that meeting felt that paying accurate attention to the law might hamper their efforts to reach an agreement. Also, from talks with the people attending the meeting, it was obvious that none of them had the complete legal picture in his or her mind, although everyone had a basic understanding of the Ramsar Convention—for instance, the concept of wise use. In addition, some government officials knew of particular applicable legislation, usually

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415. Brian Z. Tamanaha, *A Non-Essentialist Version of Legal Pluralism*, 27 J. L. & Soc. 296, 315 (2000).

that piece for which that official bore a special responsibility (*see infra* multi-level governance). This knowledge was only scarcely used in the meetings. Similar observations were made in the Scheldt estuary case. These experiences lead me to conclude that the law is intentionally kept out of this process as much as possible.

These observations do not mean that the law is not important or that the actors involved do not consider the law to be important. The actors all recognize the functions of the various sources of law. Everybody has some idea of the basic overarching concepts. The Ramsar Convention and the concept of wise use are considered to be the common normative framework, although actors only have a basic understanding of the Convention. Still, it is interesting to note that the Ramsar Convention apparently functions as a common framework within which a number of other relevant legal sources can be handled. This conclusion buttresses the proposition in literature that legal pluralism should be used in a normative sense, rather than in a sociological-descriptive sense.<sup>416</sup>

Before the relevant legal sources can be applied, however, the actors involved temporarily withdraw from the complex legal situation in order to discover what it is they actually want to achieve with the management of the protected area. This supports the idea presented in literature on legal pluralism: it is the participants themselves who determine why they enter into a discourse and what exactly they do within that discourse.<sup>417</sup> Once the goals have been set, legal procedures will have to be followed to mould the various agreements into policy plans, permits, and other decisions taken by governmental authorities as well as in company management plans and other decisions at the level of business corporations.

The conversion of the agreements into legal decisions by a great variety of institutions—government agencies in both countries on various levels, individual business corporations, and NGOs—is a difficult and dangerous task. Still, it may be argued that the ambiguity of all the rules that apply to a certain case and the multiplicity of legal systems is precisely what is needed in complex situations where there are many conflicting interests at stake. One downside is that a single coherent system of clearly defined rules does not allow a broad group of people to

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416. Massimo La Torre, *Legal Pluralism as Evolutionary Achievement of Community Law*, 12 *RATIO JURIS* 182, 182–95 (1999); Ruth S. Meinzen-Dick & Rajendra Pradhan, *Implications of Legal Pluralism for Natural Resource Management*, 32 *IDS BULLETIN* 10, 10–16 (2001).

417. Emmanuel Melissaris, *The More the Merrier? A New Take on Legal Pluralism*, 13 *SOC. LEG. STUD.* 57, 75 (2004).

be involved and to be heard.<sup>418</sup> In a pluralistic situation, every stakeholder invokes a specific legal rule that applies to the case: the rule that best fits his interests. To be able to do so may very well be an important impetus for the stakeholders to become involved; they feel that they have some legal power because their positions are backed by one or more legal rules. Another advantage of a pluralistic legal situation is that it is better suited to deal with environmental, political, or other uncertainties.<sup>419</sup> Such uncertainties are particularly relevant in cases such as the ones presented in this article: dynamic ecosystems in which important transfrontier economic activities take place. Finally, diverse and overlapping forms of governance add to the flexibility and enable adaptation to new developments.<sup>420</sup> I agree with these arguments supporting a pluralistic legal environment, but only if and in so far as all the national legal rules and standards enable an effective implementation of the overarching international legal concepts. Once national law makes it impossible to translate agreements based on common international legal concepts into national legal decisions, we are on the wrong track.

### *B. Multi-level Governance and Cooperative Governance*

Multi-level governance is the logical consequence of having a pluralistic legal environment. It is within all of these spheres of governance that the conversion of the agreements into legal decisions has to take place. The phrase “multi-level governance” is usually applied to describe decision making in the European Union, where governance is dispersed across multiple and territorially overlapping powers of supranational, national, regional, and local governments.<sup>421</sup> It is clear, however, that the same concept can be applied when studying other areas of the world where overlapping powers regulate a specific topic, such as the management of transboundary wetlands in the southern African region. Multi-level governance usually applies to vertical development, such as harmonization of laws within the EU or SADC framework and the devolution of powers to decentralized authorities. The concept of governance, on the other hand, usually applies to the horizontal

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418. Meinzen-Dick & Pradhan, *supra* note 417, at 15.

419. *Id.*

420. *Id.*

421. Ian Bache & Matthew Flinders, *Themes and Issues in Multi-level Governance*, MULTI-LEVEL GOVERNANCE 3 (Ian Bache & Matthew Flinders eds., 2004); Gary Marks & Liesbet Hooghe, *Contrasting Visions of Multi-level Governance*, MULTI-LEVEL GOVERNANCE 16 (Ian Bache & Matthew Flinders eds., 2004).

development. At a specific level—i.e., national, provincial, or local—policy making is a matter of both governmental and non-governmental actors. Public and private actors, government institutions and NGOs, local communities, business organizations, and individual business corporations work together to solve societal problems. Note that such collaboration goes much further than public participation in the traditional sense, where participation is limited to listening to interested citizens as a part of a carefully regulated procedure, followed by autonomous decision-making by the competent authority.<sup>422</sup> The word “hearing” is illustrative in this respect. Governance, on the other hand, implies a decision making process in which the various actors are more or less equal, and in which the authorities only affirm the results of the negotiations. Partnership arrangements or co-management are other words for this same notion.

Combining the concepts of governance and multi-level governance when studying nature conservation policy issues—the term “cooperative governance” may be used here—Van der Zouwen shows that the following characteristics emerge:<sup>423</sup>

1) The state role in policy processes has changed (i.e., the state leaves more room for private initiative and joint-ventures (JV)), and there is an increasing interconnectedness in EU [SADC, or JV], national, regional, and local levels of policy-making decisions.

2) Network-like structures in which public and private actors from different territorial levels interact.

3) Shifts in the locus of nature policy making towards more informal practices as well as sub-national and transnational practices and towards ad hoc and temporary coalitions.

These characteristics are clearly visible in the two cases described above. In both cases, the national governments alone do not have decisive power over the area. The fact that the Orange River Mouth and the Scheldt River estuary are transboundary sites implies that two national governments are interdependent. In both cases, however, there are provincial and local authorities that have a say in the management of the area, as do functionally organized authorities, such as the water authorities. Network-like structures without a clear legal basis exist in

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422. Jonathan Verschuuren, *Public Participation Regarding the Elaboration and Approval of Projects in the EU after the Aarhus Convention*, 4 Y.B. EUR. ENVTL. L. 29, 43–46 (2005).

423. MARIËLLE VAN DER ZOUWEN, NATURE POLICY BETWEEN TRENDS AND TRADITIONS, DYNAMICS IN NATURE POLICY ARRANGEMENTS IN THE YORKSHIRE DALES, DOÑANA AND THE VELUWE 25 (2006).

both cases as well. The ORMIMC is a perfect example of a network in which both public authorities and private actors—such as private companies, local communities, and NGOs—from both countries regularly meet and discuss management issues of the Orange River Mouth. The Advisory Parties Committee on the Scheldt estuary had a similar function. The fact that the stakeholders in this Committee were able to overcome their differences paved the way for the national governments to reach a common position on the future of the estuary.

Earlier publications have stated that the active involvement of parties other than government representatives is very important to achieve co-management.<sup>424</sup> Co-management has been defined as the active participation in the management of a wetland by the community of all individuals and groups having some connection with, or interest in, that wetland.<sup>425</sup> The ultimate goal of cooperative management is to achieve a sustainable utilization of the wetland's resources through sharing the authority and responsibility with the people who work and live in and near the wetland.<sup>426</sup>

We have seen an additional reason to opt for co-management of the Ramsar site: to achieve voluntary compliance. The two cases discussed above have shown that it is virtually impossible to monitor all activities in large transboundary protected areas. Voluntary compliance is the prime option rather than government monitoring and enforcement.<sup>427</sup>

Wetland management and river basin management have also been evident. Policies and decisions are no longer simply aimed at prescribing a specific measure to protect the water quality within the wetland, or solely meant to preserve a certain species of water bird. Instead, policies and decisions are taken from the wider perspective of the entire river basin. According to some, this has consequences for stakeholder involvement. Stakeholder involvement should then encompass all water users within the entire river basin.<sup>428</sup> In my view, this is a rather theoretical option in river basins as large as the Orange River, which has more than fourteen million inhabitants.<sup>429</sup> Therefore, I think that

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424. GORDON CLARIDGE & BERNARD O'CALLAGHAN, COMMUNITY INVOLVEMENT IN WETLAND MANAGEMENT: LESSONS FROM THE FIELD (Wetlands Int'l 1997).

425. *See id.* at 19.

426. *Id.* at 25, 30.

427. This is especially the case in South Africa as was illustrated *supra* Part II(C).

428. UNEP/WETLANDS INT'L, INTEGRATED RIVER BASIN MGMT. EXPERIENCES IN ASIA AND THE PAC. 135 (1997).

429. Hubert H.G. Savenije & Pieter van der Zaag, *Conceptual Framework for the Management of Shared River Basins; With Special Reference to the SADC and EU*, 2 WATER POL'Y 9, 26 (2000) (arguing that some decisions are to be taken at the river basin

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stakeholder involvement will still have to take place at the level of a protected wetland within such a body as the ORMIMC. In addition, stakeholder involvement at the river basin level will have to be organized by a catchment authority, such as ORASECOM in the case of the Orange River. It is essential that there is a solid, communicative, and open relationship between the two bodies to enable coordination of both cooperative governance processes. In addition, it is important that the general public in the area is well informed by the stakeholders involved in the process. The Scheldt estuary case shows that resistance from the general public against the results of the stakeholder process may cause serious setbacks once politicians feel that they cannot ignore this resistance when reaching final decisions to implement the outcome of the stakeholder process.

Informality is a key word in the functioning of both the ORMIMC and the Advisory Parties Committee. Both bodies operate in a safe and informal sphere, allowing each participant to freely speak his or her mind.<sup>430</sup> As already explained above, the talks in such bodies as the ORMIMC and the Advisory Parties Committee take place in a simplified legal environment. After an agreement has been reached, the difficult and dangerous task of converting the agreement into legal decisions has to be fulfilled by the various authorities.

This task is difficult because of the complicated legal situation described above. Various authorities will have to apply various pieces of legislation to implement the outcome of the cooperative governance process. Since the stakeholders have some idea of the existing legal requirements, but do not and cannot care for the details, a certain outcome may very well prove to be difficult to convert into legal decision making. Sometimes the norms in the various acts and regulations simply coexist, but sometimes applying them to the same area could result in a contradictory outcome. For instance, it is unclear whether the experimental dredging strategy for the Scheldt River<sup>431</sup> has to be laid down in the license on the basis of the Dutch Nature Conservation Act of 1998 or in the permit based on the Dutch Pollution of Surface Waters Act. Both Acts fail to provide for experiments and morphological considerations do not fall under their reach.<sup>432</sup>

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level, while others should be taken at a much lower level, such as the sub-catchment).

430. Interviews, *supra* note 16 (based on author observations and concluded from various interviews).

431. See Part III(A) (under "Redressing the adverse factors" No. 2).

432. Other case studies also show that the complexity of the institutional arrangements is the prime reason for the fact that the process is extremely time-

The task to implement the outcome into legal decision making is also dangerous because the stakeholders may not recognize the outcome of the talks in the decisions taken by the competent authorities. This failure in recognition may result in disappointment about the entire process and turning away from co-management of the wetland and resorting to other means to achieve their goals, for instance, by going to a court.<sup>433</sup> This risk actually manifests itself in the Scheldt estuary case. After the Scheldt Estuary Development Outline 2010 was concluded, the authorities at various levels in both countries not only thought the Advisory Parties Committee was no longer needed, but sometimes also seized the opportunity that the law offers to take a decision that is contrary to the outcome of the stakeholder process. After the talks conclude and legal decision making begins, competent authorities tend to fall back into their old position of using their own specific legal domain to “do it their way.”<sup>434</sup>

One simple example of this tendency is the fact that both the Flemish Region and the Netherlands are now setting their own conservation objectives—each aiming at the rarest habitat type within their respective national boundaries—although it was agreed upon during the talks on the Scheldt Estuary Development that common conservation objectives should be set for the entire wetland.<sup>435</sup> As a consequence, the Flemish Region is aiming to establish salt marshes in the Flemish part of the Scheldt estuary, rather than salt meadows. The Netherlands is doing the opposite. Salt meadows are relatively easy to create and protect in the higher parts of the estuary—i.e., in the Flemish Region—and salt marshes are a more natural habitat type in the Dutch part of the wetland.<sup>436</sup> Other examples include various decisions by local administrations in the Flemish region, which were not involved in the stakeholder process that halted individual wetland restoration projects and the decision by the Dutch Parliament in October 2006 that the 600 hectares of new wetland area may not be flooded—honoring public distrust against this measure—which hung Damocles’ sword over the fragile agreements reached in the stakeholder process.<sup>437</sup>

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consuming. Maria Hauck & Merle Sowman, *Coastal and Fisheries Co-Management in South Africa: Is there an Enabling Legal Environment?* 12 S. AFR. J. ENVTL. L. & POL'Y 4, 20–21 (2005).

433. Piet Gilhuis et al., *Negotiated Decision-Making in the Shadow of the Law*, NEGOTIATED DECISION-MAKING 219, 225 (Boudewijn de Waard ed., 2000).

434. As was stated by various persons interviewed.

435. See Symens Interview, *supra* note 265.

436. *Id.*

437. Netherlands Parliamentary Papers II 2006–07, 26,980, No. 30.

Despite these examples, it is important that the results of the cooperative governance process be implemented into law, primarily because of the risk that the process will get bogged down in endless talks without clear and practical results as to the management and protection of the wetland. The Orange River Mouth case shows that this is not an imaginary risk. Although the ORMIMC achieved some results, after ten years of talks, important objectives of the committee, such as the designation of the South African part of the site as a protected area, still had not been met in 2007.<sup>438</sup> In addition, implementing the results of the cooperative governance process only every now and then also precludes a situation in which future stakeholders forget or simply do not know that a certain point has already been discussed. Uniform implementation has the ability to sustain co-management arrangements over time.<sup>439</sup>

Furthermore, implementing the results into legal decisions is necessary for enforcement. While voluntary compliance may be relied upon as valuable and effective, legal enforcement action may still be necessary as a last resort—for instance in cases of severe and intentional pollution. The fact that legal enforcement action may be taken also deters people from, for instance, intentionally polluting the area.

Finally, legislation sometimes simply compels the authorities to take a certain decision, for example, to draw up a management plan or to issue a license. Since these decisions as well as the refusal to accept a decision can be reviewed in court, it is essential that the outcome of the cooperative governance process has a firm legal basis so that it survives court procedures.

Difficult and dangerous as it may be, multi-level governance is generally considered to have many advantages. Marks and Hooghe give an overview of all advantages that have been described in literature, and of those that largely overlap with the advantages attributed to legal pluralism.<sup>440</sup> Operating at multiple levels makes it possible to capture variations in the territorial reach of policy externalities and better reflects heterogeneity of preferences among citizens. It also facilitates credible policy commitments, allows for jurisdictional competition, and facilitates innovation and experimentation.<sup>441</sup> In the field of complex environmental matters, such as the management of transboundary protected areas,

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438. Interview, *supra* note 16 (Minutes of the 18th ORMIMC Meeting, Oranjemund (Feb. 7, 2006)). By late May 2006, the draft management plan had been completed. Interview with Dewald Badenhorst, *supra* note 352.

439. CLARIDGE & O'CALLAGHAN, *supra* note 425, at 58.

440. Marks & Hooghe, *supra* note 422, at 16.

441. *Id.*

cooperative governance with the involvement of stakeholders is a prerequisite to success.<sup>442</sup>

## V. CONCLUSION

How does international environmental law work in practice, not in ICJ cases, but at the grassroots level? In the domain of international environmental law, there exists a complex pluralistic situation of principles, rules, and regulations originating from various government institutions. Using transboundary wetlands as protected by the Ramsar Convention as an example, this study has shown that indeed the legal situation is extremely complex. This is not so much the case at the international and the regional levels, where environmental conventions and all the soft law that goes with them are governed by similar principles—such as integrated river basin management, transboundary co-operation, and sustainable use. The problems clearly occur at the national level where legislation exists on water management, nature conservation, environmental protection, mining, fisheries, agriculture, tourism, various levels of government, and on both sides of national borders.

Through two detailed case studies, I have explored how all actors involved—not only public authorities, but also interest groups and landowners—deal with international law in such a complex legal environment. The first conclusion is that the Ramsar Convention itself plays a limited role. The main concepts of the Convention are well known to the stakeholders and play an important role in the stakeholder process as overarching agreed-upon common concepts. On a more detailed level, however, more specific provisions or soft law documents connected to the Convention—such as the Ramsar Handbooks—limit the Convention's role. In the Scheldt estuary case, the Convention hardly plays any role at all, simply because its obligations have been elaborated in EU law in much greater detail and in a more legally binding way—i.e., the Wild Birds and Habitats Directives. Even the fact that parts of the site on Belgian territory have been placed on the Ramsar's Montreux record of degraded wetlands does not seem to bother many of the parties involved. This is different in the Orange River Mouth case, where the fact that part of this site has been listed on the Montreux record is the

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442. KIRBY, *supra* note 140, at 291; C.J. da Silva & P. Girard, *New Challenges in the Management of the Brazilian Pantanal and Catchment Area*, 12 WETL. ECOL. & MGMT. 553, 559 (2004).

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main impetus to deal with the site. Here, as well, however, the Convention's specific obligations are not a major factor at the grassroots level.

This grassroots level approach relates to the second conclusion. The Ramsar Convention requires an integrated management for protected wetlands, but such a complex legal situation is burdensome to the aims of involved parties. Both cases clearly show that all people involved in the area, both decision makers and third-party stakeholders from both countries, more or less withdraw from the law. They do not want to bother with the legal details. Instead, they favor vague broad notions, such as the concept of wise use, taken from the Ramsar Convention or other relevant legal documents. "Keep the lawyers out!" is their message to people, such as me, who raise legal issues during the process of cooperative governance. They realize that once you get into the details of all of the relevant law that applies to the area, it will be impossible to reach an agreement on the management of the site. Abstraction from the law enables all actors involved to freely discuss their views on the conservation and management of the site.

This leads to the third conclusion. Multilevel cooperative governance is the key to dealing with complex situations with many stakeholders that have conflicting interests. In both cases, the presence of an informal committee in which all relevant stakeholders are represented has been crucial in the decision making process with regard to the management of the Ramsar sites. Conflicts of interests have been overcome in these bodies, paving the way towards long-term integrated and sustainable management of the site and avoiding legal conflicts within or between the two states involved. In the two cases studied here, even a boundary dispute between Namibia and South Africa and a centuries-long conflict on the accessibility of an inland port between Belgium and the Netherlands could not impede the success of the stakeholder process. Such a stakeholder process is time consuming and slow, however, and should be carefully led, keeping a close eye on all sensitive positions.

The fourth conclusion is that the success of the stakeholder process does not guarantee successful ecological outcome. After the stakeholders have reached an agreement, the law takes over again. Government institutions at all levels in both countries have the difficult task of translating the outcome of the cooperative governance process into a large number of legal decisions based upon a wide variety of statutes and regulations in the various legal domains. This is not only a difficult phase of the decision making process, but also one in which the productive results of the stakeholder process can easily be destroyed. The legal

complexity is sometimes used by government officials or representatives who were not involved in the stakeholder process or who changed their opinion on the outcome of the process. Therefore, it is important that the cooperative governance process continues during the translation of the agreements into legal decisions and that all relevant government institutions are actually involved in the process and committed to its outcome.