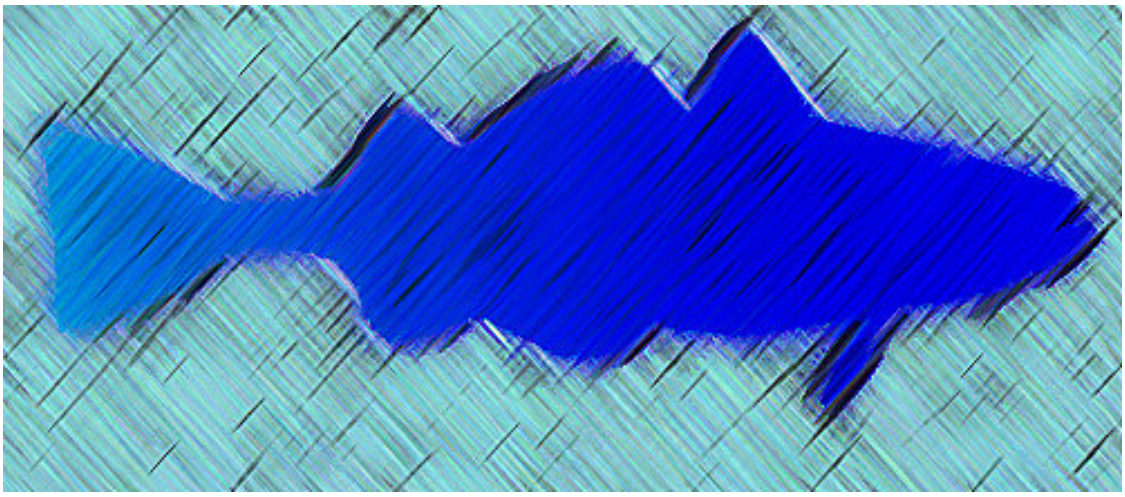
COMPARATIVE LEGAL ANALYSIS AND REPORT ON LAW REFORM

BCLME Project LMR/SE/03/03



PRESENTED TO:

BCLME
Benguela Current Large Marine Ecosystem Programme

BCLME Activity Centre for Living Marine Resources

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EXECUTIVE SUMMARY

This report will analyse the regulatory systems governing the processes of quota or rights allocations and effort management including vessel licensing mechanisms in place in each of the three BCLME member states. The analysis is undertaken from the perspective of shared stock fisheries management with the objective being to determine the possibility of joint or shared management within the BCLME of these common fish stocks.

This report concludes that South Africa, Namibia and Angola importantly each regulate their commercial fisheries in terms of quotas or rights, have adequate *national* laws in place regulating the allocation of quotas or rights and regulate vessel numbers in the various commercial fisheries. Closed or regulated access fisheries management accords with the Food and Agriculture Organisation's Code of Conduct for Responsible Fisheries.

Although each of the member states have overarching national laws in place to regulate the allocation of rights or quotas, this report identifies substantial gaps in the implementation detail. Broadly, these gaps include –

- the lack of complementary or joint fisheries science, management and compliance methodologies continues to place substantial strain on shared stocks such as hakes and small pelagics;
- the lack of complementary and effective administrative systems aimed at recovering the costs of fisheries management, compliance and research precludes holistic, regular and effective fisheries management. This aspect is also covered in significant detail in Project LMR/SE/03/05, which was presented to the BCLME in September 2004 by the Consortium;
- varying degrees of codified policy and regulations pertaining to the allocation of rights or quotas and managing effort results in economic uncertainty, an unwillingness to commit to long-term investment programmes and sector instability;
- a lack or shortage of fisheries managers and scientists, as well as training and mentoring programmes for fisheries managers threatens the achievement of long-term fisheries sustainability and the attainment of socio-economic and political objectives.

1. With respect to the shared or joint management of shared stocks, this Report found that a legal obligation exists amongst the three BCLME member states to sustainably manage its shared stocks.

2. Where there is a common stated objective to promote the 'responsible and sustainable' use of marine resources, this can only be attained through negotiated, co-operative agreements between the participating countries. The intention to establish an interim Benguela Current Commission will go a long way to ensuring that shared fish stocks in the BCLME are sustainably and responsibly managed.

3. Of the three member states of the BCLME, Angola is the only one that has to date not signed nor acceded to or ratified the UN Fish Stocks Agreement of 1995. Angola should ratify this Agreement as a matter of urgency.

4. Each of the three BCLME countries has relatively new fisheries laws (statutes) in place. Angola replaced its 1992 fisheries law with updated fisheries statute in 2004.

Namibia did likewise in 2000. South Africa repealed its 1989 fisheries statute with the Marine Living Resources Act in 1998. There is accordingly no need for these statutes to be fundamentally overhauled or repealed.

5. In addition, none of the three fisheries statutes contain any substantive or fundamental philosophical fisheries policy, management, compliance or research contradiction. Accordingly, the basic fisheries laws in each of the BCLME countries are broadly complementary.

6. However, significant gaps and differences exist at the regulatory, policy and implementation levels.

7. With respect to fisheries policy, for example, the three countries need to urgently develop a single policy with respect to foreign (ie. Non BCLME) flagged vessels, operational management procedures for shared stocks (such as hakes and pelagics), foreign fishing in BCLME EEZ's, European Union fish processing investments in the BCLME and marine protected areas.

8. With respect to fisheries research policy and rules, the BCLME countries need to design shared or complementary research methodologies, scientific expert exchange programmes, complementary gear utilisation rules (such as mesh sizes, trawl and purse-seine nets) and importantly how to effectively harness and incorporate indigenous knowledge systems into fisheries science.

9. With respect to fisheries compliance, the BCLME countries must each implement their National Plans of Action to Prevent, Deter and Eliminate IUU Fishing within their EEZ's. To date, it is understood that among the BCLME countries, only South Africa has failed to draft an NPOA on IUU Fishing. The NPOAs of the three BCLME countries should be complementary in strategy and policy. In addition, joint compliance initiatives undertaken under the SADC-EU MCS programme proved tremendously successful. Joint compliance initiatives that are permanently in place would significantly bolster the fight against IUU fishing in the BCLME EEZ. This in turn will require complementary regulatory and policy provisions pertaining to fines, arrest, seizure, detention, cancellation and suspension of rights/quotas, vessel monitoring systems on vessels and the sharing of VMS information amongst BCLME members[1], powers of fishery control officers and the ability of FCO's of one BCLME country to be able to enforce the laws of another BCLME country while in its waters.

10. In conclusion, this Report elaborates on the possible opportunities the IBCC may have to guide statutory, regulatory and policy harmonization with respect to not only capture fisheries but importantly aquaculture as it may pertain to shared stock farming. This Report notes that the current version of the "final draft" IBCC Agreement may be fatally flawed in that it seeks to establish a Scientific Committee as the most important advisory committee to the Interim Commission, and ultimately to the Ministerial Conference. Although sound scientific advice is paramount, the challenges facing the BCLME states are not founded in science – the challenges are socio-economic and the core advisory group to the decision-makers must accordingly be capable of providing advice that is practical, implementable and appropriate for developmental states. In other words, the key committee that will advise the decision-makers of the BCLME must comprise fisheries scientists, fisheries managers (who

[1] It is important to note that as members of SADC, South Africa, Angola and Namibia have agreed to share VMS data of vessels authorised to fish in their respective EEZ's. This agreement was concluded in 2004.

understand the balance needed to be struck between science and socio-economic imperatives) and compliance strategists.

11. To continue with the current programme which has focused on the BCLME being a science programme, will ensure that it remains of little socio-economic and political interest to the vast majority of the users and beneficiaries of the Benguela system.

CONTENTS

LIST OF ACRONYMS

AFA	Annual Fisheries Agreement
BCLME	Benguela Current Large Marine Ecosystem
BENEFIT	The Benguela Environment Fisheries Interaction and Training Programme
CCAMLR	Convention on the Conservation of Antarctic Marine Living Resources
DDC	Directorate of Development Co-operation
DEAT	Department of Environmental Affairs and Tourism (South Africa)
EEZ	Exclusive Economic Zone
EIA	Environmental Impact Assessment
EU	European Union
EVAC	Environmental Variability and Co-ordination Unit
FAO Code of Conduct	The Food and Agricultural Organisation Code of Conduct for Responsible Fisheries
GEF	Global Environment Facility
HABs	Harmful Algal Blooms
IBCC	Interim Benguela Current Commission
ICCAT	International Commission for the Conservation of Atlantic Tunas
ICES	International Commission on the Exploration of the Sea
MCM	Marine and Coastal Management, a Branch within DEAT (South Africa)
MCS	Monitoring, Control and Surveillance
MET	Ministry of Environment and Tourism (Namibia)
MFMR	Ministry of Fisheries and Marine Resources (Namibia)
MME	Ministry of Mines and Energy (Namibia)
NPC	National Planning Commission (Namibia)
ORM	Orange River Mouth
PCU	Programme Co-ordinating Unit (of the BCLME)

PSC	Programme Steering Committee (of the BCLME)
SADC	Southern African Development Community
SAP	Strategic Action Programme (of the BCLME)
SEAFO	South East Atlantic Fisheries Organisation
TAC	Total Allowable Catch
TDA	Transboundary Diagnostic Analysis
UNCLOS	United Nations Convention on the Law of the Sea
UNDP	United Nations Development Programme
UNOPS	United Nations Office for Project Services
ZOPCSA	Zone of Peace and Co-operation in the South Atlantic

1. INTRODUCTION

Article 2 of the Draft Interim Benguela Current Commission (IBCC) Agreement makes explicit the objective –

> *"to give effect to the Strategic Action Programme by establishing an Interim Benguela Current Commission pending the establishment of a permanent Benguela Current Commission, in order to establish a formal institutional structure for cooperation between the Contracting States that will facilitate the understanding, protection, conservation and sustainable use of the Benguela Current Large Marine Ecosystem by the Contracting States".*

The objective calls for the contracting state parties (South Africa, Namibia and Angola) to establish an IBCC that will facilitate an understanding, protection, conservation and sustainable use of the Benguela ecosystem. For the IBCC to successfully undertake these activities, the contracting state parties must necessarily have fisheries and ecosystem regulatory systems which are complementary at the minimum[2].

This report carefully analyses the legal and regulatory systems governing access to fisheries in each of the three BCLME member states, comparing the three systems paying particular attention to the systems regulating –

- the allocation of fishing quotas or rights;
- effort management with particular emphasis on vessel licensing;
- shared stocks.

The analysis is however premised on, taking as its fundamental point of departure, the Article 2 objective, which requires facilitation to ***protect***, ***conserve*** and ***sustainably utilise*** the fisheries resources of the Benguela. Accordingly, the comparative legal analyses of the regulatory systems governing access to fisheries in each of the three BCLME member states will have regard to each country's research (***conserve***), fisheries compliance (***protect***) and fisheries management (***sustainably utilise***) systems.

Once analysed, this report will then consider whether there can be a role for an institutional arrangement, such as the IBCC, in the joint management of shared stocks, the extent of such a role (if there is indeed one) and, albeit very briefly, the funding arrangements of such an institution.

By way of a general and overarching introduction, Angolan, South African and Namibian fisheries law is regulated in terms of fisheries specific laws, including regulations and policies. South Africa has the most significant set of laws, policies and regulations governing the administration of fisheries. In addition, to the Marine Living Resources Act, 18 of 1998 ("the MLRA"), South African fisheries administration is governed by various Constitutional provisions, such as the right to environmental security, the rights to administrative justice and transparent governance and the Maritime Zones Act 15 of 1994 (which determines territorial and jurisdictional boundaries of South African waters). In South Africa, administrative law was effectively codified with the adoption of the Promotion of Administrative Justice Act 3 of 2000 and the Promotion of Access to Information Act 2 of 2000.

Namibian fisheries administration is substantially governed by its Marine Resources Act, 27 of 2000 ("MRA"). In addition, broader fisheries policy is determined having regard to the National Development Plans. The first set of Plans was introduced shortly after

[2] By complementary we do not believe that the regulatory systems need to be the same, rather that policies, regulations and laws should complement and not contradict each other, create loopholes or unnecessary ambiguity allowing for opportunistic exploitation of marine living resources in one country, which will inevitably adversely affect at least one other contracting state.

independence. A second set of development plans was issued in 2000 for the period 2000 to 2005. Like the MLRA, the MRA governs the manner in which fishing rights may be allocated and the duration of these rights.

The Angolan fishing industry (industrial and artisanal) is regulated in terms of the Aquatic Biological Resources Act, 2004. It is important to note that it is fallacious to talk about Angolan fishing and administrative law as "European-based" as if the latter form of law is distinct and very different from the so-called "Roman-Dutch law" which forms an important component of South African law but is not foundational to its fisheries laws. Much like the South African MRLA, the Angolan law deals with topics such as the types of fishing allowed (namely artisanal and industrial), international and regional cooperation, the authorisation of fishing activities and the licensing system, the powers of officials and the arrest of vessels, as well as special rules for Angolan and foreign fishing vessels. The law however additionally deals with matters such as quality control, which in South African is dealt with by the South African Bureau of Standards and the Department of Trade and Industry. In Angola, fisheries policy is determined in terms of annual executive directives (regulations). These include decrees that govern Crustacean fisheries (Decreto Executivo Nº 10/97) and the source and quality of the fishing products for export (Decreto Executivo Nº 36/97).

South Africa, Namibia and Angola are also each bound by international treaties and agreements regulating fishing. These include the United Nations Convention on the Law of the Seas and the Food and Agriculture Organisation's Code of Conduct for Responsible Fisheries. South Africa and Namibia have acceded to (South Africa) and ratified (Namibia) the 1995 UN Fish Stocks Agreement for the Conservation and Management of Straddling Stocks and Highly Migratory Stocks. Angola has neither signed nor acceded to or ratified the Convention. Furthermore, all three BCLME countries are bound by the SADC Fishing Protocol, ICCAT (International Commission for the Conservation of Atlantic Tuna), SEAFO (South-East Atlantic Fisheries Organisation) and CCAMLR (Commission for the Conservation of Antarctic Marine Living Resources).

2. WHAT ARE SHARED STOCKS?

2.1 Shared Stocks of the BCLME

The major shared, commercially important fish stocks[3] within the BCLME include:

- Large Pelagics (swordfish and tuna)
- Hake
- Small Pelagics (sardines, pilchards and anchovies)
- Horse mackerel
- Crustaceans (red crab and rock lobster)

2.2 Management of Shared Stocks

The management of shared fish stocks presents one of the greatest challenges to the achievement of long-term, sustainable fisheries. Legal, biological, socio-economic and financial drivers all form an essential part of shared fish stock management.

Internationally, there are four recognised categories of fish stocks. Article 7 of the FAO *Code of Conduct for Responsible Fisheries*[4] defines these categories as follows:

a) Fish resources crossing the Exclusive Economic Zone (EEZ) boundary of one coastal State into the EEZs of one, or more, other coastal States. These are commonly referred to as transboundary or shared stocks;

b) Highly migratory species, which are listed in Annexure 1 to the 1982 UN Convention on the Law of the Sea ("UNCLOS"). These species consist of mainly tuna species, which are highly migratory in nature, and resources found both within the EEZ of coastal States and on adjacent high seas;

c) All other fish stocks (excepting for anadromous and catadromous stocks) are referred to as straddling stocks, as they are found both within coastal State EEZs and the adjacent high seas;

d) Fish stocks found exclusively on the high seas, known as discreet high seas fish stocks.

It is important to note that the above categories are clearly not mutually exclusive. In other words, certain fish stocks may fall into categories (b) or (c) as well as (a).

The 1995 UN Fish Stocks Agreement for the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (also referred to as the Straddling Stocks Convention), recognises transboundary stocks as those fish stocks that occur within the exclusive economic zones of two or more coastal States[5]. Article 63(2) defines Straddling Stocks as those fish stocks that occur both within the Exclusive Economic Zone (EEZ) and in an area beyond and adjacent to it.

Shared fish stocks as such have not been legally defined. Neither UNCLOS nor the Straddling Stocks Convention provides a legal definition. A definition proposed by Hayashi in 1993 and subsequently adopted by Caddy (in 1998) and others, has since been used to refer specifically to trans-boundary stocks that do not extend to the high seas as follows:

[3] A table illustrating more detailed information regarding shared stocks and based on SADC catch data reported to the FAO statistical fisheries capture database is contained in **APPENDIX 3** to this report.
[4] FAO, 2003b
[5] Article 63(1).

> *'A group of commercially exploitable organisms distributed over, or migrating across, a maritime boundary between two or more national jurisdictions, whose exploitations can only be managed effectively by cooperation between the States concerned, but where emigration to or immigration from other jurisdictions need not be taken into account.'*
> [Own emphasis]

For the purposes of this Report, the above definition has been used but interpreted liberally so as to include *commercially exploitable organisms* such as tunas and swordfish that are also managed by regional fisheries management organisations, such as ICCAT and CCSBT.

2.3 Degrees and Stages in Resource Management and Conservation

Where the harvesting activities of one State may well affect the harvesting opportunities of another country due to the sharing of resources, a *prima facie* case for the establishment of a co-operative management institution does exist.[6]

At least two levels of cooperation are currently recognized in such situations. The so-called primary level of co-operation exists in terms of shared and coordinated research programmes and activities. In the context of the BCLME, BENEFIT ("Benguela Environment Fisheries Interaction and Training") provides a well-known and ideal example in our region. Simultaneously this provides the suitable and requisite platform from which to move to the next, secondary level of cooperation, that of active or shared management. Current expert opinion is that this form of co-management requires (almost by definition) the establishment of coordinated, joint management programmes. Should this premise be accepted (which it appears is the case within the BCLME as a final draft IBCC Agreement has been provisionally agreed to), this then in turn requires the following commitments:

- The determination of optimal global harvests over time, which is to feed into the application of a so-called optimal management strategy through time;
- The implementation and enforcement of coordinated management agreements; and
- The allocation of harvest shares among participating states.

To achieve the above-mentioned commitments the following would be necessary:

- A co-operative management authority (such as an IBCC);
- Detailed, joint management plans;
- A set of agreed, common objectives;
- Agreed management tools, which include reference points and indicators for monitoring performance levels; and
- A joint ecosystems management forum to provide strategic advice.[7]

An important note to add in the above context is that it is crucial for the coastal States concerned in shared management to have the same agreed-upon management goals. If these management aims are not identical, the role-players concerned are required to develop mutually acceptable but compromised resource management programmes. At the same time, co-management of shared resources within an ecosystem must prove to be beneficial to those States involved in order to make it 'worth their while'.

[6] Munro, G., Van Houtte, A. and Willmann, R. (2004) The Conservation and Management of Shared Fish Stocks: Legal and Economic Aspects p. 5.
[7] See further the "RECOMMENDATIONS" section below, where it is argued that the Scientific Committee intended for establishment under the draft IBCC agreement should be replaced with an ECOSYSTEMS MANAGEMENT committee.

2.4 The Co-operative Management of Shared Fish Stocks

There are many international examples of institutional structures to provide for the co-operative management of shared fish stocks between two or more countries. Broadly speaking, these can be divided into two groups, depending on the main distributional patterns of the targeted fish stocks. Firstly, shared stocks, whose migratory movements take them onto the high seas where they are exploited and where no coastal state has jurisdiction.[8] These so-called highly migratory species (and to some degree straddling stocks), are mostly managed by dedicated international commissions, which have been established according to specific conventions or agreements. These treaties grant the co-operative management Institution in question (e.g. CCAMLR, ICCAT and SEAFO) their specific managerial mandate.

Secondly, there are those fish stocks whose migratory patterns take them through the EEZs of more than one country and they are commercially exploited by the fishing industry of more than one country. In other words, as is the case in the BCLME, such shared fish stocks are exploited in terms of the jurisdictions of at least two sovereign, coastal states. Internationally, various tri-lateral fisheries agreements between affected coastal states have been used to regulate the co-operative management of such resources. Examples of such agreements include existing contracts between Norway and the European Union; Russia and Iceland; Iceland/Greenland and Denmark/Sweden (the 'Skagerak Agreement'); and the Faeroe Islands, Iceland and Russia.[9]

This legal analysis of the BCLME countries' fisheries laws (as they pertain to rights allocations, and the objectives of transformation and sustainability) is based on the premise that the Interim Benguela Current Commission (IBCC) will be agreed to. The IBCC has the potential to co-ordinate ecosystems strategies beyond fisheries management only. In the **Recommendations** section the Consortium seeks to identify a range of strategic ecosystems issues that should fall within the scope of joint management.

2.5 International Framework and Obligations

Shared management of shared stocks is a pre-requisite from a scientific, socio-economic and fisheries-management perspective. The mandate for the development of measures for the transboundary management of shared stocks in the region clearly exists.[10] This duty is enshrined in both the national legislative frameworks of Namibia, South Africa and Angola, as well as the international and regional instruments listed in the *Introduction* to this Report. To reiterate, these include the 1982 United Nations Convention on the Law of the Sea (UNCLOS), the FAO Code of Conduct on Responsible Fisheries, the SADC Fishing Protocol, the 1995 United Nations Agreement for the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (also known as the Straddling Stocks Convention), ICCAT (International Commission for the Conservation of Atlantic Tuna), SEAFO (South-East Atlantic Fisheries Organisation) and CCAMLR (Commission for the Conservation of Antarctic Marine Living Resources).

The common, stated objective of all the applicable regional and international legal and policy frameworks is to promote the 'responsible and sustainable' use of marine resources. In the case of shared stocks, this can only be attained through negotiated, co-operative agreements between the participating countries.

[8] See Cullinan, C., Munkejord, S. and Currie, H. (2005) Institutional Study regarding the Establishment of a Regional Organisation to Promote Integrated Management and Sustainable Use of the BCLME, p. 61.
[9] Cullinan, C., Munkejord, S. and Currie, H. (2005) Institutional Study regarding the Establishment of a Regional Organisation to Promote Integrated Management and Sustainable Use of the BCLME, p. 62.
[10] See Sumaila, R., U., Ninnes, C. and Oelofsen, B. (2002) Management of Shared Hake Stocks in the Benguela Marine Ecosystem p. 16.

What follows is a country-by-country analysis of the legal systems regulating the control of access to marine fisheries and the management of effort, particularly the authorisation of vessels, in each of the three BCLME countries.

3. ANALYSING NAMIBIA'S REGULATORY SYSTEM

3.1 Introduction

The Sea Fisheries Act, 29 of 1992, established Namibia's fisheries management regime that is still applied and maintained to this day. The key elements of this system consist of the allocation of fishing rights to right-holders and setting TACs on the basis of scientific research. Namibia's Marine Resources Act, 27 of 2000, replaced the Sea Fisheries Act during 2000. Namibia's MRA incorporates international best practice for the management of the country's marine capture fisheries, including key elements of the applicable international fisheries management instruments in which Namibia participates.

The terms and conditions governing all vessels and fishermen operating in Namibia's territorial waters are stipulated in regulations promulgated under the Marine Resources Act.

3.2 Fishing Rights Allocations

Namibia's fisheries legislation provides for the consideration of international agreements when issuing licences, the maintenance of a register reflecting fishing rights and the disclosure of information in certain circumstances.

The first implementation phase of Namibia's 1991 Fishing Policy, (contained in a White Paper Document and titled *Towards Responsible Management of the Fisheries Sector)* was marked by the enactment of the above-mentioned Sea Fisheries Act in 1992. This piece of legislation and accompanying regulations required the Minister to have regard to a number of social criteria and objectives when considering fishing right applications. These were clearly aimed at redressing various socio-economic impacts of apartheid, including the need to ensure equitable access to the country's fisheries resources by Namibian citizens, especially those who had been disadvantaged by apartheid. A further important consideration included the need for an equitable distribution of benefits derived from the Namibian fishing industry along its coastline.

Section 14(6) of the Sea Fisheries Act, read together with Regulation 2(2) of the 1993 Namibian regulations, listed the following as important considerations when allocating commercial fishing rights:

- whether or not the applicant is a Namibian citizen;
- if the applicant is a company, whether Namibians have beneficial ownership thereof;
- whether Namibians have beneficial ownership of any vessel that may be used by the applicant;
- the applicant's ability to exercise the prospective right in a satisfactory way;
- the advancement of people in Namibia who have been economically, socially or educationally disadvantaged by discriminatory laws or practices enacted or practised before independence;
- regional development within the country;
- co-operation with other countries, particularly those within the Southern African Development Community (SADC); and
- the conservation and economic development of marine resources.

As noted above, the Sea Fisheries Act of 1992 was repealed by Namibia's Marine Resources Act in 2000. Section 2 of the MRA empowers the Minister to determine the general fisheries

policy concerning the utilisation and conservation of marine resources in order to achieve the greatest benefit for all Namibians, in the present and future. The commercial harvesting of Namibia's marine resources is regulated in Part VI of the Marine Resources Act. Section 33 vests the Minister with the discretion to announce a period during which applications for rights of exploitation are to be submitted. In the granting of fishing rights, the same considerations may be taken into account by the Minister as listed above, as well as the following:

- whether the applicant has performed successfully under an exploratory right in respect of the resource applied for;
- socio-economic concerns;
- the contribution of marine resources to food security; and
- any other matter that may be prescribed.

Section 38(1) of Namibia's Marine Resources Act empowers the fisheries Minister to set total allowable catches for fish stocks. According to section 38(2), the Minister is required to determine any such TAC on the basis of the 'best scientific advice available, and having requested the advice of the advisory council, determine the total allowable catch in the *Gazette*.' Section 39 allows the Minister to subject the harvesting of living marine resources to any measure the Minister considers necessary by notice in the *gazette*.

3.3 The Costs of Fisheries Management

Part VIII of the MRA addresses the financial provisions relating to Namibia's fisheries. Section 44 empowers the fisheries Minister, in consultation with the advisory council[11], and with the approval of the Minister of Finance, to determine the fees payable in respect of the harvesting of the country's fish resources. The basis and calculation of these fees can vary depending on the values and amounts of various species harvested, the level of fishing effort applied or quotas allocated, and the specific species or area concerned.[12] Anther important factor influencing the level of fees and levies payable by right-holders relates to the degree of Namibianisation – in other words, whether the right-holder or applicant is a Namibian citizen, or a Namibian citizen maintains beneficial control where this concerns a company, and whether the beneficial control of any vessel concerned is held by Namibians.[13]

Once these amounts have been finalised according to the above considerations and procedures, they are gazetted. In addition, sub-sections 44(3) and (4) empower the Minister to impose levies on the harvesting of any marine resource[14], to be paid into either the Marine Resource Fund or the Fisheries Observer Fund. The Marine Resource Fund was initially established under the Sea Fisheries Act of 1992, before being continued in terms of the MRA, and consists of:

- monies collected as levies;
- monies appropriated by Parliament for the realisation of the objects of the fund;
- interest on investments;
- monies accruing to this fund from any other source, subject to the approval of both the fisheries and the finance Ministers;

[11] established under section 24 of the Marine Resources Act (MRA)
[12] Section 44(2) of the MRA
[13] Section 33(4) a), b), c)
[14] 'Marine Resource' is extremely widely defined as 'all marine organisms, including but not limited to, plants, vertebrate, and invertebrate animals, monerans, protests (including seaweeds), fungi and viruses, and also includes guano and anything naturally derived from or produced by such organisms'.

- any interest accruing on investments made into the fund, by the Permanent Secretary, out of monies not required for immediate use, subject to approval of the Finance Minister.

This Marine Resource Fund is used to cover costs related to research, training, education and development of marine resources. The Fisheries Observer Fund is maintained through levies imposed under section 44, and other sources identical to those listed above pertaining to the Marine Resource Fund. The Fisheries Observer Agency is a parastatal, with its headquarters stationed in Walvis Bay. Section 7 of the Marine Resources Act provides for the appointment of fisheries observers by the agency and outlines their functions. Any person commercially harvesting a marine resource may be required by the Minister to carry an observer on board the relevant fishing vessel, or admit a fisheries observer to any land or premises used for such harvesting. Observers are entitled to access all records, documents and marine resources found on board a vessel and the right holder concerned may be required to provide reasonable accommodation for the observer, as well as allowing the observer the use of all equipment necessary for the performance of his/her functions.

The Sea Fisheries Fund was established in order to share research, development and training costs between government and industry. During 1999, the Sea Fisheries Fund contributed approximately 9% to Namibian fisheries income. However, this figure increased as higher TACs were set. By the end of the first planning period, the fund recorded its largest income from levies on fish landed in the amount of N$22,100,000.[15] Previously, in the early seventies, research fees were only levied on anchovy, pilchard, horse mackerel, monk, kingklip, rock lobster and sole. Since 1992, and in conjunction with the allocation of new fishing rights in 1994, a Marine Resource Fund levy has been charged on all species for which harvesting rights are granted. The Minister is empowered to amend these levies, in order to make them more effective. Money from the Marine Resources Fund is used to cover some of the costs related to development, research and training conducted under the auspices of the Ministry of Fisheries and Marine Resources (“MFMR”).

The actual setting of quota levies involves two separate decisions. Firstly, the basic level of the quota levy, which can be adjusted annually, and secondly, the system of surcharges and rebates. The latter is supposed to be more permanent, although adjustments obviously need to be made periodically in line with commercial realities and currency fluctuations. In determining basic quota levy levels, the following factors are inclusively regarded, although the most important consideration relates to the value of the fish:

- the profitability of fishing and processing operations; and
- catch rates and other cost structures.

Usually the basic level varies between 5 and 15 per cent of the first hand value. In principle, Namibia’s policy states that all quota-regulated fisheries should be covered by a levy system, whilst species for which there is free fishing (unsurprisingly) do not require any quota levy. The volume of fish caught determines the levy charged. This helps to achieve the dual objective of reducing the temptation to under-report catches, as well as making right-holders apply for the quotas they actually hope (and eventually expect) to catch.

On the other hand, if weather (or any other unforeseen climatic circumstances) makes it impossible for all right-holders to obtain the quotas as granted, the Government may grant extraordinary rebates to those affected.

[15] Strategic Plan 2004-2008, MFMR, p. 9.

3.4 Fisheries Policies

Between 1991 and 1994 Namibia put in place National Development Plans ("NDP") to alleviate poverty, reduce unemployment, stimulate economic growth and reduce income inequalities. Within fisheries, the NDP determined a number of fisheries and marine resource targets as follows:[16]

- Increase in employment throughout the fishing sector by 9000 to 21 000 formal employees by 2000;
- Achieve 80% Namibianisation of the fishing fleet (except for mid-water trawlers) by 2000;
- Achieve 80% Namibianisation of the crew (excepting the mid-water trawlers) by 2000;
- Achieve 50% shore-based processing of hake by 2000;
- Achieve Namibianisation of patrol vessels by 2004;
- Increase to 12% (from 8%) the fisheries sector contribution to Namibian GDP.

The second NDP (2001-2005) focussed on significantly more substantive goals:

- To increase the value of fish landed by promoting processing activities;
- To expand the Namibian fishing industry within the SADC region;
- To promote the integration of the Namibian fishing industry within the SADC region's fisheries management systems; and
- To recognise the importance of fish as a source of food security.

3.5 Analysis

In terms of both statutory and regulatory law and policy, ventures that are *beneficially* owned by Namibians, are clearly shown preference in the allocation processes of rights and quotas. From 1994 to 2001 fishing rights were only granted for periods of four, seven and ten years. Those companies with a minimum of 90% Namibian shareholding and investment in the fisheries were given 10-year rights. Companies with less Namibian shareholding but the requisite investments were granted 7-year rights. Most of the new entrants to the industry ('newcomer companies'[17]) received rights for 4 years. As a company could be promoted from one category to the next, this system simultaneously addressed the two-fold objectives of increased investment and "Namibianised" shareholdings. For example, if a 7-year rights-holder increased its Namibian shareholding or investment, it could be up-graded to the 10-year rights category.

It is important to note the following. Firstly, the majority of rights allocated are in the ten and fifteen year categories, indicating that the quota holders are 90% plus Namibian owned and these are applicable to the most valuable of the fisheries.[18] Secondly, no rights have been allocated for the 20-year period category. The 20-year right category is applicable to those companies that employ 5000 and more Namibians in shore-based facilities on a permanent basis. Total capital investment in shore infrastructure and fishing vessels over the past

[16] National Development Plan 1, Fisheries and Marine Resources, Chapter 12, p. 192
[17] Iyambo, I. (2003) Progress in Broad-based Empowerment in the Fisheries and Marine Sector p. 3.
[18] It is noted that the substantive nature of the Namibianisation of right holders has not been properly tested. In other words, it remains unclear as to whether Namibian shareholding in right holders equates to proportionate levels of control, rights to dividends and voting rights. This concern was also raised in the Consortium's Report on *Measuring Transformation in the Marine Fishing Industries of the BCLME Countries – October 2005.*

decade has exceeded N$2 billion. The four-year rights initially allocated proved too short for sufficient planning in terms of vessel and shore-based infrastructure. It also adversely affected the "newcomer companies" most.

3.6 Policy on the Granting of Rights of Exploitation

Namibia's principal policy statement pertaining to quota allocations is the *Policy Statement on the Granting of Rights of Exploitation to Utilize Marine Resources and on the Allocation of Fishing Quotas* of 8 July 1993. The core elements of this policy are the following:

- *Maintaining stock recovery:* This is required to ensure the sustainable utilisation of marine resources. This will be achieved by the promotion of stock recovery to long term sustainable yield levels through the conservation of marine resources and the protection of the Namibian EEZ. The current strategy is setting total allowable catches at levels low enough to promote recovery of depleted stocks.
- *Compliance control*: To protect the Namibian EEZ, the Ministry will continue to curb illegal fishing and harmful fishing practices. Monitoring, control and surveillance will become an even more important issue in the future, since the enhanced status of fish stocks will become an increasingly attractive target for illegal fishing.
- *Industrial development*: To ensure that gains in rebuilding fish resources are translated into economic gains in terms of increased private incomes, employment and government revenue, the industry must be given a viable economic environment. This is especially important in on-shore processing and in areas such as quality control and export promotion.
- *Namibianisation*: In a holistic sense, this is said to reflect a political imperative that to be able to take up opportunities provided for by development of the fisheries sector, Namibians must be able to acquire skills through training. In addition, to increase the role which Namibian businesses play in the sector, supporting policies and programmes are needed for the allocation of fishing rights and quotas. This goal will be achieved by strengthening the research and training capacities of the fishing industry.
- *Advancement of socially or educationally disadvantaged persons:* To ensure greater beneficial participation in the sector for Namibians coming from groups previously subject to discriminatory laws and practices. This will be achieved through affirmative action.
- *Improving the services of the Ministry of Fisheries and Marine Resources*: This is required to ensure effectiveness, efficiency and economy of the MFMR. Achieving this requires the training of qualified and competent personnel in the fishing industry, as well as the MFMR. Also, fair returns from the fishing industry to the government need to be ensured. The MFMR must guarantee the conservation and protection of Namibia's marine fish resources. To remain focused and to keep abreast of the changes in the industry, the MFMR has developed a strategic plan spelling out strategies and initiatives for a period of five years.
- *Successfully promoting regional co-operation in marine fisheries:* Regional co-operation is to be enhanced through the activities of the SADC Sector Co-ordinating Unit for Marine Fisheries and Resources.

3.7 Quota Allocations and Systems of Fishing Rights

The 1991 policy document[19] states that the main objective of the quota system and rights of exploitation is to control and limit fishing in terms of resource management strategies. More recently, the quota allocation system has been employed as a tool to Namibianise the sector, while research and quota levies were designed to boost Government income from the exploitation of a national natural resource. At both operational and ownership levels, these levies have built-in rebate systems, which provide incentives for Namibianisation.

> *"The Government intends to constantly review the quota levy and rebate system and the various regulatory measures, with a view to making them more effective and less complicated to implement, reducing unintended effects, and providing the participants in the sector with sufficient stability for their planning and investment activities."*[20]

The rebate system currently in place provides a three-pronged incentive scheme, aimed at encouraging increased levels of onshore processing, landings of fish catches by Namibian vessels and the employment of Namibian crew.

Once the right-holders within the commercial fisheries sector have accepted their quota allocation, they become liable to pay the quota fee, irrespective of whether they fulfil this quota or not. Quota fees are an extremely useful policy tool available to the Government. Namibian-owned companies are charged preferential rates (referred to as rebates), as are companies who employ predominantly Namibians on their fishing vessels. Land-based processing of fish is encouraged in a similar way, as a smaller quota fee is charged for fish that is landed for shore-processing than catches that are processed at sea. According to the MFMR, quota fees have contributed significantly to increased participation by Namibians in the sector, in terms of both ownership and employment. This becomes apparent by perusing quota fee tables, tracking contributions from the main commercial sectors during the years 1994 to 1998.[21]

During 2001 the Minister announced a policy shift affecting the quota fees leviable in the mid-water trawl fishery. It is understood that the rationale underpinning this policy shift was to accelerate the Namibianisation of the mid-water trawl crews. After consultation with the industry, a 3-year strategy was developed and initiated. The process was implemented in three separate phases, with the aim of achieving a Namibianised crew of 35% by the year 2002, projected to reach 45% by 2003 and 55% by 2004.

3.8 Re-allocations and Transfer of Rights

Importantly, section 33(6) provides –

> "*If at any time before the expiry of a right, the holder of that right has met the prescribed criteria that would have permitted a longer term at the time of granting the right, or no longer fulfils the prescribed criteria for the term that was granted, the Minister may vary the period of validity of the right to the period for which the holder qualifies, and when so varying the period, may also vary any condition attaching to the right or impose any additional condition.*"

Furthermore, an updated 1993 *Policy Statement on the Granting of Rights of Exploitation to Utilize Marine Resources and on the Allocation of Fishing Quotas* stipulates the following:

> '*Quotas will not be able to be transferred permanently, except in association with the sale of a vessel and with the approval of the Minister. It is planned to allow rights holders to make one transfer annually of some amount from the annual quota they cannot fully utilize to other vessels*

[19] Towards a Responsible Fishing Sector p. 32.
[20] Supra
[21] See HYPERLINK "http://www.mfmr.gov.nam" www.mfmr.gov.nam (“Revenue”).

which they own or to other rights holders for use by their vessels. The transfers will be taken into account when subsequent quota allocations are made.

Fishing effort will continue to be regulated by measures such as limits on the number of vessels to be licensed in fisheries such as the line fish and tuna fisheries where there are no limited quotas and such measures are necessary to prevent over-exploitation.[22]

Section 42 (1) of the Marine Resources Act provides the following: 'No right or exploratory right may be transferred to another person except with the approval of, and subject to the conditions determined by, the Minister, but such approval may only be granted if the quota, if any, or a portion thereof, connected with the right or exploratory right is also transferred to the same person.' Section 42(2) further provides that 'No quota for any marine resource…may be transferred to the holder of a right valid for the same resource, except with … the Minister's approval.' Any transfer of a fishing vessel licence requires the Minister's consent.[23] In addition, no fishing licence may be transferred unless the licensee holds a fishing right or exploratory right for the resource concerned, and where quotas have been allocated, also holds a quota for the resource in question.[24] If this latter requirement is not fulfilled, the fishing licence is deemed invalid.

3.9 Effort Control

3.9.1 Fishing Licences

Licences are commonly employed as useful tools for limiting effort in fisheries that are not subject to TACs or quota allocations. In order to fish commercially in Namibia's 200-mile EEZ, vessels are required to obtain a licence. In addition, vessels flying Namibia's flag in order to harvest marine resources outside the Namibian EEZ are required to have a specific licence. This would occur, for example in terms of existing regional arrangements, like the SEAFO Convention. Presently there is a significant gap in the governing legislation, as the Marine Resources Act does not provide for the situation where foreign vessel-owners (for example in terms of joint venture agreements with local quota-holders) fish outside Namibian waters, but under the Namibian flag, and land their catches in Walvis Bay. This is a serious oversight and should be addressed urgently.

As Namibians have increasingly taken over control of the major companies in the sector, expressing the desire to invest in their own vessels and fly the Namibian flag, the actual fishing fleet operating in the country's waters has become predominantly composed of Namibian-registered vessels.[25] During 2002, 335 vessels were licensed for commercial fishing.[26] The proportion of Namibian vessels contributing to this figure had risen from 51% (of the 214 vessels operating in 1991) to 71% during 2002. In conjunction with the above developments, more sea-based employment for Namibians has mirrored the increased Namibianisation of the fishing fleets. These successes have contributed to substantial rises in the number of Namibian officers and crew. Another noteworthy example is found in the development of whitefish processing plants, which has grown from zero in 1991 to more than 20 in 2002[27], creating a concomitant growth in employment. By way of summary, between 1993 and 2004, the number of jobs in the Namibian fishing industry grew from 11500 to approximately 15500. In 1993, Namibians comprised 45% of sea going and 50% of land based workers. By 2004, Namibians comprised 68% of sea going and 98% of land based workers.

[22] Paragraph 30 and 31 of the updated 1993 Policy Statement on the Granting of Rights of Exploitation to Utilize Marine Resources and on the Allocation of Fishing Quotas.
[23] Section 42(3)
[24] Section 40(2)
[25] Iyambo, I. (2003) Progress in Broad-based Empowerment in the Fisheries and Marine Sector p. 4.
[26] See Table in 2002 Annual Report of the MFMR, p. 24.
[27] Iyambo, I. (2003) Progress in Broad-based Empowerment in the Fisheries and Marine Sector p. 5.

3.9.2 Fees and subsidies

In Namibia's Fisheries Management structure, fees serve two important functions. Firstly, they earn important revenues for the government, and, secondly, they provide incentives aimed at encouraging the policy objectives of Namibianisation of the industry and long-term, sustainable conservation of the resource. The most significant here are the quota fees, payable on the allocated quotas. These quota fees were established to encourage Namibian registration and ownership of fishing vessels.

Namibia has successfully implemented a rights-based fisheries management system. Notwithstanding the need to grow its fishing industry, thereby furthering the *Namibianisation* policy, Namibia has commendably resisted subsidising its fishing industry, recognising that subsidisation would lead to the over-capitalisation of the industry, as well as unfair trade distortions; left unchecked, this can easily result in over-fishing, and increased incidences of illegal, unreported and unregulated ("IUU") fishing activities.[28] However, a more suitable arena for subsidies should be acknowledged with regard to cleaner technology and production standards. This encourages significant investment in the above, whilst simultaneously leading to improved resource quality, awareness, external markets and savings of water and energy.

In the past, fishing quotas were allocated subject to various conditions, which, however, proved too cumbersome to implement.[29] For example, pilchard quotas were set so as to control fishing, as well as attempting to satisfy the demands of the processing industry. This double quota system required part of the quotas allocated to processing plants to be fished specifically by vessels owned by the same processing company, while different, smaller quota allocations were made to other independently-owned fishing ships. Such a system was tedious to operate, and did not actually limit fishing effort. In the hake fisheries, processing and fishing quotas were combined in the allocation process. This system ignored the realities of the actual number and capacity of hake vessels, which resulted in a number of short-term arrangements with chartered vessels. Thus it was decided to rather emphasise the actual *licensing* of fishing vessels, and then allocate quotas to the *owners* of these vessels. This results in equal opportunities for all owners in terms of obtaining quotas, as well as clearly regulating fishing through effort controls. It does however necessitate the need to carefully monitor the number of vessels licensed, and, accordingly, differentiate between Namibian as opposed to foreign fishing effort.

Accordingly, the fisheries policy requires the following:

> *"The Government will strictly limit the number of fishing vessels being licensed. Preference will be given to Namibian vessels. Secondly mixed vessels may be considered, provided that the number of Namibian vessels is not sufficient. Only if the total number of Namibian-registered vessels is not sufficient, will there be room for chartered or other foreign vessels on a year-to-year basis. In the longer term, these might be phased out and may subsequently be utilized to cope with temporary variations in the fish resources, if any."*[30]

3.10 Fisheries Monitoring, Control & Surveillance (MCS)

Initially Namibia's MCS system was based on the operation of fisheries patrol vessels, vehicles and aircraft. The absence of an artisanal or small scale commercial sector in

[28] See Armstrong, C. W., Munro, G. and Sumaila, R. U. (2002) Transboundary Fisheries off the Namibian Coast.
[29] See 1991 policy document: Towards a Responsible Fishing Sector p. 33.
[30] White Paper, Towards a Responsible Fishing Sector, p. 34.

Namibia's fisheries makes the monitoring of catches and landings at Namibia's two ports (stationed at Walvis Bay and Luderitz) relatively easy.

MCS issues are addressed in Part VI of Namibia's Marine Resources Act, which prescribes the controls for the harvesting of marine resources in Namibia. The following is regulated and prohibited:

- Harvesting any marine resources in Namibia or Namibian waters, for commercial purposes, except in terms of a fishing right, exploratory right or fisheries agreement;[31]
- The use of any vessel in Namibian waters to harvest marine resources for commercial purposes, except in terms of a licence;[32]
- The harvesting of marine resources on the high seas by a Namibian flag vessel, except under a licence; and
- The harvesting of marine resources regulated under any international agreement by a Namibian flag vessel, unless authorised in terms of a right granted under section 33 of the MRA, or an exploratory right granted in terms of section 34, or a quota granted under section 39.

Sections 4 - 6 address the appointment of fisheries inspectors and honorary fisheries inspectors, together with their respective powers. Part IV of the Marine Resources Act establishes Namibia's unique fisheries observer agency or FOA. FOA operates out of Walvis Bay and operates closely with the training institute of the Fisheries Ministry, NAMFI.[33] The observer agency is also required to provide the requisite expertise and facilities for the training of fisheries observers. Section 7 regulates the functions and appointment of observers. The same section also sets out right-holders' obligations, roles and responsibilities *viz a viz* observer coverage on board vessels. This includes access to all parts of land, premises and fishing vessels, documents, records and marine resources found there. Right-holders are also required to provide the observers with accommodation and equipment for the purpose of carrying out their observer duties. The observer agency may be required to provide observers to carry out duties outside of Namibian waters, pursuant to agreements between Namibia and other parties.

Part VIII of the MRA addresses the main management and control measures. This part of the Act contains prohibitions on certain types of fishing gear and method restrictions. Section 47 prevents the use of explosives, drift nets, noxious substances and poison. Subsection 3 gives the Minister the discretion to prescribe measures for the conservation of marine resources, the control of harvesting these and measures to protect the marine environment. The MRA regulations contain such measures as prescribed by the Minister in terms of this section. Part VI of the regulations specifically stipulates permissible gear to be used for the commercial harvesting of living marine resources. Regulations 5-22 restrict fishing of certain species, the use of specific fishing gear, the entrance and periods of remaining inside marine reserves and the importation of live marine organisms. Regulations 23 and 24 in Part V of these regulations restrict the dumping of waste and fishing gear in the marine environment. Regulation 31 in Part VII of the MRA regulations governs by-catch landings, and fees payable in respect thereof. Section 48 requires every right-holder, quota-holder, licensee and holder of any other authorization under the Act to maintain records and furnish the Permanent Secretary (PS) with other prescribed information. IUU Fishing (illegal, unregulated and unreported fishing) is a well-known problem that occurs across all captive fisheries. It is, however, a growing and dynamic problem, as the form in which it is occurring is becoming

[31] Section 32 of Act 27 of 2000
[32] Issued under section 40
[33] Pers. Comm. Dr. Neville Sweijd, Director, BENEFIT, December 2005.

increasingly sophisticated and organized. IUU fishing undermines the sustainability and management of fish resources, penalises responsible fishing, erodes social and economic security and affects food security. To combat this mounting problem, the FAO has provided an international plan of action (IPOA), based upon which participating countries are to establish, publish and implement their own national plans of action. These national plans of action provide a systematic approach to addressing the problem, as they are intended to prevent, deter and eliminate IUU fishing. The FAO's IPOA is aimed at action on three different levels: globally, by using internationally agreed, market-related measures to discourage the movement of IUU caught fish;[34] regionally, through RFMO's, and national action by all states, flag states, coastal states and port states. It is important to note in this respect that of the three BCLME countries, Namibia is so far the only one with a formalised plan of action.[35] It is, however, important for every country and region to establish and implement its own plan of action to facilitate mobilization against IUU fishing, with the full backing of the law. In the preparation of these national plans of action, the FAO's IPOA can assist according to a developing country's needs in terms of legislation reviews, improved data collection, the strengthening of regional institutions and the enhancement of MCS programmes (for example implementing satellite monitoring systems).

[34] Doulman, D. A Global Strategy: The FAO International Plan of Action (IPOA) to prevent, deter and eliminate illegal, unregulated and unreported IUU fishing. Abstract presented at a SADC-EU MCS Symposium held in Cape Town, February, 2005.

[35] Following the first, regional training workshop conducted by the FAO in Zimbabwe in November 2003, Namibia and the Seychelles finalized their national plans of action for IUU fishing.

4. ANALYSING ANGOLA'S REGULATORY SYSTEM

4.1 Introduction

The Angolan Government started actively regulating its fishing industry during the 1990's. An analysis of the Angolan legal system and comprehensive regulatory framework indicates that almost every aspect of the industry is regulated by law. The courts themselves do not provide much overseeing of the industry; instead the entire industry is regulated and ruled over by the Ministry of Fishing. Often, this Ministry is authorised to act upon mere suspicions of breaches of regulations and laws.

Angola's main fishery resources include horse mackerel, sardinellas, sardines, shrimps, *Dentex* spp, lobster, crabs and other tropical bottom species. The fisheries sector is ranked as the third most important industry, behind oil and diamond-mining. In addition, it provides an essential source of protein to the country's inhabitants. Presently, around half the Angolan population is reliant on the fishing industry for their livelihood with most of these involved in artisanal fishing. Only 5 per cent of the total landings are exported, of which prawns are the most important. This includes some high quality fish and lobsters from the artisanal fishery. Within Africa, there is a growing trend towards fish meal and fish oil exports. Angola is no exception.

4.2 Legislative Framework

4.2.1 Constitution of the Republic of Angola (Lei Constitucional da Republica de Angola), 1992

Article 12 of the 1992 Constitution requires the State to protect and conserve Angola's natural resources and to protect the environment, and Article 25 entrenches the right to a healthy and unpolluted environment. Article 12 provides:

> *"All natural resources existing in the soil and subsoil, in internal and territorial waters, on the continental shelf and in the exclusive economic zone shall be the property of the state, which shall determine under what terms they are used, developed and exploited.*
>
> *The State shall promote the protection and conservation of natural resources guiding the exploitation and use thereof for the benefit of the community as a whole.*
> *Land, which is by origin the property of the State, may be transferred to individuals or corporate bodies, with a view to rational and full use thereof, in accordance with the law.*
>
> *The State shall respect and protect people's property, whether individuals or corporate bodies, and the property and ownership of land by peasants, without prejudice to the possibility of expropriation in the public interest, in accordance with the law."*

In line with the constitutionally entrenched, public-resource nature of Angola's marine resources as illustrated above, any individual or legal person causing damage to biological resources or the environment, is to repair this damage and indemnify the State.

4.2.2 Fisheries Legislation

Up until November of 2004, Angola's legal framework pertaining to fisheries was primarily composed of the 1992 Fisheries Law (LP), together with various other executive decrees

addressing fisheries management and planning, vessels, companies, surveillance and quality control.

More recently however, Angola's national authorities have acknowledged that the existing legislation was outdated, did not adequately reflect regional and international developments in the sector and tended to be incoherent and contradictory in some instances, due to the operation and implementation of various autonomous and unrelated laws and regulations. Thus the new '*Lei dos Reicursos Biologicos Aquaticos*' was drafted in 2003, representing a full revision of Angola's fisheries legislation.[36] This updated law sets up new principles and provisions regarding the sustainable management of Angola's aquatic resources, and reflects both regional and international developments in the fisheries sector. These include the important requirement of integrating the management of Angola's marine resources with its other national policies. This new Act was approved by Parliament on 23 June 2004. For the sake of completeness however, this report addresses both the previous fisheries law that was applied up to 2004, as well as the present Aquatic Biological Resources Act of 2004.

4.2.3 Regulatory Framework: Overview

The following laws and decrees (and subsequent regulations promulgated there under) constitute Angola's fishing regime:

- Law 20/92 of Fisheries
- Law 21/92 on Internal Waters, the Territorial Sea and the Exclusive Economic Zone
- Decree 2/93 on fines for breaches of fishing laws
- Executive Decree 51/95 to update the fishing license fees
- Executive Decree 33/98 on the regulation and the management of fishing resources in Angolan jurisdictional waters
- Executive Decree 14/99 to approve the regulatory programme of inspection of fishing vessels and fish processing establishments and derivatives
- Executive Decree 13/99 as approval of the sanitary and quality inspection programme for fish products
- Executive Decree 47/98 to provide mechanisms for the regulation and conclusion of freight contracts for fishing vessels
- Executive Decree 10/97 regulating crustacean fisheries
- Executive Decree 17/80 regulating and updating requirements of net-fishing from mechanically propelled fishing vessels
- Executive Decree 2/99 on management measures for fisheries
- Executive Decree 48/98 on the co-ordination of national fisheries resources
- Executive Decree 42/98 to prohibit industrial fishing by foreign vessels within 12 nautical miles of the Angolan coastline
- Dispatch 182/94 concerning fishing crews' insurance contracts
- Undated Executive Decree to implement a vehicle monitoring system (VMS, or SIMAP in Portuguese)

[36] *See* http://www.angolapress-angop.ao/governo.asp.
Translation provided by Adv. Emile Myburgh, South Africa, November, 2004.

- Executive Decree on the acquisition of any fishing vessel, including any (other) importation and / or modification that requires authorization by the Ministry of Fisheries
- Dispatch 112/96 setting up a register of all companies exercising any activities that fall within the jurisdiction of the Ministry of Fisheries

4.2.4 The Fundamental Law of Angola

Other legal instruments that have a bearing on Angola's fishing regime include the Fundamental Law of Angola of 1992. Although this piece of legislation does not contain specific laws concerning fishing resources or community rights, Title II does create certain fundamental rights and duties, of which a number of rights are important in a fisheries context.

It is a fundamental obligation of the Angolan State to adopt all measures required to ensure full protection of the national territory. Article 24 contains an environmental liability clause, stating that any person who directly or indirectly causes damage to the environment will be punished.

Article 6 of this Fundamental Law grants the State sovereign rights over Angolan territory, interior waters, the territorial sea (including aerial space, soil and subsoil). In addition, article 12 provides that all natural resources existing in the subsoil, soil, internal waters, territorial sea, contiguous zone and EEZ belong to the State, which is responsible for determining the use and exploitation of these resources, as well as the promotion of their conservation and protection, for the benefit of the Angolan community as a whole.

4.2.5 The Law of the Principles for Private Investment

The Law of the Principles for Private Investment of 2003, as well as the Environmental Basic Law (EBI) of 1999 are both indirectly relevant to the regulation of Angola's fisheries. The EBI is a catch-all piece of comprehensive legislation, covering those environmental aspects of fishing that are not provided for in Angola's fishing laws.

4.2.6 Framework Law on the Environment[1]

Article 13 of this framework law on the environment specifically addresses the protection of Angola's biodiversity. Article 14 provides for the establishment of 'special protection' areas, while Article 16 entrenches the requirement for environmental impact assessments. Article 19 circumscribes environmental pollution prevention, including air, waste and noise pollution.

Chapter IV of the framework law on the environment contains a set of rights and duties rooted in a regime of strict liability. These include the right to information, education, and access to justice. Article 32 of the framework environmental law addresses surveillance issues. The Government may constitute a body of community inspectors with the objective of ensuring effective participation of local communities, including sufficient use of their knowledge and capabilities.

4.2.7 Investment and Participation

In recent years, there have been significant efforts to attract and incentivise foreign investment into all sectors, including fisheries. To this end, international investment forums have been promoted, and existing legislation has been updated. Article 11 of Angola's

[1] Law 5 of 1998, from 19 June 1998

Constitution provides for the protection of property and foreign investment. The above-mentioned framework law on private investment (11/2003) provides for the equal treatment of both foreign and national investors, and to this end Article 12 prohibits any discrimination between investors. Another complimentary law in this respect is Law 17/03 of 25 June 2003, which provides incentives from both a fiscal and customs' point of view by exempting all so-called 'investment operations' from customs duties. Accordingly, fishing activities and all fishery products are treated as a priority sector.

The Fundamental law specifically encourages the development of family-based, private, mixed and cooperative initiatives, in order to encourage small and medium scale economic activity. To such end, a draft 'cooperatives framework law' has been submitted to the Ministerial Council, and is pending approval. This law defines cooperatives as autonomous legal entities, established to satisfy the economic, cultural and social needs and aspirations of their members, which can be constituted in various sectors, including fisheries. Chapter II of the proposed 'cooperatives framework law' contains detailed legal and procedural rules for the establishment and formation of cooperatives, while chapter IV defines the nature, admission, rights and responsibilities of the members of cooperatives. Finally, Chapter VI addresses the responsibilities of the cooperatives themselves. This law, if promulgated, will have retroactive effect, thereby being applicable to all existing cooperatives.

4.3 The Fisheries Act (*Lei das Pescas*), No. 20/92 of 14 August

Although this Act has been substituted with subsequent legislation – the Aquatic Biological Resources Act of 2004 – many of its administrative provisions which are relevant for the purposes of the Report remain relevant, particularly as the Aquatic Biological Resources Act has only been in force since the latter half of 2004. Accordingly, both pieces of legislation are discussed here.

4.3.1 Licensing Regime for Fishing Vessels

Article 27 requires the licensed fisheries to supply details of their catches to the Fisheries Ministry within defined time periods and on prescribed forms. All fishing equipment on board vessels that have not been licensed to fish in Angolan waters, and/or are temporarily not in those waters, in which they have been licensed to fish, must be stored onboard in sealed compartments in such a manner that ensures that this equipment cannot be used to fish when outside the licensed area.

4.3.2 Angolan fishing vessels

Chapter Two of Title II of the 1992 Fisheries Law provides for the licensing regime that is applied to Angolan fishing vessels. Article 11 stipulates that all fishing activities are conditional upon the prior issue of a fishing licence from the Ministry of Fisheries. Every owner or ship operator, as well as every fishing vessel, is required to possess a valid fishing licence. These have duration of one year and are issued on a fishery-specific basis. Subsistence fishers are however not required to obtain a licence. Article 13 requires a licence fee to be set by regulation. Article 14 provides that these fishing licences are not transferable from one fishing vessel to another. In terms of article 15, the Fisheries Minister may prescribe conditions subject to which the licence to fish must be exercised. These relate to fishing zones, vessel dimensions, exploitable species, and so on. These fishing licences can be refused or revoked under a list of circumstances outlined in article 17, including the non-use of the licence for more than six months, sustainability of fish stocks, political reasons, if the fishing operations for which the licence was issued are considered to be unsuited to Angola's overall development objectives. Article 16 provides that the Ministry of Transport is

responsible for the regulation and authorisation of the construction, importing and modification of Angolan vessels.

4.3.3 Foreign Vessels

Licensing of a foreign flagged vessel to fish in Angolan waters requires a vessel licence (as with Angolan flagged vessels). However, foreign fishing vessels must also be listed on a foreign ship's registry.

Article 18 of the Fisheries Act makes an international access agreement a precondition to foreign fishing vessels being granted access to Angola's fishing waters. In the absence of an agreement between Angola and the foreign state, the Ministry of Fisheries may require the foreign fishing fleet to provide a bond so as to ensure compliance with the license conditions, fisheries laws and regulations. Article 19 of the Fisheries Act regulates the contents of Angola's Foreign Access agreements, by providing minimum terms and conditions for foreign fishing vessel access. The minimum terms and conditions are stipulated as follows:

- the number and technical specifications of fishing vessels allowed to fish in Angolan waters, as well as limitations regarding species that are allowed to be captured;
- fees payable for the right to fish;
- regulations compelling ship owners to report regularly to the Angolan fishing ministry regarding fishing statistics;
- a provision placing an obligation on the flag state to ensure that all measures have been taken to ensure that the vessel(s) respects the provisions, agreements or other contracts of Angolan laws and regulations;
- dispute resolution mechanisms; and
- the number of Angolans that must be aboard these vessels.

Prior to 2005, Angola had concluded fisheries access agreements with the European Union. However, once the last of these agreements lapsed in August 2004, Angola decided to not renew these agreements with the EU. The 2002 / 2004 Access Agreement was worth ∈31 million.

4.3.4 Scientific Research Licences

Article 23 regulates the issuing of licences for scientific research purposes. The Ministry of Fisheries is mandated to authorise fishing operations in Angolan waters when these are required for scientific research. A program detailing the operations to be conducted according to international law must first be submitted. Somewhat surprisingly, vessels with this form of fishing licence are exempted from compliance with environmental protection measures. However, the Ministry does prescribe various conditions for the exercise of a scientific research licence, although these are more in terms of ensuring the presence of Angolan observers on board the scientific vessel for the entire duration of its operations in the country's waters, as well as the submission of all results acquired to their Fisheries Ministry.

4.35 Incidental and Related Fishing Activities: Chapter / Title III

Articles 23 – 30 provide for, *inter alia*, dispute resolution procedures, regulation of the transportation of noxious substances, vessel markings, the provision of statistical data and information supply, fishing by electrocution and unauthorised artisanal fishing.

4.3.6 Dispute Resolution Procedures

Article 25 contains prescribed procedures aimed at preventing and / or settling disputes between fishers using various different fishing methods. These mechanisms include the following:

- *zonal attachment or definition reserved for different categories and methods of fishing;*
- *identification of and signaling by artisanal fisheries;*
- *fishing fleets are required to register insurance policies for the purposes of being able to fulfill the "polluter pays" principle;*
- *the creation of commissions of enquiry and / or conciliation and the adoption of measures to implement and apply the decisions taken;*
- *the drafting and adoption of appropriate settlements between industrial and artisanal fishers.*

4.3.7 Fish Processing Establishment, Quality and Export of Fishing Products: Title IV

The erection, installation and operation of processing establishments where fish products are treated as destined for export are all subject to prior authorisation by the Ministry. Article 32 defines an establishment for the treatment of fish as *any place where or installation in which fish is canned, dried, salted, smoked, frozen, put on ice or made into fish meal to be sold in Angola or abroad.*

Article 33 mandates the Ministry to make regulations and standardise norms to govern the storage, processing, elaboration and manipulation of fish on board fishing vessels. Articles 35 and 36 in Chapter II of the Fisheries Law require the Fisheries Minister to appoint agents to inspect fish processing and exporting establishments and installations for quality purposes. Any fish products may then only be exported once the Ministry has issued a certificate of quality for the product concerned in terms of article 34. In addition, article 36 provides for this permission for any establishment to export its products to be suspended if it fails to meet minimum health regulations.

4.3.8 Law Enforcement and Regulation: Title V

Article 27 of Angola's Fisheries Act places national fishing vessels (regardless of where they operate), and foreign fishing vessels operating within the country's jurisdiction under a legal duty to provide information concerning all industrial fishing vessels within its maritime waters. This should include information pertaining to most aspects of operations, catches, landings, mother ships and support vessels. More specifically, article 6 of the Executive Decree 8/02 places the fisheries administration under a duty to maintain records of fishing vessels that are entitled to fly Angola's national flag (including those authorised to be used on the high seas), where these are subject to VMS (vessel monitoring systems).

The fisheries administration is also empowered (but not obliged) to verify data from vessel monitoring systems, (in terms of the above-mentioned Executive Decree 8/02) and logbook data on licences (according to article 39. c of the Fisheries Act). Article 8 of the Annual Executive Decree (03/04) creates an obligation to complete the vessels' logbooks. National and foreign vessels under Angola's jurisdiction are to maintain records and promptly report on vessel position, entry and exit from defined maritime zones, catches of target and non-target species, fishing effort and other fisheries data required in terms of sub-regional, regional and global standards on data collection.

The fisheries Ministry appoints certain categories of officials as agents to report on breaches of the fisheries law in terms of article 38. These include maritime authority agents, commanders of military ships and aeroplanes that have been charged with enforcing fisheries laws. Conservation measures are not addressed in much detail in the LP, which primarily regulates the fishing activities under Angola's jurisdiction from an economic perspective. Other than measures obliging the industrial and semi-industrial fleets to have and invest in infrastructure and capacity on land, and requirements for the competent authorities to prepare, and periodically update management plans for the main fisheries (including target species, licencing programmes and fishing effort), this older law does not specifically address conservation measures.

4.4 A New Fisheries Regime: The Aquatic Biological Resources Act of 2004

The Aquatic Biological Resources Act applies to all fishing activities undertaken in Angola's maritime waters, Angolan-flagged vessels on the high seas, aquaculture and fish-processing establishments. It adopts a holistic approach towards the regulation of Angolan fishing.

Article 1 of the above law defines, among others, fisheries observers, inspectors, infractions (referred to as 'administrative infractions'), community observers and so forth. Chapter II of Angola's new Aquatic Biological Resources Act addresses monitoring issues, in terms of which the duties and roles of community observers are defined. Other than this, it does not fundamentally alter the Fisheries Act of 1992.

Chapter III addresses the operating rules for surveillance activities, fisheries infractions and also the procedures applicable to these infractions as provided for under Chapter IV. The Aquatic Biological Resources Act provides a comprehensive set of laws, reflecting the Angolan Government's policies towards the sustainable use of natural resources and environmental protection. In an integrated and inclusive fashion, it draws on Angola's Environmental Framework Act, Constitutional Law and legislation that promotes Angolan business. The Act takes account of Angola's obligations in the international arena, under instruments like the SADC Fisheries Protocol, the United Nations Convention on the Law of the Sea (UNCLOS) and the Convention on Biological Diversity (CBD). An attempt is made to harmonise various different pieces of legislation pertaining to Angola's marine resources.

Article 6(3) provides for sustainable development, responsible fishing, optimal conservation and use of aquatic biological resources, the user-pays - , precautionary - , prevention- and polluter pays principles.

Article 90(2) requires the Fisheries Ministry to promote environmental impact assessments of fishing methods and gear, the introduction of new fishing technology, and to regulate aquaculture. Article 263 criminalises and specifies certain activities that may cause damage to biological resources and cause environmental degradation, and requires the imposition of penalties for such activities. Article 27 of Angola's Fisheries Act places national fishing vessels (regardless of where they operate), and foreign fishing vessels operating within the country's jurisdiction under a legal duty to provide information concerning all industrial fishing vessels within the maritime waters, to provide necessary information concerning each vessel and its fishing activities. This should include information pertaining to most aspects of operations, catches, landings, mother ships and support vessels. More specifically, article 6 of the Executive Decree 8/02 places the fisheries administration under a duty to maintain records of fishing vessels that are entitled to fly Angola's national flag (including those authorised to be used on the high seas), where these are subject to VMS (vessel monitoring systems).

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5. ANALYSING SOUTH AFRICA'S REGULATORY SYSTEM

5.1 Introduction

South Africa's fisheries legal and regulatory system closely resembles that of Namibia. The most crucial difference is the level of political and economic relevance of fisheries in each country. Fisheries contribute slightly more than 1% to South Africa's gross domestic product, whereas it contributes some 8.5% to Namibian gross domestic product. Fisheries in Namibia are the second most important economic activity after mining. In South Africa's Western Cape Province, where some 80% of all commercial fish is landed, fishing ranks only 7th out of the top 10 commercial sectors in that Province.[39]

However, South African commercial fisheries remain a crucial regional economic contributor and job creator along the South African west coast, particularly for the Western Cape Province. If one analyses the landings of fish on a fishery-by-fishery basis, the annual contribution of the South African commercial fishery to gross domestic product at the end of December 2005 would be worth approximately R4,522,599,200.[40] No less than 70 percent of this value (i.e. R3.15 billion) passes through the ports and harbours at Cape Town, Hout Bay, Saldanha and Lamberts Bay.[41] The fishing industry as a whole employs some 36 000 people directly, the absolute majority of whom are employed in processing factories and on vessels located in the area between Hout Bay and Lamberts Bay.[42]

The South African commercial fisheries – of which there are 22 commercial fisheries – are anticipated to land some 680 000 tons of fish in 2006. In 2005, this figure was in excess of 800 000 tons. The decrease in total landings can be contributed to the 48% cut in the pilchard quota coupled with smaller decreases in 2006 TAC's for hake (trawl and long line), west coast rock lobster, toothfish and abalone.[43]

Like Namibia and Angola, South Africa regulates access to its commercial fisheries, including those fisheries considered to be shared stock fisheries. The South African regulatory system comprises a substantial set of regulatory and policy tools.

5.2 Legislative Framework

5.2.1 The Constitution of the Republic of South Africa, 1996

There are three particular constitutional provisions that directly affect the allocation of fishing quotas or rights in the South African context.

Section 24 of the Constitution – the *Environmental* rights clause – guarantees all persons living in South Africa the right to an environment that is sustainably managed and conserved. Section 24 provides the following:

> *"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."*

[39] See www.dti.gov.za
[40] Research undertaken by Feike (Pty) Ltd.
[41] Ibid
[42] Ibid
[43] Ibid

In addition to the environmental rights clause, the South African Bill of Rights guarantees every person the right to *just administrative action by the state*[44] and *access to information held by the state (and private persons).*[45]

The allocation of commercial fishing rights in South Africa – as is the case in Namibia and Angola – is a species of administrative action and must accordingly be *fair, transparent* and *rational.* Of course, the administrative action results in decisions being taken as to who may qualify for a quota and the extent of such a quota and who does not qualify for a quota. These decisions in turn require the state to provide access to affected persons to a range of information created by the state or that was created by applicants for quotas.

5.2.2 *The National Environmental Management Act, 1998*

The National Environmental Management Act of 1998 ("NEMA") was promulgated in 1998 as framework environmental legislation. Essentially, all actions such as allocating quotas or regulating vessel access for the purposes of exploiting marine resources must give effect to the principles set out in Chapter 1, which provides for a set of environmental principles that must be adhered to by the state and all organs of state. The most applicable Chapter 1 principles are the following:

"1) The principles set out in this section apply throughout the Republic to the actions of all organs of state that may significantly affect the environment and--
a) shall apply alongside all other appropriate and relevant considerations, including the State's responsibility to respect, protect, promote and fulfil the social and economic rights in Chapter 2 of the Constitution and in particular the basic needs of categories of persons disadvantaged by unfair discrimination;
b)…;
c)…;
d)…;
e) guide the interpretation, administration and implementation of this Act, and any other law concerned with the protection or management of the environment.

2) Environmental management must place people and their needs at the forefront of its concern, and serve their physical, psychological, developmental, cultural and social interests equitably.

3) Development must be socially, environmentally and economically sustainable.

4) a) Sustainable development requires the consideration of all relevant factors including the following:
- *i) That the disturbance of ecosystems and loss of biological diversity are avoided, or, where they cannot be altogether avoided, are minimised and remedied;*
- *ii) That pollution and degradation of the environment are avoided, or, where they cannot be altogether avoided, are minimised and remedied;*
- *iii) that the disturbance of landscapes and sites that constitute the nation's cultural heritage is avoided, or where it cannot be altogether avoided, is minimised and remedied;*
- *iv) that waste is avoided, or where it cannot be altogether avoided, minimised and re-used or recycled where possible and otherwise disposed of in a responsible manner;*
- *v) that the use and exploitation of non-renewable natural resources is responsible and equitable, and takes into account the consequences of the depletion of the resource;*
- *vi) that the development, use and exploitation of renewable resources and the ecosystems of which they are part do not exceed the level beyond which their integrity is jeopardised;*

[44] Section 33 of the Constitution. The Right to Just Administrative Action was in 2000 codified as a statute in terms of the Promotion of Administrative Justice Act, 3 of 2000.
[45] Section 32 of the Constitution. The Right to Access to Information was also codified as a statute in in terms of the Promotion of Access to Information Act, 2 of 2000.

vii) that a risk-averse and cautious approach is applied, which takes into account the limits of current knowledge about the consequences of decisions and actions; and

viii) that negative impacts on the environment and on people's environmental rights be anticipated and prevented, and where they cannot be altogether prevented, are minimised and remedied.

b) Environmental management must be integrated, acknowledging that all elements of the environment are linked and interrelated, and it must take into account the effects of decisions on all aspects of the environment and all people in the environment by pursuing the selection of the best practicable environmental option.

c)….;

d) Equitable access to environmental resources, benefits and services to meet basic human needs and ensure human well-being must be pursued and special measures may be taken to ensure access thereto by categories of persons disadvantaged by unfair discrimination.

e)…;

f)….;

g) Decisions must take into account the interests, needs and values of all interested and affected parties, and this includes recognising all forms of knowledge, including traditional and ordinary knowledge.

h)…;

i)…;

j)…;

k) Decisions must be taken in an open and transparent manner, and access to information must be provided in accordance with the law.

l) There must be intergovernmental co-ordination and harmonisation of policies, legislation and actions relating to the environment.

m)…;

n) Global and international responsibilities relating to the environment must be discharged in the national interest.

o) The environment is held in public trust for the people, the beneficial use of environmental resources must serve the public interest and the environment must be protected as the people's common heritage.

p)…;

q)…;

r) Sensitive, vulnerable, highly dynamic or stressed ecosystems, such as coastal shores, estuaries, wetlands, and similar systems require specific attention in management and planning procedures, especially where they are subject to significant human resource usage and development pressure."

[Own emphases]

5.2.3 The Marine Living Resources Act, 1998

The Marine Living Resources Act of 1998 ("the MLRA") is the foundational piece of fisheries legislation in South Africa. It is in terms of this legislation that fishing rights or quotas are allocated. The MLRA replaced the Sea Fisheries Act of 1988 in part. Certain provisions of the Sea Fisheries Act, such as those pertaining to levies, remain in force. There is a set of proposals before the Minister of Environmental Affairs and Tourism to amend certain provisions of the MLRA to ensure a more efficient administration of fisheries quotas. These amendments are technical in nature and will not substantively affect the manner in which fishing rights are allocated or administered subsequent to an allocation of fishing rights.

The MLRA contains a number of central provisions that directly relate to the allocation of quotas/rights or permits. These will be identified below.

5.2.3.1 Section 2 of the MLRA

Section 2 of the MLRA is the foundation upon which fisheries management is premised in South Africa. In terms of section 2 of the MLRA, the Minister and any organ of state shall have regard to a number of objectives and principles when exercising any power under the MLRA. These are:

(a)	*The need to achieve optimum utilisation and ecologically sustainable development of marine living resources;*
(b)	*the need to conserve marine living resources for both present and future generations;*
(c)	*the need to apply precautionary approaches in respect of the management and development of marine living resources;*
(d)	*the need to utilise marine living resources to achieve economic growth, human resource development, capacity building within fisheries and mariculture branches, employment creation and a sound ecological balance consistent with the development objectives of the national government;*
(e)	*the need to protect the ecosystem as a whole, including species which are not targeted for exploitation;*
(f)	*the need to preserve marine biodiversity;*
(g)	*the need to minimise marine pollution;*
(h)	*the need to achieve to the extent practicable a broad and accountable participation in the decision-making processes provided for in this Act;*
(i)	*any relevant obligation of the national government or the Republic in terms of any international agreement or applicable rule of international law; and*
(j)	*the need to restructure the fishing industry to address historical imbalances and to achieve equity within all branches of the fishing industry.*

5.2.3.2 Section 18 of the MLRA

In order to commercially exploit marine resources, a person or entity needs to apply and be granted a right under the MLRA. Section 18 provides as follows:

(1)	*No person shall undertake commercial fishing or subsistence fishing, engage in mariculture or operate a fish processing establishment unless a right to undertake or engage in such an activity or to operate such an establishment has been granted to such a person by the Minister.*

5.2.3.3 Section 13 of the MLRA

The allocation of rights has been the primary mechanism to give effect to the principles and objectives set out in section 2 of the MLRA. In order to exercise a right granted under section 18, a person needs to be issued with a permit under section 13 of the MLRA, which provides as follows:

(1)	*No person shall exercise any right granted in terms of section 18 or perform any other activity in terms of this Act unless a permit has been issued by the Minister to such person to exercise that right or perform that activity.*

5.2.3.4 Fisheries Regulations (in terms of the MLRA)

Apart from the MLRA, the General Regulations, promulgated in GN 1111 in Government Gazette 19205 of 2 September 1998 (as amended) are relevant. These regulations contain certain procedures relating to appeals against decisions made under sections 13 and 18 of the Act, and by regulating closed seasons and closed areas, the use of gear and species restrictions. The Regulations further deal with the landing, transportation, delivery, receipt, processing and marketing of fish and fish products, compliance control, the leaving of objects in the sea, fishing harbour regulations and offences and penalties.

An important difference with its Namibian and Angolan counterparts is the fact that the MLRA and its Regulations were interpreted in a number of court decisions concerning the medium term rights allocation process, some setting important legal precedents. Between 2002 and 2005, more than 50 judicial reviews were instituted against decisions taken on the allocation of medium term fishing rights (four year long). Of the 50 reviews, the Minister of Environmental Affairs and Tourism was unsuccessful in only 2; although neither of these two decisions undid the allocations process.

5.2.3.5 Types of Fishing Allowed

In terms of the Marine Living Resources Act, only South African persons[46] may be permitted to hold a commercial fishing right granted under section 18 of the MLRA.

However, foreign persons may be allocated a foreign commercial fishing permit or a recreational fishing permit. However, since January 2003, no foreign commercial fishing is allowed in South African waters. South African fisheries policy precludes any foreign commercial fishing in South African waters.

The final type of fishing allowed is subsistence fishing, which currently is only authorised along the Cape South East Coast, the Eastern Cape coast and in KwaZulu-Natal. South Africa does not explicitly recognise “artisanal fishing”. Instead, “small-scale” commercial fishing quotas are allocated as part of the local commercial category recognised under the MLRA.

In summary, the following types of fishing are recognised in law:

- Local commercial fishing (including small scale commercial fishing);
- Foreign commercial fishing (although not implemented);
- Recreational fishing in certain fisheries only; and
- Subsistence fishing.

5.2.3.6 Institutional Arrangements under the MLRA

The MLRA allows for establishment of two fisheries management related institutions – the Consultative Advisory Forum (“CAF”) and the Fisheries Transformation Council (“FTC”). Unlike their Namibian and Angolan counterparts, these types of institutional arrangements have failed dismally in South Africa. Neither have been utilised this century. In fact, the proposed amendments to the MLRA mentioned above proposed their removal from the statute books entirely.

The establishment of the FTC is provided for in Part 5 of the MLRA. The first FTC was established shortly after the MLRA came into force in September 1998 and was mooted as South Africa’s first real attempt to equitably redistribute fishing quotas. The FTC’s principal objective was to allocate fishing rights to fishers from coastal communities disadvantaged by the legacies of apartheid and thereby attempt to redistribute the skewed way in which fishing quotas were allocated. In 1994 Government introduced an experimental fishery for the harvesting of hake by long line. The experimental fishery continued until 1998 when the FTC attempted to allocate commercial fishing rights in this fishery. As with most of the allocations of fishing rights attempted by the FTC, the first ever attempt to allocate hake long line fishing rights to predominantly black fishers and black owned fishing companies was set aside by

[46] A South African person is defined to include SA citizens, SA trusts and SA owned and controlled companies and close corporations.

South African courts due to various procedural flaws committed by the FTC. The FTC was also dogged by rumours and accusations of maladministration and corruption.

The effect of the reign of the FTC over fishing right allocations during the 1998/1999 and 1999/2000 fishing seasons was general chaos and significant instability in the South African fishing industry. In 2000, the newly appointed Minister of Environmental Affairs and Tourism, Mohammed Valli Moosa[47], requested the Parliament of South Africa to permit a once off "roll-over" of fishing rights from the 1999/2000 fishing season to the 2000/2001 fishing season in an attempt to design a strategy to secure transformation of the fishing industry and entrench economic stability and an environment in which large fishing companies would feel confident to invest further in infrastructure and jobs and small companies would be able to develop. An amendment – section 18(6A) – to the Marine Living Resources Act was passed in 2000 and all fishing rights allocated in the 1999-2000 fishing season remained valid for the 2000/2001 fishing season.

The Minister disbanded the FTC in 2000. In 2000, a special projects manager, Horst Kleinschmidt[48], was appointed to lead the design of a strategy that would meet the above objectives. By the end of 2000, the Minister had established the branch Marine and Coastal Management, which had its own marine living resources fund to fund fisheries management, compliance and research needs.[49]

While the FTC was seen as the institution that would be used to effect transformation in the South African fishing industry, the CAF was intended as an advisory body to the Minister that would advise on aspects as diverse as fisheries biology, economics and the social implications of fisheries management. The CAF comprised a diverse group of individuals that met on an *Ad hoc* basis. Two particular reasons may be put forward as to why the CAF failed and no longer exists. Firstly, South African fisheries ministers since Minister Valli Moosa, relied substantially on special advisers to advise on fisheries matters. These advisers were full-time advisers who had their hands constantly wet and were accordingly completely *au fait* with fisheries management issues. Secondly, the CAF simply added a bureaucratic layer to fisheries management that acted as an obstacle to fluid management. In addition, its part-time nature meant that it was never able to fully appreciate the dynamic and fluid nature and nuances of fisheries management. This meant that rather than providing advice, the CAF was constantly seeking advice.

5.2.4 The Sea Fisheries Act, 1988

The MLRA repealed the Sea Fisheries Act of 1988 in part. The most significant provisions of the Sea Fisheries Act that continue in force are those that maintained the Sea Fisheries Fund (now called the Marine Living Resources Fund) and the provision regulating the determination of levies on fish landed.

5.3 Fisheries Management

Fisheries management in South Africa – like Namibia and Angola – is principally managed by regulating access to and utilisation of all marine resources, including the non-consumptive uses of whales, dolphins and sharks. As stated above, no person may fish for or utilise any marine resources without a permit or right allocated in terms of the MLRA.

[47] Mohammed Valli Moosa was appointed as Minister of Environmental Affairs and Tourism in the Cabinet of President TM Mbeki in June 1999 and served as Minister until April 2004. Mohammed Valli Moosa currently serves as the President of the World Conservation Union.
[48] Horst Kleinschmidt is currently the Managing Director of Feike (Pty) Ltd.
[49] See www.mcm-deat.gov.za and link to "About MCM/structure" to view the current structure of Marine and Coastal Management, which today employs approximately 700 staff along South Africa's coastline.

Complementing the regulated closed system of fisheries management, quota holders and other users of marine resources are controlled via TACs and TAEs which are determined annually in terms of section 14 of the MLRA.

Implementing fisheries management in South Africa occurs substantially via three components, namely fisheries research, fisheries management/administration and fisheries compliance.

5.3.1 *Fisheries Research*

The Chief Directorate: Research, Antarctica and Islands is responsible for managing all fisheries research. The principle purpose of scientific research is to ensure the ecologically sustainable utilisation of fish stocks and the conservation of marine ecosystems, including species which are not targeted for exploitation such as seals and seabirds. The Department of Environmental Affairs and Tourism subscribes to Principle 15 of the Rio Declaration of the UN Conference on Environment and Development (Rio de Janeiro, 1992), which states that:

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

Scientific research is aimed at understanding the dynamics of fish stocks and informs the Total Allowable Catch ("*TAC*") or the Total Applied Effort ("*TAE*") determined in terms of section 14 of the MLRA. Each fishery is biologically managed with the assistance of *scientific working groups* that are responsible for interpreting the stock analyses carried out on the different fish stocks and this interpretation ultimately informs the determination of the TAC/TAE. Scientific research further informs the designation of marine protected areas, the designation of fisheries management areas, the determination of closed areas, closed seasons, prohibited fishing times, minimum species size, vessel and gear restrictions and fishing methods, including by-catch prevention methods. Scientific research is also conducted in order to develop new fisheries, in line with the Department's *New Fisheries Policy*[50].

Scientific working groups currently function in respect of each fishery sector. Each working group is made up of departmental scientists as well as external experts from other marine science institutions, such as institutions of higher learning. Most sectors are scientifically managed in terms of an Operational Management Procedure ("*OMP*"). Others are managed by means of annual assessments.

5.3.2 *Fisheries (and Coastal) Management*

The Chief Directorate: Resource Management (also known as Fisheries Management) is primarily responsible for the performance of two functions. Firstly, to facilitate and regulate the sustainable and equitable development as well as the utilisation of marine living resources through the administration of fishing rights, permits, exemptions and licences. Secondly, its function is to optimise the sustainable use of South Africa's coastal resources, by controlling human impacts on the environment (other than commercial fishing), such as coastal development, subsistence fishing, recreational fishing, marine pollution and marine eco-tourism. The Chief Directorate is supported by specialists in fisheries economics, fisheries management, oil and marine pollution management and coastal zone management.

[50] See www.mcm-deat.gov.za

It is this chief directorate that is ultimately responsible for managing fishing right and permit allocation processes, managing effort (including the licensing and control of vessels, gear and other effort mechanisms) and advising on the economic status of fishing sectors.

5.3.3 Fisheries and Coastal Compliance

The performance of this function is managed by the Chief Directorate: Monitoring, Control and Surveillance. In order to ensure compliance with fisheries laws, the Chief Directorate uses a number of measures aimed at encouraging and enforcing compliance. These measures include:

- State of the art inshore and offshore environmental patrol vessels;
- Specialised environmental courts[51];
- Observer programmes;
- Marine protected areas;
- Vessel monitoring systems;
- Public education programmes;
- Co-management of fish stocks;
- Employment of fishery control officers responsible for ensuring that all fishing takes place in a regulated and lawful manner and that all landings are properly recorded;
- Honorary fishery control officers; and
- Strategic compliance partnerships with non-governmental organisations, local governments, conservation bodies and other applicable organs of state.

South Africa also has a *Strategic Plan for Monitoring, Control and Surveillance*, which outlines the requirements to achieve optimal levels of compliance.[52] Section 50 of the MLRA specifically provides for persons to be designated as observers who shall 'exercise the scientific, compliance, monitoring and other functions determined by the Minister.' This observer coverage extends to vessels licensed under the MLRA. Regulation 82 of the MLRA regulations elaborates on the scientific, compliance and monitoring functions of observers. Section 42 refers to the specific aspect of sharing and providing information on international management and conservation measures.

Section 51 provides for powers that are usually exercised by fisheries enforcement officers, including powers to stop a vessel, requiring the master to facilitate boarding, entering and searching the vessel without a warrant, bringing a vessel to port and seizing a vessel, its equipment and fish or fish products on board. An essential and effective MCS activity linked to enforcement is the requirement for all holders of a right, licence or permit in terms of the LMRA to report any contravention of this Act by other persons.

Judicial stipulations that support enforcement are also elaborated on, addressing wide-ranging issues that include penalties and offences, security for the release of vessels, aircraft and vehicles, forfeiture, the treatment of detained and seized possessions, forfeiture, courts' jurisdiction, documentary and photographic evidence.

[51] It is noted with concern that the future of these courts remains uncertain.
[52] The Strategic Plan was authored by the MCS Chief Directorate, led by Shaheen Moolla until 31 March 2005. This strategic plan for MCS was addressed in detail in Feike's previous report on Fisheries Management Protocols of the BCLME countries (BCLME/LMR/SE/03/03.

On the issue of penalties, section 77 (2)(a) is noteworthy in that it provides for regulations to be passed in order to increase the amount of penalties, where required by inflation or international law. Section 77 (2)(d) allows for the additional imposition of a fine, representing the value of any forfeited items. Further MCS provisions contained in regulations to the MLRA include the following: Regulation 77 controls the marking of fishing vessels, regulation 78 governs radio call signs, logbooks are governed by regulation 79, regulation 80 stipulates the necessary documents to be carried on board fishing vessels and regulation 81 addresses gear stowage.

5.4 Allocating Fishing Quotas/Rights (commercial/subsistence/recreational)

5.4.1 Policy on Allocating Quotas

On 01 March 2005, the Minister of Environmental Affairs and Tourism published for public comment and discussion 19 stand alone fishery policies and a General Fishery Policy[53]. Between May and July 2005, the Cabinet of the Government of South Africa approved each of these policies. These policies were the bedrock upon which commercial fishing rights were allocated between November 2005 and March 2006. In addition, each of the policies also specified certain post-allocation management considerations. The most important of these considerations concerned the adoption of an ecosystem approach to fisheries management, effort (vessel) control and limitation and environmentally sustainable practices, including mitigating against by-catch targeting.

The commercial fishery policies, although substantially different in content and evaluation criteria, are carefully knitted together by four overarching considerations, which in turn require careful balancing. These are:

- Transformation: Attaining an equitable level of participation by those who depend on fishing for their income remains a core consideration;
- Biological: The allocation of fishing rights must be subject to the maximum levels of fish that may be harvested in any one season.
- Ecological: It is recognised that fishing impacts adversely on the marine ecosystem. These impacts need to be monitored and mitigated against.
- Socio-Economic: The allocation of fishing rights has an important socio-economic impact in a developmental state such as South Africa. It is able to provide important sources of income for people along the South African coastline, which in turn sustains various local and regional authorities. This socio-economic role can only be successfully achieved if the environment in which fishing takes place is conducive to economic growth and stability.

Each of the fisheries policies essentially codifies certain key elements in the management of each fishery. These key elements have long been utilised in one way or the other in practice, including the management of effort in the fisheries. While these policies principally aim at stating the criteria and policy against which applications for commercial fishing rights will be allocated, the Department is also obliged to commence with a complementary process of designing management manuals for each fishery. It is anticipated that these manuals will be finalised after consulting with right holders during 2006 and will be the finite yet fluid management tool that will guide all right holders and fishery managers.

[53] These policies may be viewed at www.feike.co.za.

The commercial fishery policies provide an extremely definitive and complete set of policies, criteria and vision for fisheries on a fishery-by-fishery basis. The extent of the codification is quite unique in global fisheries management circles and should provide a template for other developing countries. Importantly, the codification of policy to such an extent has provided the South African fishing industry with important yardsticks by which the industry is able to predictably measure their rate of investment in assets such as vessels and processing factories, jobs, skills development and transformation.

As at the date of this Report, the allocation of long term commercial fishing rights resulted in the allocation of more than 1740 commercial rights to individuals, companies and close corporations in 20 commercial fisheries. As this Report was being written, applicants for quotas that were unhappy with decisions taken on their applications are serving appeals on the Minister of Environmental Affairs and Tourism. It is anticipated that once the appeals process has been finalised, a further 1000 commercial fishing rights would have been allocated. The duration of a right is dependent on the fishery concerned. However, no commercial fishing right may be allocated for a period longer than 15 years in terms of section 18 of the MLRA.[54] Depending on the fishery, the rights allocated have either been granted for 8 years, 10 years or 15 years.

With respect to subsistence and recreational fisheries, South Africa does not have any final policy statement on how to manage either of these fisheries. A draft subsistence fisheries policy does exist but it is fatally flawed as it attempts to put in place a "one-size fits all" policy for very diverse fisheries, involving very different types of communities living along very different types of coastline.

5.4.2 *Process of Allocating Quotas*

The process of allocating long term commercial fishing rights or quotas is detailed in the General Fishery Policy[55], but essentially involves the following steps[56]:

(a) Public participation in policy formulation

The policies were developed after consulting with formal industry associations, coastal communities, small-scale fishers and individual quota holders.

(b) Allocation Process determined by Cluster

For purposes of the long term rights allocation process, the 19 fishing sectors are grouped together in four clusters for the assessment of applications for fishing rights. The purpose of clustering fisheries together was administrative, procedural and, to a lesser extent, substantive. This process of clustering was perhaps the most innovative concept of the process as it facilitated targeted consultation and communication strategies. The clusters were as follows:

[54] For further detailed information about the duration of rights allocated on a fishery-by-fishery basis, see www.feike.co.za where you will find a detailed analysis of each commercial fishery.
[55] To view the General Policy, see www.feike.co.za.
[56] The General Policy details more than 20 steps in total.

Cluster A

- Hake Deep Sea Trawl
- Hake Inshore Trawl
- Horse Mackerel
- Small Pelagics
- Patagonian Toothfish
- South Coast Rock Lobster
- KwaZulu-Natal Prawn Trawl

Cluster B

- Hake Long Line
- West Coast Rock Lobster (off shore)
- Squid
- Seaweed
- Tuna Pole
- Demersal Shark

Cluster C

- Handline Hake
- West Coast Rock Lobster (near shore)

Cluster D

- Net Fish (trek- and gillnets; beach seine)
- KZN Beach Seine
- Oysters
- White Mussels

(c) Invitation to apply for rights

Invitations to apply for commercial fishing rights were published in the Government Gazette. Notices were also placed on MCM's website and in regional newspapers.

(d) Receipting of applications

Different receipting processes were designed for each fishery cluster.

(e) Decision-making

All decisions taken had to be based on the applicable laws and guided by the applicable policies.

(f) Criteria used for decision-making

Four types of criteria were used to assess applications for fishing rights. Applications were screened in terms of a set of "*exclusionary criteria*", and thereafter ranked in terms of a set of "*weighted balancing criteria*". In addition, and in some sectors, the decision-maker could employ one or more of a number of "*tie-breaking factors*" in order to make a decision if there were too many applicants with the same score. A proportion of the TAC or TAE was then allocated to each successful applicant in terms of a set of "*quantum or effort criteria*".

5.5 Effort Management and Transfers of Rights

The management of effort and the regulation of quota or rights transfers is determined firstly in terms of the MLRA and its regulations, and secondly (and in substantially more detail) in the General Fishery Policy and each of the fishery specific policies[57].

5.5.1 *Effort Management*

[57] These policies are available at www.feike.co.za (and link to the SA Fisheries pages).

The MLRA introduces the concept of effort management by stipulating in section 14 that the Minister shall annually determine, *inter alia,* the effort or TAE to which any fishery may be subjected. In addition, effort is regulated indirectly via closed areas, marine protected areas and controls and restrictions on gear, vessel type and size and so forth.

At a policy level, the General Fishery Policy and the fishery specific policies each detail the manner in which effort requires control in particular fisheries. For example, the Squid Fishery Policy recognises the problem of creeping effort and also recognises the challenge of excessive light use and the artificial increase in boat lengths.

The fishery policies also emphasise the need for another species of effort management – that of consolidating the number of right holders. Consolidation is explicitly recognised as an important tool to reduce effort in a number of fisheries where the number of right holders and quotas allocated to right holders are considered unsustainable.[58]

5.5.2 Vessel Licensing

In terms of section 23 of the MLRA, no person may operate a *South African* fishing vessel in South African waters unless it is licensed as a fishing vessel and in terms of the General Fishery Policy, the vessel is authorised to operate in that particular fishery. Accordingly, once granted a right/quota to use a particular vessel or vessels, right holders may not change their vessel(s) or increase the number of vessels they are entitled to use.

With respect to foreign flagged vessels, South African fisheries law only permits such vessels to fish in South African waters if a foreign fishing vessel licence is issued under section 39 of the MLRA.

However, read with South Africa's fishing policies, there are only three fisheries where a foreign fishing vessel may be permitted to operate or where such vessels currently operate. These fisheries are the horse mackerel fishery, the small pelagic fishery and the large pelagic fishery. The reason for allowing foreign flagged vessels in the large pelagic and horse mackerel fisheries relates directly to the availability of suitable South African vessels (or rather the lack thereof). In the small pelagic fishery, Namibian vessels were authorised to fish for pilchards on behalf of South African quota holders due to the fact that there was insufficient South African capacity available to harvest the full TAC in 2004 and 2005.

5.5.3 Transferring Fishing Rights / Quotas

A fishing right is granted to a specific person or entity. Fishing rights or quotas are non-transferable and non-tradable. Section 21 of the MLRA contains the legal provisions applicable to South Africa's commercial fisheries. Section 21(3)(d) stipulates the following on the transferability of South Africa's commercial fishing rights:

> *"The Minister may, after consultation with the [Consultative Advisory] Forum, make regulations regarding the reallocation of any right of access, having regard to any significant alteration in the long-term revenue derived from the resource being exploited or in the long-term availability of the resource."*

No fishing right may be transferred without the approval of the Minister or his delegate. Upon the death, sequestration, or liquidation of the right holder, the right vests respectively in the executor, trustee or liquidator, and may be continued to be exploited for the period of time legally provided for. Transfer of any fishing right to a third party requires Ministerial approval.

[58] See for example, the hake long line, hake deep sea trawl, small pelagic, hake inshore trawl or west coast rock lobster policies and General Published Reasons, which are available at www.feike.co.za.

Fishing rights or quotas in South Africa – like in Namibia or Angola – are not considered property rights. A fishing right is more akin to an administrative authorisation or permission. The General Fishery Policy sets out the policy and procedures pertaining to the transfer of fishing rights or quotas.

5.6 Paying for Fisheries Management

The costs of fisheries management (including fisheries research, compliance and administration) in South Africa is borne by both the state and the fishing industry. The principal vehicle used for financing fisheries management in South Africa is the Marine Living Resources Fund. The Fund is used to finance actions related to the preservation of marine biodiversity, to minimize marine pollution and in a socio-economic context, to restructure the fishing industry by broadening and improving access to marine resources, to address historical imbalances and promote economic growth and stability within the sector.

The Marine Living Resources Fund sources its revenue from application fees, annual fishing permit fees, vessel licensing fees, sales of confiscated (and forfeited) fish, gear and other materials, annual levies on fish landed, harbour fees, fines, and from money appropriated by Parliament in terms of section 10 of the MLRA.

The MLRF is responsible for raising approximately 86% of its annual budget, which approximates to R350 million. The remaining 14% of the costs associated with managing and administering fisheries management is sourced from the National Treasury. This 14% comprises staff salaries for some 700 staff and substantial capital costs, such as the recent procurement of the fisheries patrol vessels.

5.6.1 Levies on Fish Landed[59]

Section 29 of the Sea Fishery Act of 1998 empowers the Minister of Environmental Affairs and Tourism, in concurrence with the Minister of Finance, to impose a levy on fish and fish products. Levies are payable on **landed** fish (harvested in terms of an annual permit which is required to activate the fishing right in question[60]) on a per kilogram basis. This system illustrates a significant difference to the Namibian system, where levies are payable once the right-holder accepts the fishing allocation in question, irrespective of whether or not fish is subsequently caught.

The annually-reviewed and adapted levies are effective on 1 April of every year. There is no express provision in the MLRA stipulating that the income derived from a specific fishing sector is limited to covering the management costs incurred in managing that same fishery. Consequently, cross-subsidizing of certain sectors does occur, where the income derived from a specific fishery is insufficient to cover the expenses incurred by MCM in managing such a sector.

5.6.2 Harbour fees

[59] The issue of levies charged on fish is the subject of a separate report produced by the Consortium.
[60] See Feike's BCLME report on transformation, which addresses the nature of fishing rights and function of permits in more detail.

Section 27(3) of the MLRA provides for the Minister to determine the fees payable in respect of the use of a fishing harbour, or the facilities located in such a harbour. There are fifteen fishing harbours along the South African coast.

5.6.3 Fishing Right, Permit and Licence Fees

Section 25 of the MLRA enables the Minister to determine the fees payable in respect of applications for and the issuing or granting of fishing rights, permits and licences. The fees determined for the allocation of long term commercial fishing rights is an example of a radical and impressive example of cost recovery that has direct regard to the value of the fishery and the number of right holders entitled to exploit each fishery.[61]

[61] To view the application fees, see www.feike.co.za.

6. RECOMMENDATIONS

This section of the report will record a set of Recommendations for each of the three BCLME countries with the aim being to guide the BCLME toward implementing a complementary and co-ordinated suite of fisheries policies, regulations/decrees and statutes. The Recommendations commence with a set of general "Regional Recommendations".

6.1 Regional Recommendations

1. The broader regional fisheries regulatory systems within the Southern African Development Community ("SADC") require urgent attention. The SADC Fisheries Protocol, which forms an important component of Namibian fisheries policy, is currently completely stalled. Lawful and regulated fisheries trade within the BCLME requires a co-ordinated and complementary system of monitoring and control within SADC. This is lacking.

2. With respect to the draft IBCC agreement, this Report has noted that it may be flawed in that it continues to perpetuate a scientific bias with the establishment of a Scientific Committee only, which is intended to directly advise the decision-makers and Ministerial Conference. It would be impossible for the IBCC to give effect to its mandate in the absence of strategic regional fisheries management, economic and compliance advice and co-ordination. The Consortium strongly recommends that the draft IBCC agreement be amended replacing the *Scientific Committee* with an *Ecosystems Management Committee.* Such a Committee should comprise, for example, fisheries management, compliance, economists, legal and scientific experts who are able to strategically advise the IBCC on how best to balance the increasingly competitive demands of conservation and protection (of fish stocks and more broadly the Benguela ecosystem) and the need to arrest poverty and develop coastal regions to benefit the poor and marginalised.

3. In light of the above recommendation, the Consortium would recommend the following amendment to clause 9 of the final draft Agreement:

> *"**ECOSYSTEMS MANAGEMENT COMMITTEE***
>
> *1. The role of the Ecosystems Committee is –*
>
> *(a) to provide the Interim Commission and the Contracting States with advice pertaining to the sustainable management of the ecosystem that adequately balances the competing needs to ensure ecosystem protection and conservation and the need to ensure sustainable socio-economic development of the Benguela Current Large Marine Ecosystem; and*
>
> *(b) to build capacity within the Contracting States in order to provide a common pool of high-quality scientific, environmental compliance and management advice and skills that can be relied upon by the Interim Commission, the Ministerial Conference, and the Contracting States, in taking decisions that affect the Benguela Current Large Marine Ecosystem.*
>
> *2. The Ecosystems Committee shall be coordinated by an Ecosystems coordinator in the Secretariat.*
>
> *3. The Ecosystems Committee shall determine its own rules of procedure to the extent that these have not been determined by the Interim Commission.*
>
> *4. The Ecosystems Committee may establish working groups or subcommittees to assist it in the performance of its functions.*

5. *Working groups may include any person with appropriate expertise or who represents a particular sector or group of people with an interest in the matter being dealt with by the working group.*
6. *The Ecosystems Committee shall meet at least once annually and shall make decisions by consensus.*
7. *The Secretariat shall convene the first meeting of the Ecosystems Committee within three months of this Agreement coming into force.*
8. *The Ecosystems Committee shall submit annually to the Interim Commission, a draft work plan and budget for the forthcoming two years and a draft annual report of its activities during the previous year."*

4. By adopting a broader strategy as to the nature of the expertise that would provide advice to the IBCC and the Ministerial Conference, the BCLME would allow for an integrated approach to the overall management of the BCLME, thereby giving effect to the Strategic Action Programme. Importantly, the IBCC would be strategically positioned to act as a centre for co-ordination and the development of regional expertise that would co-ordinate and champion the harmonisation of the following strategies:

- Transboundary and joint fish stock assessments;
- Transboundary and joint ecosystem and 'state of the environment' assessments;
- Transboundary impact assessments;
- The control of marine pollution;
- Monitoring, control and surveillance (MCS) of fishing vessels;
- Marine mining, and offshore oil and gas exploration and exploitation;
- Maritime shipping issues;
- Facilitation and strengthening of the relative positions, relationships and united fronts between the three BCLME countries, especially on a regional and international level, where this could be advantageous to Namibia, Angola and South Africa. Examples could include mutual representation at ICCAT negotiations, the mobilization of funds aimed at the management, development and protection of this ecosystem and the development of common marketing tools, such as "BCLME eco-labels".

5. The three BCLME member States should urgently take steps to ensure that they draft and deposit with the FAO complementary National Plans of Action, particularly the NPOA's pertaining to Effort and IUU Fishing.

6. Finally, the effective management and administration of fisheries, particularly shared stocks, will require the efficient utilisation of up-to-date and centrally located fisheries and ecosystems data. The Consosrtium has previously recommended the establishment of an *Information Management Agency*. However, and in light of the recent appointment of service providers to construct a set of *Ecosystem Information Systems* and an *Early Warning System,* the Consortium believes that the recommendations above are even more applicable as the sharing of ecosystem related information and databases would require a complementary regulatory framework within the BCLME.

6.2 Recommendations by Country

1. The Consortium has studied the fisheries and related statutes in each of the three countries with a view to identifying areas of significant conflict or gaps pertaining to fisheries management. The Consortium holds the view that the governing fisheries statutes in Namibia, Angola and South Africa are broadly complementary and do not require any substantive review and amendment, save for those already proposed by the South African government in 2004/2005 concerning the Marine Living Resources Act. The Consortium supports these proposed amendments.

2. South Africa has very recently codified its fisheries policies in substantial detail, which has led to greater levels of economic and ecological predictability and certainty. This, in turn, has led to a marked increase in the number of jobs (up from 29000 in 2002 to 36500 in 2005) in the fisheries sector and allowed for increased investments in new vessels, technologies (including environmentally sustainable technologies) and infrastructure. Importantly, the South African fishing policies provide "fishery specific visions" for management, transformation and investment. The Consortium would recommend that Namibia and Angola consider the detailed codification of their commercial fisheries policies in a similar complementary manner in an attempt to give effect to their respective broader national economic and growth policies.

3. Perhaps the most glaring anomaly in the regulatory systems of Namibia, Angola and South Africa, is the manner in which right holders are levied or taxed for the privilege to fish and process fish commercially. The Consortium recommends that the regulatory and policy frameworks governing the methodologies in terms of which commercial fishing is levied, subsidised, encouraged or taxed be harmonised.

4. The Consortium recommends that it is now opportune for the member states of the BCLME to also conclude a joint policy on foreign fishing in the waters of the member states. The Consortium recommends that, particularly in light of the fact that Angola has decided to no longer pursue a partnership with the European Union allowing EU members to fish in its waters, South Africa, Namibia and Angola issue a joint policy statement declaring that their respective EEZ's are to be exclusively fished by their own respective nationals.

5. With respect to Namibia, it is recommended that it address certain unintended consequences of its Namibianisation policy, which includes latent and excessive processing capacity compared to the amount of fish landed and an excessive number of right holders competing for decreasing fish stocks, which in turn has negatively affected fish prices.

6. With respect to Angola, it is noted that draft regulations currently exist intending to regulate recreational fisheries, surveillance, investigation and licensing issues. The Consortium considers these draft Regulations an important step in the direction toward co-ordinated fisheries monitoring and compliance. The Consortium recommends that these Regulations be adopted and implemented without delay.

7. With respect to South Africa, although it has impressively regulated and codified its commercial fisheries via effective regulations and policies, South Africa has not adopted policy or implemented an effective regulatory system for its recreational and subsistence fisheries. Both these fisheries are managed on an ad hoc and in certain instances "open access" system, which is contrary to the FAO Code on Responsible

Fisheries. The Consortium recommends that South Africa urgently addresses this significant gap in its fisheries regulatory and policy toolkit.

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1995 UN Agreement Relating to the Conservation and Management of Straddling Fish Stocks and Migratory Fish Stocks, 34 *ILM* 1542; (1995) 6 *RECIEL* 841.

1995 FAO International Code of Conduct for Responsible Fisheries.

1995 Declaration on the Protection of the Marine Environment from Land-based Activities (Washington), 6 RECIEL (1995), 883.

2001 SADC Protocol on Fisheries (signed 14 August 2001)

2001 Convention on the Conservation and Management of Fishery Resources in the South East Atlantic Ocean ("SEAFO") (Signed on 20 April 2001 by South Africa, Angola and Namibia and came into force on 13 April 2003)

Internet Resources

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www.fao.org.za

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APPENDIX 1: PERSONS CONSULTED

In compiling this Report, the following persons and organisations were consulted:

1. The Deputy Director-General, Marine and Coastal Management, South Africa
2. The Chief Director, Fisheries Management and Fisheries Compliance, South Africa
3. The Director, Monitoring and Surveillance, South Africa
4. The Director, Compliance, South Africa
5. The Legal Adviser to South Africa's Marine and Coastal Management Branch
6. Special Adviser to the Minister of Fisheries, Namibia
7. The Fisheries Minister of Angola
8. Director, Cabinet of International Relations, Ministry of Fisheries and Environment, Angola
9. IIM and BCLME Representative in Angola
10. Director of Aquaculture, Ministry of Fisheries and Marine Resources, Namibia
11. Chief Environmental Economist, Ministry of Fisheries and Marine Resources, Namibia
12. Director, Directorate of Policy, Planning and Economics, Ministry of Fisheries and Marine Resources, Namibia
13. Deputy Director, Resource Management, Ministry of Fisheries and Marine Resources, Namibia
14. Chief Economist, National Planning Commission of Namibia (Office of the President), UN Systems and Affiliated Organisations, Multilateral Programmes, Directorate of Development Cooperation (DDC)
15. Managing Director of NAMSOV Fishing Enterprises (Pty) Ltd., Walvis Bay, Namibia

APPENDIX 2: NATIONAL LEGISLATION

Country	Law
Angola	Constitution of the Republic of Angola (*Lei Constitucional da República de Angola*) *Aquatic Biological Resources Act, 2005* Environment Framework Act (*Lei de Bases do Ambiente*), No. 5 of 1998 of June 19; and the Environmental Impact Assessment Decree *(Decreto sobre Estudos de Impacte Ambiental)* No. 51/04 of 23 July Fisheries Act (*Lei das Pescas*), No. 20/92 of 14 August Territorial Sea, Contiguous Zone and Exclusive Economic Zone Act (*Lei sobre águas interiores, mar territorial e zona económica exclusiva*), No. 21/92 of 28 August Water Act (*Lei de Águas*), No. 6/02 of 21 June
South Africa	Constitution of the Republic of South Africa, Act No.108 of 1996 Marine Living Resources Act, Act No. 18 of 1998 National Environmental Management Act, 107 of 1998
Namibia	Constitution of the Republic of Namibia, 1990 Aquaculture Act, No. 18 of 2002 Marine Resources Act, No.2000 Territorial Sea and Exclusive Economic Zone of Namibia (No 3 of 1990, amended by Act 30 of 1991) Companies Act No 61 of 1963

APPENDIX 3: SHARED STOCKS

(*from* Penney, A.J., Hampton, I., van der Elst, R.P., Wood, A.D., Boyer, H.J., Fennessey, S., Andrew, T.G., (2003) *Requirements for Development of Effective Cooperative Arrangements for the Management of Shared Fish Stocks in the SADC Region*.)

Table 1. Summary of average annual catches (tonnes) by species or species groups (contributing over 250 tonnes per year) reported by SADC countries to the FAO fisheries database over the ten-year period 1990 - 1999, ranked in order of total average annual catch. Stocks which are, or may be, shared to some extent are shaded.

Species	Angola	Namibia	South Africa	M'bique	Tanzania	Mauritius	Seychelles	Total
Cape hakes	506	90943	137917					229366
Southern African anchovy		24943	159834					184776
Southern African sardine (pilchard)		65811	90320					156131
Horse mackerel	37273	72680	31356					141309
Whitehead's round herring		3442	56353					59795
Sardinellas	25256				7128			32384
Snoek		1083	15378					16461
Monkfish		9253	5868					15120
Emperors (scavengers)			1		7554	5157	338	13050
Penaeus prawns			159	10754				10913
Skipjack tuna	30	2	7			4156	3399	7594
Silver scabbardfish			7512					7512
Albacore		664	5997			7	20	6687
Chub mackerel			6320					6320
Cape squid			5899					5899
Tuna-like fishes			13	4352	805	263	11	5444
Orange roughy		5222						5222
Kingklip		1803	2912					4714
Yellowfin tuna	224	31	268			1658	2092	4272
Spinefeet (rabbitfishes)					3597	483		4080
Indian mackerel					3560		480	4040
Dentex spp	3,622							3622
Carangids	68				1909	106	1464	3548
Wrasses, hogfishes					3134			3134
Rays, stingrays, mantas		88	1		2988	2	1	3080
West African croakers	3,068							3068
Sharks, rays, skates	176	122	592	21	1456	19	89	2475
Natantian decapods	192				2220	11		2422
Cape rock lobster		262	1985					2248
Gobies		2200						2200
Mullets		11	1059		491	120		1681
John dory	497	106	1055					1658

Table 1. Summary of average annual catches (tonnes) by species or species groups (continued)

Raja rays	497		1148					1645
Groupers, seabasses	27		15		469	905	179	1595
Halfbeaks					1472			1472
Southern meagre (kob)	26	396	956					1377
Bigeye tuna		53	70			604	619	1345
Cape redfish		254	1036					1290
Snappers, jobfishes							1140	1140
Geryon crabs		584	88	461				1132
Lanternfish			1077					1077
Sea cucumbers				8	1041			1049
Octopuses	5		88	42	544	332	37	1046
Mackerels, seerfishes			24		979	12		1014
Atlantic pomfret			1013					1013
Panga seabream		201	798					999
Cape gurnard		141	846					987
Southern spiny lobster			945					945
Sea catfishes	48	16	1		818			883
Mud sole			807					807
Marlins, sailfishes					532	241	21	793
Deepwater rose prawn	793							793
Various squids	202	171	74	308				755
Percoids					445	179		624
Striped red prawn	612							612
Yellowtail amberjack			593					593
Perlemoen abalone			577					577
Goatfishes, red mullets	4	2				495		501
Cape elephantfish			494					494
Geelbek croaker			475					475
Porgies, seabreams			462					462
Flatfishes	449							449
Patagonian toothfish		5	420					426
Swordfish	1	73	27	225			99	425
Carpenter seabream			419					419
West coast sole		382	28					410
Threadfins, tasselfishes	410							410
Small tunas	237		1				151	388
Sand steenbras	369							369
Threadfin breams					356			356
Wreckfish	347							347
Alfonsinos		343						343
Unicorn cod						317		317
Tropical lobsters				283		15	2	299
Pargo breams	292							292
Cape bonnetmouth			279					279
Grunts, sweetlips	275							275
Mozambique lobster			58	211				270
Barracudas	12				38		215	265

It must be noted that these data sets are subject to a number of shortcomings, the most serious of which result from under-reporting of catches, particularly in the non-industrial fisheries, and from grouping of species into broad categories, rather than reporting by species. (For example, the total reported annual west coast horse mackerel catch should be closer to 400 000 tonnes, which would make this the most important shared stock in the western region). The magnitude of these problems tends to be related to the developmental status of the countries concerned, with the less developed countries having poorer fisheries monitoring systems. Also, FAO catch data are reported by flag, and not by EEZ, so catches made in SADC coastal state waters by foreign vessels fishing under permit are not included in the above table. This further contributes to under-reporting catches of certain species, such as the east coast prawns, and catches of tunas and billfishes throughout the region. Nonetheless, these data sets do provide some comparative measure of the composition of SADC member catches.

Before considering what these reported catch data indicate concerning the shared nature of stocks, there are a number of other important characteristics of the SADC regional fisheries that are evident in the table:

- Annual SADC reported catches average almost 1 million tonnes per year. Trawl-caught and purse-seine caught species are by far the most important contributors to catches. Of these, purse-seine catches of pelagic species contribute the largest reported catch (46%, or about 450 000 mt average per year), slightly more than catches taken by demersal trawl (43%, or about 420 000 mt average per year). However, because the value of the product is higher, the demersal trawl fishery is the greatest contributor to fisheries-derived income in the region. In contrast, although they are high value species, the prawn trawl and crustacean trap fisheries together only contribute some 2% (or about 17 000 tonnes per annum) to SADC catches. Small-scale (shore or boat-based) net and line fisheries together contribute at least 10% (or about 100 000 tonnes on average per year) to the overall reported catch. Of all the catch components, it is in these small-scale fisheries that under-reporting is most prevalent. The contribution of these non-industrial, labour-intensive fisheries to regional employment and subsistence is therefore far more substantial than is apparent from the reported catch, and over-exploitation of these fisheries has an immediate negative impact on food provision and income to artisanal and subsistence fishers in coastal communities. Likewise, the value of recreational fisheries in terms of employment and the generation of revenue thorough tourism and related industries is far greater than the value of the catch.

- There is a notable disparity in the number of species or species groups reported in catches by the various member states, ranging from 94 by South Africa to 20 - 30 for Mozambique, Tanzania and Mauritius. This certainly does not reflect the actual species diversity in these countries' fisheries. Considering that species diversity is substantially higher along the tropical and sub-tropical east coasts, this discrepancy provides a clear indication of the disparity in the resolution and coverage of data collection and reporting systems in the various SADC member countries.

Regarding indications of shared stocks, Table 1 indicates that:

- All SADC coastal states share certain of the highly migratory tunas, billfishes and giant mackerels. These resources are also shared by numerous high-seas fishing fleets, and are consequently managed by established international fisheries management organizations.
- On the west coast, there is substantial sharing of the important demersal and pelagic fish resources. Most of the important demersal trawl and pelagic purse-seine target species are, or may be, shared to some extent by two or more SADC states.
- On the east coast, there is sharing of the various prawn (and, to some extent, lobster) resources. Similarly, on the west coast, the red crab resource is shared between Angola and Namibia, and possibly South Africa. The west coast rock lobster may be a shared species because of the possibility of larval interchange between South Africa and Namibia.
- A number of the small-scale net- and line-caught species are shared between two or more SADC members, specifically kobs and snoek on the west coast, and numerous Sparids, Lutjanids, Lethrinids and Serranids on the east coast.

In addition to the specific resources identified above as being probably or possibly shared, there are a number of species groups that are reported by most SADC states, particularly "tuna-like fishes" and "sharks, skates and rays". It is highly likely that these groups contain species which also form shared stocks exploited by two or more SADC states.

From the data in this table, there is clearly scope, and probably a need, for cooperative management of these shared resources, as well as a requirement to improve monitoring and reporting of catches to improve understanding of the degree of sharing of the various resources.

2. CLASSIFICATION OF FISHERIES

2.1 Fishery Stratification Factors

Within regional and international fisheries management organizations, fisheries are classified into categories based on certain defining characteristics, the most important of which are:

- Ocean Region: This typically dictates the area of jurisdiction, and often the name, of organizations responsible for shared stocks management in the region concerned (such as the South-East Atlantic Fisheries Organization, or Indian Ocean Tuna Commission).
- Species, or Species Group: This is the most important level of stratification for assessment and management purposes. Practically all fisheries assessments, and most resultant management measures, are species-specific, although a few might apply to a group of similar species that are typically caught in close association, and for which a common management measure is appropriate.
- Gear Type: The (principal) fishing gear type used, or sometimes the combination of gear type and vessel type or vessel size class, is usually the next most important main stratification criterion. Different fishing gears often have different selectivities, both with

regard to species and to the size of fish caught. There are also usually different management challenges and requirements associated with different gear types, particularly concerning responsible fishing issues, such as the discarding of unwanted by-catch.

- Flag Country: Fisheries data, and the reports based on such data, are usually stratified by flag country. This is a direct result of the fact that flag states are responsible, under existing provisions of international fisheries law (LOSC, UNFSA and the FAO Code of Conduct for Responsible Fishing), for monitoring, control, surveillance and implementation of management measures on vessels flying their flags.

Further stratification within these primary strata, for example by month or quarter, 5°x5° square or vessel size, varies depending on the characteristics of the fisheries / species concerned, and the requirements of the agreed assessment procedures for these species.

2.2 SADC Fishery Regions

Within the SADC context, two main fisheries regions are apparent:

- The Western SADC Fisheries Region: Extending from the north-western limit of SADC jurisdiction, southwards and eastwards to 20° E (corresponding roughly to Cape Agulhas, South Africa, the southern-most tip of Africa).

- The Eastern SADC Fisheries Region: Extending eastwards and northwards from 20° E to the north-eastern limit of SADC jurisdiction.

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