



Project no: **INCO 003739**

Project acronym: **INCOFISH**

Project title: Integrating Multiple Demands on Coastal Zones with Emphasis on Aquatic Ecosystems and Fisheries

Instrument: Specific Targeted Research Project (STREP)

Thematic Priority: International Cooperation

**D10.3.a Country Report Namibia:**

Promotion and Management of Marine Fisheries in Namibia

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Due date of deliverable: Month 15+25

Actual submission date: Month 25

Start date of project: **01/05/2005**

Duration: **3 years**

Organisation name of lead contractor for this deliverable: University of Bremen

Project co-funded by the European Commission within the Sixth Framework Programme (2002-2006)		
Dissemination Level		
PU	Public	X
PP	Restricted to other programme participants (including the Commission)	
RE	Restricted to a group specified by the consortium (including the Commission)	
CO	Confidential, only for members of the consortium (including the Commission Services)	

## **Promotion and Management of Marine Fisheries in Namibia**

Raymond Mavetja Rukoro, Windhoek

Namibia inherited a severely depleted fishery. The previous regime left the fishing industry uncontrolled, under excessive exploitation practices and had no sustainable fishing practices in place. This practice opened the waters for long distance fleets who openly exploited the fish stock found outside the territorial waters and severely pressured the resource.

The former administration had jurisdiction over 12 nautical miles, while the remainder was managed by the International Commission for South East Atlantic Fisheries. This organisation which was established mainly as a tool to ensure sustainable fishing in the South East Atlantic was abused by member states whose main aim was to harvest to the maximum the rich resources found in the said waters.

With the attainment of independence and the change in the governing regime, a new fisheries management regime started with the enactment by parliament of the Territorial Sea and Exclusive Economic Zone Act (Act 3 of 1990). It stipulates that the sea outside the territorial sea of Namibia, but within a distance of two hundred nautical miles from the low water line or any other base line from which the territorial sea was measured, shall constitute the exclusive economic zone of Namibia.

This proved to be a mammoth task at first as Namibia had no adequate means to enforce the fisheries laws within the EEZ. For the first year illegal fishing by uncontrolled foreign vessels continued. This prompted the government to implement a fisheries management system and parliament enacted the Sea Fisheries Act (Act 29 of 1992) to ensure that Namibia's living marine resources were utilized on a sustainable basis, as required by Article 95(1) of the Constitution of Namibia. It also ensures compliance with fisheries laws and regulations.

Namibia has one of the most productive fishing grounds and its marine ecosystem is dominated by the Benguela current. The fishery supports vast populations of commercially exploitable fish species, some of which are shared with Angola and South Africa. The inshore marine environment provides valuable migration and nursery habitats for many marine organisms. These organisms, in turn, support rich populations of fish, which constitutes the very foundation of marine fisheries in Namibia. As is the case in other upwelling systems, relatively few species dominate and their abundance is very much dependent on changing environmental and climatic conditions.

The fisheries sector is one of the main foreign currency earners and contributed heavily to the Namibian economy. In 2000, the sector contributed US \$221.1 million to the GDP in comparison with US \$97.8 million in 1996.

As a measure to regulate the industry, the government of Namibia opted for a rights-based approach to its management of the fishery. The prerequisites to the commercial harvesting of marine resources generally states that no person shall in Namibia, or in Namibian waters, harvest any marine resource for commercial purposes, except under a right, an exploratory right or a fisheries agreement.

The Namibian fishery management system is proving to be somewhat successful in that it was able to eradicate illegal fishing in Namibian waters. Limited cases, if any at all, of illegal fishing have been reported more recently. However, the trend of decline in fish stocks is still pertinent and some of it is not as a result of a lax management regime, but rather adverse environmental conditions.

## ***I. ENVIRONMENTAL AND SOCIO-ECONOMIC BACKGROUND***

### **1. STATE OF THE RELEVANT FISHERIES RESOURCES**

Upon gaining Independence on 21 March 1990, Namibia inherited a fisheries industry whose resources were severely drained.<sup>1</sup> This was because the pre-Independence regime had left the fishing industry uncontrolled and heavily exploited rather than the sustainable.<sup>2</sup> Before Namibia's 200-nautical mile Exclusive Economic Zone was declared in 1990, the former administration had jurisdiction only over 12 nautical mile territorial waters<sup>3</sup> while the remainder was managed by the International Commission for South East Atlantic Fisheries.<sup>4</sup> Long distance fleets openly exploited the fish stock found outside the territorial waters and the fishing pressure was high.<sup>5</sup>

Namibia's fisheries management regime started with section 4(1) of the Territorial Sea and Exclusive Economic Zone Act<sup>6</sup> which stipulates that

'[t]he sea outside the territorial sea of Namibia but within a distance of two hundred nautical miles from the low water line or any other base line from which the territorial sea was measured shall constitute the exclusive economic zone of Namibia.'

Namibia had no adequate means to enforce the fisheries laws within the EEZ and for the first year illegal fishing by uncontrolled foreign vessels continued.<sup>7</sup> In early 1991, the

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<sup>1</sup> Namibia. Ministry of Fisheries and Marine Resources. *Presentation on the Namibian fisheries compliance on monitoring, control and surveillance*. (Windhoek: Ministry of Fisheries and Marine Resources, 2000), p. 2.

<sup>2</sup> *Ibidem*.

<sup>3</sup> Section 2(1) of the Territorial Sea and Exclusive Economic Zone Act, Act 3 of 1990, also lays down that '[t]he sea within a distance of 12 nautical miles measured from the low water line shall be the territorial sea of Namibia'.

<sup>4</sup> Namibia. Ministry of Fisheries and Marine Resources. *op.cit.* (2000), p. 2.

<sup>5</sup> *Ibidem*.

<sup>6</sup> Act of 3 of 1990.

<sup>7</sup> Namibia. Ministry of Fisheries and Marine Resources. *op.cit.* (2000), p. 2.

Government of the Republic of Namibia (hereinafter referred to as ‘Government’) set out its fisheries policies in a White Paper towards Responsible Fisheries.<sup>8</sup> Following the guidelines in the White Paper, the Sea Fisheries Act<sup>9</sup> came into force in October 1992 to ensure that Namibia’s living marine resources were utilized on a sustainable basis as required by Article 95(1) of the Constitution of Namibia,<sup>10</sup> and an optimal level of compliance with fisheries laws and regulations.<sup>11</sup> Through the establishment of the Monitoring, Control and Surveillance System (MCS) project, the hope was to find practical options that will materialize the government’s fisheries management goals in the fisheries sector.

Namibia exhibits one of the most productive fishing grounds and systems in the world.<sup>12</sup> Namibia’s marine ecosystem is dominated by the Benguela current, and supports vast populations of commercially exploitable fish species, some of which are shared with Angola and South Africa.<sup>13</sup>

The Benguela current is a broad northward flow off southwestern Africa and is part of the South Atlantic subtropical gyre. It is driven by large-scale wind patterns and thermohaline forcing.<sup>14</sup> The currents close to the coast are known as the Benguela upwelling system, which is forced locally by the wind stress field off Southwest Africa.<sup>15</sup> The Benguela upwelling system stretches from the southern tip of Africa to about 15°–16°S where it is bounded by the Angola front, which separates the warm water of the Angola Current from the cold Benguela water.<sup>16</sup> In the northern part of the Benguela upwelling system, a poleward surface flow is found that extends as far south as 17°–18°S. The upwelling varies alongshore.

The area of the Benguela is exposed to a persistent alongshore wind associated with the St. Helena high pressure system. The upwelling favorable alongshore wind has a maximum at about 25°S and decreases toward the northern and southern boundaries of the Benguela system at the Angola front and the southern tip of Africa, respectively.<sup>17</sup> In the south, the winds are highly seasonal and reach a maximum during spring and summer.

North of 31°S, the seasonal variation is weaker with permanent alongshore winds with a spring–summer maximum and autumn minimum as far north as 25°S. North of that

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<sup>8</sup> *Ibidem*.

<sup>9</sup> Act 29 of 1992.

<sup>10</sup> Act 1 of 1990.

<sup>11</sup> Namibia. Ministry of Fisheries and Marine Resources. *op.cit.* (2000), p. 2.

<sup>12</sup> See also Vere L. Shannon and M.J. O’Toole. Sustainability of the Benguela: ex Africa simper aliquid novi, In: G. Hempel & K. Sherman (eds.). *Large marine ecosystems of the world: Trends in exploitation and research*. (Elsevier B.V., 2003): 227-253, at p.228.

<sup>13</sup> Government of the Republic of Namibia. *Namibia Vision 2030*. (Windhoek: Office of the President, 2004), p.157.

<sup>14</sup> Available from <http://www.ams.allenpress.com/>

<sup>15</sup> *Ibidem*

<sup>16</sup> *Ibidem*

<sup>17</sup> Available from [http://www.ams.allenpress.com](http://www.ams.allenpress.com/)

latitude, the maximum occurs in late winter to spring. The wind increases somewhat away from the coast.<sup>18</sup>

The driving physical process in the Benguela system is coastal, wind-induced upwelling. Prevailing southwesterly winds, which occur all year round off Namibia, tend to move nearshore surface water northwards and offshore, while cool, central water from a depth of about 300m wells up to take its place.<sup>19</sup> The deeper water is rich in dissolved nutrients which, when present in the photic zone, facilitate rapid growth of phytoplankton, the basic food of fish. The high productivity of these microscopic plants supports abundant marine life.<sup>20</sup> The most intense upwelling regions off Namibia are found where the continental shelf is narrowest and the wind strongest, e.g. off Cape Rio, Palgrave Point and Lüderitz. The strongest most extensive and intense center of the upwelling in the entire Benguela system is off Lüderitz, Namibia.<sup>21</sup>

The inshore marine environment provides valuable migration and nursery habitats for many marine organisms.<sup>22</sup> These organisms in turn support rich populations of fish, which constitutes the very foundation of marine fisheries in Namibia.<sup>23</sup> As is the case in other up-welling systems, relatively few species dominate and their abundance is very much dependent on changing environmental and climatic conditions.

Figure 1 hereunder depicts the external and internal boundaries of the Benguela current, its large marine ecosystem, bathymetric features and surface (upper layer) currents.

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<sup>18</sup> *Ibidem*

<sup>19</sup> B. J. Van Zyl. *A decade of Namibian fisheries and biodiversity management*. (2002) p.5 available from <http://www.wordfish.org/BlueMillenniumPDFs/Chapter 2-VanZylCaseStudy.pdf>.

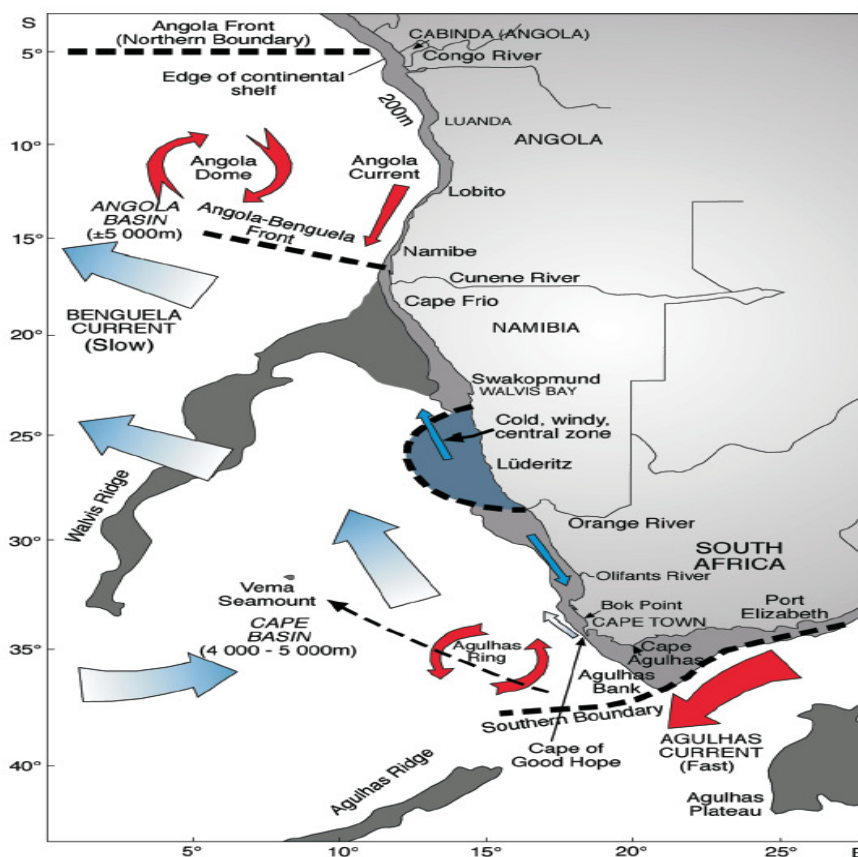
<sup>20</sup> *Ibidem*

<sup>21</sup> *Ibidem*

<sup>22</sup> Government of the Republic of Namibia. *op.cit.* (2004), p.157.

<sup>23</sup> Ussif Rashid Sumaila, David Boyer, Morten, D. Skogen & Stein Ivar Steinshamn. (eds). *Namibia's fisheries: Ecological, economic and social aspects*. (Eburon Academic Publishers: Netherlands, 2004), p.2.

*Integrated Management of the Benguela Current Region*



Source: Vere L. Shannon and M.J. O'Toole. Sustainability of the Benguela: *ex Africa semper aliquid novi*, In: G. Hempel & K Sherman (eds.). Large marine ecosystems of the world: Trends in exploitation and research. (Elsevier B.V., 2003): 227-253.

The spawning biomass of the hake species was estimated at 1.3 million tonnes in 2003 and, added to this, the research done in January/February 2004 estimated a very high recruitment. The stock assessment model for the fishable biomass in 2004 was estimated at around 35,000 tonnes.<sup>24</sup>

However, there is a descending trend in the biomass of monkfish and that catches have to be slightly reduced to counter this.<sup>25</sup> Horse mackerel stock size is growing steadily. This resource is estimated at 1.4 million tones, comprising of 47% juvenile and 53% adult fish.<sup>26</sup> The total horse mackerel catch in 2002-2004 was 350, 000 tonnes.<sup>27</sup>

<sup>24</sup> Namibia. Ministry of Fisheries and Marine Resources. *op.cit.* (2005). at p.11.

<sup>25</sup> *Ibidem.*

<sup>26</sup> Namibia. Ministry of Fisheries and Marine Resources. *op.cit.* (2005) at p.11.

<sup>27</sup> Namibia. Ministry of Fisheries and Marine Resources. *op.cit.* (2005) at p.21.

Namibia's pilchard stock has progressed, as well as others, due to measures designed to re-build stocks. There is concern for recruitment levels which appear to be largely influenced by environmental factors. Catches have declined rapidly in recent years from 68, 600 tonnes in 1998 to 25, 400 tonnes in 2000.<sup>28</sup> During October 2004, pilchards were forming patchy aggregations in central Namibia. They were also extending into southern Angola, with the proportion of the stock found there having an increase of 35% of the total biomass.<sup>29</sup> The pilchard stock was estimated at approximately 327,000 tonnes.<sup>30</sup> The adult stock decreased from 320,000 estimated in October 2003 to 147, 000 tonnes in a period of one year.<sup>31</sup> Despite this decrease, recruitment from the 2003/2004 spawning season was very good and the juveniles (with a modal length at 17 cm) accounted for about 60% of the total biomass estimated in October 2004.<sup>32</sup>

The rock lobster stock, which is shared with South Africa, is showing signs of continued growth.<sup>33</sup> The 2000 catch was 365, the 2001-2003 catch was 400, and the 2004 was 420.<sup>34</sup>

The research on deep-sea red crab shows that the stock size continues to grow slowly.<sup>35</sup> The estimated total biomass of deep-sea red crab during 2004 was between 10, 000 and 13, 000 tonnes.<sup>36</sup> The biomass of this species has remained relatively stable since 1993. The allocated TAC for the 2004 season increased from 2,000 tonnes in 2003 to 2,200 tonnes in 2004.<sup>37</sup>

The Cape fur seals harvests have rose from 29, 500 seals in 1998 to nearly 42,000 in 2000.<sup>38</sup> Seals, including predominantly kelp, are harvested at a number of locations. Production in 2000 was 825 tonnes,<sup>39</sup> in 2004 sealing season was 28,496 pups and 3,415 bulls.<sup>40</sup>

It is evident from the foregoing that fishery resources are generally healthy. The government is to be commended for the current state of fishery resources as this is a direct result of its management policy. The fisheries resources were severely depleted under the previous management regime.<sup>41</sup> This severe depletion and the mortality of fisheries resources are the factors that motivated the government's stringent and conservative management approach.

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<sup>28</sup> *Ibidem.*

<sup>29</sup> Namibia. Ministry of Fisheries and Marine Resources. *op.cit.* (2005). at p.11.

<sup>30</sup> *Ibidem.*

<sup>31</sup> *Ibidem.*

<sup>32</sup> *Ibidem.*

<sup>33</sup> Namibia. Ministry of Fisheries and Marine Resources. *op.cit.* (2005) at p.11.

<sup>34</sup> *Ibidem.*

<sup>35</sup> Food and Agriculture Organization of the United Nations. *op.cit.* (2002).

<sup>36</sup> Namibia. Ministry of Fisheries and Marine Resources. *op.cit.* (2005) at p.12.

<sup>37</sup> *Ibidem.*

<sup>38</sup> *Ibidem.*

<sup>39</sup> *Ibidem.*

<sup>40</sup> Namibia. Ministry of Fisheries and Marine Resources. *op.cit.* (2005) at p.12.

<sup>41</sup> Abraham Iyambo. *Managing fisheries with rights in Namibia: A Minister's perspective, use of property rights in fisheries management.* (Fremantle, West Australia: Proceedings of the Fish Rights 99 Conference, 2000), pp.142-3.

## **2. OVERVIEW OF MULTIPLE DEMANDS ON THE COASTAL AND EXCLUSIVE ECONOMIC ZONE AND THE SOCIO-ECONOMIC RELEVANCE OF THE FISHERIES.**

### **2.1 MULTIPLE DEMANDS ON NAMIBIA OTHER THAN FISHERIES**

#### a) Urbanization

Namibia has three major coastal towns: Swakopmund, Walvis Bay and Lüderitz. However, in terms of Namibia's 2001 Housing and Population Census, Swakopmund and Lüderitz are not considered large urban areas due to a low population size compared to Walvis Bay. Even though the population size is not large in these two coastal towns, it is expected that more people will be moving to these towns as the fishing industry and marine explorations continue to grow. Walvis Bay, which is Namibia's largest harbour town and the second largest town, is considered to be a large urban area as mentioned above, with a population of about 42,415 people.<sup>42</sup> A rise in the need for housing means a high level of urbanisation in these towns, where housing developments tend to be moving more towards the sea because of the forbidding Namib Desert.

#### b) Modern Ports

Namibia has two major ports which consist of the Port of Walvis Bay and the Port of Lüderitz. The Walvis Bay Port is Namibia's largest commercial port, receiving approximately 1,000 vessel calls each year and handling about 2.5 million tonnes of cargo. It is a sheltered deepwater harbour benefiting from a temperate climate.<sup>43</sup>

Namport is Namibia's Ports Authority Company and it has a container terminal at the port of Walvis Bay that can accommodate 380 containers, with space for 210 reefer container plug points. The container terminal can host about 150,000 containers per annum.<sup>44</sup> The Walvis Bay syncrolift, a modern drydocking facility, which is also owned and operated by Namport, is located between the commercial and fishing harbours, and it caters mainly to fishing vessels, offshore supply boats and offshore mining industry vessels of up to 2,000 tonnes. While many of the smaller fishing boats berth at the jetties of the various factories, larger white fish trawlers use the commercial port.

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<sup>42</sup> Namibia. National Planning Commission. *2001 Census*. August 2006. Also available from <http://www.npc.gov.na/census/index.htm>

<sup>43</sup> Namibia. Namibian Port Authority. *The port of Walvis Bay*. August 2006. Available from: <http://www.namport.com/content/show.php?m=4>

<sup>44</sup> *Ibidem*

Since 1995, investment into the Port of Lüderitz has significantly improved harbour facilities as it can now handle modern coastal traffic, as well as the needs of the offshore sector, including the diamond mining and fishing industries.<sup>45</sup> This has included dredging the approach channel to the harbour, as well as the 198m wide turning basin to -8.15m CD and the water alongside the new quay to -8.75m CD for the first 300m. The length of the entrance channel to the jetty is 708m, with a width of 60.9m. The concrete quay has a depth alongside of -6.1m CD.<sup>46</sup> Cargo handled at the Port of Lüderitz increased dramatically from 1994, when the average number of ship calls was 826 and cargo reached 51,513 tonnes. By 1997 ship calls were 1,253 and tonnage peaked at 102,614t. The cargo landed consisted mainly of fuel and fish products. Exports were predominantly fish products. However, mineral and offshore activities in southern Namibia have brought a new lease on life for the Port of Lüderitz, which in recent years has depended mainly on the fishing industry.<sup>47</sup>

c) Industrial estates

Fishing continues to be a major line of business for the Port of Walvis Bay. About two-thirds of the waterfront area of the port is taken up by the fishing harbour, where the many landing quays are backed by more than two kilometres of warehouses, processing facilities and canning factories.

In recent years, the industry has shown great flexibility in managing to adapt to changing tastes and markets. A large modern cold store allows high-value fish to be stored for export to niche markets around the world.

d) Tourist attractions

Old-world charm, adventure sports and spotless beaches are some of the many qualities one associates with Swakopmund, one of the fastest growing cities in the country.

One of the biggest building initiatives at the coast is the Swakopmund Waterfront development project that is already underway. Not only will this development project add shops, housing, restaurants and a marina to what Swakopmund already has to offer, it will actually extend Namibia's territory, as it will change the high-water mark, thus adding land.<sup>48</sup> Phase 1A of the development is almost complete, with 72 townhouses and eight houses built thus far. Ultimately there will be up to 240 residential units, in addition to shops, restaurants, and activities

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<sup>45</sup> Information available from <http://www.ports.co.za/luderitz.php>

<sup>46</sup> *Ibidem*

<sup>47</sup> Namibia. Namibian Port Authority. *op.cit.*

<sup>48</sup> Information available from <http://www.travelnews.com.na/index.php?fAfricaId=881>

based around the marina.<sup>49</sup> The idea is to create as many activities as possible. The beach will grow north of the development as sand is pushed around the marina.

Demand and growth are going hand in hand at the coastal towns and mainly at Swakopmund, for the benefit of residents and tourists alike. Upon completion of the marina, business opportunities will be available. Thus, creating a demand for activities such as Mola Mola-type tours, sundowner cruises, fishing excursions and many more<sup>50</sup>. These are some of the many demands aimed at attracting tourists in Namibia's coastal zone.

e) Marine exploration and mining

Namibia has a wealth of marine mineral resources, such as glauconite, phosphorite, industrial minerals and diamonds. The exploration and development of oil and gas marine resources are fully captured in the *White Paper on Energy Policy*.<sup>51</sup> The current Kudu Gas Project – a project on the development of a power-generating and gas-fired station 170 kilometres off the coast near Oranjemund – is an example of the government's increasing marine exploration.

Marine diamonds accounted for 60% of Namibia's total diamond production in 2001.<sup>52</sup> The increase in marine diamond production was a response to the dwindling on-shore diamond reserves, as well as to the development of new exploration technologies.<sup>53</sup> With on-going research and further improvements in technology, marine diamond production is likely to increase.<sup>54</sup>

Since offshore development in exploration and mining is a relatively new activity, the associated impact on the environment is not yet fully understood.<sup>55</sup> Therefore, there is a need for continued on-going research into the probable environmental impacts.<sup>56</sup>

## 2.2 COASTAL ZONE FISHERIES

a) Indigenous coastal fisheries

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<sup>49</sup> *Ibidem*

<sup>50</sup> *Ibidem*

<sup>51</sup> Namibia. Ministry of Mines and Energy. *White paper on energy policy*. (Windhoek: Ministry of Mines and Energy, 1998).

<sup>52</sup> Namibia. Ministry of Mines and Energy. *Minerals policy of Namibia – draft*. (Windhoek: Ministry of Mines and Energy), at p.17.

<sup>53</sup> *Ibidem*.

<sup>54</sup> *Ibidem*.

<sup>55</sup> *Ibidem*.

<sup>56</sup> *Ibidem*.

There are no indigenous coastal fisheries communities, nor is there any artisanal fishing.<sup>57</sup> There are remnants of traditional fisher communities found in Namibia. These communities would endure the harsh environmental conditions prevalent in the Namib desert which is part of the Namibian coastline.<sup>58</sup> However the said communities are no longer actively involved in fishing as part of the coastal areas are either turned into National Parks with restricted entry. The Topnaars community have been absorbed into the main industrial fisheries industry as they were allocated quotas and have entered into joint venture with companies involved in fisheries as they possess the technical know how and the capital required to successfully harvest the sea resources.<sup>59</sup> Furthermore there exist initiatives within the industry that specially focus on the needs of the Topnaars communities and many fishing companies contribute financially towards improving their livelihood.<sup>60</sup> It must be noted that no organised artisanal fisheries were found and no traditional or indigenous laws exist that regulates fishing. The aim of the research was to ascertain the existence or absence of legal instruments managing fisheries. As such one can safely conclude that as due to the absence of a formalised structure of artisanal fisheries industry there exist no laws regulating this. A further testimony to this is the absence of it in the national fisheries laws.

#### b) Recreational fishing

Namibia's entire coastal zone falls within the Namib Desert and is characterized by low rainfall and limited freshwater resources.<sup>61</sup> The only coastal fishing activity is recreational fishing.<sup>62</sup> Local inhabitants of the coastal towns and cities mostly use this form of fishing to obtain fish for own consumption and sometimes to supply small markets it must be noted however that there exist limits for daily catches to discourage people from using this type of fishing to engage in viable business initiatives. In fact whilst on patrol with the Patrol officials in Swakopmund fishermen confirmed that their taking for the day is either for own consumption or simply as a sport and the catches are either donated to local poor communities or divided amongst the participants.

Recreational fishing has also started along the coastline beach-caster rods. Target species include blacktail, also known as *dassie* (*Diplodus sargus*), *Dichistius capensis*, kob which is also known as kabeljou (*Argyrosomus spp.*), snoek, etc. Additionally, there are coast steenbras, also known as white fish (*Lithognathus aureti*), barbell, sharks (principally

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<sup>57</sup> Paul Nichols. Marine fisheries management in Namibia: Has it worked. In: Ussif Rashid Sumaila, David Boyer, Morten, D. Skogen & Stein Ivar Steinshamn. (eds). *Namibia's fisheries: Ecological, economic and social aspects*. (Eburon Academic Publishers: Netherlands, 2004), 319-332 at p.326.

<sup>58</sup> Field Note 9

<sup>59</sup> Field Note 10

<sup>60</sup> Field Note 8 see also Field Note 2

<sup>61</sup> Government of the Republic of Namibia. *Namibia Vision 2030*. (Windhoek: Office of the President, 2004), p.157.

<sup>62</sup> Ibid

cow shark) (*Notorynchus cepedianus*), bronze whaler, spotted gullyshark (*Triakis megalopterus*) and smooth hound (*Mustelus mustelus*)).<sup>63</sup>

#### Total recreational fishing permits issued and revenue generated during 2004

Months	Permits issued	Revenue collected (N\$)*
January	4,572	89,264
February	4,807	83,146
March	5,331	87,416
April	4,631	73,150
May	3,060	54,544
June	1,763	30,072
July	2,622	44,114
August	2,191	40,992
September	2,297	41,650
October	2,829	52,388
November	4,764	98,574
December	14,284	228,774
Grand total	51,772	924,084

Source: Namibia. Ministry of Fisheries and Marine Resources. Annual report 2004. (Windhoek: Ministry of Fisheries and Marine Resources, 2005). at p.23.

\* 1 N\$ is approximately 7.5 €.

#### Types of permit issued in 2004

Period	Total number of permits	Amount received (N\$)
Monthly permits issued	50,478	706,692
Year permits issued	1,294	217,392
Total	51,772	924,084

Source: Namibia. Ministry of Fisheries and Marine Resources. Annual report 2004. (Windhoek: Ministry of Fisheries and Marine Resources, 2005). at p.23.

Harvesting for recreational purposes is regulated in terms of Regulation 5.<sup>64</sup> which requires that persons who wants to harvest fish in the Namibian waters for recreational purposes must be in possession of a fishing permit and carry out such harvesting in accordance with the conditions prescribed in the regulations.

## 2.3 INDUSTRIAL FISHERIES IN THE EXCLUSIVE ECONOMIC ZONE

### a) Fishing industry

Namibian fisheries industry can be divided into 8 main fisheries:

- 1. Demersal fisheries:** around 111 demersal trawlers (19-77m length) are currently licensed. Their principal targeted species is hake (*Merluccius capensis* and *M. paradoxus*), caught in deeper water (trawlers are not permitted in less than 200 m depth). The spawning biomass of hake was estimated at 1.3 million tonnes and the

<sup>63</sup> Food and Agriculture Organization of the United Nations. *op.cit.* ( 2002).

<sup>64</sup> Regulations made in terms of section 61 (1) of the Marine Resources Act 27 of 2000

allocated TAC for the 2004/5 fishing season was 195,000 tonnes.<sup>65</sup> In addition thereto, a strong cohort is expected to create a fishable component of the commercial fishery during the 2005/6 fishing season.<sup>66</sup> Smaller trawlers fish more inshore for monkfish, sole and kingclip. Twenty-four demersal long-liners (19-55 m length range) also target with smaller quantities of highly valuable kingclip and snoek. Catches in 2000 were hake; monkfish – 14, 358 tonnes; and kingclip – 3, 922 tonnes.<sup>67</sup> The stock assessment model estimate for the fishable biomass in 2004 was around 35,000 tonnes.<sup>68</sup> However, there is a downward trend in the biomass of monkfish. Thus, catches have to be slightly reduced to counter for this.<sup>69</sup>

2. **Mid-water fishery:** Twenty-six mid-water trawlers in the 62-120 m length range are licensed for horse mackerel (*Trachurus capensis*). This sub sector has the largest number of foreign vessels, with 12-15 operating at any one time.<sup>70</sup> However, at least 8 are wholly owned by Namibian nationals, but retain foreign flags in order to facilitate work permits for the largely expatriate bloc crews.<sup>71</sup> Horse mackerel stock size is growing steadily. This resource is estimated at 1.4 million tonnes, comprising of 47% juvenile and 53% adult fish.<sup>72</sup> The total horse mackerel catch 2002-2004 was 350, 000 tonnes.<sup>73</sup>
3. **Purse-seine fishery:** A fleet of 30 purse-seiners (21-47 m length range) target pilchard (*Sardinops sagax*) for canning.<sup>74</sup> Juvenile horse-mackerel and anchovy (*Engraulis capensis*) are sporadically found in Namibian waters and are also used for fish meal. Namibia's pilchard stock has not progressed as well as others to measures designed to re-build stocks, and there is concern for recruitment levels which appear to be largely influenced by environmental factors. Catches have declined rapidly in recent years from 68,600 tonnes in 1998 to 25,400 tonnes in 2000.<sup>75</sup> During October 2004, pilchard were creating patchy aggregations in central Namibia and extending into southern Angola, with the proportion of the stock found in southern Angola increasing to 35% of the total biomass.<sup>76</sup> The pilchard stock was estimated at approximately 327,000 tonnes.<sup>77</sup> The adult stock decreased from 320,000 estimated in October 2003 to 147, 000 tonnes in a period

<sup>65</sup> Namibia. Ministry of Fisheries and Marine Resources. *Annual report 2004*. (Windhoek: Ministry of Fisheries and Marine Resources, 2005), p.11.

<sup>66</sup> *Ibidem*.

<sup>67</sup> Food and Agriculture Organization of the United Nations. *Fishery country profile: Namibia*. November 2002. Available from <http://www.fao.org/fi/fcp/en/NAM/profile.htm>

<sup>68</sup> Namibia. Ministry of Fisheries and Marine Resources. *op.cit.* (2005). at p.11.

<sup>69</sup> *Ibidem*.

<sup>70</sup> Food and Agriculture Organization of the United Nations. *op.cit.* (2002).

<sup>71</sup> *Ibidem*.

<sup>72</sup> Namibia. Ministry of Fisheries and Marine Resources. *op.cit.* (2005) at p.11.

<sup>73</sup> Namibia. Ministry of Fisheries and Marine Resources. *op.cit.* (2005) at p.21.

<sup>74</sup> Food and Agriculture Organization of the United Nations. *op.cit.*(2002).

<sup>75</sup> *Ibidem*.

<sup>76</sup> Namibia. Ministry of Fisheries and Marine Resources. *op.cit.* (2005). at p.11.

<sup>77</sup> *Ibidem*.

of one year.<sup>78</sup> Despite this decrease, recruitment from the 2003/2004 spawning season was very good and the juveniles (with a modal length at 17 cm) accounted for about 60% of the total biomass estimated in October 2004.<sup>79</sup> A TAC of 25,000 tonnes was granted for 2004.<sup>80</sup>

4. **Deep-water fishery:** A fleet of 56 tuna vessels in the 6-79 m length range utilizing long-line and line gear are licensed to target albacore (*Thunnus alalunga*), bigeye (*Thunnus obesus*), *Xyphias gladius* and skipjack (*Katsuwonus pelamis*).<sup>81</sup> Pelagic sharks are also taken. Some 2,000 tonnes of tuna species and 290 tonnes of swordfish were landed in 2000.<sup>82</sup>
5. **Rock lobster fishery:** The fishery for rock lobster (*Jasus lalandii*) is based in southern Lüderitz. Twenty-nine 7-21 m craft are currently licensed and use lobster traps. The rock lobster stock, which is shared with South Africa, is showing signs of continued growth.<sup>83</sup> During 2003/2004 commercial season, the lobster fishing fleet again did not succeed in filling the lobster TAC, similar to the previous three seasons.<sup>84</sup> This was mainly due to high swell conditions (and possibly also due to the high bottom dissolved oxygen levels, resulting in adult lobsters having migrated to deeper waters and thus out of reach of the fleet).<sup>85</sup> Catch per unit effort was lower than that of the previous season, and about one half of the TAC remained uncaught.<sup>86</sup>
6. **Deep-sea red crab fishery:** Deep-water traps area used to target red crab (*Chaceon maritae*). Several vessels are licensed in this small, but valuable, fishery. Research on deep-sea red crab indicates that stock size continues to grow slowly.<sup>87</sup> Being a shared stock, Namibia has initiated research activities with neighbouring Angola. The estimated total biomass of deep-sea red crab during 2004 was between 10,000 and 13,000 tonnes.<sup>88</sup> The biomass of this species has remained relatively stable since 1993. The allocated TAC for the 2004 season has increased from 2,000 tonnes in 2003 to 2,200 tonnes in 2004.<sup>89</sup>
7. **Linefish vessels:** A fleet of 26 industrial linefish vessels operate offshore and target kob, steenbras, etc. This fishery landed 1,600 tonnes in 2000.<sup>90</sup>

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<sup>78</sup> *Ibidem.*

<sup>79</sup> *Ibidem.*

<sup>80</sup> *Ibidem.*

<sup>81</sup> Food and Agriculture Organization of the United Nations. *op.cit.* (2002).

<sup>82</sup> *Ibidem.*

<sup>83</sup> Namibia. Ministry of Fisheries and Marine Resources. *op.cit.* (2005) at p.11.

<sup>84</sup> *Ibidem.*

<sup>85</sup> *Ibidem.*

<sup>86</sup> *Ibidem.*

<sup>87</sup> Food and Agriculture Organization of the United Nations. *op.cit.* (2002).

<sup>88</sup> Namibia. Ministry of Fisheries and Marine Resources. *op.cit.* (2005) at p.12.

<sup>89</sup> *Ibidem.*

<sup>90</sup> Food and Agriculture Organization of the United Nations. *op.cit.* (2002)

8. **Cape fur seals:** Cape fur seals (*Arctocephalus pusillus*) are also harvested around Cape Cross, Wolfs Bay and Walvis Bay. Harvests have risen from 29,500 seals in 1998 to nearly 42,000 in 2000.<sup>91</sup> Seals, including predominantly kelp, are harvested at a number of locations. Production in 2000 was 825 tonnes,<sup>92</sup> in 2004 sealing season was 28,496 pups and 3,415 bulls.<sup>93</sup> During 2004, a rolling TAC was set for the period 2004-2006. The harvesting TAC was set at 60,000 pups and 5,000 bulls.<sup>94</sup>

b) Landed fish

The total volume of marine resource production for 2005 is not available yet. However, the total volume of marine resource production for 2004 declined by 10%, compared with the total volume of the previous year.<sup>95</sup> Overall, the exchange rate volatility and the cost of fishing were not the most favourable to the fisheries and resources sector during 2004.<sup>96</sup> These factors affected the operation of major fisheries such as those for horse mackerel, hake and tuna.<sup>97</sup>

**Total volume of marine resources production for the period 2000 to 2004**

Species	2000	2001	2002	2003	2004
Pilchard	25,388	10,763	4,160	22,255	28,605
Hake	171,397	173,277	154,588	189,305	173,902
Hake mackerel	344,314	315,245	359,183	360,447	310,405
Monk	14,358	12,390	15,174	13,135	8,961
Kingclip	3,922	6,607	7,210	6,603	7,067
Tuna	2,401	3,198	2,837	3,371	3,581
Crab	2,700	2,343	2,471	2,092	2,400
Rock lobster	365	365	361	269	214
Other fish species	22,987	30,810	77,407	33,644	31,997
Total fish harvest	588,404	554,998	623,391	631,121	567,133
Seals (numbers)*	41,753	44,223	40,000	34,000	31,971
Seaweed	829	800	500	288	n/a

Source: Namibia. Ministry of Fisheries and Marine Resources. Annual report 2004. (Windhoek: Ministry of Fisheries and Marine Resources, 2005). at p.23.

Note: Other fish species are orange roughy, alfonsino, anchovy, sharks, sole, linefish species, amongst others.

\* Seals are in number, not tonnes. N/a = not available.

3. ECONOMIC IMPORTANCE OF THE FISHERY SECTOR IN NAMIBIA

Since Namibia's Independence in 1990, the country's prosperous economy, which has a real Gross Domestic Product (hereinafter 'GDP') growth rate of 3.5%,<sup>98</sup> has been driven

<sup>91</sup> *Ibidem.*

<sup>92</sup> *Ibidem.*

<sup>93</sup> Namibia. Ministry of Fisheries and Marine Resources. *op.cit.* (2005) at p.12.

<sup>94</sup> *Ibidem.*

<sup>95</sup> Namibia. Ministry of Fisheries and Marine Resources. *op.cit.* (2005), at p.21.

<sup>96</sup> *Ibidem.*

<sup>97</sup> *Ibidem.*

<sup>98</sup> CIA World Factbook. Namibia. July 2006. Available from <http://www.cia.gov/cia/publications/factbook/geos/wa.html>.

by mining (diamond and uranium), fishing, agriculture (cattle herding and subsistence agriculture) and tourism as stated earlier. Namibia's GDP is approximately twice the average for African countries. Fishing is the third-largest sector of the Namibian economy, after agriculture and mining, and the second-largest-growing industry in the Namibian economy (after tourism), a growth achieved mainly through product value enhancement.<sup>99</sup> Namibia's small population makes it one of the world's lowest population densities. Regarding the urbanization of Namibia, approximately 60% of the population resides in rural areas – predominantly inland – and the remaining 40% resides in urban areas.<sup>100</sup> Consequently, there is practically no marine subsistence fishing sub-sector.

The socio-economic relevance of the fisheries in Namibia may be evaluated in terms of

- (a) their contribution to the national economy;
- (b) their exports and foreign exchange earnings;
- (c) employment for Namibians;
- (d) corporate social responsibilities;
- (e) the growth of landed vessels and catch year on year; and
- (f) the number of species landed.

However, this list is by no means exhaustive nor is it the only way of evaluating the socio-economic relevance of the fisheries, but it suffices for the purposes of this report and it lucidly canvasses the discussion under this heading;

a) Contribution to the national economy

Firstly, the fisheries sector is a major contributor to the national economy. Some non-official estimates are optimistic and indicate that the sector generates more than 10% of the GDP.<sup>101</sup> However, the official data indicate rather conservatively that the fisheries sector contribution was 6.7%, 7.1%, 7.3%, and 7.8% of the GDP in 2000, 2001, 2002, and 2003, respectively.<sup>102</sup> In 2000, the sector contributed US \$221.1 million to the GDP, compared with the US \$97.8 million in 1996.

**Fisheries Gross Domestic Products contribution, 2000-2004**

GDP contribution	2000	2001	2002	2003	2004*

<sup>99</sup> David Boyer & Burger Oelofsen. Co-management: Namibia's experience with two large scale industrial fisheries – sardine and orange roughy. In: Ussif Rashid Sumaila, David Boyer, Morten, D. Skogen & Stein Ivar Steinshamn. (eds). *Namibia's fisheries: Ecological, economic and social aspects*. (Eburon Academic Publishers: Netherlands, 2004), 333-356, p.336.

<sup>100</sup> See also Volker Winterfeldt, Tom Fox & Pempalani Mufune. *Namibia. Society. Sociology*. (Windhoek: University of Namibia Press, 2002). [on the preliminary pages].

<sup>101</sup> David Boyer & Burger Oelofsen. *op.cit.*, (2004) at p.332; Richard Sherman estimates that fisheries contributes 35% of the GDP: Richard Sherman. Briefing on national, regional and international fisheries and marine-related agreements. (Global Legislators Organisation for a Balanced Environment (GLOBE) Southern Africa, 2003). Available from <http://www.emg.org.za/Documents/FisheriesBriefing.doc> .

<sup>102</sup> Namibia. Ministry of Fisheries and Marine Resources. *op.cit.* (2005) at p.24.

Fishing	1, 044	1, 445	1, 608	1, 627	1, 293
Processing	548	494	703	899	920
Total	1, 592	1, 939	2, 311	2, 526	2, 213
% of GDP	6.7%	7.1%	7.3%	7.8%	6%

Source: Namibia. Ministry of Fisheries and Marine Resources. Annual report 2004. (Windhoek: Ministry of Fisheries and Marine Resources, 2005). at p.20.

\* Provisional figures.

Direct Government revenues generated from the fisheries sector include quota fees, Marine Resource levy fund (a levy on all landed species, used to fund research and training), a by-catch levy which must be landed – discarding is prohibited) with charge rates per tonne set on a species basis, and licence fees for vessels. Although the contribution of income from marine resources to GDP has fluctuated over the years, mainly due to the unpredictable nature of the resource, it has shown an overall increase from N\$ 288 million (4%) in 1991 to N\$ 2.016 million (6.6%) in 2002.<sup>103</sup> However, as Namibianisation of the industry progresses, a reduction in the revenue due to tax incentives is expected.

**State revenue from the marine fishing industry, 2000-2004 (N\$ thousands, current value)**

Fee	2000	2001	2002	2003	2004
Quota fees	76, 125	69, 900	100, 011	74, 437	84, 629
Marine Resources Fund levy	11, 027	9, 211	15, 794	12, 042	17, 663
By-catch fees	10, 300	12, 800	15, 788	13, 561	16, 294
License fees	185	172	286	187	110
Total revenue	97, 637	82, 083	131, 879	100, 227	120, 292

Source: Namibia. Ministry of Fisheries and Marine Resources. 2005. Annual report 2004. Windhoek: Ministry of Fisheries and Marine Resources. at p.23

However, two fisheries experts state that the calculations of revenue from the harvesting of marine resources are ‘very unreliable’.<sup>104</sup> They have identified a number of weaknesses in the calculation including the manual calculation of revenue at the factories by fisheries inspectors before it is entered in the database, cumbersome work routines when data is collected and registered, an inaccurate reconciliation process leading to almost a 100% reliance on industry figures, large backlogs in data entry, and software problems and inadequate training in the use of the database.<sup>105</sup>

<sup>103</sup> Paul Nichols. *op.cit.* (2004), p.327.

<sup>104</sup> Erik Bergh & Sandy Davies. ‘Against all odds: Taking control of the Namibian fisheries’. In: Ussif Rashid Sumaila, David Boyer, Morten, D. Skogen & Stein Ivar Steinshamn. (eds). *Namibia’s fisheries: Ecological, economic and social aspects.* (Eburon Academic Publishers: Netherlands, 2004), 289-318 at p.306.

<sup>105</sup> *Ibidem.*

That said, the government realized at an early stage that the actual and potential benefits that it can derive from the utilization, conservation, protection and promotion of marine resources. Hence, the tight control of the industry as part of its management regime. This is illustrated in the mission statement of the responsible ministry.

#### b) Exports and foreign exchange earnings

The marine fisheries sector is an important foreign exchange earner and has continuously been the second largest sector in the Namibian economy behind mining in terms of export earnings. A major export market for Namibia's fisheries and marine resource production is the European Union ('EU'). According to the EU Market Survey (2002) for Fisheries Products, the EU imported 99,410 tonnes of fish and fish products worth an estimated € 180 million.<sup>106</sup>

#### c) Employment for Namibians

The fishery sector is one of the major contributors in terms of employment and job creation. The Ministry of Fisheries and Marine Resources ('MFMR') estimates a total employment in the fishing sector to be around 15,000 persons in 2000<sup>107</sup>. Of this total, some 7,500 are employed on-board the vessels, 65% of which are Namibians. Shore workers are nearly all Namibians.

#### d) Corporate social responsibilities

One accomplishment worthy of commendation – and which most often goes unnoticed – is the voluntary contributions on a regular basis made by companies in the marine fisheries sector to several social development schemes throughout the country. The companies in the fishing industry have lent a helping hand and provided money and other forms of assistance to schools, clinics, and other much-needed civic facilities. The contribution of the fishing industry to these noble causes has been, over the past 11 years, in excess of N\$ 33 million (approximately 4, 4 million euros). The newcomer companies equally deserve special mention. Despite being new to fishing, they have managed to contribute altogether an amount in excess of N\$ 11 million (approximately 1, 4 million €).<sup>108</sup>

#### e) Growth of landed vessels and catch year on year

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<sup>106</sup> Food and Agriculture Organization of the United Nations. *op.cit.*(2002).

<sup>107</sup> David Boyer & Burger Oelofsen. *op.cit.* (2004) at p.336 see also Namibia. Ministry of Finance. *op.cit.*(2006).

<sup>108</sup> Food and Agriculture Organization of the United Nations. *op.cit.*(2002).

The healthy state of the Namibian fisheries sector is further evidenced by the growth of landed vessels and the annual catch. The value of all landings has risen from US \$ 156.25 million in 1996 to US \$ 286 million in 2001.<sup>109</sup> Value of exports has risen from US \$ 181.4 million in 1996 to US \$354 million in 2001. There are estimates that the revenue generated by recreational fishing is in excess of US \$ 3.75 million per year.

f) Number of species landed

More than 20 commercially important species are landed. During 2000, a total of 309 vessels were licensed to fish in Namibian waters, 80% of which were Namibian flagship vessels having multiple licences allowing them to target more than one species.<sup>110</sup> Foreign flag vessels can only operate with a local right holder and all fish caught by such vessels must be landed in Namibia, at either Walvis Bay or Lüderitz, and counted against the local right-holder's quota species.

**Harvest of the main commercial species, 2000-2004 (tones, except seals)**

Species	2000	2001	2002	2003	2004
Pilchard	25, 388	10, 763	4, 160	22, 255	28, 605
Hake	171, 397	173, 277	154, 588	189, 305	173, 902
Horse mackerel	344, 314	315, 245	359, 183	360, 447	310, 405
Monk	14, 358	12, 390	15, 174	13, 135	8, 961
Kingklip	3, 922	6, 607	7, 210	6, 603	7, 067
Tuna	2, 401	3, 198	2, 837	3, 371	3, 581
Crab	2, 700	2, 343	2, 471	2, 092	2, 400
Rock lobster	365	365	361	269	214
Other fish species	22, 987	30, 810	77, 407	33, 644	31, 997
Total fish harvest	588, 404	554, 998	623, 391	631, 121	567, 133
Seals (numbers)*	41, 753	44, 223	34, 000	34, 000	31, 971
Seaweed	829	800	288	288	Not available

Source: Namibia. Ministry of Fisheries and Marine Resources. 2005. Annual report 2004. Windhoek: Ministry of Fisheries and Marine Resources. at p.22.

Note: other fish species are orange roughy, alfonsino, anchovy, sharks, sole, linefish species, amongst others.

\* Seals are in number, not tones.

#### 4. PERCEPTION/NON-PERCEPTION OF BASIC FISHERIES ISSUES

<sup>109</sup> *Ibidem.*

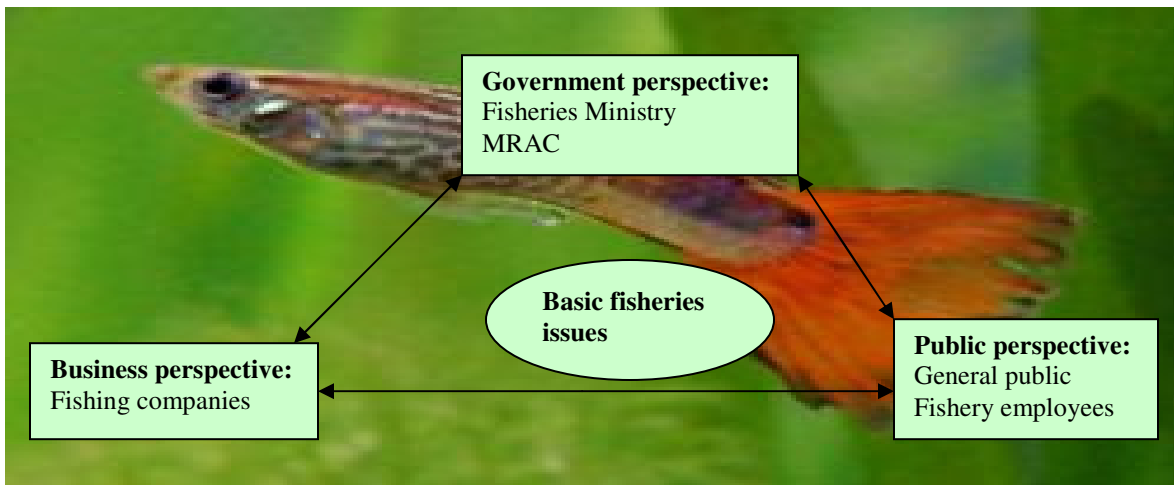
<sup>110</sup> Food and Agriculture Organization of the United Nations. *op.cit.*(2002).

#### 4.1.1. STRUCTURE OF THE POLITICAL DEBATE

Different stakeholders take different positions on different fisheries issues. However, debates on basic fisheries issues tend to be argued out from three perspectives:

- (1) the government, as represented by the Ministry of Fisheries and Marine Resources and the Marine Resources Advisory Council ('MRAC');
- (2) the economic players in the fishing industry; and
- (3) the general public whose views are generally reported in the media.

The structure of the political debate on basic fisheries issues can be visually presented as presented below:



#### 4.1.2. PUBLIC AWARENESS

Issues are perceived differently depending on the perspective assumed, but, generally speaking, the general public does not have a great awareness of most of the issues identified below. As can be gathered from the media, issues perceived by the public include the allocation and use of fish quotas, and job losses and the closing down of some businesses in the fishing sector mainly due to adverse exchange rates and a low Total Allowable Catch (TAC). Whereas the TAC issue has also affected and elicited some reaction from the business community, most fisheries issues are technical and usually confront only specialists in both the government and the business community, leaving most of the general public unaware of the developments in those areas.

#### 4.1.3. BASIC FISHERIES ISSUES

In a nutshell, fisheries issues may be classified into those concerning (a) the sustainability of fisheries, (b) fisheries economics and (c) fisheries management. Naturally, these classifications are only used for the sake of convenience and do not imply that fisheries

issues can be compartmentalised in water-tight categories. There are many ways in which these categories interact, intersect and overlap.

a) Sustainability issues

Sustainability issues are those which directly or indirectly touch on the biological sustainability of the various fisheries. In this report, these include questions on fisheries management, the Marine Resources Act, on fish stocks and on the environment.

b) Economic issues

The economic issues are those connected to the trade, finances and other economic aspects of fisheries in Namibia. In this report, these include questions on state revenues, the Namibian economy as it relates to the fishing sector, and product quality and standards in trade.

c) Fisheries management issues

Fisheries management issues are those involving generally the development of the fishing industry, Namibianisation and empowerment, and sustainability. In this report, however, these include questions on the Ministry of Fisheries and Marine Resources; fisheries management; the Marine Resources Act, empowerment, Monitoring, Control, and Surveillance ('MCS'); and compliance with fisheries law and regulations.

#### 4.1.4. THE ISSUES

**a) Ministry of Fisheries and Marine Resources**

Some issues facing the Ministry relates to its human resources. Apart from the remote question of the impact of the increase in the population growth, there are questions as to whether the training that Ministry officials get equips them sufficiently to perform satisfactorily their duties. Other questions relate to the concerns raised as the number of unemployed trainees of the Namibia Maritime and Fisheries Institute ('NAMFI') grows and the impact of the high prevalence of HIV/AIDS on the fisheries sector. Addressing the HIV/AIDS pandemic represents one of the greatest tasks confronting the government in particular and the different governments in Southern Africa in general.<sup>111</sup> The general public occasionally argues that government does (or does not) do enough to address the problem.

**b) Fisheries management**

As far as the fishery management is concerned, one basic issue has been whether the effectiveness of fisheries management is or should be measured in terms of biological sustainability (i.e. ensuring that fish stocks are not depleted) or in terms of economic and industrial growth (i.e. ensuring that contributions to GDP and businesses expand). Stated differently, the issue is how the government balances its interest to develop the fishing industry and the economy with its interest to ensure the reconstitution of fish stocks. Flowing from that basic issue are those concerning the necessity for the Ministry of Fisheries and Marine Resources to consult with businesses in the fishing industry on a

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<sup>111</sup> Nichols. *op.cit.* at (2004) p.330.

regular basis and the influence these businesses have on the Ministry's policy-making functions.<sup>112</sup>

The Minister of Fisheries and Marine Resources once said that the particularity of Namibia's fisheries management is that it is based on rights and not on licences. This management system is not without its disadvantages<sup>113</sup> and has been the subject of criticism from fishery experts' quarters.

### **c) Marine Resources Act**

As of yet, only one major structural weakness has been identified in the practical working of the Marine Resources Act, 27 of 2000.<sup>114</sup> It has been argued that the complexity of the Act has confounded compliance with its provisions.<sup>115</sup> This is so mainly because some provisions of the Marine Resources Act are not clear enough both to the officials of the Ministry of Fisheries and Marine Resources and to the fishing companies.<sup>116</sup>

### **d) Fish stocks**

Namibia's fisheries management, despite being extremely conservative, has been deficient in areas where fish stocks are depleted or overfished. For instance, the sardine stocks are depleted as ever before, while the recently developed orange roughy fishery blossomed and collapsed in just a matter of four short years.<sup>117</sup> Moreover, some fisheries experts have called into question the accuracy and reliability of estimations of stocks and the resulting establishments of appropriate TACs.

### **e) State revenues**

Seemingly a great cause for concern is the unreliability of information systems. Two fisheries experts stated that the calculations of revenue from the harvesting of marine resources are 'very unreliable'.<sup>118</sup> They have identified a number of weaknesses in the calculation, including the manual calculation of revenue at the factories by fisheries inspectors before it is entered in the database, cumbersome work routines when data is collected and registered, an inaccurate reconciliation process leading to almost a 100% reliance on industry figures, large backlogs in data entry, software problems and inadequate training in the use of the database.<sup>119</sup> The extent to which the existing taxation

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<sup>112</sup> David Boyer & Burger Oelofsen. *op.cit.* (2004), at p.336 please see II.4.(a) ('Institutional and organizational structures') below.

<sup>113</sup> Abraham Iyambo. *Managing fisheries with rights in Namibia: A Minister's perspective, use of property rights in fisheries management.* (Fremantle, West Australia: Proceedings of the Fish Rights 99 Conference, 2000).

<sup>114</sup> Erik Bergh & Sandy Davies. *op.cit.* (2004), p.295.

<sup>115</sup> *Ibidem.*

<sup>116</sup> Bergh claims that the complexity of the Act and the regulations made under it has confounded officials in the Ministry and the people who are supposed to comply with the law.

<sup>117</sup> Ussif Rashid Sumaila, David Boyer, Morten, D. Skogen & Stein Ivar Steinshamn. *op.cit.* (2004), p.4 and 5.

<sup>118</sup> Erik Bergh & Sandy Davies. 'Against all odds: Taking control of the Namibian fisheries'. In: Ussif Rashid Sumaila, David Boyer, Morten, D. Skogen & Stein Ivar Steinshamn. (eds). *Namibia's fisheries: Ecological, economic and social aspects.* (Eburon Academic Publishers: Netherlands, 2004), 289-318 at p.306.

<sup>119</sup> *Ibidem.*

system of fishing companies is deemed appropriate is a problem that has never been much debated.

#### **f) Economy**

Perceptions on economic issues include the redistribution or reinvestment of revenues generated by fisheries, the strength of the Rand/Namibian dollar, the impact of the low Total Allowable Catch ('TAC'), and the subsidization of the fishing industry. Firstly, Lange, a fisheries expert, claims that Namibia does not reinvest systematically the revenues (or resource rent) from fisheries in other forms of productive capital, thus missing an opportunity to build national wealth.

Secondly, both the government and economic analysts say that the big export earners like mining and fishing have been the hardest hit by the continuing relative strength of the Rand/Namibian dollar against other major currencies used by Namibia's fisheries trading partners. The Namibian Ministry of Finance stated in its budget that Namibia's trade deficit worsened, largely due to the uncompetitive exchange rate.<sup>120</sup> In 2003 and 2004, the overall fiscal position deteriorated due to lower tax receipts from export-orientated industries, including the fishing industry, caused by the continuing strength of the domestic currency. Namibia's marine fisheries sector was badly affected by the strength of the Namibian dollar, resulting in reduced profitability and, with a number of companies, in the fishing industry closing down.

A further question relates to the manner in which the Ministry of Fisheries and Marine Resources intend to protect the fishing companies trading in the local market against international competition, given that the government does not subsidize the fishing industry.

Finally, the low TAC has raised much heated debate. The fishing industry complains that it has not been consulted when the Ministry of Fisheries and Marine Resources set the TAC and also claims that Namibia is losing markets because fish exporters in Namibia cannot deliver due to the 'devastating' fish quotas.

#### **g) Product quality and standards in trade**

Quality control in food industries is a critical fisheries issue. As consumer awareness regarding fish quality increases, it becomes essential that Namibian fish products meet the highest standards. Plentiful harvests of fish are worthless if no consumers are willing to buy. The Ministry of Fisheries and Marine Resources is currently working toward maintaining the clean waters of Namibia, and ensuring that fish processing methods match the best possible.<sup>121</sup> This will make sure that the demand for fisheries products from Namibian waters remains competitive even amongst the fussiest consumers in the developed world. Currently, most of the big markets are setting standards for goods imported from other parts to ensure that the product is received by its consumers. Otherwise, it is of no use to them.

In that respect, questions as to the existence or non-existence of relevant structures are being asked among trade experts, especially structures relating to standardisation,

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<sup>120</sup> Namibia. Ministry of Finance. *Namibia Budget 2004/05 – 2006/07*. (Windhoek: Ministry of Finance, 2006). Available from <http://www.mof.gov.na>

<sup>121</sup> Namibia. Ministry of Fisheries and Marine Resources. Windhoek: Ministry of Fisheries and Marine Resources. March 2006. Available from <http://www.mfmr.gov.na>.

accreditation, certification, testing, inspections and metrology, to ensure that the quality of Namibian fish products meet the technical regulations of importing countries.

#### **h) Environment**

There is a general perception, especially from the scientific community, that climatic fluctuations may adversely affect the biological functioning of the Benguela marine ecosystem. The major implication of this is that efficient and effective fisheries management is the function of an extensive understanding of the dynamics of the Benguela marine ecosystem. The climatic conditions that determine prevailing winds, ocean currents, water temperature and fish stock distribution vary with temporary changes in the earth's atmosphere. As a result, the maximum sustainable yields of fish stock fluctuate from one season to the other. Various environmental conditions, which are difficult to predict could increase response to atmospheric changes linked to global warming. There is great concern over the state of Namibia's environment. Many experts predict significant long term environmental changes due to phenomena such as global warming and acid rain.<sup>122</sup>

#### **i) Empowerment**

One of the strategies to develop the fishing industry in a sustainable manner consists in 'empowering', or benefiting the historically disadvantaged Namibians. However, the implementation of empowerment in practice leaves much to be desired. The general public perception is that fisheries benefits mostly benefit the economically well-off businesses in the fishing industry and much less the previously disadvantaged Namibians.<sup>123</sup> Public perception and the government have both realized that the distribution of fisheries benefits is still problematic, even though the Namibianization programme of the government is helping to deal with the problem.<sup>124</sup>

The problem is that whilst it is true that a great number of Namibians have received fisheries benefits through amongst other the Namibianization policy, there is suggestion and evidence that the major beneficiaries are the already well-off economic players in the fishing industry and not so much the neediest or the previously disadvantaged Namibians. For instance, in 1998 one Namibian labour expert stated that fishing quotas tend to benefit a few individuals and not the disadvantaged communities as a whole.<sup>125</sup> He claimed that the criteria for obtaining quotas have effectively favoured business people, while community-based organizations have been unable to benefit.<sup>126</sup>

#### **j) Monitoring, Control and Surveillance (MCS)**

The present Monitoring, Control and Surveillance ('MCS') system has generally been very successful and is performing well. However, some experts have suggested that there are certain areas – compliance, efficiency and finances – where improvements on the

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<sup>122</sup> Ussif Rashid Sumaila, David Boyer, Morten, D. Skogen & Stein Ivar Steinshamn. (eds). *op.cit.* at p.4 and 5.

<sup>123</sup> See Alexactus T. Kaure. 2006. Living in a parasites' paradise. *The Namibian* 7 July. Also available from: <http://www.namibian.com.na/>.

<sup>124</sup> Ussif Rashid Sumaila, David Boyer, Morten, D. Skogen & Stein Ivar Steinshamn. *op.cit.* (2004), p.4.

<sup>125</sup> Herbert M. Jauch. *Affirmative action in Namibia: Redressing the imbalances of the past?* (Windhoek: New Namibia Books (Pty) Ltd., 1998). at p.147.

<sup>126</sup> *Ibidem.*

MCS system are much needed. Some fisheries expert have suggested a three-pronged solution,<sup>127</sup> namely:

(i) *Setting realistic compliance levels to guide MCS development and operational planning.*

It is imperative to explore what required level of compliance is realistic for each fishery.

(ii) *Improving the efficiency and effectiveness of MCS operational platforms.*

Improving the effectiveness and efficiency of the MCS system operations can be summed as decreasing the operation costs and increasing the incentives for compliance.

(iii) *Facing future financial implications.*

This alludes to the financial implications of changes in the fiscal framework of the MFMR and the MCS organisation. These are usually the result of fluctuations in fish stocks, capital repayment and running costs, changes in market demands, global political or social events or changes in the priorities of the Namibian government, to name just a few.<sup>128</sup> Whatever is the driving force, the result may bring higher landings and a greater demand on the present resources, or lower landings and a reduction in revenue and consequently in the funds available for MCS operations.<sup>129</sup> Optimal management of these new resources is vital if they are going to be cost effective investments.

#### **k) Compliance**

In matters of compliance, one important concern relates to the presence of foreign vessels entering illegally into Namibian waters and the reasons therefor. Another concern relates to the celerity of the decision-making process in response to serious violations of fisheries law and regulations. Reduced catches in many other important fisheries of the world, combined with growing demand for high-quality fish products, is expected to increase the risk of illegal, unreported and unregulated ('IUU') fishing. The major issue for the coastal countries of Southern Africa is the depletion of fish stocks by unsustainable levels of harvesting.<sup>130</sup> In most of the region, coastal and marine resources are under pressure from unsustainable rates and methods of harvesting resulting from increasing demand on marine resources for food (driven by population increase, rising demand by wealthy consumers, export markets, and tourists).<sup>131</sup> Demands come not only from the maritime countries, but also from inland nations. There will be a yield contraction in many important fisheries of the world. At least 70% of the world's commercially important marine stocks are reported to be either in a state of depletion, in the process of collapsing or slowly recovering.<sup>132</sup> Additionally, many marine ecosystems throughout the world have begun to display signs of irreversible damage.<sup>133</sup> Consequently, the Monitoring Control and Surveillance of the Ministry of Fisheries and Marine Resources will become even more demanding than it is today.

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<sup>127</sup> See Erik Bergh & Sandy Davies. *op.cit.* (2004), at p.312ff.

<sup>128</sup> *Ibidem.*

<sup>129</sup> *Ibidem.*

<sup>130</sup> Richard Sherman. *op.cit.* (2003).

<sup>131</sup> *Ibidem.*

<sup>132</sup> Government of the Republic of Namibia. *op.cit.* at (2004) p.157.

<sup>133</sup> *Ibidem.*

## **II. THE LEGAL REGIMES GOVERNING FISHERIES**

### **1. GLOBAL AND REGIONAL INTERNATIONAL LEGAL INSTRUMENTS AFFECTING NAMIBIA**

Article 144 of the Constitution of Namibia<sup>134</sup> stipulates that the general rules of public international law and international agreements binding upon Namibia form part of the law of Namibia. More particularly, the Minister of the MFMR is empowered by the Marine Resources Act to make regulations necessary or expedient for the carrying out and giving effect to the provisions of international fisheries agreements or any amendment thereof.<sup>135</sup> The Minister must publish in the national *Gazette* the texts of all conservation and management measures adopted under any international fisheries agreement to which Namibia is a party, and any measure published must be deemed to be regulation by the Minister in terms of the Marine Resources Act.<sup>136</sup>

By virtue of Article 144 of the Namibian Constitution, all principles of customary international law, including international environmental law, are applicable to Namibia. These principles of customary international law include the sovereignty over natural resources, the responsibility for environmental damage, the principle of preventive action, good neighbourliness and international co-operation, sustainable development, the precautionary principle,<sup>137</sup> the polluter-pays principle, and the principle of common, but differentiated responsibility.<sup>138</sup>

Namibia has ratified a number of international environmental legal instruments related to fisheries. For instance, the 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), the 1979 Bonn Convention on Migratory species (CMS), and 1993 Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas.

Moreover, Namibia has taken great pride in participating in regional fora and organizations to enhance fisheries management, such as<sup>139</sup>:

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<sup>134</sup> Act 1 of 1990.

<sup>135</sup> Section 37(1).

<sup>136</sup> Section 37(2).

<sup>137</sup> Although the binding nature of the principle of sustainable development and precaution is still uncertain, the principle of sustainable development is binding in Namibia to the extent that it is provided for in Article 95(l) of the Namibian Constitution, in Namibia's Marine Resource Policy (2004), and in the provisions of the Marine Resources Act.

<sup>138</sup> Sands, Philippe. *Principles of international environmental law*. Volume I: Frameworks, standards and implementation. (Manchester: Manchester University Press, 1995), at 181ff.

<sup>139</sup> Erik Bergh & Sandy Davies. *op.cit.* at (2004) p.314.

- (a) the Southern African Development Community (SADC) Fisheries Protocol;
- (b) the South East Atlantic Fisheries Organisation (SEAFO);
- (c) the International Commission for the Conservation of Atlantic Tunas (ICCAT);  
and
- (d) the International Convention Commission established by the Convention on Conservation of Antarctic Marine Living Resources (CCAMLR).

a) Southern African Development Community (SADC) Fisheries Protocol

The Southern African Development Community (SADC) has been in existence since 1980. It was formed as a loose alliance of nine majority-ruled States in Southern Africa known as the Southern African Development Coordination Conference (SADCC), with the main aim of coordinating development projects in order to lessen economic dependence on the then apartheid South Africa.<sup>140</sup> The transformation of the organization from a Coordinating Conference into a Development Community (SADC) took place on August 17, 1992 in Windhoek, Namibia, when the Declaration and Treaty was signed at the Summit of Heads of State and Government, thereby giving the organization a legal character.<sup>141</sup> The Member States are Angola, Botswana, the Democratic Republic of Congo, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, South Africa, Swaziland, United Republic of Tanzania, Zambia and Zimbabwe.<sup>142</sup>

Namibia ratified the Southern African Development Community ('SADC') Fisheries Protocol on 21 June 2002. The Southern African region straddles three great oceans: the Atlantic, the Indian and the Southern Ocean.<sup>143</sup> The coastline extends from Angola on the west (Atlantic) coast to Tanzania on the east (Indian Ocean) coast.<sup>144</sup> The coast is rich in fish, seafood, mangroves and coral reefs, as well as oil, diamonds and other mineral deposits.<sup>145</sup> The region has a total of eight coastal States: Angola, Democratic Republic of Congo, Mauritius, Mozambique, Namibia, Seychelles, South Africa and Tanzania.<sup>146</sup> The Exclusive Economic Zone (EEZ) of these countries is approximately 5 million sq. km, and in most instances the living marine resources of the SADC waters are shared between two or more countries.<sup>147</sup>

There are also increasing incidences of pollution from activities on land and from oil spills with a potential impact on rising sea levels including inundation of major coastal settlements with associated damage to ecosystems, infrastructure and displacement of populations.<sup>148</sup>

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<sup>140</sup> Southern Africa Development Community (SADC). *SADC profile*. July 2006. Available from:

<http://www.sadc.int/>

<sup>141</sup> *Ibidem*.

<sup>142</sup> *Ibidem*.

<sup>143</sup> Richard Sherman. *op.cit.* (2003).

<sup>144</sup> *Ibidem*.

<sup>145</sup> *Ibidem*.

<sup>146</sup> *Ibidem*.

<sup>147</sup> *Ibidem*.

<sup>148</sup> Richard Sherman. *op.cit.* (2003).

*Application of the Protocol*

The Protocol – which generally applies to fishing by nationals of State parties and related activities – also applies to living aquatic resources and aquatic ecosystems within the jurisdiction of a State party, and outside the areas under their jurisdiction, or high seas resources.<sup>149</sup> Finally, the scope of application of the Protocol extends to international activities outside SADC that promote the objectives of the Protocol.<sup>150</sup>

*Aims and objectives of the Protocol*

The aims and objectives of the Protocol is to promote responsible and sustainable use of the living aquatic resources and aquatic ecosystems of interest for State Parties in order to promote and enhance food security and human health, safeguard the livelihood of fishing communities, generate economic opportunities for nationals in the region, ensure that future generations benefit from these renewable resources, and alleviate poverty with the ultimate objective of its eradication.<sup>151</sup>

The guiding principles of the Protocol are set out in Article 4 thereof as follows: to endeavour and to ensure the participation of all stakeholders in the promotion of the objective of this Protocol; to take appropriate measures to regulate the use of living aquatic resources and protect the resources against over-exploitation, whilst creating an enabling environment and building capacity for the sustainable utilisation of the resources; and to promote gender equality and address any potential inequalities.

*Substantive provisions of the Protocol*

State parties have five responsibilities,<sup>152</sup> starting with the responsibility for taking measures, at national and international levels, suitable for the harmonisation of laws, policies, plans and programmes on fisheries aimed at promoting the objective of the Protocol. Secondly, it also calls on them to adopt measures to ensure that their nationals and juridical persons act in a responsible manner in the use of living aquatic resources in areas within and beyond the limits of national jurisdiction. Thirdly, with regards to authorising the use of vessels flying under their flags for fishing in the regions' waters, the Protocol states that this should only be granted where a Party is able to effectively exercise its responsibilities under the Protocol. Fourthly, it requests Parties to ensure that vessels or nationals fishing in waters covered by the Protocol take appropriate steps to ensure that they comply with measures adopted under the Protocol, and that they do not engage in any activity that undermines the effectiveness of such measures. Finally, it requests Parties to ensure that aquatic living resources in the areas under their national jurisdiction are not endangered by over-exploitation.

In relation to the management of high seas fishing resources, the Protocol urges parties to recognise that all States have the right for their nationals to engage in fishing on the high

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<sup>149</sup> Article 2, SADC Fisheries Protocol.

<sup>150</sup> Article 2.

<sup>151</sup> Article 3.

<sup>152</sup> Article 5 read with Article 8, which deals specifically with the harmonization of legislation..

seas, to work towards effective management of the high seas living aquatic resources,<sup>153</sup> to protect the aquatic,<sup>154</sup> to collaborate in the establishment of common positions and policies with regards to the effective management of the high seas living aquatic resources, and to support the activities of international organisations which conserve and manage living aquatic resources on the high seas.<sup>155</sup>

Under trade and investment, the Protocol calls on Parties to promote sustainable trade and investment in fisheries and related goods and services by reducing barriers to trade and investment; facilitating business contacts and exchange of information; and establishing basic infrastructure for the fisheries sector.<sup>156</sup> The Protocol further calls on parties to create favourable economic conditions to support sustainable fishing and processing activities in order to promote regional food security and fisheries development. With regard to the establishment of joint ventures, the Protocol urges Parties to give special consideration to ensuring sustainability of living aquatic resources and preventing overfishing and excess fishing capacity; promoting regional food security; promoting trade in fish products in the region; promoting value-added processing; establishing a favourable cross-border investment regime; and ensuring that nationals and their vessels comply with applicable domestic and international laws.<sup>157</sup>

As far as institutional arrangements are concerned, parties are urged to establish a national committee to oversee the implementation of the Protocol.<sup>158</sup> Other articles in the Protocol address international relations, management of shared resources, law enforcement, access agreements, aquaculture, human resources development, science and technology, information exchange, and financial provisions.<sup>159</sup>

#### b) Fisheries Management Organisation for the South East Atlantic (SEAFO)

SEAFO is a regional fisheries management organisation in South East Atlantic Ocean established to protect valuable fish stocks which are straddling between member States' EEZ's and the high seas in line with the provisions of the United Nations Law of the Sea ('UNCLOS')<sup>160</sup> and United Nations Fish Stocks Agreement ('UNFSA'). The objective of its Convention on the Conservation and Management of Fisheries Resources in the South East Atlantic Ocean ('SEAFO Convention') is to ensure the long-term conservation and sustainable use of the fishery resources in the Convention Area through the effective implementation of the Convention. The Convention Area includes exclusive economic zones of the coastal states in the region. Economic important SEAFO fish species in the Convention Area include sedentary, discrete and straddling species such as alfonsino, orange roughy, oreo dories, armourhead, sharks, deepwater hake and red crab.

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<sup>153</sup> Article 11.

<sup>154</sup> Article 14.

<sup>155</sup> Article 11.

<sup>156</sup> Article 16.

<sup>157</sup> Article 16.

<sup>158</sup> Article 19.

<sup>159</sup> For more information on the SADC Protocol and its Sector Coordinating Unit. see: <http://www.schoemans.com.na/sadc/>.

<sup>160</sup> Article 118, UNCLOS.

The inclusion of discrete high seas stocks takes the SEAFO Convention beyond the scope of the UNFSA.

The SEAFO Convention is the first to create a regional management organization after the adoption of UNFSA. The Convention was signed in April 2001 in Windhoek by Angola, the European Community, Iceland, Namibia, Norway, Republic of Korea, South Africa, United Kingdom on behalf of St. Helena and its dependencies of Tristan da Cunha and Ascension Islands and the United States of America. It entered into force on April 2003 after the deposit of instruments of ratification by Namibia and Norway, and approval by the European Community as required under Article 27 of the Convention. States that have participated in the negotiations, but have not signed the Convention are Japan, Russian Federation and Ukraine.

From the date of signatures in 2001, the Ministry of Fisheries and Marine Resources in Namibia acted as an Interim Secretariat. In March 2005 with the appointment of the staff, the permanent secretariat was opened in Walvis Bay, Namibia.

SEAFO comprises of the Commission, the Scientific Committee and the Compliance Committee as subsidiary bodies and the Secretariat. The Compliance Committee is yet to be formalised. The Commission has an oversight responsibility of the Organisation. The Scientific Committee provides scientific advice on the resources status and on harvesting levels taking into consideration, among others, ecosystem approach<sup>161</sup> and precautionary approach principles.<sup>162</sup> The institutions are designed to function according to the principles of cost-effectiveness and to expand only at the same pace as its workload.

### c) International Commission for the Conservation of Atlantic Tunas (ICCAT)

The International Commission for the Conservation of Atlantic Tunas is responsible for the conservation of tunas and tuna-like species in the Atlantic Ocean and adjacent seas.<sup>163</sup> The organization was established in 1969 at a Conference of Plenipotentiaries, which prepared and adopted the International Convention for the Conservation of Atlantic Tunas. It was signed in Rio de Janeiro, Brazil, in 1966. The official languages of ICCAT are English, French and Spanish.<sup>164</sup>

About 30 species are of direct concern to ICCAT, including Atlantic bluefin, skipjack, yellowfin, albacore and bigeye tuna; swordfish; billfishes; blue marlin; and sailfish.<sup>165</sup> Through the Convention, it is established that ICCAT is the only fisheries organization that can undertake the range of work required for the study and management of tunas and tuna-like fishes in the Atlantic.<sup>166</sup> Such studies include research on biometry, ecology,

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<sup>161</sup> Article 3, Convention on the Conservation and Management of Fisheries Resources in the South East Atlantic Ocean.

<sup>162</sup> Article 7.

<sup>163</sup> International Commission for the Conservation of Atlantic Tunas (ICCAT). *About ICCAT*. July 2006.

Available from: <http://www.iccat.es/>

<sup>164</sup> *Ibidem*.

<sup>165</sup> *Ibidem*.

<sup>166</sup> *Ibidem*.

and oceanography, with a principal focus on the effects of fishing on stock abundance.<sup>167</sup> The Commission's work requires the collection and analysis of statistical information relative to current conditions and trends of the fishery resources in the Convention area. The Commission also undertakes work in the compilation of data for other fish species that are caught during tuna fishing (“bycatch”, principally sharks) in the Convention area which are not investigated by another international fishery organization.<sup>168</sup>

d) International Convention Commission established by the Convention on Conservation of Antarctic Marine Living Resources (CCAMLR)

The Commission, established under Article IX of the Convention, gives effect to the Convention’s objectives and principles set out in Article II.<sup>169</sup> In balancing the conservation of Antarctic marine living resources and their rational use, the Commission has been in the forefront of organisations in the development of an ecosystem approach to managing such resources.<sup>170</sup> Based mainly on the advice from the Scientific Committee, the Commission determines catch levels for harvested species.<sup>171</sup> It also adopts measures aimed at minimising any potential impact that fishing activities may exert on non-target species.<sup>172</sup>

## 2. OVERVIEW OF DOMESTIC LEGISLATION

At Independence, the government proclaimed a 200 nautical miles zone EEZ,<sup>173</sup> in accordance with the provisions of the 1982 United Nations Convention on the Law of the Sea (‘UNCLOS’).<sup>174</sup> In 1992, the Namibian parliament enacted the Sea Fisheries Act,<sup>175</sup> which was the principal legislation on fisheries management until it was repealed and replaced by the Marine Resources Act (‘MRA’).<sup>176</sup>

<sup>167</sup> *Ibidem.*

<sup>168</sup> *Ibidem.*

<sup>169</sup> International Convention Commission established by the Convention on Conservation of Antarctic Marine Living Resources (CCAMLR). *Commission introduction*. July 2006. Available from: <http://www.ccamlr.org/>.

<sup>170</sup> *Ibidem.*

<sup>171</sup> *Ibidem.*

<sup>172</sup> *Ibidem.*

<sup>173</sup> Section 4(1), Territorial Sea and Exclusive Economic Zone Act 3 of 1990. In terms of section 1, read with section 2, Walvis Bay and Off-shore Islands Act, 1 of 1994, the government reintegrated into Namibia the town and the port of Walvis Bay, which was up to that date controlled by South Africa on 1<sup>st</sup> March 1994.

<sup>174</sup> See generally Namibia. Ministry of Fisheries and Marine Resources. *Namibia’s marine resources policy: Towards responsible development and management of the marine resources sector*. (Windhoek: Ministry of Fisheries and Marine Resources, 2005), at p.15ff.

<sup>175</sup> Act 29 of 1992.

<sup>176</sup> Act 27 of 2000.

The Constitution of Namibia, the first constitution in the world to provide for the protection of the environment,<sup>177</sup> stipulates in terms of Article 95(1):

“The State shall actively promote and maintain the welfare of the people by adopting, *inter alia*, policies aimed at the maintenance of ecosystems, essential ecological processes and biological diversity of Namibia and utilization of living natural resources *on a sustainable basis* for the benefit of all Namibians, both present and future; in particular, the Government shall provide measures against the dumping or recycling of foreign nuclear and toxic waste on Namibian territory.”<sup>178</sup>

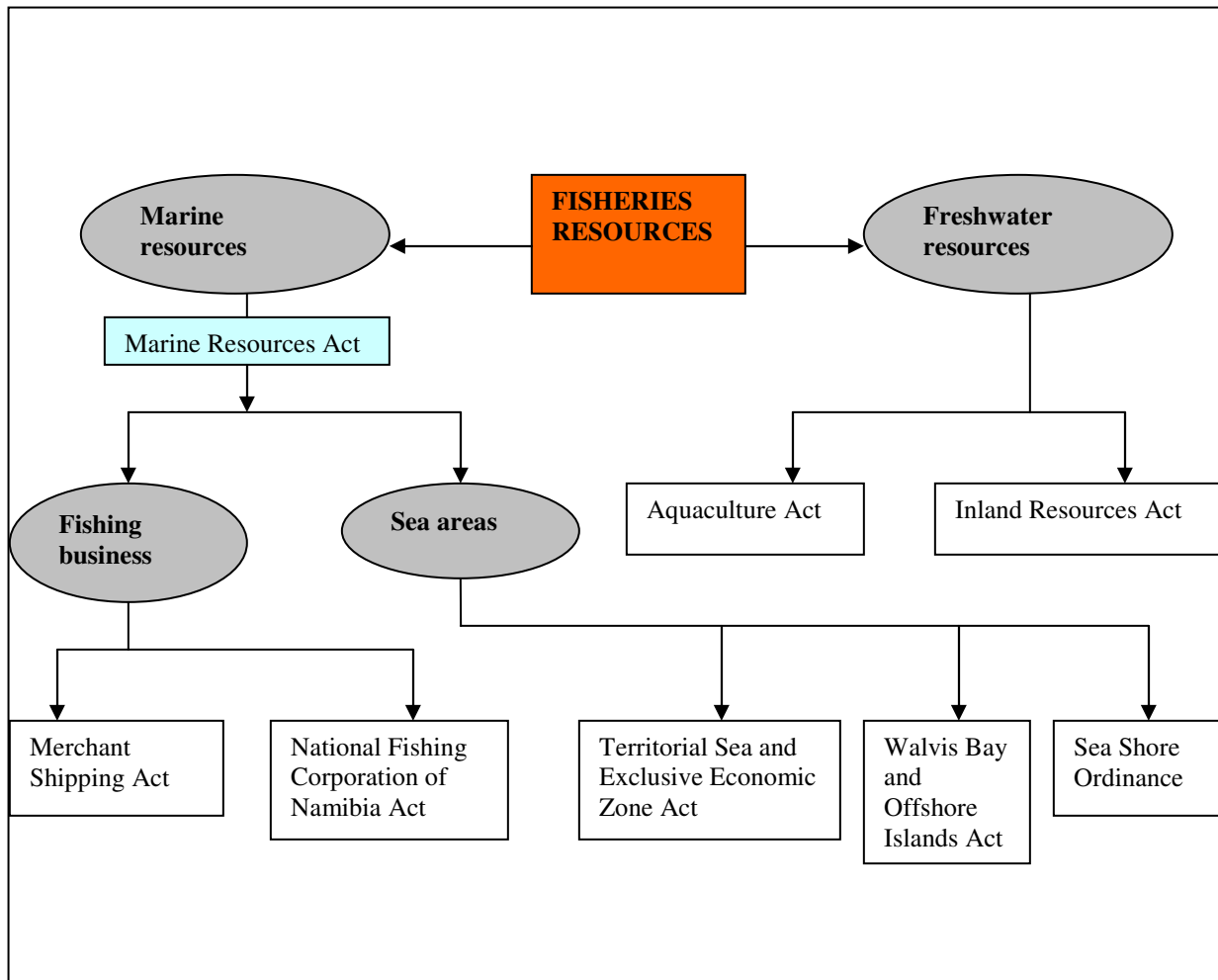
However, in terms of Article 101, Article 95(1) is not by itself legally enforceable by any Court, but nevertheless guides the Government in making and applying laws to give effect to Article 95(1). The courts are entitled to have regard to the Article 95(1) in interpreting any laws based on it, such the MRA.

a) Overview of fisheries domestic legislation

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<sup>177</sup> CIA World Factbook. *Namibia*. June 2006. Available from <http://www.cia.gov/cia/publications/factbook/geos/wa.html>.

<sup>178</sup> Emphasis added.



The diagram above demonstrates the pivotal role that the Marine Resources Act plays in the legislative framework for fisheries management in Namibia. The entire realm of marine resources is regulated by the Marine Resources Act.

Fisheries resources may conveniently be grouped in two broad categories, namely inland, or freshwater, fisheries resources and offshore, or marine, fisheries resources. The principal pieces of legislation for freshwater fisheries resources are the Aquaculture Act 18 of 2002, and the Inland Fisheries Resources Act 1 of 2003. On the other hand, the principal piece of legislation for marine fisheries resources is the Marine Resources Act 27 of 2000.

However, for the purposes of this report, we will confine further overview of fisheries domestic legislation to marine fisheries resources.

Firstly, Namibia has demarcated distinct sea areas as required by international law. The Territorial Sea and Exclusive Economic Zone of Namibia Act 3 of 1990, determines and defines the territorial sea, internal waters, exclusive economic zone and continental shelf of Namibia. Whilst the Sea Shore Ordinance 37 of 1998 determines the position of the high-water mark, the Walvis Bay and Offshore Islands Act squarely places the town and port of Walvis Bay and specified offshore islands under the jurisdictional reach of Namibia. Section 3(1) of the Marine Resources Act states that the southern and northern

limits of the territorial sea and exclusive economic zone shall be as determined by the President by proclamation in the *Gazette*, which boundaries may be described in such proclamation with reference to a map compiled for that purpose.

Secondly, the Namibian parliament has also legislated on fisheries resources as a business activity. The Merchant Shipping Act 57 of 1951, as amended, provides for the licensing and registration of fishing vessels, except for foreign flag vessels. In addition thereto, the National Fishing Corporation of Namibia Act 28 of 1991 has established the National Fishing Corporation of Namibia Ltd., which is a company formed with the object of exploiting marine resources, and promoting the establishment, development and efficiency of other businesses engaged in the fishing industry.

In view of its centrality in the management of marine fisheries resources, the provisions of the Act are now examined in greater detail.

#### b) Marine Resources Act, 27 of 2000

The Marine Resources Act, which entered into force on 1<sup>st</sup> August 2001, is the entry point to the vast complex of principles and rules that regulate, restrict and enable the exploitation of marine resources in Namibia. One drawback of such a relatively complex legal piece of legislation is that at times it is not fully understood by MFMR staff or fishers.<sup>179</sup> The Marine Resources Act repealed the Sea Fisheries Act<sup>180</sup> and the Sea Birds and Seals Protection Act,<sup>181</sup> and significantly improved on the previous legislation.<sup>182</sup> The Sea Fisheries Act was repealed as a result of some gaps observed and experienced, including maturation and dynamics of the fishing industry over the implementation period.<sup>183</sup> The Marine Resources Act retained all essential elements of the previous legislation including the conservation of marine resources on a sustainable basis.<sup>184</sup> The objective of the Marine Resources Act is broadened and covers all marine biological resources, incorporates the Seabirds and Seals Protection Act,<sup>185</sup> and includes Namibia's involvement and participation in international and regional fisheries activities in order to

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<sup>179</sup> Erik Bergh & Sandy Davies. *op.cit.* (2004), p.295. These authors also point out at the same page that, for instance, a lack of understanding by legal personnel of the potential gains made by illegal fishing resulted in very low fines for serious violations of the MRA, resulting in turn in high gains for the companies concerned.

<sup>180</sup> Act 29 of 1992. Section 64(4) of the Marine Resources Act stipulates that any person, who at the commencement of the Marine Resources Act, is or was deemed to be the holder of a right of exploitation under the Sea Fisheries Act shall be deemed to have been granted a right under the Marine Resources Act valid until such date as is indicated in the right of exploitation.

<sup>181</sup> Act 46 of 1973. Section 64(5) of the Marine Resources Act stipulates that any person, who at the commencement of the Marine Resources Act, is the holder of a permit under the Sea Birds and Seals Protection Act must be deemed to have been granted a right under the Marine Resources Act valid until such date as the Minister may determine.

<sup>182</sup> Act 29 of 1992. See also Food and Agriculture Organization of the United Nations. *Fisheries enforcement: Related legal and institutional issues: National, sub regional or regional perspectives.* (Food and Agriculture Organization of the United Nations, 2001),p.17.

<sup>183</sup> Namibia. Ministry of Fisheries and Marine Resources. *op.cit.* (2005), at p.15.

<sup>184</sup> *Ibidem.*

<sup>185</sup> Act 47 of 1973.

ensure compatibility and consistency with the international obligations, while ensuring that Namibia's interest in relevant areas is adequately represented and protected.<sup>186</sup>

In enacting the Marine Resources Act 27 of 2000, the intention of the Namibian parliament was to 'provide for the conservation of the marine ecosystem and the responsible utilization, conservation, protection and promotion of marine resources on a sustainable basis' and 'to provide for the exercise of control over marine resources.'<sup>187</sup> Section 1 of the Act defines the key terms, concepts and premises. "Marine resources" means all marine organisms, including, but not limited to, plants, vertebrate and invertebrate animals, monerans, protists (including seaweeds), fungi and viruses, and also includes guano and anything naturally derived from or produced by such organisms.

#### *Application of the Act*

Generally speaking, the Act applies to the management, protection and utilization of marine resources in Namibia and Namibian waters. Thus, the Act applies to the entire field of marine resources in Namibia, that is it extends substantively to all marine organisms, including, but not limited to, plants, vertebrate and invertebrate animals, monerans, protists (including seaweeds), fungi and viruses, and also includes guano and anything naturally derived from, or produced by, such organisms in Namibia and geographically to the Namibian waters (inland waters, the internal waters, the territorial sea, the exclusive economic zone, the seabed up to the high water mark, and private water).

#### *Administration of the Act*

The Minister of Fisheries and Marine Resources is the main administrator of the Act and wields considerable powers in administration of the Act and the management of marine resources in Namibia.<sup>188</sup> Thus far, no structural weakness has been found in the Marine Resources Act,<sup>189</sup> although the complexity of its provisions has adversely affected its implementation.<sup>190</sup> The most important provision of the Act from a political, administrative and legal point of view is Section 2 of the Act, which empowers the Minister to determine from time to time the general policy with regards to the conservation and utilization of marine resources in order to realize the greatest benefit for all Namibians both present and future. This includes the general control over,<sup>191</sup> and the power to determine the overall policy within which the Fisheries Observer Agency shall operate.<sup>192</sup>

Generally speaking, no member of the board of the Fisheries Observer Agency, member of the Marine Resources Advisory Council, member of a committee, or staff member of the MFMR is allowed to disclose any information obtained by him or her in carrying out

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<sup>186</sup> Namibia. Ministry of Fisheries and Marine Resources. *op.cit.* (2005), at p.15.

<sup>187</sup> Long title of the Marine Resources Act.

<sup>188</sup> The Minister is however entitled to delegate some of his powers, except his power to make regulations and subject to conditions as the Minister may determine, to any staff member of the MFMR or to any person employed by a local authority: Section 63.

<sup>189</sup> Food and Agriculture Organization of the United Nations. *op.cit.* (2004) at p.20.

<sup>190</sup> Erik Bergh & Sandy Davies. *op.cit.* (2004), p.295.

<sup>191</sup> Section 10, Marine Resources Act.

<sup>192</sup> Section 10(a).

his or her duty under this Act, except with the consent of the Minister, for the purposes of legal proceedings, and to the extent to which it may be necessary for the proper administration of the Act.<sup>193</sup> Moreover, the State, the Minister, a member of the board, a member of the Marine Resources Advisory Council or a person in the employment of the State may not be liable in respect of anything done or omitted to be done in good faith in the exercise of any power or discharge of any duty under the Act.<sup>194</sup> The Minister may exempt in writing any person who conducts scientific investigation, experimentation or research, or any particular category of persons permitted or required to perform any act under any other law which would or might result in a contravention of the Act.<sup>195</sup>

Section 45(1) establishes the Marine Resources Fund and states that the previous Sea Fisheries Fund established under the repealed Sea Fisheries Act<sup>196</sup> shall continue to exist under the name Marine Resources Fund, into which shall be paid moneys collected from levies, moneys appropriated by the Namibian parliament, interest on investments, moneys which may accrue from any other source, and interest on late payments. The fund is administered by the Permanent Secretary,<sup>197</sup> but the Minister is obliged to utilize the moneys available in the fund to defray the expenses of research, development, training and education relating to marine resources.<sup>198</sup> The Minister, on the other hand, may, from moneys available in the fund, arrange for the undertaking of research, development, training and education relating to marine resources by any competent institution of the State or any person.<sup>199</sup>

Section 46(1) establishes the Fisheries Observer Fund into which shall be paid moneys collected from levies, moneys appropriated by the Namibian parliament, interest on investments, moneys which may accrue from any other source, and interest on late payments. The fund is administered by the Permanent Secretary,<sup>200</sup> but the Minister is obliged to utilize the moneys available in the fund to finance the activities of the Fisheries Observer Agency.<sup>201</sup>

### c) Excursion: Aquaculture Act, 18 of 2002

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<sup>193</sup> Section 59(1).

<sup>194</sup> Section 60(1). However, in the event of any of the aforementioned persons intentionally contravening the provisions of the Act, any civil proceedings against the State or any such persons must be instituted within twelve months: Section 60(3).

<sup>195</sup> Section 62.

<sup>196</sup> Section 23, Sea Fisheries Act, 29 of 1992.

<sup>197</sup> Section 45(4) and section 45(5).

<sup>198</sup> Section 45(5).

<sup>199</sup> Section 45(3).

<sup>200</sup> Section 46(3) and section 46(4).

<sup>201</sup> Section 46(2).

### *Definitions in the Act*

In enacting the Aquaculture Act 18 of 2002, the intention of the Namibian parliament was to ‘regulate and control aquaculture activities; to provide for the sustainable development of aquaculture resources; and to provide for related matters.’<sup>202</sup>

Section 1 of the Act defines the key terms, concepts and premises: “aquaculture” means the farming and ranching of aquatic organisms; “aquaculture facility” includes any equipment, construction or site in which aquaculture is conducted; “aquaculture product” means the aquatic organisms or part thereof, whether alive or dead, which are being, or have been farmed in an aquaculture facility in Namibia, or which are being, or have been ranching, in Namibian waters; “aquatic organisms” include live forms of fauna and flora that exist in water, excluding mammals, birds, amphibians and reptiles, except for those amphibians and reptiles declared to be aquatic organisms by the regulations; “Namibian waters” means the inland waters of Namibia as well as the internal waters and territorial sea, as defined in the Territorial Sea and Exclusive Economic Zone of Namibia Act 1990 (Act No. 3 of 1990) and includes the seabed up to the high water mark and further includes private water as defined under Section 1 of the Water Act;<sup>203</sup> “sea ranching” means the type of aquaculture in which aquaculture products are intentionally released, without restriction, into the marine environment for the purpose of harvesting them when they mature; and “site” means an area of land or water, including the seabed, in respect of which a person has applied for a licence.

### *Application of the Act*

The Act applies to the entire field of aquaculture in Namibia, which extends substantively to the farming and ranching of aquatic organisms in Namibia and geographically to the Namibian waters (inland waters, the internal waters, the territorial sea, the seabed up to the high water mark, private water). An area excluded from the ambit of the Aquaculture Act is that of aquaculture in conservation areas or other protected areas, which are subject to the specific law governing such proclaimed conservation or protected areas.<sup>204</sup>

### *Administration of the Act*

The Ministry of Fisheries and Marine Resources is the administrator of the Act, especially the Minister,<sup>205</sup> the Permanent Secretary and the staff of the Ministry.<sup>206</sup>

As regards to the administrative powers of the Minister, the two major sections of the Act are Sections 2 and 43. Section 2 of the Act – arguably the most important provision of the Act from a political, administrative and legal point of view – empowers the Minister, in consultation with the Aquaculture Advisory Council,<sup>207</sup> to determine aquacultural policy, with a view to promote sustainable aquaculture;<sup>208</sup> the management, protection and

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<sup>202</sup> Long title of the Aquaculture Act.

<sup>203</sup> Act 54 of 1956.

<sup>204</sup> Section 30.

<sup>205</sup> See, especially, section 2(1) of the Act.

<sup>206</sup> See, especially, section 10(1) of the Act. See also sections 24(1) (registration of licences – Permanent Secretary)

<sup>207</sup> Section 2(2).

<sup>208</sup> Section 2(1)(a).

conservation of marine and inland aquatic ecosystems;<sup>209</sup> and the promotion of aquaculture projects.<sup>210</sup>

Furthermore, by virtue of section 43, the Minister has a wide discretionary power ‘to make regulations in relation to *any matter* permitted or required’,<sup>211</sup> to be prescribed in terms of the Act or ‘which the Minister considers necessary or expedient’ to prescribe for achieving the purposes of the Act.<sup>212</sup> Thus, Section 2 and 43 are the principal legal bases on which most administrative decisions in pursuance of the purposes of the Act will be founded.

The cornerstone of the Aquaculture Act, and the main instrument for the administration of aquacultural activities, is the issue of licences. Effectively, a person may not engage in aquaculture without a licence issued by the Minister<sup>213</sup>, and he or she who does engage in aquaculture without a licence will have his or her aquaculture facility taken over by the Minister<sup>214</sup> or, worse still, will face criminal prosecution<sup>215</sup> and will, on conviction, be sentenced to a prison term or a fine or both.<sup>216</sup>

An application for a licence must be made to the Minister in the prescribed manner and form and be accompanied by the payment of licence fees<sup>217</sup> and such documents and information as the Minister may require.<sup>218</sup> The Act creates a criminal offence where the applicant knowingly provides false information in relation to an application for a licence.<sup>219</sup> The applicant shall give notice of the application, at his or her expense, to persons, including the public in general, as determined by the Minister, and the notice shall invite all those persons to submit to the Permanent Secretary within thirty days from the date of the notice any objections to, or representations in connection with, the application.<sup>220</sup> In the event of more than one person applying for a licence covering all or part of the same site, preference in relation to that site shall be given to the applicant who, in the Minister’s opinion, is the best overall applicant based on the information contained in the applications.<sup>221</sup>

On receiving the application, the Minister has the power to issue the licence,<sup>222</sup> issue the licence subject to any conditions the Minister considers appropriate,<sup>223</sup> reject the application,<sup>224</sup> suspend or cancel an existing licence,<sup>225</sup> or renew it.<sup>226</sup> In the event of the

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<sup>209</sup> Section 2(1)(b).

<sup>210</sup> Section 2(1)(c).

<sup>211</sup> Emphasis added.

<sup>212</sup> Section. 43(1); 43(2)(b)(content of licence); 43(2)(f)(measures in relation to diseased or harmful organism); 43(2)(f)-(g)(import and export of live aquatic organisms);.

<sup>213</sup> Section 11(1)(a).

<sup>214</sup> Section 21(1)(c).

<sup>215</sup> Section 39(e).

<sup>216</sup> Section 41(1)(b).

<sup>217</sup> Section 15.

<sup>218</sup> Section 12(1).

<sup>219</sup> Section 39(o).

<sup>220</sup> Section 12(4).

<sup>221</sup> Section 12(6).

<sup>222</sup> Section 13(3)(a).

<sup>223</sup> Section 13(3)(b) and 14(4).

<sup>224</sup> Section 13(3)(c).

<sup>225</sup> Section 19(1).

<sup>226</sup> Section 18(2).

Minister rejecting an application, he or she must in writing notify the licensee of the decision and the reasons for the decision.<sup>227</sup> However, the relevant considerations the Minister must take into account include whether the applicant must obtain any authorization, permit or approval required by laws relating to land or water use;<sup>228</sup> whether, where required,<sup>229</sup> the applicant has produced an environmental clearance for the project has been issued in accordance with the relevant laws;<sup>230</sup> and where the applicant is not the owner of the site, whether the application is accompanied by the written consent of the owner of the site authorising the applicant to use the site.<sup>231</sup> In addition thereto, the relevant considerations the Minister may take into account include any representations or objections received;<sup>232</sup> whether the grant of a licence will adversely affect the environment;<sup>233</sup> and whether the site in respect of which a licence is sought is unsuited for aquaculture or for the type of aquaculture planned, having regard to its general characteristics, traffic requirements, or the risk of conflict with other activities being undertaken or proposed in the vicinity of the proposed site.<sup>234</sup>

The minimum contents of a licence are prescribed by the Act. A licence is generally non-transferable<sup>235</sup>. It must be issued for the site defined in the licence and must specify the species of aquatic organisms that may be farmed and harvested at the site.<sup>236</sup> Moreover, it confers upon the licensee an exclusive right to farm and harvest aquaculture products within the site defined in the licence<sup>237</sup> and, where issued for sea ranching purposes, it confers upon the licensee an exclusive right to release and harvest aquaculture products within the site defined in the licence.<sup>238</sup> Over and above these minimum provisions, the Minister may further subject the issue of a licence to specified conditions.<sup>239</sup>

In the administration of aquacultural activities, there are a specified number of management and control measures that the MFMR may or must adopt.<sup>240</sup> Three of these measures deserve mentioning. Firstly, where there is deemed to be a significant risk to any aquatic organism or the environment, the MFMR Permanent Secretary may, upon the advice of the Minister of Health and Social Services,<sup>241</sup> (a) isolate, quarantine, or treat

<sup>227</sup> Section 20. This provision is in line with the decision of the Supreme Court of Namibia in the case of *Sikunda v. Minister of Home Affairs* where it was held that administrative justice requires that reasons for administrative decisions be given, without which an aggrieved person would not be able to exercise his right to be heard.

<sup>228</sup> Section 13(1)(b).

<sup>229</sup> Section 12(2).

<sup>230</sup> Section 13(1)(c).

<sup>231</sup> Section 13(1)(d).

<sup>232</sup> Sections. 13(2)(a) and 12(4).

<sup>233</sup> Section 13(2)(b).

<sup>234</sup> Section 13(2)(c).

<sup>235</sup> Section 23(1). Except when the Minister gives his prior written approval.

<sup>236</sup> Section 14(1).

<sup>237</sup> Section 14(2).

<sup>238</sup> Section 14(3). Section 39(a) criminalizes the release of any aquaculture products or aquatic organisms or both from an aquaculture facility without lawful authority except where such release is based on section 14(3).

<sup>239</sup> Section 14(4).

<sup>240</sup> Part IV of the Act.

<sup>241</sup> Section 25(2).

any diseased or harmful aquatic organism; (b) destroy or restrict the movement of any diseased or harmful aquatic organism; and (c) quarantine any suspect aquaculture facility. In addition thereto, a failure on the part of any licensee or other person engaged in aquaculture to report immediately to the MFMR Permanent Secretary or an inspector about the presence of any diseased or harmful aquatic organism, will result in a suspension or cancellation of his or her licence<sup>242</sup> and is a criminal offence,<sup>243</sup> punishable with a prison term or a fine or both.<sup>244</sup> Secondly, where test results show that the water quality is unsuitable for aquaculture<sup>245</sup> or that the aquaculture products are not fit for human consumption,<sup>246</sup> the Minister must immediately by notice close an aquaculture facility and may prohibit the sale or marketing of aquaculture products farmed therein. A person is guilty of an offence that knowingly harvests and sells or offers or displays for sale aquaculture products from an aquaculture facility that has been closed by the Minister<sup>247</sup> and such person will be amenable to a prison term, a fine or both.<sup>248</sup> Finally, the Minister may seize, hold, quarantine, disinfect or destroy any live aquatic organisms that have been imported or that are destined for import or export,<sup>249</sup> and the Act criminalizes and punishes the import or export of aquatic organisms without the written permission granted by the Minister.<sup>250</sup>

### *Structures of the Act*

There are two important structural arrangements made in the Aquaculture Act: the Aquaculture Advisory Council and the ministerial power to create aquaculture development zones.

Section 3 of the Act establishes a council, known as the Aquaculture Advisory Council, to advise the Minister in relation to any matter on which the Minister is required to consult the Advisory Council under the Aquaculture Act, any matter which the Minister refers to the Advisory Council for investigation and advice and on matters relating to aquaculture policy. This provision confirms the government commitment to consult with the industry and scientists.<sup>251</sup> Effectively, the Advisory Council must consist of a minimum of 10 members,<sup>252</sup> including the Permanent Secretary; two staff members of the MFMR;<sup>253</sup> one person nominated by the Association of Regional Councils;<sup>254</sup> one person nominated by the Association of Local Authorities;<sup>255</sup> one person nominated by the Council of Traditional Leaders;<sup>256</sup> four persons who, in the opinion of the Minister, have knowledge and expertise in matters relating to aquaculture, fisheries and ecosystems or in

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<sup>242</sup> Section 19(1) (e).

<sup>243</sup> Section 39(j).

<sup>244</sup> Section 40(1) (a).

<sup>245</sup> Section 26(3) (a).

<sup>246</sup> Section 26(3) (b).

<sup>247</sup> Section 39(h).

<sup>248</sup> Section 40(1) (b).

<sup>249</sup> Section 28(4).

<sup>250</sup> Sections. 28(1), 39(c), and 40(1)(b).

<sup>251</sup> See I.3 (10) above.

<sup>252</sup> Section 4(1).

<sup>253</sup> Section 4(1) (a).

<sup>254</sup> Section 4(1) (b).

<sup>255</sup> Section 4(1) (c).

<sup>256</sup> Section 4(1) (d).

matters on which the Minister is, under the Act, required to consult the advisory council.<sup>257</sup> From the composition of the Advisory Council, therefore, it is evident that the parliament intends the council to involve organs at every level of government, as shown by the mention in the council of the association of regional councils, the association of local authorities and the council of traditional leaders.<sup>258</sup> The members of the Advisory Council shall serve for 3 years and at the expiry of that period shall be eligible for re-appointment.<sup>259</sup> The Act further provides, *inter alia*, disqualification for membership,<sup>260</sup> vacation of office and filling of vacancies,<sup>261</sup> meetings of Advisory Council,<sup>262</sup> and the various committees of the Advisory Council.<sup>263</sup>

As regards aquaculture development zones, the parliament of Namibia outlined the statutory purposes of aquaculture development zones as follows:<sup>264</sup>

- (a) to attract, promote or increase the development of aquaculture facilities in areas which are particularly suitable for aquaculture;
- (b) to manage and control aquaculture in those areas;
- (c) to encourage the transfer of technology and the development of responsible aquaculture practices;
- (d) to generate or increase employment in aquaculture;
- (e) to protect aquaculture developments; and
- (f) to ensure responsible planning of aquaculture.

The Minister may by notice in the *Gazette* and by regulation<sup>265</sup> create and structure aquaculture development zones<sup>266</sup> More specifically, the Minister may, by notice in the *Gazette*, specify restrictions and conditions on the conduct of aquaculture in an aquaculture development zone, or part thereof, as the Minister considers necessary, including<sup>267</sup> the aquatic species which may be farmed,<sup>268</sup> the conditions subject to which aquaculture and any related activities may be conducted,<sup>269</sup> the number and size of the aquaculture facilities that may be established within an aquaculture development zone, and the carrying capacity of the aquaculture zone concerned.<sup>270</sup>

Following the collaborative relationship of the Minister and the aquaculture advisory council,<sup>271</sup> before declaring a place as an aquaculture development zone, the Minister must consult with the Advisory Council and any Ministry having jurisdiction in the

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<sup>257</sup> Section 4(1) (e).

<sup>258</sup> See also section 36(2).

<sup>259</sup> Section 6.

<sup>260</sup> Section 5.

<sup>261</sup> Section 7.

<sup>262</sup> Section 8.

<sup>263</sup> Section 9.

<sup>264</sup> Section 32.

<sup>265</sup> Section 43(2) (h).

<sup>266</sup> Section 33(1). See also section 33(4).

<sup>267</sup> Section 34.

<sup>268</sup> Section 34(a).

<sup>269</sup> Section 34(b).

<sup>270</sup> Section 34(c).

<sup>271</sup> Section 2(1).

proposed aquaculture development zone, and undertake an environmental impact assessment with regard to the aquaculture development zone and establish the development objectives of the aquaculture development zone.<sup>272</sup>

Furthermore, the Minister may, by notice in the *Gazette*, in order to protect the aquaculture activities undertaken in an aquaculture development zone, specify restrictions and conditions on the conduct of activities and uses in<sup>273</sup> the aquaculture development zone,<sup>274</sup> the waters draining into an aquaculture development zone,<sup>275</sup> and any land or water area adjacent to an aquaculture development zone.<sup>276</sup>

#### *Enforcement of the provisions of the Act*

Inspectors are given the primary responsibility for the enforcement of the provisions of Act. Part VII of the Aquaculture Act provides for the enforcement of the Act. Under Section 36(1), the Minister has the power to designate any staff member in the MFMR as an inspector for the purposes of the Act. To accomplish their mission, inspectors have specified powers to enforce the Act and its penalty<sup>277</sup> and forfeiture clauses.<sup>278</sup> Amongst the most notable offences created by the Act are<sup>279</sup> releasing without lawful authority; causing the release of any aquaculture products, aquatic organisms or both from an aquaculture facility;<sup>280</sup> importing or exporting, without the written permission of the Minister, any aquatic organism;<sup>281</sup> engaging in aquaculture without a licence;<sup>282</sup> knowingly harvesting and selling or offering or displaying for sale diseased or toxic aquaculture products, or aquaculture products from an aquaculture facility that has been closed by the Minister;<sup>283</sup> failing to keep such records or to provide such information required by the Act;<sup>284</sup> failing to report the presence of a disease or harmful organism or to take measures to prevent the spread of disease or any harmful organism or to treat or destroy any diseased or harmful aquatic organism;<sup>285</sup> (l) failing to provide to an inspector his or her name and address;<sup>286</sup> failing to remove an aquaculture facility, or part thereof, or to restore a site;<sup>287</sup> contravening the terms and conditions of a licence;<sup>288</sup> and

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<sup>272</sup> Section 33(2).

<sup>273</sup> Section 33(3).

<sup>274</sup> Section 33(3) (a).

<sup>275</sup> Section 33(3) (b).

<sup>276</sup> Section 33(3) (c).

<sup>277</sup> Section 37(1). However, section 41 exonerates from criminal liability the Minister, the Permanent Secretary or any employee of the State or of a regional council or local authority council is not personally liable for anything done or not done in good faith.

<sup>278</sup> Section 42.

<sup>279</sup> Sections. 39 and 40.

<sup>280</sup> Section 39(a).

<sup>281</sup> Section 39(c).

<sup>282</sup> Section 39(e).

<sup>283</sup> Section 39(h).

<sup>284</sup> Section 39(i).

<sup>285</sup> Section 39(j).

<sup>286</sup> Section 39(l).

<sup>287</sup> Section 39(m).

<sup>288</sup> Section 39(n).

knowingly providing false information in relation to an application for a licence or in relation to aquaculture or to an aquaculture facility.<sup>289</sup>

On the commission or suspicion that any of the aforementioned offences have been committed, inspectors have generally the power to stop, enter, search and seize. Any attempt to assault, obstruct, threaten or intimidate an inspector in the exercise of his or her powers constitutes a criminal offence.<sup>290</sup> He may *inter alia* enter any aquaculture facility and inspect that aquaculture facility, its structure, equipment, tanks and ponds; any aquaculture product therein and any document or record required under this Act;<sup>291</sup> stop, enter, search (and seize)<sup>292</sup> any vehicle, vessel or aircraft which may be transporting aquaculture products;<sup>293</sup> seize any aquatic organism or aquaculture product or any sample of an aquatic organism or aquaculture product, which the inspector suspects is diseased or harmful;<sup>294</sup> require any person who may have information concerning a possible offence to furnish his or her name and address, and failure to furnish such information is a criminal offence.<sup>295</sup>

### 3. INSTITUTIONAL AND ORGANIZATIONAL STRUCTURES

The MFMR consists at present of four directorates, one subdivision, and is responsible for two parastatals. More specifically, the four directorates are:

- (a) The Directorate of Resource Management (responsible for research activities);
- (b) the Directorate of Operations (in charge of operations and administration);
- (c) the Directorate of Policy, Planning and Economics (responsible for the development of the fisheries sector);<sup>296</sup> and
- (d) the Directorate of Aquaculture (responsible for the development of aquaculture)<sup>297</sup>

The subdivision of the MFMR is the SADC sector co-ordinating Unit, which is responsible for the development of the fisheries sector in the Southern African Development Community (SADC) region.

The two parastatals are:

- a) *The National Fishing Corporation of Namibia Ltd. ('Fishcor')*.  
It is the government's fishing and fish-processing, and product value-adding group.
- b) *The Namibia Maritime and Fisheries Institute ('NAMFI')*.  
It is the government's fisheries institution of learning and training.

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<sup>289</sup> Section 39(o).

<sup>290</sup> Section 39(d).

<sup>291</sup> Section 37(1) (a).

<sup>292</sup> Section 37(2) (a).

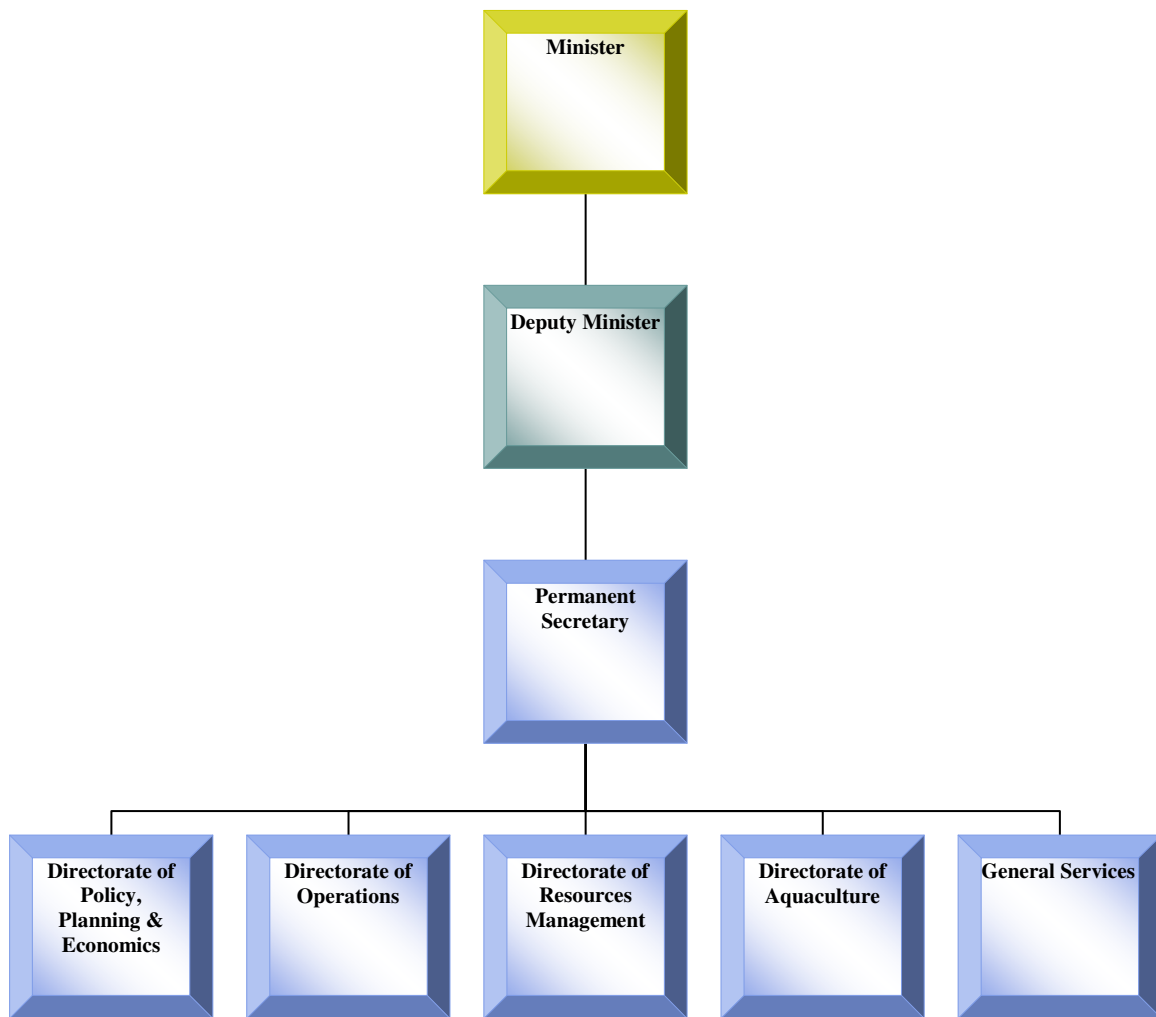
<sup>293</sup> Section 39(b).

<sup>294</sup> Section 39(e).

<sup>295</sup> Section 39(l).

<sup>296</sup> Added to the MFMR's structure in 1998.

<sup>297</sup> Added to the MFMR's structure after 1998.



The functions of the different parts of the Ministry are as follows:

*(a) Directorate of Resource Management*

Resource Management exists to provide information and advice needed to manage the sustainable utilization and conservation of living aquatic resources. The main objectives of the directorate are to:

1. provide advice on the state of commercially important marine fish stocks and recommendation on their appropriate yield to enable total allowable catches (TAC) to be determined;
2. provide advice so that policy on harvesting activity and techniques can be formulated. The formulation of the policy is achieved by providing appropriate management measures in relation to species and fish size limitations, closed

- seasons, closed areas, and limitations on the types and effectiveness of fishing gear; and
3. provide advice on the inter-relationship of the environment and the impact this has on fish stocks.

*(b) Directorate of Operations*

This directorate has the responsibility of monitoring, control and surveillance (the MCS system). The MCS system is the regulatory component of fisheries management within the 200 nautical mile EEZ. The main objectives are to:

1. restrict fishing activity to those entitled to do so;
2. ensure that fishing activity is conducted within legal and administrative guidelines with the assistance of the MCS system; and
3. ensure that revenue from landings is correctly calculated.

*(c) Directorate of Policy, Planning and Economics*

The purpose of the Directorate of Policy, Planning and Economics is to manage the development of the fisheries sector both nationally and internationally. The main objectives are to:

1. ensure that fisheries activity contributes to Namibia's socio-economic development goals;
2. create a conducive environment in which the fisheries sector can grow to its full potential; and
3. ensure that Namibia is properly represented internationally and that national fisheries interests are protected; administer fisheries legislation and regulations; manage the collection of fees generated by fishing activities; manage the collection and preparation of information and fishery statistics.

*(d) Directorate of Aquaculture*

The main responsibilities are to:<sup>298</sup>

1. ensure the responsible and sustainable development of aquaculture to achieve socio-economic benefits and environmental sustainability;
2. to facilitate an efficient, coordinated administrative and institutional framework for aquaculture;
3. ensure that the genetic diversity and integrity of the aquatic ecosystem is maintained; and
4. promote responsible aquaculture production practices.

*(e) SADC sector co-ordinating Unit*

The Southern African Development Community (SADC) includes six coastal countries: Angola, Mauritius, Mozambique, Namibia, South Africa and Tanzania. The co-ordination of the sector for marine fisheries and resources lies in the hands of Namibia, under the auspices of the MFMR. The MFMR established the SADC sector co-ordinating unit, for the task of providing the region with leadership and guidance in the formulation,

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<sup>298</sup> Namibia. Ministry of Fisheries and Marine Resources. *op.cit.* (2005), p.3.

evaluation, management and implementation of specific policies, programmes and projects for the development of the sector.

*(f) Namibia Maritime and Fisheries Institute ('NAMFI')*

The NAMFI is a rapidly developing maritime training institution with the main aim to be the leading fisheries training institute in the SADC region. Also, to satisfy the need of individuals, the government, fisheries and private sector by providing quality training in the maritime and fisheries field regionally. Under the leadership of the Board of Trustees, NAMFI strives to encourage financial contributions, promote openness and engender commitment for effectiveness.

*(g) Marine Resources Advisory Council (MRAC)*

One of the key strategies on which the government's marine fisheries policy stands is research development.<sup>299</sup> Research development in the fisheries sector has involved, amongst others, utilizing the services of expert consultants to assist government fisheries scientists.<sup>300</sup> In organizational structural terms, most of the primary research on fisheries resources is conducted by state-run research institutes, primarily the National Marine Information and Research Centre ('NatMIRC') within the Directorate of Resource Management of the MFMR.<sup>301</sup> This research is in terms of section 45(2) of the Marine Resources Act largely funded by levies on commercial catches and paid into the Marine Resources Fund.<sup>302</sup> In recent times research has also been supported by the use of commercial vessels to assist with resource surveys on hake, horse mackerel, orange roughy and sardine.<sup>303</sup>

Part V of the Marine Resources Act provides for the establishment, constitution, and operation of the Marine Resources Advisory Council ('MRAC').<sup>304</sup> The MRAC is a broad-sectored group mandated to advise the Minister in relation to (1) any matter on which the Minister is required to consult the MRAC under the MRA and (2) any matter which the Minister refers to the MRAC for investigation and advice.<sup>305</sup>

The MRAC is appointed by the Minister in consultation with the fishing industry and constituted,<sup>306</sup> taking gender balance into consideration,<sup>307</sup> by five experts in matters relating to marine resources, one member of the MFMR, and five representatives of the fishing industry.<sup>308</sup> It is worth noting that these representatives are appointed for their expertise and experience in the industry (and not to represent their own interests). The

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<sup>299</sup> See I.4.(b)(aa) ('structural policies') below.

<sup>300</sup> Government of the Republic of Namibia. *op.cit.* (2004), p. 161.

<sup>301</sup> David Boyer & Burger Oelofsen. *op.cit.* (2004), p.337.

<sup>302</sup> Read with section 44(3) of the Act, which empowers the Minister of Fisheries and Marine Resources to power to impose levies to be paid into the Marine Resources Fund.

<sup>303</sup> David Boyer & Burger Oelofsen. *op.cit.* (2004), p.337. 'A Marine Resources Fund levy is imposed per tonne of landed catch to finance fisheries research and training initiatives': Paul Nichols. *op.cit.* (2004), p.324..

<sup>304</sup> Section 24, Marine Resources Act.

<sup>305</sup> Section 24.

<sup>306</sup> Section 25(2).

<sup>307</sup> Section 25(6).

<sup>308</sup> Section 25(1).

institutions represented therein are trade unions, the state conservation Ministry, financial institutions and the University of Namibia.<sup>309</sup>

The function of the MRAC is to advise the Minister of Fisheries and Marine Resources in relation to (1) any matter on which the Minister is required to consult the MRAC under the MRA and (2) any matter which the Minister refers to the MRAC for investigation and advice.<sup>310</sup> Scientific recommendations for harvesting of all major resources are presented to the MRAC, which in turn makes recommendations to the MFMR after considering socio-economic factors and the industry's perception of the state of the resource.<sup>311</sup> The Minister, after consultation with the Ministerial Fisheries Management Committee and other senior managers within the MFMR (and often the scientists responsible for making recommendations), submits management recommendations to Cabinet for final endorsement.<sup>312</sup>

The Act also provides for the committees of the MRAC<sup>313</sup> and the disqualification,<sup>314</sup> term of office,<sup>315</sup> vacation of office,<sup>316</sup> meetings,<sup>317</sup> and the remuneration of the MRAC.<sup>318</sup>

The structural relationship of the MRAC with other state institutions or organs can be graphically presented as follows:

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<sup>309</sup> David Boyer & Burger Oelofsen. *op.cit.* (2004), p.337.

<sup>310</sup> Section 24.

<sup>311</sup> David Boyer & Burger Oelofsen. *op.cit.* (2004), p.337.

<sup>312</sup> *Ibidem.*

<sup>313</sup> Section 30.

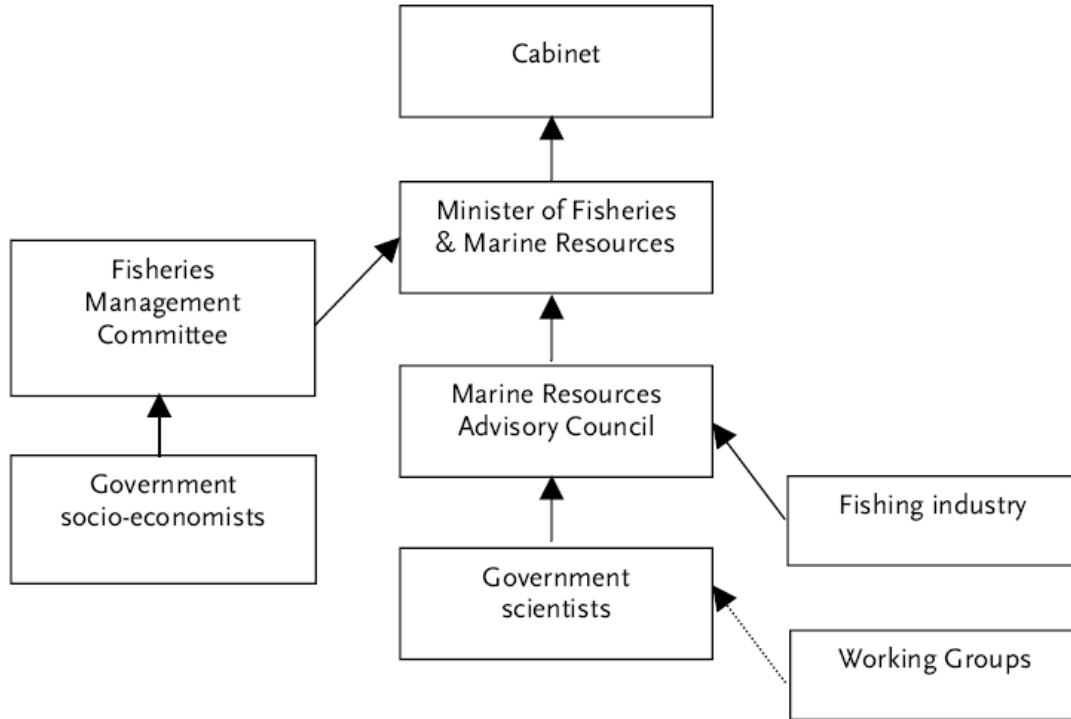
<sup>314</sup> Section 26.

<sup>315</sup> Section 27.

<sup>316</sup> Section 28.

<sup>317</sup> Section 29.

<sup>318</sup> Section 31.



Source: David Boyer & Burger Oelofsen. Co-management: Namibia's experience with two large scale industrial fisheries – sardine and orange roughy. In: Ussif Rashid Sumaila, David Boyer, Morten, D. Skogen & Stein Ivar Steinshamn. (eds). *Namibia's fisheries: Ecological, economic and social aspects*. (Eburon Academic Publishers: Netherlands, 2004), 333-356, p.337.

The creation of the MRAC symbolizes the government's firm commitment to work with the fishing industry on a reconciliation basis. This practice has been referred to as 'co-management', 'co-operation', or more frequently 'consultation'. This is in stark contrast to the mid-1990s situation whereby state and scientists were at loggerheads, with the former accused of being unduly confident and the latter of being overly cynical.<sup>319</sup> To date, working groups have been established for the orange roughy, hake, monk, horse mackerel and rock lobster fisheries, while the other major fisheries (sardine, tuna, crab, recreational and subsistence fisheries) are involved in the management process in less formal ways.<sup>320</sup>

#### 4. INSTRUMENTS PROMOTING FISHERIES

##### a) Structural policies

###### (i) Subsidies

The Namibian fishing industry is not subsidized.<sup>321</sup> The government's position is to avoid subsidizing the fishing industry, creating tax breaks and market interventions that could

<sup>319</sup> David Boyer & Burger Oelofsen. *op.cit.* (2004), p.338.

<sup>320</sup> *Ibidem.*

<sup>321</sup> *Ibidem.*

encourage unsustainable fishing practices.<sup>322</sup> The government believes that subsidy policies pursued by other nations cause over-capitalization, which distorts trade unfairly and eventually leads to illegal fishing and over-fishing.<sup>323</sup> Namibia instead prefers a system of taxation, applied specially through the quota fees. This was one of the main attractions for implementing a rights-based system.<sup>324</sup> On the one hand, the application of a rights-based system has led to healthier stocks, improved compliance and an efficient industry that supports proper fisheries management and earns healthy profits.<sup>325</sup> On the other hand, limiting access to the resource and fishing mortality for each participant has provided a basis for extracting some of the profits.<sup>326</sup>

## **b) Market organization**

Market organization as established in the European Commission is not to be found in Namibia. The reason is that, on the one hand, there is sufficient supply of fish for the Namibian market, and, on the other, there is not a situation of overproduction, but rather the problem of developing fishing capacity and effort.

Namibian fisheries are mostly exploited for export and target mostly the major world markets. Fish consumption in Namibia is very minimal, making the Namibian market completely insignificant.<sup>327</sup>

The process of marketing fish involves three main actors in the market chain which includes (i) the Government level, (ii) the Confederation of fishing Association and (iii) the Company level.

### **(i) Governmental level**

The Namibian government plays an active role in the setting of standards and mechanisms for fisheries in the fish market. The Ministry of Trade and Industry is responsible for the establishment of the necessary business environment regarding the marketing of Namibia products on the international market and therefore plays a key role in adapting Namibia to the new international trade regime. The Directorate of International Trade in the Ministry of Trade and Industry is the national focal point for Namibia's trade and external trade relations. Its main activities are geared towards the formulation and management of Namibia's foreign trade policy, and towards increasing the country's exports through trade promotion.

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<sup>322</sup> Government of the Republic of Namibia. *op.cit.* (2004), p.159.

<sup>323</sup> Paul Nichols. *op.cit.* (2004), p.324 and 325..

<sup>324</sup> Paul Nichols. *op.cit.* (2004), p.325.

<sup>325</sup> *Ibidem.*

<sup>326</sup> *Ibidem.*

<sup>327</sup> See field note 2

The Directorate oversees Namibia's membership of regional and international trade bodies; assists and facilitates the participation of Namibian companies in trade fairs, exhibitions and trade missions; co-ordinates import and export procedures; and provides information on trade-related issues.

The ministry therefore emphasises the importance of continuing the work of developing the Namibian Quality Infrastructure. Namibia benefits immensely from bilateral and multilateral market access agreements entered between Namibia and its counterparts in Africa, the Americas and the European Union. Namibia is considered the child of the international trade world and its products are generally well received on most major markets.<sup>328</sup> Namibian hake is sold in Europe, orange roughy in the US, tuna and rock lobster in Japan, horse mackerel in West Africa etc.

The government through its parastatal agency, the Namibia Ports Authority, is responsible for the running of Namibia's only ports. These ports are based in Walvis Bay and Lüderitz. These are the only two ports of landing in Namibia and a great deal of monetary investment has been ploughed into them to make them ports of international standards. These are the ports used for shipping of Namibian fish products onto the different markets.

Namport has recently invested in the deepening of the port of Walvis Bay. An investment of some N\$ 50 million in national infrastructure was vital to position the Port of Walvis Bay as the gateway to countries in Southern Africa through the Walvis Bay Corridor. The area of Berths 1, 2 and 3 in the commercial port of Walvis Bay, the turning basin and the approach channel are now at a depth of 12.8 metres below chart datum. From Berths 4 to 8, the depth is 10.6 metres below chart datum.

In an attempt to boost consumption of fish and fish products in Namibia, the government initiated the Namibia Fish Consumption Promotion Trust with technical assistance from the Government of Japan. The main objective was to try and improve the consumption of fish throughout the country. This was an attempt by the government to market Namibian fish to Namibia.

(ii) Confederation of Fishing Associations

The Namibia the fishing industry is divided in several sectors. Each sector targets different species. These species are, of course, harvested, processed and marketed in different ways. For this reason each sector has an association, which is a voluntary association of members who have concessions in the given sector. These associations are not legal entities and do not have the power to enforce anything.<sup>329</sup> These associations are facilitating bodies aimed at a coordinated single voice as irrespective of the size of the companies they are faced with the same rules, regulations, environmental conditions and marketing conditions.

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<sup>328</sup> See field note 2

<sup>329</sup> see Field Note 1

The abovementioned industry based associations come together as the Confederation of Fishing Associations. This association is the main representative of the entire industry. The confederation is tasked with the protection of the interest of the fishing industry. This is the consulting agent of the industry with the rest of the stake holders within the industry, be it to negotiate fuel prices, marketing of the fishery produce, etc.

(iii) Industry based organization and Company level

Apart from the governmental efforts mentioned above, the primary duty of ensuring the marketing and securing buyers for their produce lies with the companies.<sup>330</sup> Each of the companies has secured markets for their produce and a lot of resources are spent in securing or expanding into new markets. Companies have on numerous occasions exhibited their produce on foreign trade fairs, exhibitions and trade missions as a strategy to market Namibian fish and fish produce. Companies have further taken the initiative by government seriously and in an effort to support local consumption of fish sponsored the drive of making the fish available in rural areas by reducing the selling price for local consumers.

**c) Coherence with pertinent international trade agreements**

Namibia became a member of the World Trade Organization ('WTO') on the 1<sup>st</sup> January 1995.<sup>331</sup> However, as there are no subsidies in Namibia, there are therefore no encroachments on international treaties, conventions and trade agreements.

The MRA confers on the President the power to enter into, and publish, a fisheries agreement with a member country of the SADC, providing for such country to harvest marine resources in Namibian waters<sup>332</sup> and in respect of which the Minister may make such regulations as he or she may consider necessary or expedient for the carrying out and for giving effect to the provisions of any such agreement or any amendment of such agreement.<sup>333</sup> The Minister must also publish in the *Gazette* the texts of all conservation and management measures adopted under any international agreement to which Namibia is a party and any such measure must be deemed to be a regulation for all practical purposes.<sup>334</sup>

*(i) Implementation of the 1993 FAO Compliance Agreement*<sup>335</sup>

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<sup>330</sup> See field note 5

<sup>331</sup> World Trade Organisation (WTO). *Members and observers*. 25 July 2006. Available from: <http://www.wto.org/>

<sup>332</sup> Section 35 and 36.

<sup>333</sup> Section 37.

<sup>334</sup> Section 37(2).

<sup>335</sup> See also the Agreement relating Implementation of part XI of the United Nations Convention on the Law of the Sea; and the Agreement relating Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and High Migratory Fish Stocks.

With respect to Namibia's legislation compatibility with FAO legal instruments, Namibia deposited its instrument of acceptance of the 1993 FAO Compliance Agreement on the 7<sup>th</sup> August 1998.<sup>336</sup>

The Marine Resources Act<sup>337</sup> allows for the implementation of the 1993 FAO Compliance Agreement to some extent. A holder of a right, a person who wishes to use a fishing vessel for commercial purpose in Namibian waters or a person who wishes to use a Namibian flag vessel for harvesting any marine resource outside Namibian waters, shall apply for a licence to the Permanent Secretary of the MFMR.<sup>338</sup> The Minister may refuse an application for a fishing licence if he or she is satisfied that the issue of the licence would be inconsistent with an international agreement to which Namibia is a party<sup>339</sup>, or the approval might threaten the biological sustainability of a particular marine resource.<sup>340</sup>

However, Namibian fisheries legislation does not contain specific legal requirements as set forth in the 1993 FAO Compliance Agreement such as those dealing with high seas permit registers, high seas conservation and management measures or port-state control in case of a suspected high seas foreign fishing vessel of a flag-state party to the 1993 FAO Compliance Agreement entering voluntarily its ports.<sup>341</sup>

*(ii) Implementation of the 1995 Fish Stock Agreement*

Namibia deposited its instrument of ratification of the 1995 UN Fish Stocks Agreement on April 8, 1998. The following compatible provisions could be identified in the Namibian Fisheries legislation:

Fisheries inspectors are empowered by the Act, at any time and without a warrant and in respect to Namibian flag and foreign flag vessels, to *inter alia*:<sup>342</sup>

(a) board, inspect and stop any vessel, its fishing gear, cargo and stores, any marine resources aboard and any document or other item required to be kept under the Marine Resources Act;<sup>343</sup>

(b) enter and stop for a routine check any premises, or any vehicle, in which marine resources or any fishing gear are kept or are being transported;<sup>344</sup> or

(c) if they have reasonable grounds to suspect that an offence has been committed under the Act, to:<sup>345</sup> (a) stop and inspect any vehicle which is reasonably suspected of carrying marine resources which have been harvested or fishing gear which has been used.

<sup>336</sup> Food and Agriculture Organization of the United Nations. *op.cit.* (2004) at p.20

<sup>337</sup> Act 27 of 2000.

<sup>338</sup> Section 40(1), Marine Resources Act.

<sup>339</sup> Section 40(4)(d).

<sup>340</sup> Section 40(4)(e).

<sup>341</sup> Food and Agriculture Organization of the United Nations. *op.cit.* (2004) at p.21.

<sup>342</sup> Sections 5(1) and (3), Marine Resources Act.

<sup>343</sup> Section 5(1)(a).

<sup>344</sup> Section 5(1)(b)-(c).

<sup>345</sup> Section 5(2).

The Marine Resources Act establishes the Fisheries Observer Agency<sup>346</sup> whose functions<sup>347</sup> are (a) to provide fisheries observers to perform their tasks; (b) to provide appropriate expertise and facilities to train fisheries observers; and (c) to make fisheries observers available on a commercial basis to organizations outside Namibian waters pursuant to an agreement to which Namibia is a part.

## 6. INSTRUMENTS OF FISHERIES MANAGEMENT

Unlike many nations, Namibia has a fisheries management system that incorporates many of the accepted best-practices as outlined in the major international fisheries conventions.<sup>348</sup> The Sea Fisheries Act of 1992 was repealed by the Marine Resources Act in 2001 in order to incorporate the agreements that Namibia had ratified or otherwise entered into. The treaties and agreements that Namibia signed or ratified include the 1982 United Nations Convention on the Law of the Seas, the 1992 Convention on Biological Diversity, the United Nations Convention on Straddling Fish Stocks and Highly Migratory Fish Stocks, the 2001 Southern African Development Community Fisheries Protocol, the 1962 Fisheries Convention, the Convention on the High Seas, the Convention on Fisheries Cooperation among African States bordering the Atlantic Ocean, and the Implementation of the 1993 FAO Compliance Agreement and FAO Code of Conduct.

### *(i) Fees and levies*

Fees are instrumental for fisheries management and the Minister is given the power, after consultation with the MRAC and the approval of the finance minister, to determine fees which shall be payable.<sup>349</sup> The role of fees is twofold: firstly, to earn revenue for the government, and secondly to create incentives that work towards the goals of the management system, both conservation and Namibianisation.<sup>350</sup>

The Minister may, after consultation with the MRAC and with the approval of the Minister of Finance, by notice in the *Gazette*,<sup>351</sup> determine fees which shall be payable in respect of the harvesting of marine resources. A fee may be based on upon quotas allocated, the level of effort for harvesting a particular marine resource or the amount or value of the resources harvested, and may vary according to species, area or disposition of harvesting, and the Namibian beneficial control of the fishing company or vessel.<sup>352</sup> The most important are quota fees, which are payable on allocated quota.<sup>353</sup> By-catch fees – a feature of Namibian management system not found in many other countries – are

<sup>346</sup> Section 8.

<sup>347</sup> Section 9.

<sup>348</sup> Ussif Rashid Sumaila, David Boyer, Morten, D. Skogen & Stein Ivar Steinshamn. (eds). *op.cit.* at p.2. Examples of these practices are given in our discussion of the Marine Resources Act in II. 2. above.

<sup>349</sup> Section 44(1), Marine Resources Act.

<sup>350</sup> Paul Nichols. *op.cit.* (2004), p.324.

<sup>351</sup> Which may prescribe penalties (section 44(7)) and shall state the time and manner of payment of the fee or levy and may provide for the payment of interest, at a rate specified, on late payments (section 44(6)).

<sup>352</sup> Section 44(2), Marine Resources Act.

<sup>353</sup> Paul Nichols. *op.cit.* (2004), p.324.

applied in order to deter rights holders from targeting species other than those for which they have been issued a quota.<sup>354</sup> Such fees provide an incentive to avoid catching non-target species, but not so punitive as to encourage dumping.<sup>355</sup> Finally, licence fees are charged for all fishing vessel licences issued to vessels that fish within Namibia's waters.<sup>356</sup>

The Minister may also, after consultation with the MRAC and with the approval of the Minister of Finance, by notice in the *Gazette*, impose levies that are to be paid into the Marine Resources Fund in respect to the harvesting of any marine resource.<sup>357</sup> A levy may be based upon and vary according to the factors used for the determination of the fee, as well as the potential benefit from the activities to be funded by the levy and the contribution made to such activities.<sup>358</sup>

#### **a) Access and catch restrictions, technical measures**

In Namibia the management tool used applies to all fisheries especially taking into account the fact that the industry make-up is of such a nature that there are no small vessels apart from those chartered for purposes of catching fish for daily supply to local restaurant. Most of these vessels belong to the midwater trawlers<sup>359</sup> which is a sub-industry within the fisheries industry.

##### *(i) Management measures*

As a matter of general observation, the Act outlines procedures regarding the application for fishing rights and allocation of the fishing quotas. It sets out the procedures and criteria for licensing of fishing vessels and controlling fishing efforts, and provides for Namibia to enter into a fisheries agreement with a member country of the Southern African Development Community ('SADC'). The Act empowers the Minister to take the necessary management measures, including setting of total allowable catches ('TAC'), limitation of effort, fishing-gear specifications, protection of juvenile fish through management measures such as a minimum allowable mesh size, grid selectivity device, minimum fish sizes to be landed, restrictions on by-catch, closure of areas and fishing seasons and, trans-boundary activities.

The management measures which may be adopted in terms of Section 47 include –aside from the prohibition on the use of explosives, poisons or noxious substance to kill or disable any marine animal, and the prohibition on the use of a driftnet<sup>360</sup> – what the Minister may prescribe: (a) the place and time of harvesting operations; (b) the characteristics and quantity of harvestable marine resources; (c) the methods and gear

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<sup>354</sup> *Ibidem.*

<sup>355</sup> *Ibidem.*

<sup>356</sup> *Ibidem.*

<sup>357</sup> Section 44(3).

<sup>358</sup> Section 44(5).

<sup>359</sup> See Foot Note 1

<sup>360</sup> Section 47(1) and 47(2). Section 52(4)(f) punishes with a fine not exceeding N\$ 500 000 any person who kills or disables any marine animal by means of an explosive, poison or noxious substance, or by means of a firearm; whereas section 52(4).punishes with the same fine any person who uses a driftnet.

that may be used; and measures to limit the amount of the harvesting capacity.<sup>361</sup> The measures or regulations adopted or made pursuant to Section 47 are protected by Section 52(4)(b), which imposes a fine not exceeding N\$ 500,000 on any person who contravenes Section 47.

Thirdly, the Act provides for the stowing of fishing gear and states that all fishing gear on board a fishing vessel shall be dismantled or stowed when the vessel that is not authorized by a licence to harvest marine resources is present in Namibian waters,<sup>362</sup> or where the vessel authorized by a licence is at sea in an area in which it is not so authorized.<sup>363</sup> The Act punishes any departure from this provision with a fine not exceeding N\$ 500,000.<sup>364</sup>

Fourthly, the Act prohibits transshipment and landing unless they are authorized by a licence or ministerial authorization and are executed in accordance with any conditions in the licence or authorization,<sup>365</sup> or unless marine resources are transhipped between and landed in the territorial sea or internal waters of Namibia by vessels that are not fishing vessels.<sup>366</sup> Contravention of the prohibition on transshipment and landing constitutes a criminal offence, which punishable on conviction with a fine not exceeding N\$ 1,000,000.<sup>367</sup>

Finally, the Act confers a discretion upon the Minister – by notice in the *Gazette* describing the boundaries of any area of Namibian waters, state land and land subject to the jurisdiction of a traditional authority – to declare (and abolish)<sup>368</sup> such area to be a marine reserve for the protection or regeneration of marine resources.<sup>369</sup> Prior to the declaration of a marine resource, the Minister is obliged to consult with the interested persons, to establish management objectives and to specify the activities to be conducted within the reserve and such other requirements as may be appropriate for achieving such objectives.<sup>370</sup> These requirements may include the species of harvestable and non-harvestable marine resources, harvesting conditions, and conditions of access to the marine reserve.<sup>371</sup> Any person who, without permission, dredges or extracts sand or gravel, pollutes, or constructs any structure, or in any way disturbs, alters or destroys the natural environment in a marine reserve is liable to a fine not exceeding N\$ 500,000.

In addition thereto, the Minister may require a person harvesting marine resources from the fisheries to have observers aboard any fishing vessel,<sup>372</sup> whilst the fisheries inspectors

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<sup>361</sup> Section 47(3) read section 47(4).

<sup>362</sup> Section 49(1).

<sup>363</sup> Section 49(2). Section 52(4)(c) punishes with a fine not exceeding N\$ 500 000 any person who allows his or her vessel to be in any area which he or she is not authorized to harvest.

<sup>364</sup> Section 52(3)(l).

<sup>365</sup> Section 50(1)(a)-(c).

<sup>366</sup> Section 50(2).

<sup>367</sup> Section 52(3)(e).

<sup>368</sup> Section 51(4).

<sup>369</sup> Section 51(1).

<sup>370</sup> Section 51(2).

<sup>371</sup> Section 51(2)(a)-(c).

<sup>372</sup> Section 7(2)(a), Marine Resources Act.

control the harvesting of marine resources especially when the harvest is landed.<sup>373</sup> The inspectors also tasked with the duty of patrolling the coastal zone and on sea patrol with the patrol vessels. Regular surface aerial surveillance patrols are conducted.<sup>374</sup> Allowable landed size and daily bag limits apply to recreational fishery and routine inspections are conducted to ensure compliance by recreational anglers.<sup>375</sup> The different management measures are discussed below.

The prerequisites to the commercial harvesting of marine resources are provided for in Section 32, which generally states that no person shall in Namibia or in Namibian waters harvest any marine resource for commercial purposes, except under a right, an exploratory right or a fisheries agreement. Failure to comply with this general provision is an offence which is amenable on conviction to a fine not exceeding N\$ 1,000,000.<sup>376</sup> In the case of a marine resource which has been made subject to a quota, no person shall harvest such a resource for commercial purposes, except in terms of a quota or of a permitted by-catch under a right, an exploratory right or a fisheries agreement.<sup>377</sup> The Permanent Secretary of the MFMR, on the other hand, holds the important power to suspend, cancel or reduce rights, quotas and licences.<sup>378</sup> The conditions precedent to the suspension, cancellation or reduction of rights, quotas and licences, are that the holder of a right be it an exploratory right, a quota or a licence, must have furnished information which is untrue or incomplete in connection with his or her application; must have contravened or failed to comply with a provision of, or a condition imposed under, the Act; or must have been convicted of an offence under the Act.<sup>379</sup>

#### *(ii) Fishing rights*

It is a prerequisite under Namibian law that in order to harvest marine resources for commercial purposes this has to be in terms of a right. This right is allocated to a person according to the species they intend to harvest for commercial purposes. This is supplemented by a general quota per industry set by the Minister annually.<sup>380</sup>

Unlike other fisheries in the world, the right to fish or utilize a certain species forms the basis for exploitation in Namibia and not a fishing licence for a vessel.<sup>381</sup> The Minister may, by virtue of Section 33(1), from time to time, by notice in the *Gazette*, announce a period during which applications may be made for rights to harvest for commercial purposes any marine resources and the conditions on which such resources may be harvested.<sup>382</sup> The Minister may not consider any application received outside such period.

<sup>373</sup> Section 5.

<sup>374</sup> Food and Agriculture Organization of the United Nations. *op.cit.* (2002).

<sup>375</sup> *Ibidem.*

<sup>376</sup> Section 52(3)(a). In addition thereto, the Act punishes any violation of the conditions of a right, exploratory right, fisheries agreement, quota or licence: Section 52(4)(a).

<sup>377</sup> Section 32(2) and section 35(5). Contravention of section 32(2) is also a criminal offence, punishable with a fine not exceeding N\$ 1 000 000: Section 52(3)(b).

<sup>378</sup> Section 41.

<sup>379</sup> Section 41(1)(a)-(d).

<sup>380</sup> Section 32 (1)-(6) read with section 33

<sup>381</sup> Interview with the Minister of Fisheries and Marine Resources. *Namibia Brief* No. 20. 2<sup>nd</sup> edition. (Windhoek: Namibia Foundation, October 1998) 4-7, at p.6.

<sup>382</sup> Read with 33(2) and section 33(3).

Section 33(4) bears out the essentially political nature of the processing of applications for fishing rights by the Minister. In terms of that provision, when considering an application, the Minister may have regard to the following factors: (a) whether the applicant (or the company applying) is a Namibian citizen (or owned by Namibians);<sup>383</sup> (b) the advancement of persons previously disadvantaged by discriminatory laws or practices before the Independence of Namibia;<sup>384</sup> (c) the ability of the applicant to exercise the right in a satisfactory manner;<sup>385</sup> (d) regional development within Namibia;<sup>386</sup> co-operation with other countries, especially those of the SADC;<sup>387</sup> (e) whether the applicant has successfully performed under an exploratory right in respect of the resource applied for;<sup>388</sup> (f) contribution of marine resources to food security;<sup>389</sup> and (g) socio-economic concerns.<sup>390</sup> In addition thereto, Section 33(6) stipulates that if at any time before the expiry of a right, the holder of that right has met the prescribed criteria 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.

Fishing rights, or rights of exploitation, are the central element of the fisheries management regime.<sup>391</sup> The main purpose of fishing rights is to limit entry to the fisheries sector in order to protect the fisheries resources and to ensure the ‘responsible utilization, conservation, protection and promotion of marine resources on a sustainable basis’.<sup>392</sup>

The duration of these rights, which ranges from a period of seven to twenty years, depends on a number of criteria.<sup>393</sup> The longer rights are issued to companies who, *inter alia*, are Namibian or majority owned by Namibian citizens,<sup>394</sup> employ Namibians, have a proven track record in the industry and have demonstrated a long-term commitment by investing in the fishing sector.<sup>395</sup>

**Number and duration of existing harvesting rights as of December 2004**

Fishery	Duration of rights	Total
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<sup>383</sup> Section 33(4)(a), (b) and (c).

<sup>384</sup> Section 33(4)(e).

<sup>385</sup> Section 33(4)(d).

<sup>386</sup> Section 33(4)(f).

<sup>387</sup> Section 33(4)(g).

<sup>388</sup> Section 33(4)(i).

<sup>389</sup> Section 33(4)(k).

<sup>390</sup> Section 33(4)(j).

<sup>391</sup> Paul Nichols. *op.cit.* (2004), p.321.

<sup>392</sup> Long title, Marine Resources Act. See also Paul Nichols. *op.cit.* (2004), p.321.

<sup>393</sup> Paul Nichols. *op.cit.* (2004), p.321.

<sup>394</sup> Section 33(4)(a), (b) and (c), Marine Resources Act.

<sup>395</sup> David Boyer & Burger Oelofsen. *op.cit.* (2004), p.336.

	Four-year	Seven-year	Ten-year	Fifteen-year	Twenty-year	
Hake	0	10	6	22	0	38
Monk	0	2	2	5	0	9
Horse mackerel	0	0	11	1	0	12
Large pelagic	0	1	6	12	0	19
Red crab	0	1	2	0	0	3
Rock lobster	0	0	1	20	0	21
Line fish	1	1	2	8	0	12
Orange roughy	0	0	5	0	0	5
Pilchard	0	7	5	10	0	22
Mulletts	0	0	0	13	0	13
Seals	0	2	1	1	0	4
Guano	0	1	0	0	0	1
Total	1	25	41	92	0	159

Source: Namibia. Ministry of Fisheries and Marine Resources. 2005. Annual report 2004. Windhoek: Ministry of Fisheries and Marine Resources. at p.20.

### *(iii) Exploratory rights*

An application is also necessary for exploratory rights,<sup>396</sup> which the Minister may grant to no more than one person to harvest a marine resource in respect of which no right has been granted to another person so as to allow that person to explore the commercial viability and biological sustainability of that resource.<sup>397</sup> The central concepts here are the commercial viability and biological sustainability of the marine resource to be explored and in respect of which an exploratory right is granted. Exploratory rights can also be granted to harvest a resource for which a person has not been granted a right so as to allow that person to research the commercial viability of a harvesting method not ordinarily used for the harvesting of that particular resource in Namibian waters.<sup>398</sup> The Minister may approve the application, subject to such period and conditions as he or she may determine,<sup>399</sup> and require any applicant to carry out an environmental impact assessment.<sup>400</sup> Upon the expiry of an exploratory right, the Minister shall determine whether the resource or harvesting method is commercially viable and biologically sustainable, and if he or she determines that it is, no further exploratory right may be

<sup>396</sup> Section 34(2).

<sup>397</sup> Section 34(1)(a).

<sup>398</sup> Section 34(1)(b).

<sup>399</sup> Section 34(4).

<sup>400</sup> Section 34(3).

granted in respect of that resource or harvesting method.<sup>401</sup> If such viability or sustainability is unclear, the Minister may extend the exploratory right once only for a year; and if the lack of clarity is due to poor execution of the exploratory right, a further exploratory right may be granted to another applicant.<sup>402</sup> However, if before the expiry of the exploratory right it becomes clear that the resource or harvesting method is commercially viable and biological sustainable, the Minister may terminate the exploratory right and announce a period during which applications for rights may be under Section 33(1) of the Marine Resources Act.<sup>403</sup>

*(iv) Fishing licences*

The MRA provides that a holder of a right or a person who wishes to use a fishing vessel for commercial purpose within Namibia's 200 nautical miles EEZ or a person who wishes to use a Namibian flag vessel for harvesting any marine resource outside Namibian waters, shall apply for a licence to the Permanent Secretary of the MFMR.<sup>404</sup> The said licence enables you to use a vessel in Namibian water to commercially exploit the marine resource for which you hold a fishing right. The Act creates an offence where any person who, being the owner, the lessee, the charterer or the master of a foreign flag vessel or a Namibian flag vessel uses such vessel in Namibian waters for harvesting marine resources, or allows it to be so used without the authorization of a valid licence in respect thereof.<sup>405</sup>

Upon application, the Minister may issue a fishing licence to the applicant subject to such conditions and valid (a) for such period as the Minister may determine<sup>406</sup> and (b) only if the licensee holds a right or an exploratory right for that resource, or holds a quota for that resource.<sup>407</sup> The Minister may issue a licence to that person in respect to that fishing vessel, subject to such conditions and valid for such period as the Minister may determine.<sup>408</sup> Section 40(2) states that a licence to use a fishing vessel shall only be valid if the licensee holds a right or an exploratory right for that resource, or holds a quota for that resource.

However, the Minister may refuse an application for a fishing licence if he or she is convinced that: (a) the information furnished in the application is incorrect and incomplete;<sup>409</sup> (b) the vessel in question is not intended for use as a fishing vessel; (c) the approval of the application will not be in the interest of the sector of the fishing industry;

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<sup>401</sup> Section 34(5).

<sup>402</sup> Section 34(6).

<sup>403</sup> Section 34(7).

<sup>404</sup> Section 40(1).

<sup>405</sup> Section 52(1) and section 52(2), read with section 32 and 40(1)-(2). On conviction such person is liable to a fine not exceeding N\$ 2 000 000.

<sup>406</sup> Section 40(3).

<sup>407</sup> Section 40(2).

<sup>408</sup> Section 40(3).

<sup>409</sup> If any change has occurred in the information submitted by a licensee or if the vessel for which a licence has been issued ceases to be used, the licensee shall within 21 days inform the Permanent Secretary MFMR of that fact: Section 40(5).

- (e) the issue of the licence would be inconsistent with an international agreement to which Namibia is a party; or (e) the approval might threaten the biological sustainability of a particular marine resource.<sup>410</sup>

Licensing of vessels is a tool used to regulate the industry. A total of 334 vessels were licensed for commercial fishing in 2004.<sup>411</sup>

**Number of licensed vessels by fishery, 2000-2004**

Fishery	2000	2001	2002	2003	2004
Small pelagic	30	26	25	20	16
Demersal trawlers	111	128	114	100	125
Longliners	24	38	10	8	17
Midwater	26	24	20	26	24
Deepwater	5	3	6	5	5
Large pelagic	56	68	71	49	73
Linefish	26	22	26	19	16
Crab	2	2	2	3	2
Rock lobster	29	29	38	42	34
Monk			23	21	22
Total	309	340	335	279	334

Source: Namibia. Ministry of Fisheries and Marine Resources. 2005. Annual report 2004. Windhoek: Ministry of Fisheries and Marine Resources. at p.21.

(v) *Total allowable catches ('TAC')*

The setting of TACs is one of the main management measures by which to prevent overexploitation of Namibian fish stocks.<sup>412</sup> TACs are set for most commercial species in Namibia and are presently set for seven species, namely sardine, hake, horse mackerel, red crab and rock lobster, orange roughy and monk.<sup>413</sup> The Minister may, on the basis of the best scientific evidence available of the size and structure of stocks and as advised by the MRAC, set a TAC to limit the quantity which may be harvested in a given period,<sup>414</sup> and the aggregate of quotas allocated may not exceed the TAC set for the marine resource in question.<sup>415</sup> The Minister may also subject the harvesting of any marine resource to such measures and quotas as may consider necessary.<sup>416</sup> However, the

<sup>410</sup> Section 40(4).

<sup>411</sup> Namibia. Ministry of Fisheries and Marine Resources. *op.cit.* (2005), at p.21.

<sup>412</sup> Paul Nichols. *op.cit.* (2004), p.322.

<sup>413</sup> *Ibidem.*

<sup>414</sup> Section 38, Marine Resources Act.

<sup>415</sup> Section 39(6).

<sup>416</sup> Section 39(1). Contravention of this section is a criminal offence, punishable with a fine not exceeding N\$ 1 000 000: Section 52(3)(c)-(d).

aggregate of quotas allocated in respect of any marine resource may not exceed the TAC set for that resource.<sup>417</sup> The Minister may determine the date by which applications for the applications of quotas may be received and the conditions to which such quotas shall be subject,<sup>418</sup> he or she may allocate quotas to individual holders of a right to harvest marine resources<sup>419</sup>, and finally notify in writing the applicants of his or her decision on their respective applications.<sup>420</sup>

The purpose with the TACs is to ensure sustainable fishing operations; that the level of fishing effort does not undermine the status of each stock.<sup>421</sup> A worst-case scenario would see an all too powerful fishing industry exerting pressure on the government's to allocate TACs that are unsustainable.<sup>422</sup>

**Total allowable catches set by fishery 2000-2004**

	Pilchard	Hake	Horse mackerel:		Red crab	Rock lobster	Orange roughy	Monk
			Mid water	Pelagic				
2000	25,000	194,000	410,000	(50,000)	2,000	350	2,400	Not applicable
2001	10,000	200,000	410,000	(50,000)	2,100	400	1,875	13,000
2002	0	195,000	350,000	(40,000)	2,200	400	2,400	12,000
2003	20,000	180,000	350,000	(40,000)	2,000	400	2,650	12,500
2004	25,000	195,000	350,000	(40,000)	2,200	420	2,600	12,000

Source: Namibia. Ministry of Fisheries and Marine Resources. 2005. Annual report 2004. Windhoek: Ministry of Fisheries and Marine Resources. at p.21.

*(vi) Individual (non-transferable) quotas*

Once a TAC has been set for a fishing season, it is distributed among the right holders in each fishery in the form of quotas. The main purpose with the quota allocation is to promote economic efficiency; to give companies sufficient knowledge about expected catch levels for the year for proper planning of their fishing activities. Quotas are not permanently transferable<sup>423</sup> for the same reason that rights are not transferable: it is to protect the fisheries resources and maintain sustainable operations.<sup>424</sup>

<sup>417</sup> Section 39(6).

<sup>418</sup> Section 39(3) and section 39(4).

<sup>419</sup> Section 39(4).

<sup>420</sup> Section 39(5).

<sup>421</sup> Paul Nichols. *op.cit.* (2004), p.322.

<sup>422</sup> Paul Nichols. *op.cit.* (2004), at p.324 and 325.

<sup>423</sup> Section 39 read with section 42(2), Marine Resources Act.

<sup>424</sup> Paul Nichols. *op.cit.* (2004), at p.321. See also section 42, which formally forbids the transfer of rights, exploratory rights, quotas, and licences, 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 43 complements section 42 by requiring the Permanent Secretary of the MFMR to keep a register showing

*(vii) Monitoring, control and surveillance*

Namibia's MCS system has evolved over the years into what is today widely regarded by the international community as a very effective system. A crucial element has been the financial, human and material support from the Namibian Government. The costs to government and industry of MCS and other management activities have been kept commensurate with the value of the sector.

The major features of Namibia's MCS programme are described below.

*On-board observer programme* – Fisheries observers have the power to collect and record biological and other scientific information related to the harvesting of marine resources,<sup>425</sup> and the Minister may require a person harvesting under a right or a fisheries agreement to carry a fisheries observer aboard any fishing vessel, to admit or allow him or her to any land and any premises used for harvesting marine resources, as well as records, documents and marine resources found there.<sup>426</sup> Coverage rates range from 70% to 100%, depending on the fishery in question.<sup>427</sup> The establishment of the Fisheries Observer Agency by the MRA<sup>428</sup> should improve current capacities in this regard.<sup>429</sup>

*Sea, air and shore patrols* – Systematic sea patrols aim to ensure compliance with fishing conditions by licensed vessels through regular at-sea inspections.<sup>430</sup> Air patrols detect and deter unlicensed fishing vessels and monitor the movement and operations of the licensed fleet.<sup>431</sup> Shore patrols ensure compliance by both recreational and commercial fishers with conservation measures for inshore resources.<sup>432</sup>

*Monitoring of landings* – Complete monitoring of all landings at the two commercial fishing ports, Walvis Bay and Lüderitz, by onshore inspectors ensures compliance with quota limits and fee payments. The MRA prohibits transshipment and landing unless they are authorized by a licence or ministerial authorization and are executed in accordance with any conditions in the licence or authorization,<sup>433</sup> or unless marine resources are transhipped between and landed in the territorial sea or internal waters of Namibia by vessels that are not fishing vessels.<sup>434</sup> All marine resources must be landed at a Namibian port. This, together with the absence of an artisanal fisheries sector, helps to ensure comprehensive monitoring of catches.<sup>435</sup>

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the prescribed particulars of every right, exploratory right, quota and licence. Similarly, section 48 obliges every person holding a right, an exploratory right, a quota, a licence or other authorization to keep records, and furnish the Permanent Secretary with required information.

<sup>425</sup> Section 7(1)(b), Marine Resources Act.

<sup>426</sup> Section 7(2).

<sup>427</sup> Paul Nichols. *op.cit.* (2004), p.326.

<sup>428</sup> Section 8, Marine Resources Act.

<sup>429</sup> Paul Nichols. *op.cit.* (2004), p.326.

<sup>430</sup> *Ibidem.*

<sup>431</sup> *Ibidem.*

<sup>432</sup> *Ibidem.*

<sup>433</sup> Section 50(1)(a)-(c).

<sup>434</sup> Section 50(2).

<sup>435</sup> Paul Nichols. *op.cit.* (2004), p.326.

*Vessel reporting* – All vessels are required to supply EEZ exit and entry reports, as well as daily catch and effort reports via radio and in the form of vessel log-sheets.<sup>436</sup> Namibia is well advanced in implementing a national satellite-based vessel monitoring system (VMS).<sup>437</sup> Once fully operational, the system will benefit fisheries management in real-time monitoring of vessel movement and activities.<sup>438</sup> The system that has been chosen is already in use in South Africa and Mozambique.<sup>439</sup> The government has shown support for the idea of collaboration in the development of a cost-effective, regional VMS.<sup>440</sup>

**c) Impact of, and coherence with, pertinent international agreements and organisations relating to resource protection**

Namibia is party to a number of treaties and conventions and these are the following:

- a) United Nations Convention on the Law of the Sea, 1982;
- b) Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of Sea of 10 December 1982, 1994;
- c) Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea Convention of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, 1995;
- d) Convention on the Conservation and Management of Fishery Resources in the South East Atlantic Ocean, 2001;
- e) Convention on the Conservation of Antarctic Marine Living Resources, 1980; and
- f) SADC Protocol on Fisheries, 2001.

**a) United Nations Convention on the Law of the Sea, 1982**

Namibia signed this convention on 10 December 1982 and it was subsequently ratified the following year on April 18. The convention came into effect on 16 November 1994. As Namibia was not yet independent when it signed and ratified the convention, it was represented by the United Nations Council for Namibia as stipulated in Article 305, Paragraph 1 (b), of the Convention.

The Convention lays down a comprehensive regime of law and order in the world's oceans and seas establishing rules governing all uses of the oceans and their resources. It enshrines the notion that all problems of ocean space are closely interrelated and need to be addressed as a whole. The Convention comprises of 320 Articles and nine Annexes, governing all aspects of ocean space such as delimitation,

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<sup>436</sup> *Ibidem.*

<sup>437</sup> *Ibidem.*

<sup>438</sup> *Ibidem.*

<sup>439</sup> *Ibidem.*

<sup>440</sup> *Ibidem.*

environmental control, marine scientific research, economic and commercial activities, transfer of technology, and the settlement of disputes relating to ocean<sup>441</sup>. Today, it is the globally recognized regime dealing with all matters relating to the law of the sea, and Namibia as a party to this convention fully abides by its provisions.

**b) Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, 1994**

Namibia signed this agreement on 29 July 1994 and it acceded to it by means of the simplified procedure set out in Articles 4 (3) (c) and 5 on 16 November 1994. The agreement became effective on 28 July 1996<sup>442</sup>.

**c) Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Tocks,1995<sup>443</sup>**

Namibia signed this agreement on 19 April 1996 and it was ratified on 08 April 1998 under Proclamation 10 of 1998, Government Gazette No. 1862. The agreement came into force on 11 December 2003 and it sets out principles for the conservation and management of those fish stocks and establishes that such management must be based on the precautionary approach and the best available scientific information. It elaborates on the fundamental principle which was established in the convention regarding that states should cooperate to ensure conservation and promote the objective of the optimum utilization of fisheries resources both within and beyond the Exclusive Economic Zone.

The agreement attempts to achieve this objective by providing a framework for cooperation in the conservation and management of those resources. It promotes good order in the oceans through the effective management and conservation of high seas resources by establishing, among other things, detailed minimum international standards for the conservation and management of straddling fish stocks and highly migratory fish stocks; ensuring that measures taken for the conservation and management of those stocks in areas under national jurisdiction and in the adjacent high seas are compatible and coherent; ensuring that there are effective mechanisms for compliance and enforcement of those measures on the high seas; and recognizing the special requirements of developing states in relation to conservation and management as well as the development and participation in fisheries for the two types of stocks mentioned above. Namibia as a party to the agreement and as part of its obligations under international law undertakes to conform fully with the terms of the agreement in regulating the conservation and management of straddling fish stocks and highly migratory fish stocks.

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<sup>441</sup> Available from <http://www>.

<sup>442</sup> Available from <http://www.lac.org.com.na>

<sup>443</sup> Summary available from <http://www.oceanlaw.net/texts/summaries/seaf0.htm>

**d) Convention on the Conservation and Management of Fishery Resources in the South East Atlantic Ocean, 2001<sup>444</sup>**

Namibia signed this convention on 20 April 2001 in Windhoek, Namibia's capital and it was ratified on 15 November 2001. The convention is not yet in force, and it will enter into force 60 days after the date of deposit with the Depository of the third instrument of ratification, accession, acceptance or approval, at least one of which has to be deposited by a coastal state. The general objective of the Convention is to ensure the long-term conservation and sustainable use of the fishery resources in the convention area, which is the Southeast Atlantic Ocean and waters beyond areas under national jurisdiction. Article 4 of the convention provides a detailed delimitation. The convention applies to all fishery resources, including fish, mollusks, crustaceans and other sedentary species subject to the fishery jurisdiction of coastal states pursuant to Article 77(4) of the Law of Sea Convention and highly migratory species listed in Annex I of the Law of the Sea Convention. The convention's operative mechanism is the establishment of the South East Atlantic Fisheries Organization (SEAFO). The organization will comprise a commission; compliance and scientific committees, as subsidiary bodies and other subsidiary bodies that the commission shall establish from time to time; and a secretariat.

**e) Convention on the Conservation of Antarctic Marine Living Resources, 1980**

Namibia acceded to this convention on 29 January 2000 and the convention had been in force since 7 April 1982. The main objectives of this convention is to ensure the conservation, including rational use of Antarctic marine living resources, is based on the following principles of conservation: prevention of decrease in the size of any harvested population to levels below those which ensure its stable recruitment and for this purpose, its size is not allowed to fall below a level close to that which ensures the greatest net annual increment, maintenance of the ecological relationships between harvested, dependent and related populations of Antarctic marine living resources and the restoration of depleted populations to the levels defined above. The convention covers all Antarctic marine living resources in the Antarctic area, meaning the populations of fin fish, mollusks, crustaceans and all other species of all living organisms, including birds, south of the Antarctic convergence.

**f) SADC Protocol on Fisheries, 2001**

Namibia signed the Protocol on 14 August 2001 and it was ratified on 21 June 2002. The Protocol came into force within the SADC region on 08 August 2003<sup>445</sup>.

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<sup>444</sup> Summary available from <http://www.oceanlaw.net/texts/summaries/seafo.htm>

<sup>445</sup> Information about signing, ratification and date of coming into force was obtained from <http://www.lac.org.com.na>

The Protocol aims at giving a practical effect to achieve the goals of national development, increased regional trade, cross border investment and restructuring the productive sector. Article 22 mandates all member states to strive towards greater economic integration in the region. The Protocol further promotes and enhances food security and human health, safeguards the livelihood systems of fishing communities and generates economic opportunities for national and regional interests to ensure that future generations benefit from these renewable resources. Among other issues addressed in the Protocol are the management of shared resources; access agreements; aquaculture; artisanal fisheries; protecting the environment; human resource development; and information exchange. The Protocol addresses both marine and inland fisheries<sup>446</sup>.

### **III. THE NATIONAL MANAGEMENT SYSTEM AS APPLIED IN RELATION TO THE IMPACT OF THE “NORTH”**

#### **1. FISHING BY EC/NORTH AMERICAN/JAPANESE FLEETS**

##### **a) Bilateral access agreements**

The EU, Namibia's main export market, is highly interested in improving its access to Namibian fishing grounds. Since the EU is negotiating an “Economic Partnership Agreement” (EPA) with Namibia, including a Free Trade Agreement (FTA), there are European ambitions to include fisheries into free trade.<sup>447</sup> It is argued that an FTA with the EU could help Namibia to improve its access to modern technology and to integrate the fishing industry better into the global value chain. Namibia again is reluctant to include fisheries into free trade since it fears that its national empowerment, monitoring and sustainability policies will be undermined.<sup>448</sup>

Namibia and Morocco are considered very good examples which show that, the development of a domestic fishing industry is entirely possible without the EU. Indeed, it may even be highly advantageous for a country in both economic and financial terms. In 1990, after independence, Namibia expanded its domestic fishing industry and refused to conclude an access agreement with the EU.<sup>449</sup> Around five years ago, Morocco opted not

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<sup>446</sup> Information obtaining from [http://www.grnet.gov.na/News/Archive/2001/October/week2/cabinet\\_rpt.htm](http://www.grnet.gov.na/News/Archive/2001/October/week2/cabinet_rpt.htm)

<sup>447</sup> Meyn M (2005) “Namibianisation”, Exports and Domestic Value Additions in the Namibian Fishing Industry. Chances and Risks of Including Fisheries into a Free Trade Agreement with the EU, NEPRU Research Report No.33, Windhoek: NEPRU. Also available from <http://www.nepru.org.na/>

<sup>448</sup> *Ibidem*

<sup>449</sup> Available from [http://www.rural-development.de/fileadmin/rural-development/volltexte/2005/02/en/ELR\\_engl\\_38-40.pdf](http://www.rural-development.de/fileadmin/rural-development/volltexte/2005/02/en/ELR_engl_38-40.pdf)

to renew its agreement with the EU – a decision which has greatly benefited domestic production.<sup>450</sup>

Therefore, Namibia has not concluded any bilateral access agreement with the EU, the US and Japan for their vessels to have access to Namibian waters and this is due to the fact that Namibia is trying very hard to protect its fisheries resources after they were heavily plundered in the years before independence by Distant Water Fishing Nations.<sup>451</sup> After five years of negotiations (1995-2000) between the EC and Namibia, and extensive consultations with its interested industry, the Namibian government decided not to pursue further discussions on the EC proposals for an EC/Namibia fisheries agreement.<sup>452</sup> There is no direct access for foreign interests to participate in fishing in Namibia except in terms of the process for the granting of fishing rights described above. There are no fishing access agreements with other states, and no foreign vessels can be licensed except under the terms of a fishing right.<sup>453</sup> Foreign interests are entitled to apply for fishing rights under the Marine Resources Act in the normal way. In this way, foreign interests are treated for the purposes of fisheries management in the same way as Namibian interests except that there is a preference in terms of rights, quotas and quota fees for Namibian controlled ventures, Joint venture between Namibian and foreign interests are welcomed.<sup>454</sup>

However, Namibia as coastal state that exports fish to other markets especially the EU is party to some partnership agreements. One example of such agreements is the Cotonou Agreement. The agreement is aimed at the reduction and eventual eradication of poverty, while contributing to sustainable development and to the gradual integration of ACP countries into the world economy.<sup>455</sup>

The provisions of the Cotonou Partnership Agreement (CPA) define the terms and conditions for the export of ACP fish and fishery products to EU. This includes specifying the rules of origin that must be met in order to benefit from these special arrangements. The current market-access provisions of the CPA are based on the non-reciprocal trade preferences extended to ACP countries under the earlier Lomé Conventions.<sup>456</sup> These allow ACP countries to export their fish products to the EU without having to pay the import taxes applied to fisheries exports from other countries. These ACP tariff preferences will continue until the end of 2007.<sup>457</sup> Namibia has been a particular beneficiary of the tariff preferences extended under the Cotonou Agreement,

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<sup>450</sup> *Ibidem*

<sup>451</sup> This inference is drawn from information obtained from <http://www.intfish.net/treaties/bilaterals/c-index.htm#European%20Union>, with regard to fisheries agreements signed by different countries of the world. The only agreement reflected on this site about Namibia is the agreement between Namibia and South Africa on the prevention of illegal fishing.

<sup>452</sup> Available from <http://www.delnam.cec.eu.int/Reports/Reports/country%20strategy%20report%202002.htm>

<sup>453</sup> Available from <http://www.fao.org/fi/fcp/en/NAM/body.htm>

<sup>454</sup> *Ibidem*

<sup>455</sup> Available from [http://en.wikipedia.org/wiki/Cotonou\\_Agreement#Aims](http://en.wikipedia.org/wiki/Cotonou_Agreement#Aims)

<sup>456</sup> *Ibidem*

<sup>457</sup> *Ibidem*

expanding considerably its exports in those areas where tariff preferences are enjoyed. The following Namibian fish products enjoy duty free access to EU markets: fresh or chilled fish; frozen albacore tuna; frozen hake; and frozen fish; fresh or chilled fish fillets; frozen fish fillets; frozen fish meat and prepared sardines.<sup>458</sup> The EU is seeking to replace the current unilateral preferences with new reciprocal arrangements that would begin in January 2008.<sup>459</sup>

**b) Illegal foreign fishing and related legal issues with reference to judicial decisions**

After Namibia attained its independence it adopted a fisheries management regime which was aimed at rebuilding stocks which plundered by illegal foreign fishing in the years before independence. The management regime included a Monitoring, Control and Surveillance (MCS) system. Under this system, as observed earlier systematic sea, air and shore patrols are conducted with an effort to detect illegal fishing. From the attainment of independence to the present date, Namibian courts have built a substantial number of precedents on illegal foreign fishing. This can be seen from the number of case studies below.

**(i) Case study 1: *S v Curras 1991 NR 208 (HC)***

This case study is an example of a judicial decision of the Namibian High Court on illegal foreign fishing in which the court imposed a fine of N\$ 400,000 or imprisonment for six years failure to pay the fine, and also ordered the forfeiture of the vessel and all its implements to the state.

In this case the accused was a 39-year-old male of Spanish nationality. He was charged with contravening s 22A (4) (b) read with ss 1, 6, 16, 17, 18, 22A and 24(1) of the Sea Fisheries Act 58 of 1973 (RSA), as amended, and further read with ss 1, 4, 5, 7 and 8 of the Territorial Sea and Exclusive Economic Zone Act 3 of 1990 (Nm) and ss 90 and 250 of the Criminal Procedure Act 51 of 1977 (RSA), in that being the master or captain of the fishing vessel, *Friopesca Uno*, a vessel of Spanish registration.

During and about the period 22 September 1990 to November 1990 the accused wrongfully and unlawfully used the said vessel as a fishing boat and/or factory as envisaged by s 1 of Act 58 of 1973 within the exclusive economic zone and within the area of jurisdiction of the Namibian High Court without a permit granted in respect of the said vessel.

The accused was convicted of illegal fishing in the Namibian waters with a foreign vessel without a permit.

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<sup>458</sup> Available from [http://www.epawatch.net/documents/doc126\\_1.doc](http://www.epawatch.net/documents/doc126_1.doc)

<sup>459</sup> *Ibidem*

The court accordingly sentenced the accused to pay a fine of N\$ 400,000 and failure to pay such fine he shall go to prison for six years. The court also ordered that the ship the *Friopesca Uno* with all its equipment and implements to be declared forfeited to the State in terms of s 17 of the Sea Fisheries Act. The fish were also forfeited to the state in terms of s 6 (6) (a) of the Sea Fisheries Act. The court further concluded that it would be unjust for the owners or charterers and the accused to benefit from the unlawful fishing venture.

This case study is testimony that the implementation of the management regime started shortly after the attainment of independence. It is clear that in trying to send a very strong warning to other would-be foreign fishers, the illegal foreign fishers were quickly dealt with by the Namibian courts. This is also testimony of how serious the government of Namibia was in implementing the fisheries management system in order to allow stocks to grow and to build a strong and lucrative Namibian fishing industry.

**(i) Case study 2: *S v Martinez 1996 NR 1(HC)***

In this case the accused, the captain of a Spanish fishing vessel, was charged with contravention of s 22A (4) (b) (which made it an offence to use a fishing vessel registered in a foreign state within a fishing zone without a permit), alternatively s 8(1) (which prohibited the use of a fishing vessel without the necessary license having been issued), read with ss 1, 6, 8, 16, 17, 18 and 24 (1) of the Sea Fisheries Act 58 of 1973 (RSA) and further read with ss 1, 4, 5, 7 and 8 of the Territorial Sea and Exclusive Economic Zone of Namibia Act 3 of 1990 (Nm) and ss 90 and 250 of the Criminal Procedure Act 51 of 1977 (RSA). The charges related essentially to the unlawful fishing activities of the accused within Namibia's exclusive economic zone and that approximately 183 tons of fish with a value of R810 500 had been caught inside the EEZ.

The accused was subsequently convicted and he testified in mitigation that he expected to receive as remuneration 2% of the value of the catch in Spain, or approximately R22 000. the State requested the court to impose a fine of R22,000 in terms of s 16(2) (a) of the Sea Fisheries Act (which section provided that where any person was convicted in terms of the Act, the court shall determine the monetary value of any advantage which such person may have gained in consequence of the offence, and impose a fine equal to the amount so determined) in addition to any other penalty the court may impose.

The court held that as to the issue of the imposition of a fine in terms of s 16(2) (a), the word 'may' obviously referred to an advantage which had accrued in the past, the object of the provision being to prevent a convicted person from profiting by his spoils, and also that inasmuch as the accused had been arrested before any advantage had accrued to him from his unlawful catch, he could not be punished in terms of s 16 (2) (a).

The court held further as far as the seizure and forfeiture of the ship, its implements, and the fish caught were concerned, that a blanket seizure of implements where the implements were of great variety and where some were attached to the ship and could only be detached with difficulty was not an adequate seizure in terms of s 6 (1) (c) of the Sea Fisheries Act: such implements should have been itemized to enable the court to

exercise proper discretion. The court also held that as there had been no valid seizure of implements under s 6(1) (c), there could be no forfeiture thereof in terms of s 6(6) (a) of the Act, but further that the same considerations did not necessarily apply for fish – there was no difficulty in identifying such fish and an itemization thereof was not necessary: accordingly the forfeiture of the fish could not be set aside.

The court then, taking all the above factors into consideration, sentenced the accused to a fine of R300,000 or four years' imprisonment.

**(iii) Case study 3: *S v Pineiro & Others 1999 NR 13 (13)***

The events that led to this case took place in the Atlantic Ocean in March 1991. The first applicant had sailed from Spain in the vessel CP in February 1991 to fish off the Falkland Islands. En route he received instructions to sail to the west coast of South Africa to await instructions regarding the transshipment of fish already caught. In a position approximately 100 miles from the South African Coast and south of the boundary separating the South African fishing zone from the Exclusive Economic Zone of Namibia, 'he waited' until 21 March 1991. On that day a helicopter flew overhead and an inspector of Namibian Sea Fisheries and two soldiers came on board. The first applicant refused to sign a letter admitting that he had been fishing off the Namibian coast. He was then ordered to sail to Lüderitz, but he refused to do, contending that he was in South African waters. He was later relieved of his captaincy. On the evening of 22 March two South African Navy warships came along side and he informed them that he could go to a South African port but not to Lüderitz. Notwithstanding this, he was ordered by the South African navy to proceed to Lüderitz which he did under their escort. On arrival at Lüderitz on 25 March, he and the other Masters and their respective officers were placed in police custody in police cells. On 28 March, they appeared in the magistrate's court of that town, on a charge of contravening s 22A (4) (b) of the Sea Fisheries Act (58 of 1973). An application for bail was refused and they remained in custody. First applicant maintained that neither the Sea Fisheries inspector nor the Namibian soldiers had been entitled to take him and his crew into custody and to seize his ship while they were in the South African fishing zone and he said that such custody and seizure were unlawful.

The 11 accused were subsequently convicted of fishing without permission in the Exclusive Economic Zone of Namibia in contravention of s 22 of the Sea Fisheries Act 58 of 1973. Before they were sentenced, a Spanish bank (*Caja de Ahorros de vigo*) applied to establish its interests in the two fishing vessels used in the commission of the offence. The fishing vessels concerned were the *Cabu Primero* and the *Cotorredondo Cuatro*. From the evidence presented it appeared that the bank held registered first mortgage bonds over the vessels.

The accused were subsequently sentenced and the court also forfeited in favour of the State, the vessels *Cabu Primero* and *Cotorredondo Cuatro*. Such forfeiture was ordered in terms of the provisions of s 17 of Act 58 of 1978. The court consequently ordered that such forfeiture be subject to the bank's rights under the registered first mortgage bond. The State thereupon applied to reserve certain questions of law arising from the forfeiture

of the vessels. The court held that the questions arising from the enquiring in terms of s 17 of the Sea Fisheries did not arise on the trial of any person as intended by s 319 of the Criminal Procedure Act 51 of 1977 and therefore the State is not entitled to reserve a question of law in respect thereof and the State's application was accordingly refused.

**(iv) Case study 4: *S v Carracellas & others 1992 NR 322***

The following case study deals with the issue regarding the boundaries of the Namibian Exclusive Economic Zone as objected to by an accused charged with illegal foreign fishing in Namibian waters. The court ruled that Namibia indeed has an Exclusive Economic Zone and that the extent of it was capable of being established. The facts of the case appear from the reasons for the judgment below.

The accused were charged with contravening s 22A (4) (b) of the Sea Fisheries Act 58 of 1973 (RSA) as amended and read with the Territorial Sea and Exclusive Economic Zone of Namibia Act 3 of 1990. The accused objected to the indictment because it did not clearly outline the boundary between the Namibian EEZ and that of Angola as the accused contended that he was in Angolan waters. The court then had to determine the perimeter of the EEZ, as the State had alleged that the accused committed the offence within the EEZ. The state was afforded the chance to furnish further particulars with regard to the boundary of the northern perimeter of the EEZ. The State furnished these particulars, giving eight alternatives for the northern perimeter. The accused still objected to the indictment as amended on ground that not one of the alternative borders upon which the state now relies, constitutes in law a valid determination or delimitation of the northern boundary of the EEZ of Namibia.

The court held that this matter depended on the interpretation of the Territorial Sea and Exclusive Economic Zone of Namibia Act 3 of 1990, s 4 whereof provided that;

*'(4) (1) The sea outside the territorial sea of Namibia but within a distance of 200 nautical miles from the low water line or any other base line from which the territorial sea was measured shall constitute the Exclusive Economic Zone of Namibia. (2) In determining the extent of the Exclusive Economic Zone due regard shall be had to the rules embodied in the convention. The court also held that the convention referred to in the Act is the United Nations Law of the Sea Convention of 1982 and that article 55 of the convention stated that it shall not extend beyond 200 nautical miles from the baseline from which the territorial sea is measured. The court also held that as Namibia was not yet party to the convention at the time of the passing of the Act provision had not been made in the Act for these contingencies:*

Section 5 had to be seen in this light as it provided for a unilateral determination by Namibia of its EEZ pending a final agreement, or failing an agreement with another affected state. The court further held that s 5 of the Act contradicted the Convention in certain respects: it exhorted Namibia to negotiate with another state only if the Namibian EEZ overlapped or infringed upon the territorial sea, EEZ or other maritime zone of that other state and not because the other state had an adjacent coast as provided for in the convention. It did not compel Namibia to negotiate, but only exhorted her to do so

contrary to the convention. It also allowed unilateral determination which was not countenanced in the convention.

The court held further that allowing unilateral action in respect of the territorial sea was also contrary to Article 15 of the Convention: it was thus clear the rules of the Convention were not incorporated in the Act.

The court accordingly held that from the foregoing it was clear that Namibia did have an EEZ and that the extent of it was capable of being established. The objection of the accused was accordingly dismissed.

## 2. PURCHASE OF FISH BY EC/NORTH AMERICAN/JAPANESE FOOD COMPANIES

### a) **Namibian laws regulating sales of fish to other countries**

Namibia has no laws that regulate sales of fish to other countries, but it has a Standards Act 33 of 1962 which sets out compulsory standards specifications on different food products that are exported to other countries. The export of fish is based on the principle of equivalence. This means that the standards specifications have to be equivalent to the laws of the importing state.

### b) **Legal requirements of fish importing states related to sustainable fishing practices**

The EU has a number of laws that govern the quality of food products that they import from other countries, and these are called food laws.

### c) **Relevance of voluntary quality control schemes adopted by non-governmental consumer councils (e.g. certification by the Marine Stewardship Council) or food companies in fish importing countries for the Namibian fishing industry**

The EU has legislation that Namibia as the exporting country has to adhere to for its products to be allowed into the EU market. There is a quality management system that the EU requires every fish processing company to implement. This system is called the Hazard Analysis Critical Control Point (HACCP for short). This is a system that is based on prevention of quality problems. Civil society groups have played a significant role in promoting sustainable seafood products, primarily by raising public awareness of the issue and continually placing it on the agenda of governments and regional fisheries management organizations. The NGOs involved in this area are typically international ones such as the WWF or Greenpeace. However, some of the NGOs most active in fisheries issues are found in the US and Europe. US foundations such as the Pew Charitable Trusts and the Packard Foundation are driving forces in providing funding for sustainable-fisheries-related causes. Which fisheries are defined as sustainable is

determined in general by those same NGOs, with the assistance of notable marine biologists and ecologists. NGOs in the US, Europe and Oceania are taking a direct aim at the consumer in their efforts to promote sustainable seafood products by encouraging the consumer to buy fish only from sustainable fisheries or sustainable aquaculture. A small but growing amount of this type of activity also appears to be occurring in Asia, most notably in Japan and Hong Kong. The main market-based activities of NGOs have been (i) organised boycotts of specific species; (ii) consumer guides with recommendations on which species to purchase; (iii) ecolabelling programmes; and most recently (iv) pressuring retailers not to carry particular species that NGOs have deemed 'unsustainable.' Pervasive in all the activities of these NGOs is consumer education regarding, for example, the relative environmental impacts of various types of fishing practice, the status of various stocks, and by-catch/habitat impacts. Notwithstanding the importance that consumer education (whether with information or misinformation) plays in markets for sustainable fish, this discussion will focus on targeted market measures, namely boycotts, seafood guides and ecolabelling.

### **III. EMPIRICAL CASE STUDY ON FISHERIES MANAGEMENT**

#### **1. Promotion regimes**

Unlike in other countries Namibian fisheries industry is not subsidized.<sup>460</sup> The industry generates its own income and is responsible for the marketing of its produce to the different markets.

#### **2. Management measures: The rights regime**

As a matter of general observation, the Act outlines procedures regarding the application for fishing rights and allocation of the fishing quotas. It sets out the procedures and criteria for licensing of fishing vessels and control fishing efforts, and provides for Namibia to enter into fisheries agreement with a member country of the Southern African Development Community ('SADC').

#### Total Allowable Catch TAC

The setting of TACs is one of the main management measures by which to prevent overexploitation of Namibian fish stocks. The TAC is set on the basis of the best scientific evidence available of the size and structure of stocks and as advised by the Marine Resources Advisory Council, the same is set to limit the quantity which may be harvested in a given period.

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<sup>460</sup> See footnote 1

This has caused a lot of problems within the industry as the Minister slashed the TAC of certain fish species as a measure aimed at protecting fish stocks. In 2006 new tough restrictions were announced. These included amongst others:

- The TAC for Hake was set below the 140,000 tonnes for the 2006-2007 season and it was not to be revised unless the average size of the hake improved. This means a reduction of the TAC by 50,000 tonnes from the original 180,000 tonnes for the previous season.

This was necessitated by the fact that too many small hake ended up in catches and scientists reported no well defined hake nurseries.

- Further, the Minister announced that a trawling ban emanating from previous season is to remain and also introduced a two-month closed season in September and October every year.
- A new regulation was implemented that required fishers who caught hake that are smaller than 36 centimetres to stop fishing and steam at least 10 nautical miles away from the area they are fishing at.
- Other species such orange roughy's TAC was also reduced to almost half of what the 2005 season's TAC.

This management measures aimed at resource preservation was not received well by all in the industry. Some felt that such measures were catastrophic for the industry.<sup>461</sup> Others felt that government was caught between a rock and a hard place and the measures are necessary for long term sustainability.<sup>462</sup> The majority in the industry felt that it is hard to find a balance between saving the industry and protecting the resource. Some felt that government scientists are inconsistent with their prediction of the availability of the resource. If they previously predicted a healthy state of affairs for the year 2015, now they have a turnaround prediction which culminated into reduced TAC being allocated.<sup>463</sup> This was seen as amounting to economic sabotage and totally unnecessary and which is leading to the industry losing some of its important markets because the industry can not deliver sustainably as a result of dismal quotas.<sup>464</sup>

### **3. Enforcement and compliance issues**

#### **3.1.1 Monitoring and Surveillance of catches**

The monitoring and surveillance is a department forming part of the directorate of operations in the Ministry. The directorate operates from both ports namely Walvis Bay

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<sup>461</sup> See field note 6

<sup>462</sup> See field note 1

<sup>463</sup> See field note 6

<sup>464</sup> Ibidem

and Lüderitz. As earlier mentioned the MCS system is the regulatory component of fisheries management within the 200 nautical mile EEZ.

As a matter of general observation, evaluation of the success of the system in relation to the three strategic objectives<sup>465</sup> concluded that: a) the first objective, to restrict fishing activity to those entitled to do so, has been relatively fully achieved; b) the second objective, to ensure that fishing activity is conducted within legal and administrative guidelines, has been partially achieved, and c) the third objective, to ensure that the revenue from landings are correctly calculated, has not been achieved.

As far as the first and second objectives are concerned, evidence supports that compliance has generally improved over the last decade, although levels vary considerably across fisheries. Regular inspections by the patrol vessels reduced the number of violations. Analysis of the demersal fishery yielded very low violation rates, which were supported by survey results on perceived compliance levels. This fishery gave a strong correlation between economic return from the fishery and the level of violations, supporting the theory that financial viability of the fishery affects the behaviour of fishers. The midwater fishery on the other hand, a fishery of less social and economic importance to Namibia, is faced with unacceptably high levels of non-compliant behaviour. This fishery also provided evidence that an increase in economic return coincided with a decrease in violations. This, a predominantly foreign fishery (often utilizing flag of convenience), was also the least compliant. The pelagic fishery that has gone through severe financial difficulties in the last years has remained with a steady level of recorded violations, with no evidence of a link between the economic return of the fishery and the violation level. Results indicated that progress in improving the compliance level across all fisheries is hampered by the low deterrence value of the fines imposed and the delay between crime and punishment.

The third objective, ensuring that revenue from landings is correctly calculated, is not successfully implemented. Evidence indicated that the calculation of revenue is very unreliable and that in 1999, N\$ 700,000 was lost in bank interest, while the loss due to inaccurate reconciliation and underreported catches was impossible to estimate, but may have been considerable.

The cost of MCS in the last two years was 41% and 42% of the industry revenue: this is considered an acceptable level, as was the distribution of cost across MCS components. However, serious concern was raised over the future cost.<sup>466</sup> A fisheries expert made the following recommendations for the MCS operations:<sup>467</sup>

- (a) the setting of compliance targets to streamline logistical operations and planning;

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<sup>465</sup> See above I.4. (a) ('Institutional and organizational structures') under the section on the MFMR's Directorate of Operations.

<sup>466</sup> See I. 3. ('Perception/non-perception of basic fisheries issues') above.

<sup>467</sup> Erik Bergh, Erik & Sandy Davies. *op.cit.* (2004) p.312.

- (b) the improvement of the performance of MCS platforms to increase cost effectiveness;
- (c) a more analytical approach to balancing enforcement and voluntary compliance in order to unlock potential increases in compliance;
- (d) the shortening of the decision-making process to promote more immediate reactions to serious violations;
- (e) an increase in fines to ensure that crime does not pay;
- (f) the creation of an MCS information system to facilitate cross verification and improved planning; and
- (g) finally and most importantly, to redesign the working practices and information systems used to calculate landings in order to ensure that catch limits are not exceeded and that revenue is correctly calculated.

The least successful element in the MCS system was identified as the calculating of revenue from the industry and the quota control.<sup>468</sup> The result of this weakness was identified as not only causing an undetermined loss in revenue, but also offering a substantial threat to stock sustainability by the possible over catching of quotas. Both the cumbersome working practices for landings control and data management and the database software system were identified as contributing factors to the system failure: a total redesign of working practices and information management is required, including consideration of an MCS information system.

The low level of sanctions given to serious offences was seen as reducing the value of the penalty system as a punishment measure. It is vital that crime does not pay and that the penalty meted out is greater than the potential economic gain from the crime. Correcting this imbalance may boost the deterrent effect of penalties enough to allow a reduction in other more costly areas of MCS operations.

### 3.1.2 Landings

All fish and fish products harvested in Namibian waters are landed at the country's two main ports: the port of Walvis Bay and Lüderitz. Once the fish are landed they are tallied by officials from the Ministry of Fisheries against the quotas allocated to the said company.

### 3.1.3 Unregulated and Unreported (IUU) fishing

The dramatic initial enforcement of the EEZ in the early 1990s the newly formed MFMR was then faced with developing an MCS organisation with limited resources and an unskilled and inexperienced workforce. During 1990 and 1991, 11 Spanish trawlers and one Congolese trawler were arrested for illegal fishing and successfully prosecuted; most of them were forfeited to Namibia by the Namibian courts. These actions sent a clear

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<sup>468</sup> Erik Bergh & Sandy Davies. *op.cit.* (2004), p.312.

message to the international fishing community that Namibia was serious about establishing sovereignty over its new EEZ.

There were a few further incidents of poaching after this, but effective monitoring, control and surveillance and enforcement deterred poachers and improved compliance by licensed vessels.<sup>469</sup> Over twelve years, Namibia has developed a complex, multi-national and modern MCS organisation. The system has been shaped by the national-level policies of Namibianization and transformation and it has been supported by a strong legal framework. Although at times the complexity of the law has confounded compliance; the isolated coast of Namibia has facilitated MCS efforts, while the distance between operational units has been an obstacle for communication. The lack of an information system for MCS has reduced the capacity to plan and cross-check information, while finally, the strong reliance on donor support has on the one hand assisted the development, but on the other hand shaped progress in ways that may not always be objective.

#### **4. The divergence between ‘law in the books & law in action’, with reference to administrative and judicial decisions**

Namibia’s fishing industry is one of the few countries in the world that adhere to strict regulatory framework. There is a strict monitoring system in place and it makes it impossible for the fisher to break the rules. However, not every system is full proof, hence there are people who find it possible to beat the system. This is especially prevalent in the recreational fisheries sector where people are caught and fined either for targeting prohibited species or exceeding their daily bag limit as set by the Ministry. However, the coastal patrol fisheries inspectors are known to be ruthless in their issuing fines. In the case of foreign recreational fishers, it sometimes means that they have to abandon their fishing activity and accompany the fisheries inspectors to the nearest magisterial court or police station to pay the fines. This means that they have to sometimes drive long distances to pay these fines and they are not allowed to continue without paying same.

In the case of Namibians, they are summoned to appear in court. These are minor offences and in most cases fines are imposed. No clear records exist for the number of cases that are brought to court.

Some fishers also try to beat the system by using prohibited bait to catch fish and if caught they are fined, but it also happens they mostly get away with this as they can spot the approaching patrol vehicles from afar. What they normally do is just cut their line and destroy all evidence of any prohibited bait. The most popular bait used is worms, and from field observation they prove to be popular for the fishes.

#### **5. Realization of reforms**

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<sup>469</sup> Paul Nichols. *op.cit.* (2004) 327.

The Namibian government's fisheries management regime is geared to the conservation of the marine ecosystem and the responsible utilization, conservation, protection of the marine ecosystem and the responsible utilization, conservation, protection and promotion of marine resources on a sustainable basis and to provide the exercise of control over marine resources. Further, it aims at Namibianisation of the resource, redistribution of fisheries benefits to the wide populace, especially the formerly disadvantaged.

In order for government to succeed with these objectives the following are some of the reforms that need to be considered:

- As pointed out and discussed above, the government is loosing as a result of an unreliable revenue calculation method. This is due to weaknesses in the manual calculation method used at factories by fisheries inspectors. A further impediment is the inaccurate reconciliation process and cumbersome work routine when data is collected and registered. Fisheries inspectors at factories are a very important element in the verification of landings. If they are ineffective, it leaves the system dependent on the industry figures and no independent verification of actual landings.
- The interest between biological sustainability and economic growth has to be balanced to avoid the industry and government from being at loggerheads when it comes to the setting of TACs for the different species.
- The Marine Resources Act 27 of 2000 is seen by many as a complex piece of legislation and this hampers compliance because its interpretation is not clear to even those that have the duty to implement its provisions. The provisions have to be clarified.
- Failure to reform and reconstruct stocks of certain species is a cause of concern even in the presence of a conservative management system. There exist extra-legal causes of the failure in the recovery of certain species such as sardine and hake stocks.
- There is a clear concern from the industry questioning the accuracy and reliability of estimations of stocks used to determine TAC. The scientific basis used by the ministry should be transparent, accessible and verifiable by the actors in the industry.
- As mentioned earlier, one of the objectives of the MFMR is to redistribute revenue amongst the formerly disadvantaged and to Namibianise the industry. Government has failed to reinvest revenue generated from fisheries in other forms of productive capital, and as such misses an opportunity to build national wealth.
- There is a further need for government to rethink the manner in which the empowerment of the previously disadvantaged is achieved. A capital intensive industry such as this requires availability of resources.
- Namibia, with its abundance in fish and marine resources, imports fish products from other nations, while not providing protection measures for the local market

against heavily subsidized fish emanating from other countries. Even though fish consumption in Namibia is insignificant, it nonetheless is a market that should be enjoyed by locals and not overtaken by imported goods.

- The general view is that there is a need to for better consultation between government and industry in the setting of TACs to avoid distrust of government by industry.
- The MCS system needs to be improved by the setting of realistic compliance levels, improving the efficiency and effectiveness of MCS operational platforms and finally dealing with future financial implications.
- The absence of a Namibian Bureau of Standards leaves us at the mercy of the South African Bureau of Standards. This body is widely recognized and respected for its exceptionally high standards, but any respectable country cannot allow its standard to be determined by foreign nationals who, in most cases, are not privy to domestic circumstances.

## **V. CONCLUSIONS**

The Namibian management regime has in many cases been successful, especially if one is to have regard to the fact that they inherited totally devastated fisheries. The swift and speedy prosecution of foreign vessels found fishing illegally in Namibian waters was a deterrent to many and showed that the new regime meant business.

Domestic legal instruments are adequate and are generally adhered to, the fish stocks are responding relatively well to the management regime, but there are instances where the resource despite the conservative management is worse then before. The reasons for this are multifaceted. It can be attributed to adverse environmental conditions affecting fisheries. It can also be an indication that the scientific predictions of the availability of stocks are flawed and, hence, the reliance on it to determine TACs results in excessive or over utilization of the resource.

Generally, the industry respects and applauds the efforts of the government in trying to balance biological sustainability and economic survival of the industry. Many agree that this is not an easy task, and at times clashes between the industry and the government cannot be avoided. They, however, appreciate the open and friendly cooperation between the two.

The basic issues as identified above are a reflection that a dynamic system is at play and a conflict situation is bound to arise where human beings and resource use is concerned.

Namibia takes environmental protection and sustainable utilization of earthly resources seriously to the extent of it being one of the few countries whose constitution specifically provides for this.

The Marine Resources Act<sup>470</sup> is hailed as encapsulating the best management practices in the world. Hence, it ensures that Namibia complies with most of its international obligations. Further, in terms of Article 144<sup>471</sup>, all international agreements duly entered and ratified by Namibia become part of domestic law and, hence, can be enforced in domestic courts. The downside to this, however, is that Namibia has become a signatory to many international agreements and it is proving to be difficult to adhere to all their prescriptions. If this means that it will enable us to use resources in a sustainable manner, then it is worth the difficulty.

As mentioned earlier Namibian products are popular amongst foreign markets as a result of the quality and the high standards maintained. Namibia in general readily accepts most of the SPS requirements imposed on exported goods to importing countries. Namibian fisheries companies vigorously implement the Hazard Analysis Critical Control Point (HACCP) as a measure to meet stringent quality control measures required by importing markets such as the European Union.

The Monitoring Surveillance and Control measures are applaudable and are to a large extent effective. However, there is always an avenue to improve. The implementation of the Vessel Monitoring System (VMS) and the installation of Automatic Location communicators (ALC) on each vessel operating within the Namibian waters on board is good news. Some skeptics are fast to point out that this will be costly to maintain. The benefits derived for the industry and the sustainability of the marine resources by far outweigh the cost factor. It will improve the monitoring, control and surveillance and is a necessary tool to fulfill Namibia's international obligations. The fact that the installation of the ALCs is a compulsory precondition prior to a vessel being allowed to fish will ensure compliance.

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<sup>470</sup> Act 27 of 2000

<sup>471</sup> Constitution of Namibia

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## **VII FIELD ITINERARY**

### **FIELDNOTE 1**

Ms. D van Bergen  
Chairperson:  
Confederation of Fishing Associations  
September 2006

### **FIELDNOTE 2**

Mr. Kallie Jacobs, Director,  
Erongo Marine Enterprises  
September 2006

### **FIELDNOTE 3**

Mr. Johannes Van Zyl  
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Quality System Consultant  
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### **FIELDNOTE 5**

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Executive Secretary  
SEAFO  
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Managing Director  
Overberg Fishing  
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**FIELDNOTE 7**

Messrs Makuti and Kakujaha  
The Municipality Of Walvis Bay  
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**FIELDNOTE 8**

Mr. Bobo Kathindi  
MD: Etale Fishing  
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**FIELDNOTE 9**

Hermanus Kasper  
Business Personality  
Special Interest in Fisheries  
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**FIELDNOTE 10**

Mr. Steven Ambambi  
Deputy Director  
Directorate of Operations  
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