

In Depth Case Study of the Benguela Current Large Marine Ecosystem¹

*This case study on the Benguela Current Large Marine Ecosystem is one of a series that has been prepared as part of the Global Environment Facility (GEF) Good Practices and Portfolio Learning in GEF Transboundary Freshwater and Marine Legal and Institutional Frameworks Project International Waters Governance project. The objective of these case studies is to provide insight into how these agreements were negotiated and how well they are working. Each case study has been peer reviewed by one or more experts with direct knowledge of the agreement being analyzed.*²

1. Background

1.1. Geographic context

The Benguela Current Large Marine Ecosystem (BCLME) is located off the south coast of Western Africa, from east of the Cape of Good Hope (Port Elizabeth, South Africa) to the province of Cabinda in Angola, and encompasses Namibia's entire marine environment.³ The jurisdiction of the Interim Agreement (IA) discussed in this case study specifically applies to the area from to the 0^o meridian in the West to the meridian 27^o East, and from the line of latitude 5^o South in the North, and to a 200 nautical mile boundary along South Africa's mainland in the South (which is South Africa's territorial sea according the 1982 United Nations Convention on the Law of the Sea).⁴

It is one of the world's four major coastal upwelling ecosystems that lie on the eastern boundary of an ocean, and its unique bathymetry, hydrography, chemistry and trophodynamics make it one of the most productive ocean regions in the world, with an average annual productivity of 1.25 kg of carbon per square metre annually.⁵ This high primary productivity is important in contributing to global biodiversity and biomass of

¹ This case study was prepared by Katie McMahan, with assistance from Michael O'Toole, Maaria Curlier and Cody Denoon. Their help in helping to produce this paper is gratefully acknowledged.

² For a detailed description of the provisions of the Abidjan Convention, please see *International Waters: Review of Legal and Institutional Frameworks*, UNDP-GEF INTERNATIONAL WATERS PROJECT 148-162, (APR. 5, 2011), available at <http://iwlearn.net/publications/misc/governing-marine-protected-areas-getting-the-balance-right-main-report-lower-resolution-2mb>.

³ Michael O'Toole and Vere Shannon, *Sustainability of the Benguela: ex Africa semper aliquid novi in LARGE MARINE ECOSYSTEMS OF THE WORLD: TRENDS IN EXPLOITATION, PROTECTION AND RESEARCH* 227-253. (Gotthilf Hempel and Kenneth Sherman, eds., 2003).

⁴ Benguela Current Commission Interim Agreement art. 1, Jan. 31, 2007, available at http://www.bclme.org/index.php?option=com_k2&view=item&layout=item&id=48&Itemid=198.

⁵ See O'Toole, *supra* note 3.

zooplankton, fish, sea birds, and marine mammals. Near-shore and shelf areas of the BCLME also hold rich deposits of precious mineral deposits, including diamonds, and oil and gas reserves.⁶

The principle upwelling centre is located near Lüderitz, Namibia, which creates a natural divide between the differently functioning North and South systems, in which the main upwelling seasons are out of phase. These systems vary seasonally depending on atmospheric pressure systems and dominant wind directions. Additional spatial and temporal variability occurs inter-annually with the occurrence of major events, and decadal changes alter the species composition and water temperature over time. This species and environmental variability, in combination with the BCLME's crucial location on the "global ocean climate conveyor belt" of thermohaline circulation (where warm water passes into the Atlantic) makes it particularly vulnerable to climate change.⁷ Figure 1 depicts the geography and ocean currents of the region.

⁶ *Id.*

⁷ *The Changing State of the Benguela Current Large Marine Ecosystem: Expert Workshop on Climate Change and Variability and Impacts Thereof in the BCLME Region, 15-16 May 2007*, Background Document (10 Nov. 2010) (on file with author).

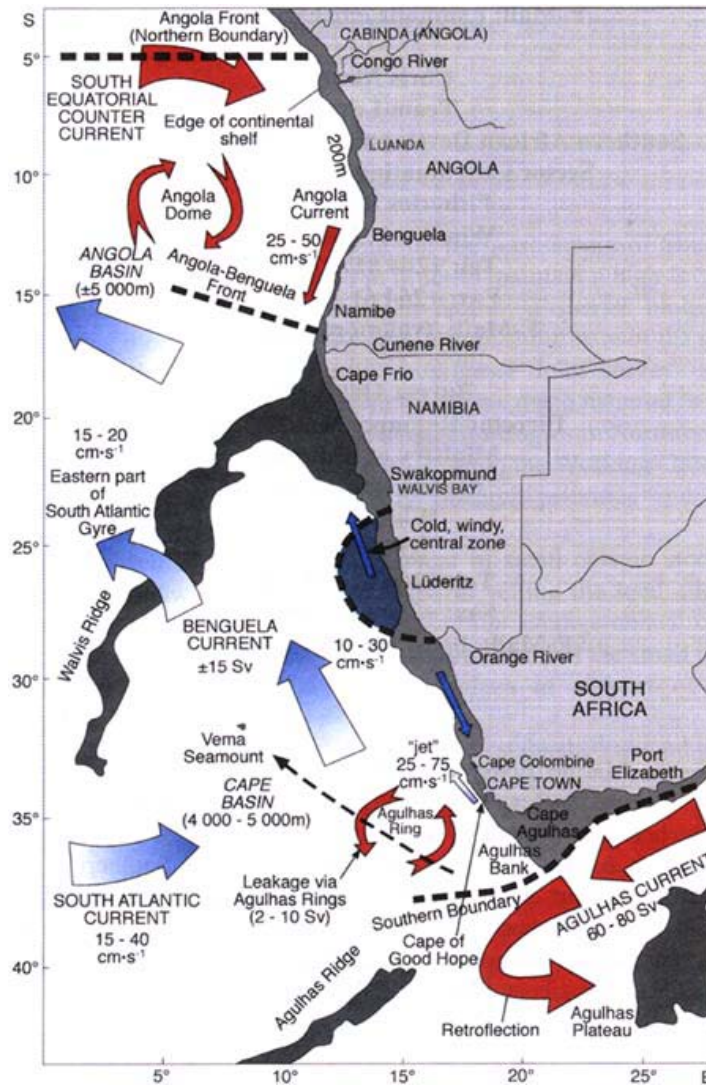


Figure 1. Benguela Current Large Marine Ecosystem region and ocean currents.⁸

1.2. Socio-Political context

Angola, Namibia, and South Africa have a history of European colonization, which has resulted in diverse ethnic populations, and little regard for indigenous peoples and natural ecosystems. Different European influences (Dutch, English, German, and Portuguese) on the nations have resulted in varying laws and management systems, and an overall absence of interagency and inter-ministerial frameworks. The explosion of foreign fishing fleets in the '60s and '70s (essentially imperialism by first world countries) resulted in liberation struggles and civil disputes. Furthermore, population migration to the coast as result of civil wars caused localized pressure on marine

⁸ See O'Toole, *supra* note 3.

resources, such as the destruction of mangroves and coastal forests, and severe pollution in some areas.⁹

As shown in Table 1 based on the UN Human Development Index (HDI), these countries are part of a developing region, and there is an overall capacity gradient (with respect to infrastructure and development) from south to north.¹⁰ Namibia gained independence from South Africa in 1990, and now has a stable multi-party parliamentary democracy.^{11,12} Angola gained independence from Portugal in 1975, followed by an intense civil war and political unrest until the ceasefire in 2002. A weak, fragmented legal system and prolonged humanitarian problems exist as a legacy of the long war.¹³ Most refugees have returned to Angola, although there is some history of tension with Namibia over refugees who fled to Namibian soils.

Table 1. Human development statistics for the Benguela Current nations.¹⁴

Nation	HDI Rank*	GNI per capita (\$)	Life Expectancy at Birth (years)	Mean Years of Schooling (of Adults) (years)
Namibia	105	6,323.1	62.1	7.4
South Africa	110	9,812.1	52.0	8.2
Angola	146	4,941.2	48.1	4.4

*Ranking based on 169 nations

⁹ United Nations Development Programme [UNDP], *BCLME Program - Transboundary Diagnostic Analysis* (Oct. 1999) [hereinafter UNDP, *BCLME Transboundary Diagnostic Analysis*], available at <http://projects.csg.uwaterloo.ca/inweh/display.php?ID=4186>.

¹⁰ *Id.*

¹¹ Klaus Dierks, *Chronology of Namibian Independence*, Namibia Library of Dr. Klaus Dierks (2 Jan. 2005), available at <http://www.klausdierks.com/FrontpageMain.html>.

¹² Anton Bösl and Nico Horn, eds., *THE INDEPENDENCE OF THE JUDICIARY IN NAMIBIA*, (Windhoek: Macmillan Education Namibia, 2008), available at <http://www.kas.de/namibia/en/publications/15058/>.

¹³ U.S. Department of State: Bureau of African Affairs, *Background Note: Angola*, 3 Sept. 2010, available at <http://www.state.gov/outofdate/bgn/angola/153748.htm> (last accessed 25 Nov. 2010).

¹⁴ UNITED NATIONS DEVELOPMENT PROGRAMME [UNDP], *HUMAN DEVELOPMENT REPORT 2010: THE REAL WEALTH OF NATIONS: PATHWAYS TO HUMAN DEVELOPMENT* (2010).

1.3. Economic context^{15,16}

The resources of the BCLME waters are important components in the economies of Angola, Namibia, and South Africa. Much of the coastline is still pristine by global standards (enabling significant tourism in some areas), yet in other areas, industrial pollution, near-shore activities, and poorly planned or managed developments have caused rapid degradation of vulnerable coastal habitats. Overfishing of pilchard and anchovy led to the collapse of the South African and Namibian fishing industries in the 1960s and 1970s. Hake overfishing (largely by foreign fleets) significantly depleted stocks, leading to the creation of 200-mile exclusive economic zones for South Africa (1977) and Namibia (1990). In Namibia, mining is the most important productive sector (responsible for 20% of their GDP), and the recent decrease in onshore diamond mining has been compensated for by increases in offshore operations. Fishing of over 20 commercially important species is the second highest export earner in the economy. The Kadu Gas Field, which is now being exploited, is the only significant resource found in active gas exploration.

In Angola, oil, diamond mining, and fishing are the most important industries. They are the second largest oil producer in Africa, and this provides 70% of the country's GDP, and 90% of exports. The fishing and seafood industry, which has a large artisanal component, provides half of the animal protein for the country.

In South Africa, gas and oil prospecting has been increasing and resulted in discoveries of sources that are starting to be exploited. There has been an increased emphasis on offshore diamond mining. While the fishing industry yields less than 1 % of South Africa's GDP, it supports approximately 26,000 people and is especially important in the social economy of the Western Cape.

1.4. Historical context

In 1971, the International Commission for South East Atlantic Fisheries Convention was implemented for the economic zones surrounding Angola, Namibia, and South Africa, It failed, however, due to a lack of compliance and enforcement mechanisms, and Namibia did not rejoin the convention when it gained independence.¹⁷ Yet, other

¹⁵ Claire Attwood, Benguela Current Large Marine Ecosystem: The LME Framework, DLIST: DISTANCE LEARNING & INFORMATION SHARING TOOL, http://webcache.googleusercontent.com/search?q=cache:4enLJ-Ctm88J:archive.iwlearn.net/www.dlist-benguela.org/index.php%40option%3Dcom_content%26task%3Dview%26id%3D107%26Itemid%3D57+Claire+Attwood+%2B+BENGUELA+CURRENT+LARGE+MARINE+ECOSYSTEM:+THE+LME+FRAMEWORK&cd=2&hl=en&ct=clnk&gl=ca&client=safari (last visited Dec. 12, 2010).

¹⁶ RASHID USSIF SUMAILA ET AL., MANAGEMENT OF SHARED HAKE STOCKS IN THE BENGUELA MARINE ECOSYSTEM, FAO Corporate Document Repository [hereinafter SUMAILA, MANAGEMENT OF SHARED HAKE STOCKS], available at <http://www.fao.org/docrep/006/y4652e/y4652e0c.htm>.

¹⁷ A. Jackson, *The Convention on the Conservation and Management of Fishery Resources in the South East Atlantic Ocean 2001: An Introduction*, INTERNATIONAL JOURNAL OF MARINE AND COASTAL LAW, 17 (2002), 33-77.

national initiatives to ratify or accede to international agreements related to BCLME conservation demonstrate an era of cooperation. An extensive list of these is available in Annex I.

In addition to cooperating on these international conventions and agreements, the BCLME has cooperated with other LMEs as part of GOOS (Global Ocean Observing System)-Africa.¹⁸ Angola, Namibia, and South Africa are also all members of the Southern Africa Development Community (SADC). Created in 1992 to further regional development and integration (including fisheries), the SADC is composed of 14 states, including the 8 states that make up the entire African coastline, and thus has an important role in facilitating transboundary management. The SADC developed a Programme of Action (POA), which included a Regional Fisheries Information Systems Project, a Policy Harmonization project, and a Monitoring Control and Surveillance of Fishing Activities Project (MCS). Their goal to develop binding regional policy frameworks was evident in the 2002 Protocol on Fisheries (which was signed by all 14 states) that outlines a commitment to shared stocks management and provides a binding policy framework against which individual or collaborative actions by member states can be monitored.¹⁹

1.5. Development of the BCLME Programme^{20,21}

In 1995, the Namibian Ministry of Fisheries and Resources held a workshop and seminar on “Fisheries Resource Dynamics in the BCLME Ecosystem” in collaboration with the German Organization for Technical Co-operation, the Norwegian Agency for Development and Cooperation, and the Intergovernmental Oceanographic Commission of UNESCO. A major regional initiative that evolved from this meeting was BENEFIT (Benguela Environment Fisheries Interaction Training). Adopted by the SADC POA in 1996, and launched in 1997 by the BCLME nations (South Africa, Namibia, and Angola) and foreign partners, its goal was to enhance the scientific capacity necessary for the sustainable utilization of BCLME resources. Two main objectives were to improve understanding of ecosystem dynamics and linkages to resource utilization, and build human and material capacity for marine science and technology in Angola, Namibia, and South Africa.²²

A second initiative discussed at the workshop and seminar- the BCLME Programme- was started following the success of regional collaboration on BENEFIT, and recognition of progress been made in sustainable management of other large marine ecosystems. The goal of the BCLME Programme was to improve structures and capacities of Angola,

¹⁸ GLOBAL OBSERVING SYSTEMS INFORMATION CENTER (GOSIC), *GOOS-Africa Program Overview*, GOSIC.ORG (Dec. 3 2010), <http://gosic.org/goos/GOOS-AFRICA-program-overview.htm>.

¹⁹ SUMAILA, *MANAGEMENT OF SHARED HAKE STOCKS*, *supra* note 16.

²⁰ UNDP, *BCLME Transboundary Diagnostic Analysis*, *supra* note 10.

²¹ See O’Toole, *supra* note 3.

²² SUMAILA, *MANAGEMENT OF SHARED HAKE STOCKS*, *supra* note 16.

Namibia, and South Africa, and enable mechanisms to address BCLME environmental issues. Funded by the Global Environment Fund (GEF) through the International Waters Portfolio of the United Nations Development Programme (UNDP), the three BCLME nations, and other sources (including BENEFIT), key BCLME issues, their root causes, and necessary remedial actions were identified. This was done through wide stakeholder participation, and planning workshops that involved local and international experts.

The First Regional BCLME Workshop was held in Cape Town in 1998, and had 100 participants, including regional and international experts and stakeholders representing a cross-section of public and private sectors in the three BCLME nations. An independent international facilitator moderated the workshop. Issues and constraints in BCLME management, and corresponding potential solutions were identified. A work plan that included the creation of six Thematic Reports on key issues was developed.²³

The Second Regional BCLME Workshop was held Okahanjo, near Windhoek, Namibia, in 1999. The 40 participants were international LME experts and regional BCLME experts representing the main stakeholders. The Thematic Reports were reviewed, and the outputs from the First Workshop synthesized. A draft Transboundary Diagnostic Analysis (TDA) was written, and a Strategic Action Plan (SAP) was developed, along with a finalized work plan for BCLME project implementation. The resultant three main transboundary issues identified were:

1. Sustainable management and utilization of living resources
2. Assessment of environmental variability, ecosystem impacts, and improvement of predictability
3. Maintenance of ecosystem health and management of pollution

A close associate of other UNDP-GEF funded marine initiatives and the SADC, the Programme implementation phase began in 2002. An activity centre was established in each of the three nations to develop and implement projects; by January 2007, 75 projects were created and actualized by a variety of parties including government institutions, universities, private consultants and the Regional Marine Science and Training Programme. One of the main goals of the BCLME Programme was to create a Benguela Current Commission that would produce annual assessments and ecosystem reports, provide advice on marine resource harvest and other sustainable resource use issues (especially fisheries), and manage the BCLME as a whole.²⁴

²³ UNDP, *BCLME Transboundary Diagnostic Analysis*, *supra* note 10.

²⁴ *Id.*

2. Negotiation of the Agreement

2.1. Development of the Agreement

The development of the Benguela Current Commission Interim Agreement (IA) resulted from the identification of common problems, as well as the need to share expertise, build capacity, and develop collective approaches to ensure sustainability.²⁵ Many of the problems required scientific investigation and common management actions because changes affect the ecosystem as a whole. Management was fragmented, and there was a lack of human and infrastructure capacity. Through the objectives and actions of the BCLME Programme, and other initiatives in the region discussed above, the need for a harmonized legal and policy objectives, and binding framework was recognized.²⁶

2.2. Negotiation process

Description of the process leading up to negotiations

As discussed previously, Angola, Namibia, and South Africa exhibited high levels of cooperation before the development of the IA, and shared a common goal of sustainable and responsible use of marine resources. Their accountability to this was enshrined in national legislation and international obligations with various international institutions they are party to.²⁷ Projects implemented, such as BENEFIT and the BCLME Programme were driven by the region for the region and stimulated further collaboration. The BCLME Programme acted as the main mechanism for writing the IA, because the SAP, which the three BCLME nations endorsed in 2001, contains specific policy and management actions, which includes the establishment of a Benguela Current Commission.²⁸ A willingness to share expertise and facilities with more disadvantaged parts of the region existed, but the GEF funding helped expedite the process.²⁹ In addition, a form of signed agreement between the countries was necessary in order for the GEF to consider further funding of the institutional arrangement of the Benguela Current Commission (BCC) after the initial funding phase ended in 2008.³⁰

Additional support for the creation of a BCC came from an external economic study, completed by the researchers at the University of British Columbia, which found that it made good financial sense to move towards cooperative management. They recommended that an Interim BCC be developed on a modest scale, to allow for

²⁵ See O'Toole, *supra* note 3.

²⁶ UNDP, *BCLME Transboundary Diagnostic Analysis*, *supra* note 10.

²⁷ SUMAILA, *MANAGEMENT OF SHARED HAKE STOCKS*, *supra* note 16.

²⁸ Attwood, *Supra* note 15.

²⁹ UNDP, *BCLME Transboundary Diagnostic Analysis*, *supra* note 10.

³⁰ Personal Communication with Michael O'Toole (4 Jan. 2011) (on file with the author).

learning, to build mutual trust, and to develop mechanisms for long-term sustainable funding.³¹

Similarly the document *Institutional Study regarding the establishment of a regional organization to promote integrated management and sustainable use of the BCLME* prepared by EnAct International found that the existing governance systems for marine resource management in the three nations had gaps and were not adequate for an ecosystem approach to BCLME protection and sustainable use.³² The study recommended the establishment of a management oriented BCC composed of a Ministerial Conference (to determine policy), a Joint Management Board (to coordinate SAP development), and three Joint Management Committees with working groups, as well as a research body from a restructured BENEFIT.

Description of the negotiation process

Past projects, programmes, and output documents outlined the needs and requirements for establishing a regional marine resources committee or intergovernmental organization for the BCLME.³³ The drafting process was guided by a group of senior officials from the three BCLME nations.³⁴ In addition, an environmental lawyer from Cape Town who was familiar with GEF International Waters programmes was contracted to draft a simple agreement between the countries that could act as an IA until a negotiation process for a legally binding convention could be completed at a later date. The lawyer used the SAP in order to create a discussion document, the draft form of which was circulated to the BCLME Steering Committee for discussion, comments, and suggestions for improvement. After it was felt that the key components were included in the document, a special meeting was held with representatives from the Attorney generals offices of the three BCLME nations, who (facilitated by the lawyer) reviewed the document in detail. The document was then amended and the Programme Steering Committee further discussed the draft agreement. A final meeting with the Programme Steering Committee and legal representatives from the South Africa, Namibia, and Angola was held to finalize the draft document, which was then

³¹ USSIF RASHID SUMAILA ET AL., BENGUELA CURRENT COMMISSION (BCC) ECONOMIC STUDY (Vancouver: Fisheries Economics Research Unit, Fisheries Centre, University of British Columbia 2005), available at <http://earthmind.net/marine/docs/bcc-economic-study.pdf>.

³² CORMAC CULLINAN ET AL., INSTITUTIONAL STUDY REGARDING THE ESTABLISHMENT OF A REGIONAL ORGANIZATION TO PROMOTE INTEGRATED MANAGEMENT AND SUSTAINABLE USE OF THE BCLME (2005), available at <http://www.dlist.org/document-library/institutional-study-regarding-the-0>.

³³ Mick O'Toole, *First moves towards a Benguela Current Commission*, BENGUELA CURRENT NEWS, July 2004, at 1-2. available at <http://archive.iwlearn.net/www.bclme.org/www.bclme.org/> (follow "Read the latest newsletter of the BCLME Programme" hyperlink; then follow "BCLME Programme Newsletter. Issue 2" hyperlink) (last visited Nov. 29, 2010).

³⁴ Mick O'Toole, *BCLME Programme looks ahead to a second phase*, BENGUELA CURRENT NEWS, July 2006, at 1-2 available at <http://archive.iwlearn.net/www.bclme.org/www.bclme.org/> (follow "Read the latest newsletter of the BCLME Programme" hyperlink; then follow "BCLME Programme Newsletter. Issue 4" hyperlink) (last visited Nov. 29, 2010).

sent to the Attorney generals' office of each country for an additional detailed examination and comments before being signed by the Ministers.³⁵

Description of the substance of the negotiations

There was generally little difficulty with acceptance of the draft, although some inter-ministerial differences within the countries threatened the signing of the IA at times. For example, there was some internal controversy in South Africa whether the Ministry of Environment and Tourism or the Ministry of Mines and Energy would represent the Government in signing the document. Furthermore, there was also disagreement between the lawyer and the Permanent Secretary of the Ministry of the Environment and Tourism from Namibia on some minor changes in the wording of the text. It was one of the most serious problems encountered because the Permanent Secretary refused to have his Minister sign the IA unless the text of one of the clauses was altered. Eventually, a Namibian UNDP representative persuaded the Permanent Secretary to agree with the IA wording.³⁶

Ultimately, the Minister of Environment and Tourism from South Africa, and the Minister of Environment and Tourism, the Minister of Fisheries and Marine Resources, and the Minister of Mines and Energy from Namibia, the signed the IA on 29 August 2006. Three months later, on 31 January 2007, when the Angolan legal department had ensured appropriate translation of the document into Portuguese, the Minister of Fisheries, Minister of Urbanisation and the Environment, and the Minister of Petroleum from Angola signed the document.³⁷

³⁵ Personal Communication with Michael O'Toole, (4 Jan. 2011)(on file with the author).

³⁶ *Id.*

³⁷ Benguela Current Commission Interim Agreement, Jan. 31, 2007 *available at* http://www.bclme.org/index.php?option=com_k2&view=item&layout=item&id=48&Itemid=198.

3. The Agreement

3.1. Overview

The objective of the IA, between the Government of the Republic of Angola, the Government of the Republic of Namibia, and the Government of the Republic of South Africa (the Contracting Parties), is to give effect to the Strategic Action Programme by establishing a Benguela Current Commission. This includes developing a formal institutional structure for co-operation among the nations to facilitate understanding, protection, conservation, and sustainable uses of the BCLME resources, and to further develop the objectives of the Strategic Action Plan.³⁸

Dispute resolution

In the event of a dispute between Contracting Parties regarding the interpretation or implementation of the Agreement, negotiation is the specified means of resolution. If the dispute cannot be settled through negotiation, a dispute resolution procedure will be agreed upon, and will potentially include jointly seeking third-party mediation. This third party may be a Contracting Party not involved in the dispute.³⁹

Financing

The Contracting Parties and donors are responsible for funding the BCC and the Contracting Parties will contribute equally, unless otherwise agreed upon.⁴⁰

Data and information exchange

Data and information are generated through the initiatives and actions of the Ecosystem Advisory Committee and the individual Contracting Parties. This information is disseminated through draft work and budget plans and annual reports created by the Ecosystem Advisory Committee.⁴¹ In addition, the Strategic Action Plan, which the IA is putting into effect, recommends the BCC create of an advisory group on information and data exchange.⁴² Decisions made by the Management Board, the Ministerial Conference, and the Contracting Parties are supported by the Ecosystem Advisory Committee, which provides them with the best available scientific, management, legal, and other information, as well as expert advice with respect to the sustainable use and development of BCLME resources. In addition, the Ecosystem Advisory Committee works to create mechanisms within the Contracting Parties to generate this expert

³⁸ Id.

³⁹ Id.

⁴⁰ Id.

⁴¹ Id.

⁴² United Nations Development Programme, *Strategic Action Programme: Integrated Management, Sustainable Development and Protection of the Benguela Current Large Marine Ecosystem BCLME*, (1 Nov. 1999), available at http://www.unep.org/AbidjanConvention/docs/BCLME_SAP.pdf (last accessed 21 Nov. 2010).

advice on an ongoing basis.⁴³ Continued research and monitoring the ecosystem will help identify necessary IA amendments in response to environmental or political changes.

Flexibility of agreement

Amendments may be proposed by any Contracting Party, and must be approved in writing by all of the Contracting Parties.⁴⁴

⁴³ Benguela Current Commission Interim Agreement art. 9, Jan. 31, 2007, *available at* http://www.bclme.org/index.php?option=com_k2&view=item&layout=item&id=48&Itemid=198.

⁴⁴ Benguela Current Commission Interim Agreement art. 15, Jan. 31, 2007, *available at* http://www.bclme.org/index.php?option=com_k2&view=item&layout=item&id=48&Itemid=198.

4. Implementation and Monitoring

4.1. Steps taken by parties to implement the Agreement

The IA outlined certain steps that the parties must take. This includes the formation of a Ministerial Conference and appointment of an Executive Secretary, as well as formation of a Management Board, which was supposed to hold its first meeting before December 31, 2007, adopt rules and procedures for functioning, and determine the initial composition of the Ecosystem Advisory Committee and three Joint Management Committees.⁴⁵ The Ecosystem Advisory Committee is required to submit annual budgets and work plans, and annual reports. The parties have successfully completed all of these specific steps.⁴⁶

The main goal of the IA was to implement the SAP, develop a comprehensive binding legal instrument for an ecosystem approach to conservation of the BLCME, and create methods for ongoing data collection and monitoring. The IA states that these goals should be completed by December 31, 2012. Important actions required for implementation include institutional support for effective transboundary management, the putting in place of legal and governance mechanisms, and realigning national policies, legislation, and operational practices of the three Benguela nations.⁴⁷

Towards these objectives, a project from 2007 to 2009, run by the UNDP with UNOPS as partners and funded by the GEF, was undertaken called Implementation of the Benguela Current LME Strategic Action Program for Restoring Depleted Fisheries and Reducing Coastal Resources Degradation (SAP-IMP).⁴⁸ The Ecosystem Advisory Committee has implemented projects for increased scientific research, and projects to increase the abilities of the nations to share and collect data.⁴⁹ The IBCC also joined the Regional Fisheries Body, and among the issues for discussion was sharing of effective methods for information dissemination to the public and other stakeholders.

Draft Terms of Reference were prepared for the legal team and consultant to draft the BCC Treaty (funded from the SAP-IMP budget). These terms of reference were

⁴⁵ Benguela Current Commission Interim Agreement, *available at* http://www.bclme.org/index.php?option=com_k2&view=item&layout=item&id=48&Itemid=198.

⁴⁶ Benguela Current Commission, *available at* <http://www.bclme.org> (last visited May 18, 2012).

⁴⁷ Mick O'Toole, *The Benguela Current Commission*, BENGUELA CURRENT NEWS, July 2007, at 1-2, *available at* <http://archive.iwlearn.net/www.bclme.org/www.bclme.org/> (follow "Read the latest newsletter of the BCLME Programme" hyperlink; then follow "BCLME Programme Newsletter. Issue 2" hyperlink) (last visited Nov. 30, 2010).

⁴⁸ United Nations Development Programme [UNDP], *UNDP Project Document: Implementation of the Benguela Current LME Strategic Action Programme for Restoring Depleted Fisheries and Reducing Coastal Resources Degradation*, *available at* http://iwlearn.net/iw-projects/3305/project_doc/benguela-sap-implementation-project-document-without-annexes/view (last visited Nov. 30, 2010) [hereinafter UNDP, *Implementation of the Benguela Current LME Strategic Action Programme*].

⁴⁹ Benguela Current Commission [BCC], *Ecosystem Advisory: EAC BCC Projects Under Implementation 2009 to 2012*, BENGUELA CURRENT COMMISSION.

circulated to the three BCLME nations for comments. Taking into consideration various options and the urgency of the matter, the Management Board identified and recommended that Mr. Terje Lobach, a Norwegian international legal expert be appointed to lead the drafting of the Convention.⁵⁰ With support from the GEF and UNDP, in March 2010 a draft convention outline was distributed to the Management Board members, along with a tentative roadmap created for treaty negotiation.⁵¹ This roadmap is similar to that used in the negotiation of SEAFO (South East Atlantic Fisheries Organisation). During the second session of the Ministerial Conference of the BCC held on 2 September 2010 in Cape Town, the Ministers reaffirmed their commitment to the Convention process and its signature and ratification by December 2012. The first Regional BCC Convention Consultation and Negotiation meeting was scheduled from October 4-8, 2010 with participation from delegations from each country.⁵² In March 2011, eight ministers responsible for marine industries and the marine environment met to address administrative matters of the BCC and to monitor the progress of the drafting of the Convention text.⁵³

⁵⁰ Extraordinary Meeting Minutes of the Benguela Current Commission Management Board and Ecosystem Advisory Committee (Nov. 25, 2009) (on file with the author).

⁵¹ Report of the 5th Meeting of BCC Management Board (June 2010) (on file with the author).

⁵² *Angola, Namibia and South Africa meet to discuss a convention for the management of their oceans*, DLIST: DISTANCE LEARNING & INFORMATION SHARING TOOL, Sept. 27, 2010, available at <http://www.dlist.org/group-discussion/message-board/press-release-benguela-current-convention-consultation-and> (last visited Dec. 5, 2010).

⁵³ Benguela Current Commission [BCC], *Media release: Angola, Namibia and South Africa prepare to sign Benguela Convention*, DLIST: DISTANCE LEARNING & INFORMATION SHARING TOOL, April 15, 2011, available at <http://www.dlist.org/group-discussion/general-discussion/media-release-angola-namibia-and-south-africa-prepare-sign> (last visited April 18, 2011).

4.2. Operational Management^{54,55}

The highest policy and decision-making body of the BCC is the Ministerial Conference. It is comprised of national delegations from each Contracting Party, each of which is led by a minister authorized to represent that party. Its role is to evaluate and approve any changes to the SAP, and take any actions necessary to facilitate implementation of the SAP. Also within the Ministerial Conference's mandate is to take all measures necessary to expedite the negotiation, conclusion, signature, ratification, and implementation of the comprehensive, binding instrument.

The Management Board consists of national delegations from each Contracting State. A Director-General or Permanent Secretary (or his or her nominee) leads each delegation. Its mandate is to promote a coordinated regional approach to dealing with management issues concerning the BCLME and its functions. This includes coordinating IA and SAP implementation by the Contracting Parties, and advancing and representing the common interests of the Contracting Parties in BCLME issues. Reporting to the Board are committees including, but not limited to, Minerals and Petroleum, Marine Living Resources, and Ecosystem Health.

A Secretariat is the body that facilitates the implementation and effective monitoring of the SAP. Its role is to: arrange and support BCC meetings; negotiate with donors interested in supporting implementation of the SAP; to perform financial and other administrative services for proper and efficient BCC operation; to prepare the plans, projects, assessments, reports, and other documentation required by the commission; to assist the Ecosystem Advisory Committee and subsidiary bodies to prepare such documents; and to obtain and regularly update information required by the Contracting States for the implementation of the IA and SAP.

An Ecosystem Advisory Committee consists of experts nominated by each of the Contracting Parties and is supervised by the Management Board. Its role is to support decisions made by the Management Board, Ministerial Conference, and the Contracting Parties by providing the best available scientific, management, legal and other information, and expert advice concerning the conservation and ecologically sustainable use and development of the BCLME. The Committee also works to build capacity within the Contracting Parties to generate and provide this information and expert advice on a

⁵⁴ Benguela Current Commission Interim Agreement, Jan. 31, 2007, available at http://www.bclme.org/index.php?option=com_k2&view=item&layout=item&id=48&Itemid=198.

⁵⁵ Benguela Current Commission [BCC], *Management Board*, available at http://www.bclme.org/index.php?option=com_k2&view=item&layout=item&id=51&Itemid=225 (last visited Dec. 15, 2010); Benguela Current Commission [BCC], *Ecosystem Advisory*, available at http://www.bclme.org/index.php?option=com_k2&view=item&layout=item&id=49&Itemid=226 (last visited Dec. 15, 2010); Benguela Current Commission [BCC], *Ministerial Conference*, available at http://www.bclme.org/index.php?option=com_k2&view=item&layout=item&id=52&Itemid=175 (last visited Dec. 15, 2010); Benguela Current Commission [BCC], *Secretariat*, available at http://www.bclme.org/index.php?option=com_k2&view=item&layout=item&id=50&Itemid=228. (last visited Dec. 15, 2010).

sustainable basis. This includes holding annual meetings, annually submitting work plans and budget plans, and creating annual reports. The Committee operates through regional Joint Working Groups.

4.3. Monitoring mechanisms

Monitoring mechanisms defined by the IA include the role of the Management Board in overseeing the committees that report to it, reviewing annual submissions from the Ecosystem Advisory Committee of draft work and budget plans and annual reports, and coordinating the overall implementation of the SAP and IA. The Ministerial Conference reviews decisions made by the Management Board, and monitors overall implementation of the SAP.⁵⁶

⁵⁶ Benguela Current Commission Interim Agreement art. 1, Jan. 31, 2007, *available at* http://www.bclme.org/index.php?option=com_k2&view=item&layout=item&id=48&Itemid=198.

5. Assessment of Agreement

5.1. Does the Agreement accomplish its objectives?

The purpose of the IA was to facilitate development of a legally binding agreement among South Africa, Namibia, and Angola for cooperative management of the BCLME. While the IA and SAP are still being implemented, negotiations for such an agreement are happening, and the three countries are preparing to sign and ratify the agreement by December 2012.⁵⁷ It is regarded as an effective document that has successfully formed the basis of the legal convention for the BCC. Although, in the final review of the BCLME Programme, the concern was raised that the BCC should have formulated a full Convention earlier on in the project, to have it completed by 2008 when the GEF funding ended, in retrospect, this may not have been achievable.⁵⁸

Stakeholders have been involved throughout the process, in the development of the TDA, SAP, and IA negotiations.⁵⁹ Currently, the three BCLME nations are well represented in the Management Board and Ministerial Conference from crosscutting ministries (Marine Fisheries and Resources, Environmental Affairs, Tourism, Mines and Energy, Transport and Communication), as well as the SADC, UNDP and SEAFO.^{60,61} Non-governmental representatives are often included as ad hoc advisors to the Ecosystem Advisory Committee.⁶² States, bodies, and other agencies that are not contracting parties can also request to attend Ministerial Conference meetings.⁶³

In addition, outlined in the role of the Management Board is to establish mechanisms for interacting with the private sector, non-governmental organizations, and other stakeholders and communities; and to ensure that there is adequate consultation with stakeholders in relation to the development and amendment of the SAP and other action plans.⁶⁴

⁵⁷ Benguela Current Commission [BCC], *Media release: Angola, Namibia and South Africa prepare to sign Benguela Convention*, *supra* note 53.

⁵⁸ Personal Communication with Michael O'Toole, (4 Jan. 2011)(on file with the author).

⁵⁹ *Angola, Namibia and South Africa meet to discuss a convention for the management of their oceans*, *supra* note 52.

⁶⁰ Report of the 1st Meeting of BCC Management Board (July 2007) (on file with the author).

⁶¹ *Id.*

⁶² Benguela Current Commission [BCC], *Ecosystem Advisory*, BENGUELA CURRENT COMMISSION, http://www.bclme.org/index.php?option=com_k2&view=item&layout=item&id=49&Itemid=226, (last visited Dec. 15, 2010).

⁶³ Benguela Current Commission Interim Agreement art. 6, Jan. 31, 2007, *available at* http://www.bclme.org/index.php?option=com_k2&view=item&layout=item&id=48&Itemid=198.

⁶⁴ *Id.*

5.2. Costs and benefits

To date, no official cost benefit analysis has been done regarding the IA, but it is likely that the Agreement has already more than paid off in terms of improved fish and seafood yields, cooperative research, shared cruises and ship time, and joint management between the countries.⁶⁵ As indicated by the economic study completed prior to the IA, economies of scale in, for example, training of regional experts, and cooperation on environmental protection and pollution control, result in overall benefits for the region.⁶⁶ The IA does, however, result in operational costs, including BCC staff salaries and Ecosystem Advisory Committee projects. Furthermore, nations experience a loss of sovereignty, although this can also facilitate political good will and have a positive effect on conflict resolution and border issues. While the BCC is still in the implementation phase, and it may take time for benefits to be realized, the economic study, based on landed values, economic rent, exports, contributions to the GCP, employment, and food security indicated that the scenario implemented would have significant potential for high net income resulting from cooperative management.

5.3. Effectiveness of particular provisions

Between funding from the three BCLME nations and donors (including Norway and Iceland), and from the GEF-UNDP for the SAP-IMP project, the IA has been successfully funded. When the 4-year SAP-IMP project is over, the aim is that the contracting parties will be able to fund the project themselves, and that sustainable funding mechanisms will be included in the legally binding convention that is created.^{67,68}

The EAC has implemented a variety of projects that contribute to research and BCLME monitoring. This includes projects to improve data exchange, such as *Renovation, Upgrading & Operationalisation of an Integrated State of the Ecosystem Information for the BCC*, and a project to *Develop a Data Policy and Data Management Protocol for BCC*.⁶⁹ In addition, a data and information manager position has been created to support commission.⁷⁰

As no major disputes have emerged, dispute resolution provisions of the IA have not been tested.

⁶⁵ Personal Communication with Michael O'Toole, (4 Jan. 2011) (on file with the author).

⁶⁶ RASHID USSIF SUMAILA ET AL., *BENGUELA CURRENT COMMISSION (BCC) ECONOMIC STUDY* (Vancouver: Fisheries Economics Research Unit, Fisheries Centre, University of British Columbia, 2005)[hereinafter SUMAILA, ECONOMIC STUDY], available at <http://earthmind.net/marine/docs/bcc-economic-study.pdf>.

⁶⁷ Report of the 5th Meeting of BCC Management Board, *supra* note 51.

⁶⁸ UNDP, *Implementation of the Benguela Current LME Strategic Action Programme*, *supra* note 48.

⁶⁹ Benguela Current Commission [BCC], *Ecosystem Advisory: EAC BCC Projects Under Implementation 2009 to 2012*, *supra* note 49.

⁷⁰ Report of the 5th Meeting of BCC Management Board (Oct. 2007) (on file with the author).

5.4. Need for additional agreements

The IA has not been amended and no issues have emerged that were not adequately addressed by the original agreement. This shows the benefits of the years of cooperation and research prior to the IA, as well as the advantage that any issues revealed to be important may subsequently be incorporated into the legally binding Convention.

6. Concluding Remarks

Recent history has shown cooperation between Angola, Namibia, and South Africa through programmes including BENEFIT, the BCLME Programme, and ultimately the signing of the IA and creation of the BCC. Continued scientific and technical support in training and research has developed the region's knowledge base and the capacity for cooperative management. While the outcome goal of sustainable BCLME resource management has not fully been achieved, projects are still under implementation and positive progress towards this goal is being made.⁷¹

The BCLME Programme, BENEFIT and other initiatives were crucial in establishing trust, communication, and cooperation among the contracting parties. This was done through: effective programme management and coordination; strong stakeholder attendance at regional workshops; exchange of visits by national managers and government personnel; cooperative actions through working groups and management committees; and promotion of the BCLME in the region through the SADC Sectoral Coordinating Committee for Marine Fisheries in Namibia framework.

Throughout this process, additional valuable lessons have been learned. This includes recognizing the importance of participatory process and full stakeholder involvement; the comprehensive SAP (from which the IA was developed), was based on the TDA and written with consensus through further discussions with government ministries and other stakeholder groups. Achieving consensus among these parties was crucial, and an experienced facilitator and using the Logic Framework Analysis approach in the planning process were found to be beneficial. Specialized input from UNDP-GEF consultants who attended the TDA and SAP regional workshops helped develop the SAP and draft project brief. The resultant SAP was an effective, thorough, and mutually agreed upon document that played an important role in defining and describing the process. It spelled out the challenges and principals fundamental to integrated marine ecosystem management of the BCLME, and specifies the nature, scope, and timetable for implementation of policy actions. It also outlined the institutional arrangements and structures required to complete the goals of the TDA, promote wider co-operation with external institutions and programmes, and addresses mechanisms of long-term sustainable funding for the integrated management of the BCLME.⁷² The TDA, SAP, and IA represent steps taken towards sustainable management of the BCLME ecosystem by South Africa, Namibia, and Angola. The creation of the IA in particular has allowed for

⁷¹ ABRAHAM IYAMBO, COMING TOGETHER FOR THE BENGUELA: TWO PROGRAMMES- ONE GOAL, BCLME: A DECADE OF COLLABORATION, 2 (Benguela Current Large Marine Ecosystem Programme (BCLME), 2007), available at <http://archive.iwlearn.net/www.bclme.org/www.bclme.org/> (follow "Ten years of collaboration: The final symposium of the BENEFIT and BCLME programmes – Swakopmund, November 2007" hyperlink; then follow "A Decade of Collaboration (PDF file" hyperlink) (last visited Nov. 30, 2010).

⁷² Mick O'Toole, *Panelist Abstract: Summary of Key Issues and Best Practices/Lessons Learned*, (Session III: Experience with GEF Strategic (SAP) Projects Plenary), IWLEARN.NET, available at <http://iwlearn.net/publications/misc/presentation/experience-with-gef-strategic-sap-projects-plenary.pdf/view>.

learning, the building of mutual trust, and the development of mechanisms for long-term sustainable funding,⁷³ and the success of this process is seen in the progress made towards the signing of the Benguela Convention.

⁷³ SUMAILA, ECONOMIC STUDY, *Supra* note 66.

ANNEX I: History of International Cooperation⁷⁴

Category	International/Regional Instrument	South Africa	Namibia	Angola
Legal	UN Convention on the Law of the Sea (UNCLOS), 1982	Ratified	Ratified	Ratified
Fisheries	UN Fish Stocks Agreement for the Conservation and Management of Straddling Stocks and Highly Migratory Stocks	Ratified	Ratified	Ratified
	FAO Code of Conduct for Responsible Fisheries	Ratified	Ratified	Ratified
	International Plan of Action to Prevent, Deter and Eliminate illegal, unreported and unregulated fishing	Ratified	Ratified	Not Ratified
	International Plan of Action for the Conservation and Management of Sharks	Ratified	Ratified	Not Ratified
	International Plan of Action for the Management of Fishing Capacity	Ratified	Ratified	Not Ratified
	International Plan of Action for Incidental Catch of Seabirds	Ratified	Ratified	Not Ratified
	SADC Protocol on Fisheries	Ratified	Ratified	Ratified
	Commission for the Conservation of Southern Blue-fin Tuna	Cooperating Non-Member	Not Member	Not Member
	International Commission for the Conservation of Atlantic Tuna	Contracting Party	Contracting Party	Contracting Party
	Commission for the Conservation of Antarctic Marine Living Resources	Member	Member	Not Member
Biodiversity	Convention on Biological Diversity (CBD)	Ratified	Ratified	Ratified
Large marine ecosystem management	Agulhas Current Large Marine Ecosystem (ACLME)	Member	NA	NA
	Gulf of Guinea Large Marine Ecosystem (GGLME)	NA	NA	Member
	Benguela Current Large Marine Ecosystem (BCLME)	Member	Member	Member
Safety & Environment	International Convention for the Safety of Life at Sea	Ratified	Ratified	Ratified
	United Nations Convention on Climatic Change (UNFCCC)	Ratified	Ratified	Ratified
	Declaration on the Protection of the Marine Environment from Land-Based Activities, 1995	Ratified	Ratified	Ratified
	Convention on the Conservation of Migratory Species of Wild Animals, 1979	Ratified	Ratified	Ratified
	Convention on International Wet Lands recognised as Important Habitats for as Aquatic Birds (Ramsar)	Ratified	Ratified	Not Ratified
	International Convention for the Regulation of Whaling	Ratified	Ratified	Not Ratified
	Convention for the Protection of the Ozone Layer	Ratified	Ratified	Ratified

⁷⁴ UNDP, *Implementation of the Benguela Current LME Strategic Action Programme*, supra note 48.

	Convention for the Protection, Management and Development of the Marine and Coastal Environment of the Eastern African Region (Nairobi Convention)	Ratified	NA	NA
	Convention for Co-operation in the Protection and Development of the Marine and Coastal Environment of the West and Central African Region	Ratified	Not Ratified	Not Ratified
	SADC Protocol on Mining	Ratified	Ratified	Ratified
	SADC Protocol Related to the Conservation of Fauna and Law Applications	Ratified	Ratified	Ratified
	SADC Protocol on Shared Watercourses	Ratified	Ratified	Ratified
Trade	Convention on International Traffic of exotic species of Fauna and Flora on risk of extinction (CITES)	Ratified	Ratified	Ratified
Pollution	Convention on the Prevention of Marine Pollution by Dumping of Wastes and other Matter, 1972	Ratified	Ratified	Ratified
	International Convention of 1973 for Pollution Prevention caused by Navigation and Protocol of 1978 (MARPOL)	Ratified	Ratified	Ratified
	International Convention on Civil Responsibility and Compensation of Damage Caused by Potentially Harmful and Dangerous Substances at Sea (HNS 96)	Ratified	Not Ratified	Ratified
	Stockholm Convention on Persistent Organic Pollutants (POPs)	Ratified	Ratified	Ratified
	Cartagena Protocol on Bio-safety	Ratified	Ratified	Ratified
	Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal	Ratified	Ratified	Ratified
	Protocol on Substances that Deplete the Ozone Layer	Ratified	Ratified	Ratified
	International Convention on Civil Liability for Oil Pollution Damage	Ratified	Ratified	Ratified