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**MINISTER
WATER AND ENVIRONMENTAL AFFAIRS
REPUBLIC OF SOUTH AFRICA**

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Ref: EDMS125564



Mr M Sisulu, MP
Speaker of the National Assembly
Parliament of the Republic of South Africa
PO Box 15
CAPE TOWN
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Dear Mr Speaker

**TABLING OF THE BENGUELA CURRENT CONVENTION IN PARLIAMENT IN TERMS OF CHAPTER 14,
SECTION 231(3) OF THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, 1996 AS AMENDED**

I refer to the above matter.

The Constitution of the Republic of South Africa, 1996 states, in Chapter 14, section 231(2), that an international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection (3) of the Chapter.

Since this is a multilateral Convention and according to Article 22 of the Convention it is subject to ratification, acceptance or approval in accordance with the domestic law and procedures in force in the countries of the Parties and in order for it to be brought into effect it has to be ratified by each Party.

In compliance with the Constitution of the Republic of South Africa, I hereby present to you copies of the above Convention for tabling in the National Assembly. Further copies for all members of the National Assembly will be delivered to the Clerk of Papers.

Yours sincerely

**MRS B E E MOLEWA, MP
MINISTER OF WATER AND ENVIRONMENTAL AFFAIRS**

DATE: 2013/07/14

DEPARTMENT OF ENVIRONMENTAL AFFAIRS

Reference: 15/6/1/3

**EXPLANATORY MEMORANDUM: RATIFICATION OF THE BENGUELA CURRENT CONVENTION
ON ENVIRONMENTAL PROTECTION AND CONSERVATION OF THE BENGUELA CURRENT
LARGE MARINE ECOSYSTEM.**

1. DRAFT RESOLUTION

That, in terms of Section 231 of the Constitution, the promotion of a coordinated regional approach to the long term conservation, protection, rehabilitation, enhancement and sustainable use of the Benguela Current Large Marine Ecosystem, be ratified by Parliament.

2. BACKGROUND INFORMATION

- 2.1 South Africa is one of three original signatories of the Benguela Current Convention, which was signed on 18 March 2013 in Province of Benguela, Angola. The Benguela Current Convention has proved itself to be one of the most forward-looking and successful international agreements of all time, being the first large marine ecosystem convention in the entire world, stands as a model of all large marine ecosystems and an example in successful international cooperation.

The Convention was signed by the three governments of the Republic of Angola, Republic of Namibia and South Africa on the 18 March 2013. The Minister of Water and Environmental Affairs as lead Minister in South Africa signed the agreement on behalf of South Africa.

The Benguela Current Convention:

- commits the Parties to the "cooperation, collaboration and sovereign equality";
- sustainable use and management of marine resources;
- the precautionary principle;
- prevention, avoidance and mitigation of pollution;
- the polluter pays principle; and
- protection of biodiversity in the marine environment and conservation of the marine ecosystem.

The Convention contains 31 Articles:

- Article 1: Definitions;
- Article 2: Objective;
- Article 3: Area of Application;
- Article 4: General Principles;
- Article 5: Organizational Structure;
- Article 6: Ministerial Conference;
- Article 7: The Commission;
- Article 8: Functions of the Commission;
- Article 9: Permanent Committees of the Commission;
- Article 10: Ecosystem Advisory Committee;
- Article 11: The Finance and Administration Committee;
- Article 12: The Compliance Committee;
- Article 13: The Secretariat;
- Article 14: National Coordinators;
- Article 15: Finance and Budget;
- Article 16: Decisions and Recommendations;
- Article 17: Obligations;
- Article 18: Cooperation with other Organisations;
- Article 19: Settlement of Disputes;
- Article 20: Languages
- Article 21: Headquarters
- Article 22: Signature, Ratification, Acceptance, and Approval;
- Article 23: Entry into Force;
- Article 24: Reservations and Exceptions;
- Article 25: Declarations and Statements;
- Article 26: Relationship with other International Instruments;
- Article 27: Amendments;
- Article 28: Withdrawal;
- Article 29: Transition;
- Article 30: Depositary;
- Article 31: Authentic Texts.

2.3 Objective of the ratification

The objective of the ratification of the Convention is to give legal effect thereto. The Articles set out in the Benguela Current Convention are mandatory and legally binding on all of the signatory Parties. Never before have nations agreed to such a comprehensive and stringent set of rules to protect the marine environment of a large marine ecosystem. In Article 4 of the Convention, the Parties undertook to take all possible steps to prevent, abate, and minimize pollution and take the necessary measures to protect the marine ecosystem against any adverse impacts; undertake environmental impact assessments for proposed activities that are likely to cause adverse impacts on the marine and coastal environments; apply management measures based on the best scientific advice available; establish mechanisms for inter-sectorial data collection, sharing and exchange thereof; where possible reverse and prevent habitat alteration and destruction; protect vulnerable species and biological diversity; and take all possible steps to strengthen and maintain human and infrastructural capacity

2.4 Advantages of accession

The Convention is fully in South Africa's interest. Its provisions advance South Africa's goals of protecting the marine environment of South Africa and that of the large marine ecosystem. Harmonizing policies and principles of managing the marine environment between neighbouring nations would be of benefit to South Africa and region, as one bad management strategy of one country could affect its neighbours as oceans are "commons".

2.5 Political benefits:

Approving the Convention and implementing it through this legislation is an opportunity to highlight and promote South Africa's support for a strong environmental protection regime in this region and our continent.

3. PROCESS OF RATIFICATION

The Department of International Relations and Cooperation and the Department of Justice and Constitutional Development were approached for legal opinion on the implications of ratification.

4. LEGAL AND CONSTITUTIONAL IMPLICATIONS

The Chief State Law Advisor of the Department of International Relations and Cooperation certified that the ratification is acceptable from an international law point of view, and is not in conflict with South Africa's other international obligations.

5. ORGANISATIONAL AND PERSONNEL IMPLICATIONS

The responsibility for the implementation of the ratification will be within the remits of the Branch Oceans and Coasts of the Department of Environmental Affairs.

6. FINANCIAL IMPLICATIONS

An annual contribution of \$174,000 per annum is made towards the operation of the Secretariat based in Swakopmund, Namibia.

7. COMMUNICATION IMPLICATIONS

Once ratified, the appropriate confirmation thereof will be provided through diplomatic channels to the Republic of Namibia Treaty depository unit and their foreign Affairs ministry will also be informed thereof accordingly. A local press release will also be issued. Private South African companies known to be operating in the Benguela Current Ecosystem area will also be informed directly of the implications thereof.

8. DEPARTMENTS / INSTITUTIONS CONSULTED

8.1 National departments:

- Department of International Relations and Cooperation
- Department of Justice
- Department of Environmental Affairs
- Department of Agriculture, Forestry and Fisheries
- Department of Mineral Resources
- Petroleum Agency of South Africa

- Department of Transport

8.2 Non-governmental and international organizations:

- None.

8.3 Business:

- None.

9. RECOMMENDATIONS

The Department of Environmental Affairs recommends that: Parliament ratifies Benguela Current Convention on Environmental Protection, Conservation, and rehabilitation of the Benguela Current Large Marine Ecosystem.



THE BENGUELA CURRENT CONVENTION

BETWEEN

THE GOVERNMENT OF THE REPUBLIC OF ANGOLA

AND

THE GOVERNMENT OF THE REPUBLIC OF NAMIBIA

AND

THE GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA

PREAMBLE

The Government of the Republic of Angola, the Government of the Republic of Namibia and the Government of the Republic of South Africa (hereinafter referred to in the singular as "a Party" and in the plural as "Parties");

Recognising the unique character of the Benguela Current Large Marine Ecosystem, the richness and complexity of its biological and physical functioning, its significance for the socio-economic development and for the well-being of the people depending on it and the threats to it;

Recalling the Interim Agreement between the Government of the Republic of Angola and the Government of the Republic of Namibia and the Government of the Republic of South Africa on the Establishment of the Benguela Current Commission signed by January 2007;

Further recalling the relevant provisions of the United Nations Convention on the Law of the Sea of 10 December 1982, the relevant provisions of the United Nations Convention on Biological Diversity of 5 June 1992, the relevant provisions of the United Nations Framework Convention on Climate Change of 21 March 1994, including implementation agreements under these conventions, as well as other global and regional instruments concerning conservation and management of marine resources, abatement of pollution, safety at sea, and protection of the environment;

Conscious of the need to avoid adverse impacts on the marine environment, protect biodiversity, maintain the integrity of the marine ecosystem and minimise the risk of long-term or irreversible effects by human activities;

Convinced of the need to take concrete actions collectively to ensure effective long-term transboundary co-operation and the integrated sustainable management and the protection of the marine resources;

Recognising the importance of stable institutional arrangements to ensure the implementation of an ecosystem approach to the management of resources and of human activities affecting the Benguela Current Large Marine Ecosystem;

Seeking to address the challenges identified by them in the Benguela Current Large Marine Ecosystem;

Convinced of their joint responsibility as custodians of this globally significant large marine ecosystem to conserve and manage it for the benefit of present and future generations;

HAVE AGREED as follows:

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Article 1
Definitions

In this Convention, unless the context indicates otherwise-

"Adverse Impact"

- (a) includes any actual or potential detrimental effect on the Benguela Current Large Marine Ecosystem that results directly or indirectly from human conduct originating wholly or partly within the area under jurisdiction of a Party or from a ship or aircraft under its jurisdiction or control; and
- (b) includes adverse impact that extends beyond the jurisdiction of a Party in which the physical origin of the adverse impact is situated; and
- (c) includes any actual or potential detrimental effect on legitimate uses of the Benguela Current Large Marine Ecosystem, on the health of the people of the Parties or on their ability to provide for their health, safety, cultural and economic well-being, which occurs or may occur as a consequence of a detrimental effect referred to in (a); but
- (d) does not include any actual or potential detrimental effect that is negligible or which has been assessed and to be determined acceptable under this Convention;

"Benguela Current Large Marine Ecosystem" means the large marine ecosystem associated with the Benguela Current and characterised by distinct bathymetry, hydrography, productivity and trophically dependent populations, within the area of application set out in this Convention;

"Ecosystem" means a dynamic system of plant, animal and micro-organisms communities and their non-living environment interacting as a functional unit;

"Environment" includes, but is not limited to, the whole or any component of -

- (a) nature, which includes air, water (including the sea, and the sea bed), land (including soils and minerals), energy and living organisms other than humans;
- (b) the interaction between the components of nature and between those components and humans; and
- (c) physical, aesthetic and cultural qualities or conditions that affect the health and well-being of humans;

"Fishery Resources" means resources of fish, molluscs, crustaceans, and other sedentary species;

"Interim Agreement" means the Agreement between the Republic of Angola, the Republic of Namibia and the Republic of South Africa on the Establishment of the Benguela Current Commission signed by January 2007;

"Marine Resources" means all living and non-living components of the marine ecosystem;

"Party" means either the Republic of Angola, the Republic of Namibia or the Republic of South Africa, and the **"Parties"** means the Republic of Angola, the Republic of Namibia and the Republic of South Africa jointly;

"Pollution" means the introduction by humans, directly or indirectly, of substances or energy into the Benguela Current Large Marine Ecosystem, which results in, or is likely to result in hazards to human health, harm to the ecosystem, damage to amenities or interference with legitimate uses of the Benguela Current Large Marine Ecosystem;

"Precautionary Principle" means the principle that a lack of full scientific certainty shall not be used as a reason for postponing measures or actions to give effect to the objective of this Convention;

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"Ship or Aircraft" means any waterborne or airborne man-made structure fixed or floating, their parts, fittings and equipment, whether self-propelled or not, operating in the marine environment; and

"Strategic Action Programme" means the Strategic Action Programme for the Benguela Current Large Marine Ecosystem adopted and signed by the Parties.

Article 2 Objective

The objective of this Convention is to promote a coordinated regional approach to the long-term conservation, protection, rehabilitation, enhancement and sustainable use of the Benguela Current Large Marine Ecosystem, to provide economic, environmental and social benefits.

Article 3 Area of Application

(1) The area of application for this Convention comprises all areas within the national sovereignty and jurisdiction in accordance with the United Nations Convention on the Law of the Sea of 10 December 1982, bounded by the high water mark along the coasts of the Parties.

(2) This Convention applies to all human activities, aircrafts and ships under jurisdiction or control of a Party to the extent that these activities or the operation of such aircraft or ship result in, or are likely to result in adverse impacts.

Article 4 General Principles

- (1) The Parties shall be guided by the following principles:
 - (a) The cooperation, collaboration and sovereign equality principle;
 - (b) sustainable use and management of the marine resources;
 - (c) the precautionary principle;
 - (d) prevention, avoidance and mitigation of pollution;
 - (e) the polluter pays principle; and
 - (f) protection of biodiversity in the marine environment and conservation of the marine ecosystem.
- (2) In giving effect to the objective of this Convention and to the principles in paragraph (1), the Parties shall -
 - (a) take all possible steps to prevent, abate and minimise pollution and take the necessary measures to protect the marine ecosystem against any adverse impacts;
 - (b) undertake environmental impact assessment for proposed activities that are likely to cause adverse impacts on the marine and coastal environments;
 - (c) apply management measures based on the best scientific evidence available;
 - (d) establish mechanisms for intersectoral data collection, sharing and exchange thereof;
 - (e) where possible, reverse and prevent habitat alteration and destruction;
 - (f) protect vulnerable species and biological diversity; and
 - (g) take all possible steps to strengthen and maintain human and infrastructural capacity.

Jim
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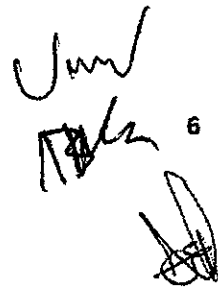
Article 8
Functions of the Commission

In giving effect to the objective of this Convention, the Commission shall -

- (a) coordinate the implementation and review of the Strategic Action Programme and recommend changes to the programme as well as possible action plans as may be necessary from time to time;
- (b) provide strategic direction, coordination and evaluation in the implementation of the work plans and budget;
- (c) agree on, where necessary, measures to prevent, abate and minimise pollution caused by or resulting from -
 - (i) dumping from ships or aircrafts;
 - (ii) exploration and exploitation of the continental shelf and the seabed and its subsoil; and
 - (iii) land-based sources;
- (d) agree on, where necessary, conservation and management measures concerning transboundary marine resources and the environment;
- (e) agree, as appropriate, on participatory rights, such as harvest levels and sharing arrangements concerning transboundary fishery resources;
- (f) promote, to the greatest extent possible, harmonisation, implementation and enforcement of existing policies and laws pertaining to the conservation and management of transboundary marine resources and environment;
- (g) encourage harmonisation of conservation and management measures concerning marine resources and the environment;
- (h) promote and support research programmes related to the transboundary marine resources and the environment;
- (i) promote the collection, exchange, dissemination and analyses of the relevant data and information, including statistical, biological, environmental and socio-economical;
- (j) promote collaboration on monitoring, control and surveillance, including joint activities in the Southern African Development Community region;
- (k) appoint an Executive Secretary and adopt rules of procedures for his or her functions;
- (l) support training and strengthening of capacity in areas covered by this Convention;
- (m) ensure adequate funding and resources to sustain the long-term operations of the Commission;
- (n) establish subsidiary bodies as it considers desirable for the exercise of its functions and direct their activities; and
- (o) carry out such other activities as may be necessary for the Commission to achieve the objective of this Convention.

Article 9
Permanent Committees of the Commission

- (1) There are hereby established as permanent committees to the Commission an Ecosystem Advisory Committee, a Finance and Administration Committee, and a Compliance Committee to provide advice and recommendations to the Commission on matters within their respective areas of competence and carry out such activities as requested from time to time by the Commission.
- (2) Each Party shall appoint experts to each Committee.
- (3) Each Committee may establish working groups as it deems necessary.


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- (4) Each Committee shall establish rules and procedures for its functioning, including work plans and budgets, to be approved by the Commission.

Article 10

The Ecosystem Advisory Committee

The Ecosystem Advisory Committee shall provide to the Commission the best scientific advice and relevant information available and shall -

- (a) establish and manage a science programme; and
- (b) recommend conservation and management measures.

Article 11

The Finance and Administration Committee

The Finance and Administration Committee shall provide financial and administrative advice to the Commission and shall, *inter alia* -

- (a) monitor the implementation of the budget and review the audited financial reports; and
- (b) review and recommend the projected budget for approval.

Article 12

The Compliance Committee

The Compliance Committee shall provide the Commission with information, advice and recommendations on the implementation of and compliance with the measures adopted to give effect to the objective of this Convention and shall -

- (a) coordinate compliance activities; and
- (b) coordinate with the other Committees on matters of common interests.

Article 13

The Secretariat

The Secretariat shall be headed by an Executive Secretary, and it shall -

- (a) provide services to the Ministerial Conference, the Commission and its subsidiary bodies to facilitate the execution of their functions;
- (b) establish rules and procedures of operation, functioning and appointment of its staff to be approved by the Commission;
- (c) propose the creation or termination of such positions as deemed necessary to perform its functions, with the approval of the Commission;
- (d) source resources, additional to the contributions made by the Parties, to carry out and implement the programmes of the Commission;
- (e) establish partnerships with other organisations; and
- (f) perform such other functions as the Commission may determine.

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Article 14
National Coordinators

Each Party may appoint, at its own expense, a National Coordinator to coordinate sectorial participation at national level.

Article 15
Finance and Budget

- (1) Each Party shall pay the expenses of its own delegation to any meetings held pursuant to this Convention.
- (2) The Parties shall contribute in equal proportions to the budget of the Commission that shall be payable in the currency of the country in which the headquarters of the Commission is located.
- (3) The Executive Secretary shall submit drafts of the annual budgets for the two succeeding financial years to each Party no later than sixty days before the annual meeting of the Commission.
- (4) A Party that fails to pay its contributions for two consecutive years shall not, during the period of its default, have the right to participate in the taking of decisions and adopt recommendations in the Commission.

Article 16
Decisions and Recommendations

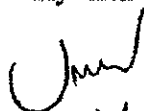


- (1) Decisions and recommendations shall be taken by consensus.
- (2) Concerning decisions and recommendations on transboundary issues affecting only two Parties, consensus means that those decisions and recommendations are supported by the affected Parties.

Article 17
Obligations

- (1) Each Party shall take measures to ensure the implementation of this Convention and any decisions and measures agreed pursuant thereto, including adoption of the necessary legislation.
- (2) Each Party shall report to the Commission on an annual basis indicating how it has implemented decisions of and acted on recommendations by the Commission.

Article 18
Cooperation with other Organisations

- (1) The Commission shall seek to develop cooperative relationships and may enter into agreements with organisations that can contribute to its work.



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(2) The Commission shall provide for the participation by invitation or on request of organisations having special competence in the fields of activity of the Commission in its meeting as observers in accordance with its Rules of Procedure.

Article 19
Settlement of Disputes

- (1) The Parties shall cooperate in order to prevent disputes.
- (2) If any disputes arise between Parties concerning the interpretation or implementation of this Convention, those concerned shall consult among themselves as soon as possible in order to settle the dispute by negotiation or any other means as they may agree upon.

Article 20
Languages

The official languages shall be English and Portuguese.

Article 21
Headquarters

The headquarters shall be established in Namibia.

Article 22
Signature, Ratification, Acceptance and Approval



- (1) This Convention shall be open for signature by the Parties on 18 March 2013.
- (2) This Convention is subject to ratification, acceptance or approval in accordance with the domestic law and procedures in force in the countries of the Parties.
- (3) Instruments of ratification, acceptance or approval shall be deposited with the depositary.

Article 23
Entry into Force

This Convention shall enter into force 30 days after the date of the deposit with the depositary of the last instruments of ratification, acceptance or approval by the Parties.

Article 24
Reservations and Exceptions

No reservations or exceptions may be made to this Convention.


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Article 25
Declarations and Statements

Article 22 does not preclude a Party, when signing or ratifying this Convention, from making declarations or statements, however phrased or named, with a view, *inter alia*, to harmonisation of its laws and regulations to provisions of this Convention, provided that such declarations or statements do not purport to exclude or to modify the legal effect of the provisions of this Convention in their application to that Party.

Article 26
Relationship with other International Instruments

This Convention shall not alter the rights and obligations of the Parties, which arise from other agreements compatible with this Convention and which do not affect the enjoyment by other Parties of their rights or the performance of their obligations under this Convention.

Article 27
Amendments




- (1) Any Party may propose amendments to this Convention to be considered by the Commission. Any such proposal shall be made by written communication addressed to the Executive Secretary at least 60 (sixty) days before the meeting of the Commission at which it is to be considered. The Executive Secretary shall promptly circulate such communication to all Parties.
- (2) Amendments to this Convention shall be considered at the annual meeting of the Commission unless a majority of the Parties requests a special meeting to consider the proposed amendments. A special meeting may be convened on not less than 60 (sixty) days' notice. The text of any agreed amendment shall be transmitted promptly by the Executive Secretary to all Parties.
- (3) Amendments to this Convention shall enter into force for the Party ratifying or acceding to them on the 30th (thirtieth) day following the deposit of the instrument of ratification or accession by at least two of the Parties.

Article 28
Withdrawal

A Party may, by written notification addressed to the depositary, withdraw from this Convention and may indicate its reasons. Failure to indicate reasons shall not affect the validity of the withdrawal. The withdrawal shall take effect one year after the date of receipt of the notification, unless the notification specifies a later date.

Article 29
Transition

- (1) The existing committees, subcommittees and working groups established under the Interim Agreement shall continue to exist unless terminated or reviewed by the Commission.




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(2) All decisions, recommendations and other agreements adopted under the Interim Agreement shall continue to be valid to the extent that they are consistent with or not explicitly terminated by this Convention.

**Article 30
Depositary**

The Republic of Namibia shall be the depositary of this Convention and any amendments thereto. The depositary shall register this Convention with the Secretary-General of the United Nations in accordance with article 102 of the Charter of the United Nations.

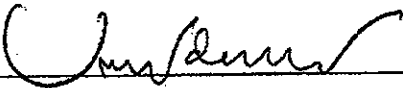
**Article 31
Authentic Texts**

The English and Portuguese texts of this Convention are equally authentic.


IN WITNESS WHEREOF the undersigned, being duly authorised thereto, have signed this Convention in the English and Portuguese languages.

DONE at Benguela, on this 18 day of March in 2013.

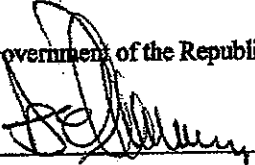
For the Government of the Republic of Angola



For the Government of the Republic of Namibia



For the Government of the Republic of South Africa





the doj & cd

Department
Justice and Constitutional Development
REPUBLIC OF SOUTH AFRICA

OFFICE OF THE CHIEF STATE LAW ADVISER

Private Bag X81, PRETORIA, 0001, Tel (012) 315 1130, Fax (012) 315 1628, Momentum Centre East Tower 12th Floor,
Pretorius Street; Office Email: OCSLA.Pretoria@justice.gov.za and ocsla@justice.gov.za

Ref: 143/2011
Enq: Adv B Venter
Tel: (012) 3151338
e-mail: bventer@justice.gov.za
website: <http://www.doi.gov.za>

Date: 06 September 2011

Ms Nosipho Ngcaba
The Director-General
Department of Environmental Affairs
Private Bag X 447
PRETORIA
0001

Dear Ms N Ngcaba

Attention: Adv N de Kock

**DRAFT INTERNATIONAL CONVENTION BETWEEN THE GOVERNMENT OF THE
REPUBLIC OF ANGOLA, THE GOVERNMENT OF THE REPUBLIC NAMIBIA AND THE
GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA: YOUR E-MAIL DATED 13
April 2011**

1. According to the submission received from the Department of Environmental Affairs this is the final draft of the draft "Convention between the Government of the Republic of Angola, the Government of the Republic of Namibia and the Government of the Republic of South Africa on the Benguela Current Convention", hereinafter referred to as the "draft Convention". We have previously scrutinized a first draft (see our Opinion 10/2011) of the same Convention. We have again scrutinised the draft Convention in terms of *paragraph 5.20(a) of the Manual on Executive Acts of the President of the Republic of South Africa* and with reference to *Chapter 5 of the Constitutional Handbook for Members of the Executive*, the Constitution of the Republic of South Africa, 1996 (the "Constitution"), other relevant legislation and applicable international instruments, and have indicated

(2) All decisions, recommendations and other agreements adopted under the Interim Agreement shall continue to be valid to the extent that they are consistent with or not explicitly terminated by this Convention.

**Article 30
Depositary**

The Republic of Namibia shall be the depositary of this Convention and any amendments thereto. The depositary shall register this Convention with the Secretary-General of the United Nations in accordance with article 102 of the Charter of the United Nations.


**Article 31
Authentic Texts**

The English and Portuguese texts of this Convention are equally authentic.


IN WITNESS WHEREOF the undersigned, being duly authorised thereto, have signed this Convention in the English and Portuguese languages.

DONE at Benguela, on this 18 day of March in 2013.

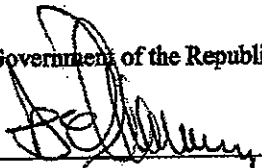
For the Government of the Republic of Angola



For the Government of the Republic of Namibia



For the Government of the Republic of South Africa



suggested amendments and made certain comments by way of track changes directly on the copy of the draft Convention attached hereto.

2. In order to assist the Department we have specifically commented on the following important aspects in the draft Convention:

2.1 The draft Convention is a formal agreement to be entered into between South Africa, Namibia and Angola on cooperation in trans-boundary marine research and environmental monitoring projects in the Benguela Current Large Marine Ecosystem which straddles the water of all three countries.

2.2 The objective of this draft Convention is to promote a coordinated regional approach to the long-term conservation, protection, rehabilitation, enhancement and sustainable use of the Benguela Current Large Marine Ecosystem, to provide economic, environmental and social benefits.

2.3 The area of application for this draft Convention comprises all areas within the national sovereignty and jurisdiction in accordance with the United Nations Convention on the Law of the Sea of 10 December 1982, bounded by the high water mark along the coasts of the Parties.¹

2.4 In terms of the draft Convention the Parties agreed to the following principles :

- (a) The cooperation, collaboration and sovereign equality principle;
- (b) sustainable use and management of the marine resources;
- (c) the precautionary principle;
- (d) prevention, avoidance and mitigation of pollution;
- (e) the polluter pays principle; and
- (f) protection of biodiversity in the marine environment and conservation of the marine ecosystem.

¹ This is the most important general multilateral treaty referred to as UNCLOS). South Africa acceded to UNCLOS in December 1997. UNCLOS is a comprehensive treaty dealing with maritime zones, the conservation and exploitation of living marine resources, and the establishment of an international sea-bed authority and lay down general obligations for regulating marine pollution. The maritime zones provided for in the UNCLOS govern the extent of sovereignty and jurisdiction enjoyed by coastal states. The extent of the maritime zones of South Africa is set out in the Maritime Zones Act 15 of 1994.

2.5 The following regional conventions pertaining to the above-mentioned principles need to be considered:

- (a) The Straddling Stocks Convention to which South Africa acceded in 2003. This convention is, in particular, important since the Benguela Current has plenty of straddling stocks as well as highly migratory fish species. This Convention establishes principles for the sustainability and optimal utilization of these stocks and obliges parties to adopt management principles based on the best scientific information available.
- (b) The UNEP'S Regional Seas Programme which is an action-orientated programme concerned with the consequences and the causes of environmental degradation in marine and coastal areas. This programme comprises regional action plans, each of which is underpinned by a regional convention. In West Africa the Abidjan Convention and in East Africa the Nairobi Convention are applicable. Both Conventions were adopted by South Africa in May 2003. The Benguela Current Convention strengthens the UNEP'S Regional Seas Programme in the Southern Africa region.

2.6 In order to achieve the goals set up in the draft Convention, the Parties agreed to set up an organisational structure consisting of –

- (a) a Ministerial Conference;
- (b) a Commission;
- (c) a Secretariat;

The functions of each of these bodies are expounded upon the draft Convention and are aimed at achieving the goals set out above.

2.7 The Department of Environmental Affairs' attention is further drawn to the provisions of section 231 of the Constitution of the Republic of South Africa, 1996, hereinafter referred to as "the Constitution", which provides as follows:

"(1) The negotiating and signing of all international agreements is the responsibility of the national executive.

(2) An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection (3).

(3) An international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive, binds the Republic without approval by the National Assembly and the National Council of Provinces, but must be tabled in the Assembly and the Council within a reasonable time.

(4) Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.

(5) The Republic is bound by international agreements which were binding on the Republic when this Constitution took effect."

2.8 Since this is a multi-lateral Convention and since Article 22 of the draft Convention provides that it is subject to ratification, acceptance or approval in accordance with the domestic law and procedures in force in the countries of the Parties, it will in our view fall within the scope of section 231(2) of the Constitution. Paragraph 5 of the Manual on Executive Acts of the President alludes to two frameworks for concluding international agreements, namely one which applies to international agreements which require ratification or accession in order to be brought into affect; and another which applies to international agreements which merely require the signature of a duly authorised representative of a contracting state party to come into affect. However, the Department's attention is further drawn to paragraph 5.21 of the Manual on Executive Acts of the President, which obliges the Department of International Relations and Cooperation to confirm whether the Convention is of a technical, administrative, or executive nature or not.

3. We assume that the relevant authorities have been consulted regarding the provisions which may have financial implications for the Republic of South Africa. We wish to draw the attention of the Department to the provisions of the PFMA and, in particular, the provisions of section 38 with regard to the responsibilities of the Accounting Officer.

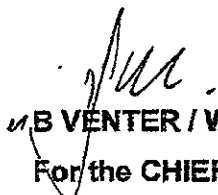
4. We suggest that the signature clause of the draft Convention be drafted along the following lines:

"IN WITNESS WHEREOF the undersigned, being duly authorised thereto by their respective Governments, have signed and sealed this Convention in two originals in the Portuguese and English languages, all texts being equally authentic.

DONE at _____ on this _____ day of _____ 2011".

5. Subject to our foregoing remarks and our comments and amendments on the text of the draft Convention, no provision of the proposed draft Convention is, as far as we could ascertain, in conflict with the domestic law of the Republic of South Africa.

Yours sincerely


B VENTER / WJJ NEL / S MASAPU
For the CHIEF STATE LAW ADVISER



international relations & cooperation

Department:
International Relations and Cooperation
REPUBLIC OF SOUTH AFRICA

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RO 297/2011

For Attention: Pheello Oliphant
Route: DAA 107

DRAFT INTERNATIONAL CONVENTION BETWEEN THE GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA, AND THE GOVERNMENT OF THE REPUBLIC OF NAMIBIA AND THE GOVERNMENT OF THE REPUBLIC OF ANGOLA ON COOPERATION IN TRANS-BOUNDARY MARINE RESEARCH AND ENVIRONMENTAL MONITORING PROJECTS IN THE BENGUELA CURRENT LARGE MARINE ECOSYSTEM

1. Your request for legal advice received on 07 September 2011 concerning the abovementioned matter refers.
4. We had an opportunity to scrutinise the draft Benguela Current Convention and took note of the comments by the Department of Justice and Constitutional Development (DOJ). We are, therefore, of the view that this instrument will be consistent with international law and South Africa's international obligations if all the amendments proposed by our Office and DOJ are effected by the line function department (the amended text is attached herein).
5. It is our view that this is an Agreement falling under the ambit of section 231(2) of the Constitution, which requires Parliamentary approval to be binding on the Republic of South Africa. However, the line function department is better placed to decide as to whether this is an agreement with the purview of section 231(2) or (3) of the Constitution or not. According to the *Manual on Executive Acts* the line function department should not lightly determine that such agreements requiring ratification or accession are "technical, administrative or executive". Failure to allow Parliament to ratify an agreement might result in a defect in the conclusion of the agreement.
6. The Desk is also reminded that the Agreement needs to be bound before signature. An appointment for this purpose must be made with the Treaty Section, at (012) 351 0872/0851/0837. Furthermore, the originally signed Agreement must be deposited with the Treaty Section for safekeeping immediately after signature.
7. Please do not hesitate to contact our Office for further details concerning this matter.

MR. MICHAEL KABAI
ASSISTANT STATE LAW ADVISER (IL)

16 SEPTEMBER 2011
PRETORIA

Parliament of RSA
19 AUG 2013
DMF