

# LEGAL REPORT ON THE DRAFT BECHE-DE-MER FISHERY MANAGEMENT PLAN

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## **PART A. KEY ISSUES TO SUPPORT EFFECTIVE IMPLEMENTATION OF THE DRAFT BDM MANAGEMENT PLAN**

### **1. INTRODUCTION**

A draft Beche-de-Mer Management Plan, prepared pursuant to s 28 of the *Fisheries Management Act 1998 (FM Act)*,<sup>1</sup> has been undergoing consultation and revisions over a number of years. In November 2015, a 'Final Draft' was endorsed (**draft BDM Management Plan**). It is anticipated that the final BDM Management Plan will be gazetted and implemented in the near future (as at February 2016). Its predecessor, the 2001 *National Beche-de-mer Management Plan*, had been in place from 2001, before the BDM fishery was closed in 2009 due to unsustainable harvesting.

The content of the draft BDM Management Plan is discussed in some detail in PART C of this document. The relevant legal framework to it is discussed in PART B of this document.

The purpose of the Key Issues document is to draw on the content of the draft BDM Management Plan and the relevant legal framework, reported experience from the field, and consultations undertaken as part of this project, to highlight key legal and related issues for further consideration. These key issues and the discussion that follow them are made with a view to supporting the effective implementation of the draft BDM Management Plan.

A key thematic issue concerns the extent to which authority for managing the BDM fishery will remain at the National Government level and the prospects for effective devolution of planning, management and implementation to secure a sustainable fishery. The draft BDM Management Plan places a strong emphasis on management at the Provincial level. However, it appears that, without additional concrete measures being taken by all levels of government, most management activity will remain located within National Government.

In order for effective devolution of the management of the BDM fishery, among other things, greater clarity is needed about how each level of government is to coordinate to achieve the joint management approach envisaged under the draft BDM Management Plan. Further, there is the clear need for significant resourcing and capacity building, particularly in the short-term within Provincial Fisheries Administrations<sup>2</sup> and Provincial Fisheries Officers.

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<sup>1</sup> The BDM Management Plan uses the term 'sea cucumber' in relation to 'all animals belonging to the Class Holothuroidea' in its live form, and 'beche-de-mer or trepang' in its processed form: cl 2(b).

<sup>2</sup> The BDM Management Plan refers to Provincial Fisheries Administrations. These are sometimes referred to as Provincial Fisheries Offices, Provincial Fisheries Administrations, and Provincial

Provincial Governments need to be able to, among other things, fulfill their responsibilities in stock assessment, purchasing data collection, preventing unauthorized inter-Provincial transfers, making sure that exporters comply with regulations and licensing processes, as well as the technical aspects of enforcement. Consultations undertaken as part of this project indicate that Provincial Fisheries Administrations already face some challenges performing their current roles, therefore, further responsibilities are likely to exacerbate existing issues if additional measures are not taken.

If efforts towards joint management achieve limited success, and management of the BDM fishery reverts largely to the National Government, it would appear that the measures in the draft BDM Management Plan related to size limits, total allowable catch and seasonal closures will become critical. In such circumstances, at a minimum, it would seem necessary to deliver education programs at the community level to generate support for, and procure compliance with, the management measures being used. The effective implementation of size limit, total allowable catch and seasonal closure measures at a National level coupled with community education at the community level, may represent the minimum requirements for delivering a sustainable BDM fishery.

For ease of reference and summary purposes, the key issues are extracted in section 2 of this part of the document. The relevant issues are discussed some detail in section 3 of this part. Finally, section 4 of this part briefly touches on the *draft Roadmap for Coastal and Marine Aquaculture for Papua New Guinea: 2016-2026*. It is anticipated that the *draft Roadmap* will be finalized soon and, importantly, some of its recommendations may go toward addressing some of the issues raised in this document.

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Fisheries Authorities, but it is our understanding that in practice, these refer to the same thing: See section headed 'PFOs' in Combined Legal overview.

## **2. SUMMARY OF KEY ISSUES**

### **Stakeholder Representation**

**Issue 1.** Ensuring adequate representation of the views and interests of Provincial Governments, Local-level Governments (LLG), and small-scale fishers on the National Fisheries Board.

**Issue 2.** Ensuring adequate representation of the views and interests of BDM fishers in the National Management Advisory Committee (**NMAC**), Provincial Management Advisory Committee (**PMAC**) and Local-level Governments Management Advisory Committee (**LLGMAC**).

### **Joint Management of the BDM Fishery**

**Issue 3.** Supporting joint management of the BDM-fishery: Identification and articulation of the roles and responsibilities of Provincial Governments, Local-level Governments and resource owners.

### **Provincial and Local-level Government**

**Issue 4.** Consider whether law making at the Provincial and/or Local-level could support implementation and enforcement of the BDM Management Plan.

**Issue 5.** Ensuring Provincial Governments and their staff are able to perform their responsibilities under the BDM Management Plan effectively, with particular focus on:

- a) monitoring, control and surveillance;
- b) prevention of unauthorized inter-Provincial transfers; and
- c) ensuring that exporters comply with their obligations.

### **Community-based Fishery Management and the BDM Management Plan**

**Issue 6.** Articulating the role of Community-based Fisheries Management (**CbFM**), including ensuring appropriate level of Government involvement and oversight and considering lessons learned from marine conservation initiatives.

## **Customary Rights and Resource Management**

**Issue 7.** Considering solutions for potential conflicts between customary rights, the FM Act and the draft BDM Management Plan.

## **BDM Fishery Management**

**Issue 8.** Ensuring an appropriate Total Allowable Catch (**TAC**)

**Issue 9.** Capacity and resourcing to implement the **TAC** including data collection and processing, and flow of data from the Provincial level to the National Fisheries Authority (**NFA**).

**Issue 10.** Timely closure of BDM fisheries.

## **An Ecosystem Approach to Managing the BDM Fishery**

**Issue 11.** Defining and explaining the ecosystem approach in the FM Act and the draft Management Plan.

## **Monitoring and Enforcement**

**Issue 12.** Supporting localized and innovative monitoring, control and surveillance (**MCS**).

**Issue 13.** Clearly articulating the enforcement roles and functions of Provincial Fishery Offices (**PFOs**) and other enforcement officers and agencies.

**Issue 14.** Building the capacity of PFOs to participate in and/or conduct administrative and criminal enforcement activities.

**Issue 15.** Raising community awareness of prohibitions that apply to the BDM fishery.

**Issue 16.** Enforcement of prohibitions - articulating and understanding the roles and functions of the community and government officials in relation to enforcement.

**Issue 17.** Effectively providing for and implementing Penalty Notices for the BDM fishery in the *Fisheries Management Regulation 2000*.

## **The Court System**

- Issue 18.*** Building the capacity of District Courts to enforce fisheries law and BDM offences.
- Issue 19.*** Supporting the role of Village Courts in community-level enforcement.
- Issue 20.*** Identifying sanctions that are most likely to effectively deter offences in the BDM fishery.

### 3. IDENTIFICATION AND DISCUSSION OF KEY ISSUES

#### 3.1 Stakeholder representation

**Issue 1.** Ensuring adequate representation of the views and interests of Provincial Governments, Local-level Governments (LLGs), and small-scale fishers on the National Fisheries Board.

The National Fisheries Board (**the Board**) is responsible for (among other things) providing general control and guidance over the exercise of the functions and powers of the National Fisheries Authority (**NFA**). The NFA is responsible for management and development of the fisheries sector. In addition to its significant responsibilities under the *Fisheries Management Act 1998 (FM Act)*, the NFA is responsible for formulating and implementing the BDM Management Plan; and is charged with giving advice to the National Management Advisory Committee (**NMAC**) on many of its major decisions regarding management of the BDM fishery.<sup>3</sup>

The list of persons who constitute the Board is set out at s 8(1) of the FM Act. Section 8(1) has been amended twice since the FM Act was passed in 1998. In comparison to the current provision, the 1998 provision provided for representation of local stakeholders, by including the following persons as members of the Board:

- the Departmental Head of the Department responsible for Provincial affairs, *ex officio* or their nominee;
- one person nominated by the Fishing Industry Association (in addition to the President of the Fishing Industry Association); and
- one person nominated by non-governmental organisations (NGOs).<sup>4</sup>

The positions for the Departmental Head of the Department responsible for Provincial affairs, the fishing industry representative and the NGOs representative have been removed. Instead there are now two positions that are to be filled at the discretion of the Minister (s 8(1)(h)). Notably, there is no mandated representative for maritime Provinces or LLGs. Small-scale fishers, such as BDM fishers, are also not separately represented.

This raises the question of whether the current regime necessarily ensures adequate representation of the interests of these stakeholders. Adequate representation does not necessarily call for amendment to s 8(1) of the FM Act. However, a formalised process to

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<sup>3</sup> See sections headed 'National Fisheries Authority' and 'National Fisheries Board' in PART B.

<sup>4</sup> These provisions were removed from the FM Act 1998 (as passed) by the *Fisheries Management (Amendment) Act 2012* and the *Fisheries Management (Amendment) Act 2015*.

incorporate the views of key stakeholders in this level of decision making is important. Such a process must recognise that regional stakeholders may not have uniform interests or opinions and so must canvass a broad representation of stakeholders.

**Issue 2.** Ensuring adequate representation of the views and interests of BDM fishers in the National Management Advisory Committee (**NMAC**), Provincial Management Advisory Committee (**PMAC**) and Local-level Governments Management Advisory Committee (**LLGMAC**).

The draft BDM Management Plan introduces a policy of joint management of the BDM fishery.<sup>5</sup> It provides for a NMAC<sup>6</sup> which is to advise the Managing Director of the NFA in relation to the BDM fishery, as well as PMACs and LLGMACs.<sup>7</sup>

The list of persons who will constitute the NMAC, PMACs and LLGMACs is set out in the BDM Management Plan.

It is unclear however whether or not the NMAC, PMAC and LLGMACs will appropriately represent the views and interests of BDM fishers in their decision-making, with no direct requirement for representation of BDM fishers.

- **NMAC:** Unlike the National Fisheries Board, Provincial Governments are appropriately represented on the NMAC as the NMAC must include as members the Chairpersons of all existing PMACs. The NMAC is also to include two industry representatives and one representative from a non-government organization whose objectives include conservation of the marine environment and management of fisheries resources.
- **PMACs:** PMACs are to include three resource-owner representatives, two exporter representatives, and one representative from a non-government organization whose objectives include conservation of the marine environment and management of fisheries resources.
- **LLGMACs:** LLGMACs are not required to include resource owners, exporters, NGO representatives, or BDM fishers.

Ongoing monitoring to determine whether the interests of BDM fishers are being represented will be required and, if necessary, a process for incorporating these views should be developed.

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<sup>5</sup> See sections headed 'Joint Management (cl 5)' in PART C.

<sup>6</sup> See sections headed 'National Management Advisory Committee (NMAC)' in PART C.

<sup>7</sup> See sections headed 'Provincial and Local-level Government Management Advisory Committees' in PART C.

Otherwise, the composition of the NMAC, PMACs, and LLGMACs seems appropriate. However this may require review in future, once the draft BDM Management Plan has come into operation.

### 3.2 Joint Management of the BDM Fishery

**Issue 3.** Supporting joint management of the BDM-fishery: Identification and articulation of the roles and responsibilities of Provincial governments, Local-level Governments and resource owners.

In comparison to the National focus of the FM Act, the draft BDM Management Plan explicitly establishes a joint management framework for the BDM fishery. It states that each level of government is 'responsible for implementing the Management Plan at their respective levels' and identifies the following responsibilities as resting with Provincial and Local-level Governments:<sup>8</sup>

- the ability to set lower TACs (only at the Provincial level or split amongst LLGs, and as long as the TACs do not exceed the Provincial TAC set nationally);
- the ability to set higher size limits;
- the ability to enforce longer closed seasons;
- advising the NFA on licences;
- supporting resource owners in their management actions; and
- the ability to establish a Management Advisory Committee at either the Provincial or LLG level.

Notably, this list applies to *both* Provincial and Local-level Governments (i.e. there is no differentiation or splitting of the roles between the two levels of Government), and so it is difficult to discern how the roles differ and any specific roles of LLGs in comparison to Provincial Governments.

The draft BDM Management Plan also provides for Provincial Governments and LLGs to develop their own BDM management plans (although they must be consistent with the national BDM Management Plan).<sup>9</sup>

The lack of clear delineation of responsibilities between Provincial Governments and LLGs naturally raises the question of how the roles and responsibilities will be effectively split and shared in practice: will the lack of prescription result in confusion, overlap, and/or some tasks

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<sup>8</sup> See section headed 'Joint Management (cl 5)' in PART C.

<sup>9</sup> To the extent of any inconsistency, the national plan will prevail. See section headed 'Provincial, Local-level, and community management plans' in PART C.

being missed/forgotten? Further, consultations undertaken for this project suggest that links between the National Government and LLGs are not strong; if and where this is the case, the risk of confusion may well be greater.

Smooth and optimal implementation may be assisted by explicitly prescribing a split of these and other responsibilities between Government levels. This could occur at a National level or the responsibilities could be split differently in different Provinces, according to need and capacity. Further detail could be provided in the BDM Management Plan or the making of these arrangements could be delegated to the Provincial level. Such arrangements may not need to be developed prior to the implementation of the BDM Management Plan, and there may be some benefit to waiting until the Plan has commenced to enable clearer identification of what responsibilities rest better where.

Another way of clarifying this issue, or a way of providing support, may be for the National and/or Provincial Government(s) to utilize their powers to delegate their roles and functions to Provincial and/or Local-level Governments.<sup>10</sup>

### 3.3 Provincial and Local-level Management

**Issue 4.** Consider whether law making at the Provincial and/or Local-level could support implementation and enforcement of the BDM Management Plan.

Section 50(2) of the *Organic Law on Provincial Governments and Local-level Governments 1998 (OPGLLG)* establishes a system of Provincial Governments and LLGs.<sup>11</sup> Sections 42 and 44 of the OPGLLG set out law-making areas that are granted exclusively to Provincial and Local-level Governments (respectively). Relevant here:

- Provincial Governments have the power to make laws about fishing and fisheries; and
- LLGs have the power to make laws about protection of the local environment.<sup>12</sup>

Although the OPGLLG grants Provincial Governments the power to make laws about fishing and fisheries, the National Government was able to pass the FM Act on the basis that the

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<sup>10</sup> See section headed 'Law making powers of National, Provincial and Local-level governments' in PART B.

<sup>11</sup> See section headed 'The Organic Law on Provincial Governments and Local-level Governments 1998 in PART B.

<sup>12</sup> See section headed 'Law making powers of National, Provincial and Local-level governments' in PART B.

law is a matter of national interest (OPGLLG s 41(2)). Nevertheless, there are still ways for Provincial Governments and LLGs to make laws about or related to fishing and fisheries:

- **Provincial Governments:** Although the National Government passed the FM Act, Provincial Governments do not appear to have lost their power to make laws about fishing and fisheries; they simply need to ensure that any laws they do make are consistent with the FM Act.<sup>13</sup>
- **Provincial Governments and LLGs:** The OPGLLG gives the National Government the power to delegate any of its powers or functions to a Provincial Government(s) or an LLG(s) (s 50(2)).<sup>14</sup> This means the National Government could delegate its power to make subsidiary legislation for the implementation of the FM Act to Provincial Governments or LLGs.
- **LLGs:** LLGs can make laws that impact marine protection by relying on their power to make laws about protection of the local environment. Such laws could potentially complement the FM Act, the draft BDM Management plan, and any other fisheries laws.

To date, law-making activity concerning fisheries has been largely carried out at the National level.<sup>15</sup> However, the governance structures described raise the question of whether there is anything to gain from Provincial Governments and/or LLGs legislating in relation to fisheries generally, or the BDM fishery in particular.

This issue warrants further consideration. On the one hand, there are potential risks associated with legislation being made at multiple levels of government; for example, the risk of overlap, conflict, confusion, and inefficiency. On the other hand, there may be some benefits; for example, could legislation made at the Local-level offer the opportunity for local communities to develop enforcement measures that reflect local cultures and customs, and therefore improve their effectiveness?

There are already some LLG laws that relate to marine conservation (such as the *Environment and Conservation Law 2007* passed by the Nali Sopat Penabu Rural LLG).<sup>16</sup> These laws are likely to be useful references when considering the possible benefits of legislation at the Provincial or Local-level.

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<sup>13</sup> If they aren't consistent, the National law will prevail. See sections headed 'Law making powers of National, Provincial and Local-level governments', and 'The Fisheries Management Act 1998' in PART B.

<sup>14</sup> See section headed 'Law making powers of National, Provincial and Local-level governments' in PART B.

<sup>15</sup> See section headed 'Provincial and Local-level Marine Protection Laws' in PART B for examples of Provincial and Local-level marine/environment protection laws.

<sup>16</sup> See section headed 'Provincial and Local-level Marine Protection Laws' in PART B.

**Issue 5.** Ensuring Provincial Governments and their staff are able to perform their responsibilities under the BDM Management Plan effectively, with particular focus on:

- a) monitoring, control and surveillance;
- b) prevention of unauthorized inter-Provincial transfers; and
- c) ensuring that exporters comply with their obligations.

### **General comments**

The FM Act does not provide for implementation of Management Plans by Provincial or Local-level Governments, with powers and procedures all sitting with the NFA and the Board.<sup>17</sup> Similarly, powers and procedures set out in the FM Regulation all sit with the Managing Director of the NFA and the Board, and the FM Regulation specifies compliance measures to be undertaken by National Government.<sup>18</sup> However, in practice, implementation of the FM Act relies to a large extent on the activities of PFOs.<sup>19</sup>

For some years, the NFA has used Memoranda of Agreement (**MoAs**) to delegate fisheries tasks to Provincial Administrations. It appears that these MoAs have had some impact, connecting the NFA to Provincial fisheries through information sharing, the provision of human resources, capacity building, assistance in developing institutional strength, decision-making support, and direct financial support.<sup>20</sup>

Despite this, consultations undertaken for this project suggest that Provincial Governments and their staff face difficulties in adequately performing their functions under the FM Act in relation to fisheries management.<sup>21</sup> There are also reports suggesting that at least some Provincial authorities have not considered the Provincial fisheries sector as being sufficiently important to warrant support.<sup>22</sup>

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<sup>17</sup> See section headed 'The Fisheries Management Act 1998 (As Amended)' in PART B.

<sup>18</sup> See section headed 'Fisheries Management Regulation 2000' in PART B.

<sup>19</sup> Catherine S Benson, 'Shifting Accountabilities? Understanding the Connections between National and Provincial Fisheries in Papua New Guinea' (2012) 36 *Marine Policy*, 859, 860. Over the last two decades, the NFA has decentralised fisheries responsibilities, reduced its size (including a reduction in the number of Province-based fisheries officers), and delegated some of its responsibilities to the Provincial level

<sup>20</sup> See, e.g., Benson, Note 19, 861-3; Paul Nichols and Steve Lindsay, *Profiling of Provincial Fisheries Resources in Papua New Guinea*, 2013, ACPII Technical Report.

<sup>21</sup> See also, e.g., Benson, above n 19, 864.

<sup>22</sup> The failure to prioritise Provincial fisheries was attributed, in the ACP Fish II report, as being attributable at least in part to 'the virtual absence of data collection and subsequent analysis on the relative socio-economic value of the sector in terms of food security, employment, business multipliers and development potential' ACP Fish II, *Strengthening Fisheries Management in ACP Countries* 8.

Further, there are reports that some officers within Provincial Administrations have weak relationships with officers working within District and Local-level Government offices. This has the potential to compromise the overall implementation of the existing fisheries management and puts at risk the draft BDM Management Plan.<sup>23</sup>

In response to concerns about the management of Provincial fisheries, the NFA created the Provincial Support and Industry Development (**PSID**) division of the NFA. The PSID's main objective is to facilitate partnerships and working relationships between National, Provincial, and Local-level Governments in the management of coastal marine and fisheries resources.<sup>24</sup> Benson describes the PSID 'as the human link between the NFA and the Provinces'.<sup>25</sup>

More recently, the Coastal and Inland Fisheries Development Agency (**CIFDA**) has been established in an attempt to enhance the NFA's abilities with respect to community fisheries. However, as an emerging national agency, it is too early to assess the extent to which it is succeeding in addressing the needs and priorities of local fisher communities.<sup>26</sup>

With this background in mind, it is significant that the draft BDM Management Plan creates new processes, functions, and responsibilities for the Provincial Governments and their staff. For example, the draft BDM Management Plan requires Provincial Fisheries Administrations to undertake a number of duties alongside the NFA, including playing a major role in compliance activities. Responsibilities include receipt of data reports from licensed exporters, monitoring Provincial annual TACs and undertaking enforcement activity.

Regardless of how successfully Provincial staff are currently implementing fisheries management under the FM Act, the creation of a new range of roles and responsibilities creates a need to adequately train and resource staff and agencies to fulfill these new responsibilities.

### ***Monitoring, control and surveillance***

The draft BDM Management Plan envisages the following types of licences:<sup>27</sup>

- exporter, buyer and storage facility licences;
- collector vessel licences;
- processing licences; and
- aquaculture licences.

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<sup>23</sup> See, e.g., Benson, above n19, 864-5.

<sup>24</sup> National Fisheries Authority: Corporate Plan: 2008-2012, Port Moresby, PNG

<sup>25</sup> Benson, above n19, 861.

<sup>26</sup> Benson, above n19, 865.

<sup>27</sup> See section headed 'Licensing' in PART C.

As a general comment, all licence-types should be the subject of compliance efforts.

According to the FM Act, licensing is carried out at the National level by the NFA with the Board being authorised to grant licences<sup>28</sup> and the NFA responsible for monitoring, control and surveillance (**MCS**).<sup>29</sup>

Whilst the FM Act details the enforcement powers of fisheries officers,<sup>30</sup> it lacks detail in relation to MCS.<sup>31</sup> Further, the only mention of 'monitoring' in the FM Regulation concerns vessel monitoring systems, which is not directly relevant to the BDM fishery.<sup>32</sup>

Since the draft BDM Management Plan tasks PFOs with ensuring that exporter obligations and prohibitions are complied with, one way of helping PFOs understand their MCS responsibilities would be to develop detailed job descriptions tailored specifically to the draft BDM Management Plan.<sup>33</sup> This could be done at the local level or from the top down.

As noted earlier, the NFA is reported to have used MoAs as a way of delegating fisheries tasks to Provincial Administrations. Consultations undertaken for this project suggest that in some cases, these MoA have specifically dealt with and/or clarified the role of Provincial Administrations in relation to MCS activities. If there are already some MoAs with MCS-specific provisions, and if they are operating effectively, these MoAs could offer another way of clarifying the role of PFOs in MCS.

Alternatively, or in addition to the above, clarification of what MCS entails and who is responsible for what could be dealt with to some extent by amendment to the FM Regulation.

One method might be to draft provisions on MCS in the FM Regulation.

### ***Prevention of unauthorized inter-Provincial transfers***

Any movement of BDM between Provinces could undermine implementation of the BDM Management Plan if movements are not appropriately tracked and recorded against the relevant TAC.

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<sup>28</sup> See section headed 'National Fisheries Board' in PART B .

<sup>29</sup> See section headed 'Monitoring and enforcement' in PART B.

<sup>30</sup> See section headed 'Appointment and powers of Fisheries Officers' in PART B.

<sup>31</sup> The FM Act states that MCS can be provided for in the FM Regulation. See section headed 'Monitoring, control and surveillance' in PART B.

<sup>32</sup> BDM fishers are village-based and use canoes, which do not require a licence.

<sup>33</sup> It is unclear whether some or any PFOs are already provided with job descriptions that detail their current responsibilities. In the case that job descriptions already exist, these could be amended to reflect the draft BDM Management Plan. Whether new or amended, it will be important to ensure that the job descriptions are well understood and known.

Given reports that inter-Provincial transfer (**IPT**) of BDM has hindered accurate calculation of Provincial catch levels in the past, this issue requires particular attention in the implementation of the BDM Management Plan.

The draft BDM Management Plan specifically addresses IPT, allowing it to occur only if *'suitable justification is provided to the National Fisheries Authority'* and the transfer is approved by the Managing Director. In addition, the draft BDM Management Plan imposes further restrictions that have the effect that each exporter is allocated a Province and each buyer is connected to both an exporter and a Province. So, buyers cannot buy BDM in one Province and sell it on to an exporter in another Province.<sup>34</sup>

Again, ensuring these management measures are followed, creates additional work and responsibilities for Provincial Fisheries Administrations and Officers. PFOs will need to monitor buyers and exporters to ensure that they are complying with these obligations, suggesting a need for additional training and resources.

***Ensuring that exporters comply with their obligations.***

The draft BDM Management Plan imposes a range of obligations and prohibitions on exporters as part of the portfolio of clause 8 'management measures'.<sup>35</sup>

Again, these provisions appear to create additional responsibilities for Provincial Governments and their staff. This is because export takes place from Provincial ports and airports, and so Provincial Governments seem to be the more obvious and possibly most appropriate level of Government for monitoring and achieving compliance.

In relation to current practice, consultations undertaken for this project suggest that it is already customary for PFOs to weigh bags of BDM at the point of export to check that the actual weight tallies with the record of purchase. Consultations also suggest that although exporters may sometimes comply with size requirements (i.e. refusing to buy undersized BDM), exporters are also known to buy undersized product.

Based on local reports, a program has already been implemented to boost capacity to monitor and respond to these issues. However, and again, given the expansion of duties and reports during project consultations that Provincial Governments may not be fully enforcing export requirements, it would be useful to provide further support to Provincial

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<sup>34</sup> An exporter's collector vessel licence requires that a vessel must only operate in the Province that is related to their export licence. Further, buyers are not freelancers; they must be connected with an exporter and can only buy in the Province of their exporter. See section headed 'Movement of BDM between Provinces' in PART C.

<sup>35</sup> See section headed 'Management measures' in PART C.

Administrations to ensure they have the capacity to fulfil this role adequately. Moving forward, performance should be monitored so that any shortfalls and capacity needs can be addressed.

### 3.4 **Community-based Fishery Management and Joint Management as set out in the BDM Management Plan**

**Issue 6.** Articulating the role of Community-based Fisheries Management (**CbFM**), including ensuring an appropriate level of Government involvement and oversight and considering lessons learned from marine conservation initiatives.

Joint management measures in the draft BDM Management Plan enable the development of Provincial and Local-level management plans/strategies (as long as they do not conflict with the National BDM Management Plan). In addition, it states that '[r]esource owners will be responsible for implementing the draft BDM Management Plan at their respective levels, as well as developing management strategies at their level or with the support of the LLG and Provincial Governments or other civil society actors. Any management strategies developed by resource owners, must not conflict with the Management Plan.'<sup>36</sup>

In this way, the draft BDM Management Plan seems to reflect and support the concept of CbFM.

Positive outcomes from adopting CbFM in the BDM fishery may include adoption of locally appropriate size limits, a ban on destructive harvesting techniques, bans on dumping rubbish in the marine area, and agreements to monitor BDM harvests.<sup>37</sup>

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<sup>36</sup> See section headed 'Joint Management' (cl 5).

<sup>37</sup> The first real attempt at establishing 'realistic and achievable community-based fisheries management' (**CbFM**) is said to have taken place in 2001-2002 through a collaboration between NFA and other PNG agencies and the Australian Centre for International Agricultural Research (**ACIAR**), which worked with a community at Obulaku village on Kiriwina Island in the Trobriand Islands: Australian Centre for International Agricultural Research (ACIAR), *Sustainable artisanal beche-de-mer fisheries in PNG* <<http://aciar.gov.au/project/fis/1999/038>>.

In PNG<sup>38</sup> the NFA has previously recognised the possibilities of CbFM. In 2006, assistance was provided by the UN Food and Agriculture Organisation (**FAO**) in developing a Policy Framework and Strategic Plan (2006-2008) for Community-based Fisheries Management in Papua New Guinea (FAO, 2006). The goals of this policy were to:

- achieve sustainable livelihood of stakeholders, particularly the rural-based population, in socio-economic terms;
- attain a balanced level of conservation and management action that ensures sustainable use of natural resources and protection of the environment for the benefit of present and future generations; and
- contribute to local, Provincial and National revenue generation for the promotion and continuation of sustainable development of Papua New Guinea.

It had been proposed in 2012 to amend the FM Act to provide for CbFM, but these amendments were not adopted.<sup>39</sup>

Although the provision for joint management in the draft BDM Management Plan reflects CbFM to some degree, ongoing monitoring and evaluation is recommended. Such monitoring and evaluation could consider, for example:

- whether Provincial and/or Local-level management plans/strategies are in fact being used;
- the extent to which 'resource owners' are implementing management plans or developing their own management plans;
- if they *are* being developed and used, whether these management plans/strategies are improving outcomes relative to areas that do not use them; and
- local perceptions of these management plans/strategies.

The FM Act, FM Regulations, and the draft BDM Management Plan lack details on what CbFM actually is. Articulation of CbFM may provide support and guidance in the implementation of local management plans/strategies. Such articulation could come in the form of amendment to the FM Act, FM Regulations, the BDM Management Plan, or separate guidelines.

In doing so, consideration should be given to what level of Government(s) would be best placed to oversee CbFM activities. For example, if a group of resource owners engaged in CbFM falls within LLG jurisdictional boundaries, the LLG may be the most appropriate level

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<sup>38</sup> Hugh Govan, Jeff Kinch and Alexandre Brjosniovski, *Strategic Review of Inshore Fisheries Policies and Strategies in Melanesia – Fiji, New Caledonia, Papua New Guinea, Solomon Islands and Vanuatu, Part II Country Reports*, SPC, July 2013, 28.

<sup>39</sup> Govan, Kinch and Brjosniovski, above n38, 26.

of Government. However, where a group spans more than one LLG, the Province may be the most appropriate level of Government. It may also be useful for LLGs to work with Provincial Government, particularly if the Provincial Government has more capacity than the relevant LLG to develop new management approaches. Care will need to be taken to ensure that such cooperative measures reduce work rather than potentially creating overlap and uncertainty.

There may be some lessons that could be learned from steps taken by LLGs in marine conservation. Pursuant to the OPGLLG, independent of any delegation from provincial government, LLGs can pass laws relating to protection of the local environment. LLGs therefore have the power to pass local laws on marine protection that complement national and provincial level fisheries laws. Examples exist of LLGs having introduced arrangements for marine conservation that may provide examples of steps that could be replicated in fisheries management such as the *Environment and Conservation Law 2007* passed by the Nali Sopat Penabu Rural LLG.

### 3.5 Customary Rights and Resource Management

**Issue 7.** Considering solutions for potential conflicts between customary rights, the FM Act and the draft BDM Management Plan.

Customary law plays a significant role in many coastal areas of PNG. However, it is unclear how the FM Act and the draft BDM Management Plan will interact to protect customary rights in relation to the BDM fishery. Notably, there appears to be a tension between s 26 of the FM Act and cl 11 of the draft BDM Management Plan.

Section 26 of the FM Act provides:

*The rights of customary owners of fisheries resources and fishing rights shall be fully recognized and respected in all transactions affecting the resource or the area in which the right operates.*

However, clause 11 of the draft BDM Management Plan states that customary open seasons that are inconsistent with the closed seasons under the BDM Management Plan will be prohibited. Clause 11 of the draft BDM Management Plan provides:

*a) Customary management measures which are consistent with the Management Plan will be encouraged to notify the National Fisheries Authority and Provincial Fisheries Administrations of such measures and have these incorporated into PMAC and LLGMAC management strategies.*

*b) Customary open seasons that are inconsistent with the closed seasons as set out in Section 8(f)(ii) are prohibited under Section 30 of the Fisheries Management Act 1998 (amended in 2012).*

Given this tension, it may be appropriate to consider the efficacy of clause 11, particularly in light of its practical effect on customary fishing practices.

### 3.6 BDM Fishery Management

**Issue 8.** Ensuring an appropriate Total Allowable Catch (**TAC**).

Provincial TACs will be set by the NMAC each year during the fishery closure period. The definition of the TAC says it is to be set at a 'safe' level and at the lower confidence limit of the estimated Maximum Sustainable Yield.

In order to set the TAC in accordance with the objectives set out in the draft BDM Management Plan, the NFA and NMAC will need to have access to accurate data including harvest rates, the condition of BDM fish stock, and the state of surrounding ecosystems. Accurate information will also be required to ensure that if a Province exceeds its allocated annual TAC in any given season, that excess amount is taken off that Province's TAC for the next season.<sup>40</sup>

Ensuring accuracy of data is related to Issue 9, which concerns capacity and resourcing to implement the TAC. Further, external verification by an independent, appropriately qualified, peer reviewer would support appropriate implementation of these criteria. There may also be a benefit in further developing the criteria to include reference to the ecosystem approach in setting the TAC.<sup>41</sup>

**Issue 9.** Capacity and resourcing to implement the **TAC** including data collection & processing and efficient flow of data from the Provincial level to the NFA.

It is clear that successful implementation of the TAC provisions will depend upon the measures taken to accurately record catch levels, as well as effective, real-time monitoring of catch levels against the TAC. Project consultations suggest that whilst a TAC has been used in the past, at times it may have been exceeded by as much as one-third. Further,

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<sup>40</sup> See section headed 'Total Allowable Catch (TAC)' in PART C.

<sup>41</sup> See section headed 'Total Allowable Catch (TAC)' in PART C.

product was not always accurately accounted for, for example, due to inter-Provincial transfers (see above Issue 5).

The primary mechanism in the draft BDM Management Plan for monitoring catch rates against Provincial TACs are the weekly buyer summary reports (submission of which is a requirement of exporter licences). Through these, harvest rates are to be monitored by Provincial Fisheries Administrations and the NFA.<sup>42</sup>

It will be important to ensure that those charged with collecting and analysing this data at the Provincial level are sufficiently trained and resourced to do so. The provision of data by exporters and buyers will need to be monitored for adequacy and completeness. The data itself will need to be analysed and then forwarded to the NFA with a minimum of time delay. Any shortfalls will need to be quickly rectified.

**Issue 10.** Timely closure of BDM fisheries.

Closure of the BDM fishery to ensure that harvest rates are kept within the TAC is perhaps the most important management measure set out in the draft BDM Management Plan. Compulsory annual closure will take place from 1 October until 31 March the following year. Given the high risk of overfishing, it may be appropriate to reconsider the adequacy of this closure period.

In addition to the compulsory closure period, if a TAC is reached *before* the annual closure date, the NFA will close the fishery early.<sup>43</sup> Further, the NFA is required to notify the media of the closure date of a Provincial fishery when it is estimated that 70 percent of the Provincial TAC has been reached.<sup>44</sup> If the appropriate TAC for a Province is considered too low for the fishery to open, the NMAC is required to recommend extended closure in that Province.<sup>45</sup> After the fishery has been closed, all declared holdings of BDM must be exported within three weeks of the closure date.<sup>46</sup>

Clearly, unless there is an efficient flow of accurate data on harvest rates from the Provinces to the NFA these measures will be ineffective. Formalising data collection and data sharing practices and procedures, either in the final BDM Management Plan or elsewhere, would be a useful tool to assist Provincial Fisheries Administrations and the NFA capture and utilise

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<sup>42</sup> See section headed 'Reporting obligations' in PART C.

<sup>43</sup> See section headed 'Closure of the fishery' in PART C.

<sup>44</sup> See section headed 'Closure of the fishery' in PART C.

<sup>45</sup> See section headed 'Total Allowable Catch (TAC)' in PART C.

<sup>46</sup> See section headed 'Closure of the fishery' in PART C.

data appropriately. It will also require strong enforcement of the closure once it is announced (see below Issue 16).

### 3.7 An Ecosystem Approach to Managing the BDM Fishery

**Issue 11.** Defining and explaining the ecosystem approach in the FM Act and the draft Management Plan.

The fundamental objectives of the FM Act require that the ecosystem approach to fisheries management be taken into account when implementing the FM Act.<sup>47</sup>

The 2003 *FAO Technical Guidelines for Responsible Fisheries, Supplement 2 – The Ecosystem Approach to Fisheries* defines the ecosystem approach to fisheries (**EAF**) as follows:

*An ecosystem approach to fisheries strives to balance diverse societal objectives, by taking into account the knowledge and uncertainties about biotic, abiotic and human components of ecosystems and their interactions and applying an integrated approach to fisheries within ecologically meaningful boundaries.*

While the description of the ecosystem approach in the FM Act mentions ‘balancing diverse societal objectives’, it does not mention management within ecological boundaries or taking into account ecosystem well-being.<sup>48</sup> In other words, although the FM Act adopts an ecosystem approach, the description of it in the Act is not in line with internationally accepted definitions.

In relation to the draft BDM Management Plan, the introduction points out that the ‘22 plus BDM species’ play an important role in the ecology of marine ecosystems in PNG.<sup>49</sup> Clause 3 includes the following as an overarching objective of the draft Plan:

*[t]o ensure the use of sea cucumber stocks is biologically sustainable and that sea cucumber populations are maintained at levels that will allow them to continue to play their role in the marine ecosystem.*<sup>50</sup>

The draft BDM Management Plan also states at cl 4 that ‘[t]he ecosystem approach to fisheries management will inform the implementation of the Management Plan’,<sup>51</sup> and

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<sup>47</sup> See section headed ‘Statutory objectives and decision making principles’ in PART B.

<sup>48</sup> See section headed ‘Statutory objectives and decision making principles’ in PART B.

<sup>49</sup> See section headed ‘The Beche-de-Mer Management Plan’ in PART C.

<sup>50</sup> See section headed ‘The Beche-de-Mer Management Plan’ in PART C.

<sup>51</sup> See section headed ‘The Beche-de-Mer Management Plan’ in PART C.

requires the NMAC to advise on the implementation of the ecosystem approach to fisheries management as part of the Management Plan.<sup>52</sup>

However, the substantive provisions of the draft BDM Management Plan do not expand the definition of an ecosystem approach, nor do they elaborate on practical aspects of implementing an ecosystem approach. Further, the management measures themselves (such as the TAC) are not explained by reference to an ecosystem approach.<sup>53</sup>

Lack of clarity in the FM Act and the draft BDM Management Plan regarding EAF, and lack of conformity with the accepted FAO definition of EAF, may cause difficulties when seeking to implement the BDM Management Plan. For example, the lack of clarity may limit the capacity of those involved in the BDM fishery to manage it in a way that does in fact reflect EAF, as it is understood internationally. It may also cause difficulties when seeking to assess whether implementation of the BDM Management Plan is in fact in line with EAF.

This issue could be addressed in a number of ways, including: amendment to the FM Act, amendment to the FM Regulations, amendment to the draft BDM Management Plan, or preparation of guidelines. In addition to amendments to these overarching documents, training for all relevant personnel on what the ecosystem approach is, why it is important, and how it can be implemented, may improve implementation of EAF.

### 3.8 Monitoring and Enforcement

**Issue 12.** Supporting localized and innovative monitoring, control and surveillance (MCS).

The likely-success of MCS measures can be bolstered by considering and developing MCS measures that are feasible and well-suited to the context; this may call for localized and innovative approaches to MCS.

For example:

- awareness-raising and compliance activities could be conducted in villages; and/or
- LLGs or local community groups could be engaged to help organise and collect data, and/or monitor stocks.

The benefit of these sorts of MCS approaches is that they could avoid or reduce the expense of having the NFA and/or Provincial officials travel around the country/Provinces

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<sup>52</sup> See section headed 'Roles and responsibilities of the NMAC' in PART C.

<sup>53</sup> See section headed 'The Beche-de-Mer Management Plan' in PART C.

doing this work. The draft BDM Management Plan provides scope for such innovations in the wording of Part 3(c).

**Issue 13.** Clearly articulating the enforcement roles and functions of PFOs and other enforcement officers and agencies.

**Issue 14.** Building the capacity of PFOs to participate in and/or conduct administrative and criminal enforcement activities.

Enforcement activities will be necessary when compliance activities are not successful in achieving desired behaviour. Enforcement of the closure of seasons will be particularly important to the overall success of the BDM Management Plan.

Under the draft BDM Management Plan, PFOs have an important role in taking enforcement action for breach of licence conditions<sup>54</sup> and in enforcing the overarching prohibitions (e.g. trading outside the season or after the TAC has been reached, trading in undersized BDM, use of underwater breathing devices, or underwater or surface lights).<sup>55</sup>

As a general comment, evidence that is collected for enforcement purposes should always be done carefully and with a view to ensuring admissibility in a Court. This is a technical skill, so all staff required to conduct evidence for enforcement purposes should receive relevant training and be assessed for their competency. The FM Act enables enforcement in the form of both criminal and administrative proceedings, so training will need to cover both.

As part of this process, it may also be beneficial to clearly articulate the enforcement roles and functions of all persons and agencies involved in enforcement (e.g. the community, PFO staff, police officers and public prosecutors). This could be achieved by way of MoAs or guidelines. Preparation of these instruments may identify further areas where personnel could benefit from training and support.

**Issue 15.** Raising community awareness of prohibitions that apply to the BDM fishery.

**Issue 16.** Enforcement of prohibitions - articulating and understanding the roles and functions of the community and government officials in relation to enforcement.

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<sup>54</sup> See section headed 'Licence enforcement' in PART C.

<sup>55</sup> See section headed 'Overarching prohibitions on fishers' in PART C.

Local communities may be in a position to provide support to PFOs in enforcing prohibitions by reporting violations or irregularities. For example:

- **Operating without a licence:** Whilst enforcement of the prohibition against operating without a licence is most appropriately carried out by PFOs, communities may be able to provide assistance by reporting suspected fishery activities by persons who may not be licensed.
- **Harvesting undersized animals:** Communities may be able to provide assistance in monitoring the size of animals being caught, encouraging compliance with size limits, and reporting violations.
- **Underwater and surface lights:** Project consultations suggest that use of underwater lights or surface lights occurs, that some villagers are unaware it is banned, and that exporters have assisted in providing torches to BDM fishers. These practices are unlikely to be detected by PFOs as they are not sufficiently proximate to BDM fishers, and so communities at the village may be better placed to report these activities.
- **Buying and selling BDM when the season is closed:** The NFA and PFOs inspect places where BDM is stored to ensure that it is not being bought and sold outside of the permitted season. Local communities could provide assistance by reporting irregularities.

Achieving the above would require awareness raising activities at the village level. This could be conducted by PFOs although this in turn may require additional training and resourcing to PFOs in order to do so.

One way of supporting the above would also be to prepare guidelines that identify the roles and functions that communities can play, and the way that these link in with the roles and responsibilities of Government officials (at all levels). Such guidelines could be included in the BDM Management Plan or be completely separate to it. If used, they would likely benefit from review and revision after an initial trial period.

**Issue 17.** Effectively providing for, and implementing Penalty Notices for the BDM fishery in the *Fisheries Management Regulation 2000*.

A recent amendment to the FM Act provides for the use of Penalty Notices in relation to certain offences.<sup>56</sup> If an authorised officer serves a penalty notice on a person who the officer believes has committed an offence, the person in receipt of the notice has the option to pay the prescribed penalty rather than having the matter determined by a court.

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<sup>56</sup> See section headed 'Penalty notices' in PART B.

Penalty notices could potentially be utilized in the BDM fishery with provisions being set out under the *Fisheries Management Regulation 2000 (FM Regulation)*. However, for this to be effective, the penalty would need to be set high enough to have a deterrent effect but low enough to provide an incentive for the offender to pay it rather than fight the case in court. This in turn is likely to require some form of consultation and assessment as well as capacity building within Provincial Government and LLG.

### 3.9 The Court System

**Issue 18.** Building the capacity of District Courts to enforce fisheries law and BDM offences.

Currently, the District Court hears offences that are set out in the FM Act; this will include offences under the draft BDM Management Plan.<sup>57</sup>

As a general rule, this seems appropriate as prosecution of such offences will raise technical legal issues and thus require a legally trained adjudicator (although see below for possible benefits of adjudication at the Village Court level).

As discussed in the Part B, District Courts are reported as under-resourced and so there is likely to be a need to give greater support to Magistrates working within the District Court system.<sup>58</sup> There is an ongoing effort by the National Government to boost numbers of Magistrates within District Courts but still there is a shortage. Further, adding adjudication of new types of offences to the District Court portfolio should prompt consideration of whether District Court Magistrates require training to assist in the adjudication of such matters. Magistrates could be consulted directly on this question, as could the broader community.

**Issue 19.** Supporting the role of Village Courts in community-level enforcement.

Ensuring that legally trained adjudicators are available to resolve disputes arising out of the BDM fishery is important. However, there may be some benefits to allowing enforcement of some matters arising out of the BDM Fishery at the Village Court level (where Magistrates are not required to be legally trained). For example, Village Courts are less formal and more accessible than Courts within PNG's formal court hierarchy and so adjudication at this level may enable faster and cheaper dispute resolution. Other benefits might include improved

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<sup>57</sup> Such prohibitions may be issued pursuant to s 30(3) of the FM Act. See sections headed 'Offences under the Fisheries Management Act 1998' and 'Prohibitions' in PART B.

<sup>58</sup> See section headed 'District Courts' in PART B.

local understanding of and connection to the BDM Management Plan, and greater impact of penalties.

At least one argument against this approach is that Village Courts are only able to impose relatively small fines. Given that the sums involved in BDM fishing are potentially large, it can be anticipated that small fines are likely to have little deterrence effect.

Further, as raised earlier, it may not be appropriate to use Village Courts to enforce offences that would require a Village Court Magistrate to follow criminal law procedure. So, consideration of using Village Courts to address issues under the draft BDM Management Plan would require careful consideration and would likely need to be restricted to more minor matters.

In order to provide Village Courts with jurisdiction to hear BDM fishery offences, an amendment to the FM Act would be required at a minimum, as the FM Act currently states that all offences against the Act are to be heard by a District Court.<sup>59</sup>

**Issue 20.** Identifying sanctions that are most likely to effectively deter offences in the BDM fishery.

For enforcement efforts to be effective, deterrence is likely to be an important factor.

Consideration could be given to creating additional sanction options that are known to be effective at the community level. If so, this process could form part of the process raised above in relation to expanding the jurisdiction of Village Courts. Additionally or alternatively, this could be one area over which Provincial Governments could legislate in relation the BDM fishery, providing for the development and implementation of locally relevant sanctions.

These ideas could be considered further by way of community consultation, pilot-trials, or other measures.

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<sup>59</sup> See section headed 'Village Courts' in PART B.

#### **4. THE DRAFT ROADMAP FOR COASTAL AND MARINE AQUACULTURE FOR PAPUA NEW GUINEA: 2016-2026**

At the time of writing, a draft Roadmap for Coastal and Marine Aquaculture for Papua New Guinea: 2016-2026 - 'Our fish, Our food, Our health, Our wealth, Our Future' (**the Roadmap**) was under discussion in relation to a National Coastal Fisheries Marine Development Plan (**NCFMDP**); it was expected to be completed in early 2016. The Roadmap is anticipated to contain legal content that will be directly relevant to management of the BDM fishery. For example, one activity foreshadowed by the draft Roadmap is the:

*...assessment and appraisal of any legislation that deals with coastal fisheries management at the National, Provincial and Local-level Government levels; as well as other sub-regional and regional instruments (e.g. the Melanesian Spearhead Group (MSG) Roadmap for Coastal Fisheries)*

It also (among other things) envisages conducting a review of current Memoranda of Agreement (**MoAs**) between the NFA and Provincial Administrations, and to assess issues surrounding monitoring, control and surveillance.

Accordingly, it will be important to take the Roadmap (as it is in its final form) into account when considering the issues identified in this Key Issues document.

## **PART B. INTRODUCTION TO THE LEGAL FRAMEWORK FOR MANAGING BECHE-DE-MER FISHERIES IN PNG**

### **1. INTRODUCTION**

This document provides an overview of the legal system and laws of Papua New Guinea (**PNG**) relevant to management of the PNG beche-be-mer (**BDM**) fishery.

The new BDM Management Plan (which, at the time of writing, is yet to be gazetted) is described separately, in PART C of this document.

This PART B of the document, together with PART C (which provides an overview of the draft BDM Management Plan), are intended to be read as supplementary to PART A, which specifically identifies and discusses key issues around successful implementation of the BDM Management Plan.

This overview comprises three sections:

- **Overview of the PNG Legal System:** this section provides an overview of the PNG legal system, focusing on aspects that are relevant to the BDM fishery.
- **Fishery Law:** this section provides an overview of the key national laws regulating the BDM fishery: the *Fisheries Management Act 1998* and the *Fisheries Management Regulation 2000*,
- **Provincial and Local-level Marine Protection Laws:** this section discusses Provincial and Local-level laws on marine protection. This is important because, although fisheries are primarily the responsibility of the National Government, there is scope for Provincial and Local-level Governments to make laws that are relevant to the BDM fishery.

### **2. OVERVIEW OF THE PNG LEGAL SYSTEM**

#### **2.1 Sources and hierarchy of laws**

The Constitution of Papua New Guinea (**PNG**) sets out the sources of PNG law, which are, relevantly, as follows:

- the Constitution;
- Organic Laws;
- Acts of Parliament (i.e. national laws);

- Provincial laws;
- Laws made or adopted under the Constitution, including subordinate legislation; and
- the underlying law.<sup>60</sup>

This section provides a brief introduction to the Constitution, Organic Laws, and the Underlying Law.

### 2.1.1 The Constitution and Organic Laws

The Constitution and the Organic Laws make up the Supreme Law of Papua New Guinea (Constitution s 11(1)); all other laws must be consistent with both.

Relevant to the BDM fishery, the preamble to the Constitution calls for wise use of resources, directs that there be conservation and replenishment of the environment, and provides that all necessary steps be taken to ensure the adequate protection of PNG's flora and fauna.

Organic Laws are made, and can be amended, by National Parliament. They:

- will be expressed to be Organic Laws (Constitution s 12);
- can only be made in relation to matters that are expressly authorized by the Constitution (Constitution s 12(1)(a));
- may only be altered by another Organic Law or an alteration to the Constitution (Constitution s 12(2));<sup>61</sup> and
- will prevail over any act (whether legislative, executive or judicial) that is inconsistent with an Organic Law, to the extent of the inconsistency (Constitution s 11(1)).

As discussed below, the *Organic Law on Provincial Governments and Local-level Governments 1998 (OLGLLP)* specifically defines the scope of the law-making powers of each level of government, including law-making powers directly relevant to the BDM fishery.

### 2.1.2 The Underlying Law

The Underlying Law is the unwritten law. PNG courts are required to apply the Underlying Law in circumstances where the written law does not apply (nuances regarding application of the Underlying Law are described in the *Underlying Law Act 2000 (UL Act)*).

The sources of the Underlying Law are the common law that was in force in England at PNG's independence and customary law (UL Act s 3). New rules of the Underlying Law can

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<sup>60</sup> *Constitution of the Independent State of Papua New Guinea 1975* (PNG) s 9 (**Constitution**).

<sup>61</sup> Alterations are subject to the requirements set out in ss 14 and 16 of the Constitution (the latter sets out the prescribed majority of votes for different types of variations).

be developed by PNG's courts in circumstances where existing rules of the Underlying Law do not apply to the subject matter of a proceeding (UL Act s 7(4)).

### 2.1.3 Customary Law

The UL Act defines Customary Law as:

*the customs and usages of the indigenous inhabitants of the country existing in relation to the matter in question at the time when and the place in relation to which the matter arises, regardless of whether or not the custom or usage has existed from time immemorial. (s 1(1)).*

The UL Act defines a hierarchy of laws, requiring a court to apply laws in the following order (UL Act ss 6-7):

- written law;
- underlying law;
- customary law (unless the parties specifically intended that customary law would not apply to the subject matter of the proceeding); and
- common law.<sup>62</sup>

## 2.2 Structure and levels of government

PNG is a parliamentary democracy with a constitutional monarchy. The Head of State is the monarch of the United Kingdom, represented by the Governor General. The Prime Minister is the Head of Government. The National Executive Council serves as the Cabinet, appointed by the Governor General on recommendation of the Prime Minister.

National Laws are made by the national Parliament which is a single-chamber, democratically elected legislature.

There are 20 provinces, one autonomous region (Bougainville) and one district (the National Capital).<sup>63</sup>

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<sup>62</sup> There may be some ambiguity in the application and hierarchy of written, underlying, customary and common law under the UL Act. Essentially, there is a suggestion that the underlying law incorporates customary and common law, as well as a suggestion that the underlying law is separate to and sits above customary and common law. On this, see ss 3, 4 & 6 of the UL Act. Whereas s 3 states that *'The sources of the underlying law shall be: (a) the customary law; and (b) the common law in force in England immediately before the 16<sup>th</sup> September, 1975'* and s 4 provides that customary law and the common law shall be adopted as part of the underlying law, s 6, provides that a court is to apply laws in the following order: (a) written law; (b) underlying law; (c) customary law; and (d) common law. There are some exceptions to the s 4 requirement to apply common and customary law which may in part address this issue; however, whether this is the case is not immediately clear.

<sup>63</sup> The provinces are Central, Chimbu, Eastern Highlands, East New Britain, East Sepik, Enga, Gulf, Hela, Jiwaka, Madang, Manus, Milne Bay, Morobe, New Ireland, Northern, Southern Highlands,

## 2.3 The Organic Law on Provincial Governments and Local-level Governments 1998<sup>64</sup>

The *Organic Law on Provincial Governments and Local-level Governments 1998 (OPGLLG)* is the organic law that establishes a system of Provincial Governments and Local-level Governments (LLGs) (s 5).<sup>65</sup>

### 2.3.1 Establishment and form of Provincial Governments

The OPGLLG establishes for each province:

- a Provincial Government (s 10);
- a Provincial legislature (s 10); and
- an office of a Provincial Governor. The Provincial Governor is the Member of National Parliament who is representing the Provincial electorate (s 17).

The executive arm of a Provincial Government is known as the Provincial Executive Council (s 23). Provincial Executive Councils are required to establish a Joint Provincial Planning and Budget Priorities Committee which have functions that include Provincial planning, budget control and approval, five-year development plans and annual reviews. The Councils are also required to establish any other committees they consider necessary to carry out their functions (s 25).

### 2.3.2 Establishment and form of LLGs

The OPGLLG requires the Parliament to make provision for a system of LLGs for rural and urban communities. There is some flexibility in the form and structure of LLGs (s 26).

LLGs are established by the Head of State acting on the advice of the National Executive Council. Provincial Assemblies can also recommend the establishment of an LLG to the Minister responsible for LLG matters, for the consideration of the National Executive Council (s 27). There are 325 LLGs in 89 districts in PNG.<sup>66</sup>

The head of an LLG is elected in accordance with an Organic Law or an Act of Parliament (s 29(1)(a)). The *Local-level Governments Administration Act 1997* details administrative aspects of the operation of LLGs such as the establishment of committees, the passing of

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Western, Western Highlands, West New Britain, and West Sepik. The *National Maritime Safety Authority Act 2003* refers to 14 Maritime Provinces: Manus, New Ireland, East New Britain, West New Britain, Bougainville, Morobe, Madang, East Sepik, West Sepik, Western, Gulf, Milne Bay, and Oro.

<sup>64</sup> All references to sections of legislation in this section are references to the OPGLLG unless otherwise stated.

<sup>65</sup> Pursuant to s 187B of the Constitution.

<sup>66</sup> *Local Government of Papua New Guinea*, Commonwealth Governance <[http://www.commonwealthgovernance.org/countries/pacific/papua\\_new\\_guinea/local-government/](http://www.commonwealthgovernance.org/countries/pacific/papua_new_guinea/local-government/)> (accessed 29 January 2016).

LLG laws, the establishment of ward development committees, special purpose authorities, and the keeping of a village book for each ward containing details including the names of clans and ethnic groups and particulars of village officials.

### **2.3.3 Law-making powers of National, Provincial and Local-level Governments**

The law-making powers of each level of Government are defined by sections 41, 42 and 44 of the OPGLLG. Section 42(1) lists the subject-matters that Provincial Governments can make laws about and s 44(1) lists the subject-matters that Local-level Governments can make laws about.

#### ***National Government***

The National Government can make laws about any matter that is *not* listed in ss 42(1) or 44(1) of the OPGLLG (s 41(1)). An exception applies if the matter is of national interest (s 41(2)). However, before the National Government can make a law about a matter set out in ss 42(1) or 44(1) as a matter of national interest, it must consult with the relevant Provincial or Local-level Government (s 41(3)).

The *Fisheries Management Act 1998 (FM Act)* (discussed in detail below) is an example of a law that has been made by the National Government on the basis of 'national interest', with 'fishing and fisheries' being a subject matter otherwise reserved for Provincial Governments under s 42(1) of the OPGLLG.

#### ***Provincial Governments***

Provincial laws will only have effect in so far as they are not inconsistent with an Act of Parliament (s 43).

Matters that Provincial Governments can make laws about include:

- village and urban or community courts (excluding the jurisdiction of these courts) (s 42(1)(i));
- community, urban and rural development (s 42(1)(j));
- fishing and fisheries (s 42(1)(l));
- trade and industry within the province (s 42(1)(m)); and
- renewable and non-renewable natural resources (s 42(1)(t)).

#### ***Local-level Governments***

LLGs do not have any direct authority to make laws about fishing and fisheries. However, the following matters listed in s 44(1) may overlap to some degree with fishing and fisheries:

- improvement of villages, towns, cities and communities (s 44(1)(g));

- maintaining peace, good order and law through consultation, mediation, arbitration and community forums (s 44(1)(h));
- dispute settlement (s 44(1)(i));
- town, city, village and community planning (s 44(1)(j));
- local environment (s 44(1)(p));
- domestic animals, flora and fauna (s 44(1)(s)); and
- the protection of traditional sacred sites (s 44(1)(z)).

### ***Delegation of powers and functions between levels of government***

The National Government has broad powers to delegate its powers and functions to a Provincial Government or LLG (s 50(2)). It may delegate any of its 'legislative power[s] or function[s]', including a power to make subsidiary legislation. It may *not* delegate its power to make:

- an amendment to the Constitution;
- an Organic Law; or
- a law of a kind that can be made only as an emergency law, as defined in the Constitution.<sup>67</sup>

Provincial Governments have the power to delegate the following powers to LLGs or to the National Government:<sup>68</sup>

- any legislative power or function of the Provincial Government, including the power to make subsidiary legislation; or
- any power or function under a Provincial law'.

Although National and Provincial Governments both have authority to delegate functions that relate to fishing and fisheries to LLGs, to date this has not occurred.

### **2.3.4 Administrative systems of Provincial Governments and LLGs**

The OPGLLG provides that the Provincial and Local-level administrative system shall consist of the following administrative institutions:<sup>69</sup>

- the offices of Provincial Administrators and District Administrators;
- an extended service of the National Departments and other agencies; and
- Provincial Government and Local-level Government support services.

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<sup>67</sup> OPGLLG s 50(2)(c)-(e).

<sup>68</sup> OPGLLG s 50(3).

<sup>69</sup> OPGLLG s 72(2)(a); see also s 80 in relation to provision for an 'extended service of the National Departments' in each Province.

An Act of Parliament is to set out the details of this administrative arrangement (ss 43, 45, 80(3)). Part IV of the OPGLLG sets out the detail regarding the institutional structure of the administrative system of Provincial Governments and LLGs.

Two important positions are the Provincial and District Administrators; these are the chief executive officers of Provincial and Local-level Governments (s 74). Their responsibilities include management of administrative services and coordination of policy formulation, planning and implementation. Provincial Administrators may delegate all or any of their powers to the relevant District Administrator.

## 2.4 The Judicial System

The judicial system in PNG comprises the following courts, listed in order of superiority:

- the Supreme Court;
- National Courts;
- District Courts; and
- Village Courts.

Both the Supreme Court and the National Court are established by the Constitution whilst the lower courts are established by Acts of Parliament.

This section contains some brief comments about each of the courts. Particular attention has been paid to the District Courts as this is the court with jurisdiction to hear fishery matters.

Although they are not part of the formal judicial system, Village Courts are also discussed in this part as it may be possible for Village Courts to play a future role in management of the BDM fishery.

### 2.4.1 The Supreme Court

The Supreme Court:<sup>70</sup>

- is the highest court in PNG;
- is the final court of appeal (Constitution s 155(2)(a)) and hears all appeals from the National Court;
- has original jurisdiction in any constitutional matters to the exclusion of all other courts (Constitution s 18(1)); and

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<sup>70</sup> See *About Supreme Court*, The Supreme and National Court of Papua New Guinea <<http://www.pngjudiciary.gov.pg/home/index.php/supreme-court/about-supreme-court>> (accessed 23 February 2016).

- is not separately constituted; its members are the judges of the National Court, sitting as an ad hoc appellate tribunal. It consists of the Chief Justice, the Deputy Chief Justice, and all other Judges of the National Court (except for Acting Judges).

#### 2.4.2 The National Court

The National Court:<sup>71</sup>

- has unlimited jurisdiction, subject to the provisions of the Constitution (Constitution s 166(1));
- is a trial court on matters originally registered with it, and hears appeals from subordinate courts, namely the District Courts and some administrative tribunals;
- is constituted by the Chief Justice, the Deputy Chief Justice, between 4 and 6 other judges, and any number of Acting Judges (ss 164-5), unless an Act of Parliament provides for additional judges (Constitution s 164);<sup>72</sup> and
- is constituted by judges.<sup>73</sup>

#### 2.4.3 District Courts

The District Court system is the court service that is accessible to most citizens in PNG. It is established by the *District Courts Act 1963 (DC Act)*, with individual District Courts being established by the Judicial and Legal Services Commission by proclamation in the National Gazette.<sup>74</sup>

District Courts are constituted by Magistrates rather than Judges. District Magistrates perform judicial functions and must be law graduates and have practiced law.<sup>75</sup>

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<sup>71</sup> See also *About National Court*, The Supreme and National Court of Papua New Guinea <<http://www.pngjudiciary.gov.pg/home/index.php/national-court>> (accessed 23 February 2016).

<sup>72</sup> The *National Court (Number of Judges) Act 1984* is one such Act. It provides that the maximum number of Judges (in addition to the Chief Justice, Deputy Chief Justice, and any Acting Judges) is to be determined by the Head of State, acting with the advice of the National Executive Council, after considering a report from the Chief Justice (*National Court (Number of Judges) Act 1984* s 2).

<sup>73</sup> Qualifications for appointment as a judge of the National Court are set out at ss 1-2 of the *National Court Act 1975*, in accordance with s 168 of the Constitution; requirements include both academic qualification and professional experience.

<sup>74</sup> *District Courts Act 1963* s 14. Section 172 of the Constitution enables Acts of the Parliament to establish, or provide for the establishment of, courts in addition to the Supreme Court and the National Court.

<sup>75</sup> *District Courts Act 1963* s 14. Magistrates and Principal Magistrates are appointed by the Judicial and Legal Services Commission (established by s 183 of the Constitution and the *Organic Law on the Judicial and Legal Services Commission*), which is also charged with determining the qualifications for appointment (*Magisterial Service Act 1975* s 7(1)). For a discussion of qualifications necessary to be appointed as a Magistrate or a Principal Magistrate, see *Magistrates of the District Courts of Papua New Guinea*, Magisterial Service of Papua New Guinea <<http://www.magisterialservices.gov.pg/magistrates.aspx>> (accessed 23 February 2016). The qualification requirements for appointment as a Magistrate are less onerous than those that apply to

According to the Magisterial Service of PNG, there is an ongoing shortage of magistrates and the Magisterial Services continues to pursue the recruitment of Magistrates.<sup>76</sup>

District Courts have more limited jurisdiction than National and Supreme Courts, as follows:

- **Criminal jurisdiction:** Put simply, District Courts have jurisdiction to hear offences that are triable summarily.<sup>77</sup>
- **Civil jurisdiction:** District Courts have jurisdiction to hear actions where the claim does not exceed:
  - PGK10,000, if the Court consists of one or more Principal Magistrates; or
  - PGK8,000, if the Court consists of one or more Magistrates.<sup>78</sup>

#### ***Jurisdiction of District Courts to hear offences under the FM Act***

Jurisdiction to hear criminal proceedings under the FM Act rests with the District Court (FM Act s 56), with offences to be prosecuted summarily before a Principal Magistrate (s 57(1)).<sup>79</sup> This would include prohibitions set out in the BDM Management Plan, once gazetted.<sup>80</sup>

#### ***Local Land Courts***

Local Land Courts also form part of the District Court system. Local Land Courts play a role in the resolution of customary land ownership and use disputes under the *Land Disputes Settlement Act 1975*. This system, and the Local Land Courts, may be relevant to the BDM fishery if customary land ownership in PNG extends to the sea bed from where BDM are harvested.

#### **2.4.4 Village Courts**

The system of Village Courts is established by the *Village Courts Act 1989 (VC Act)*.<sup>81</sup> The VC Act describes Village Courts as having the primary function of '[ensuring] peace and harmony in the area for which 'they are established, by mediating in, and endeavouring to

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appointment of Judges, although the qualification requirements for Judges and Principal Magistrates appear to be the same or very similar.

<sup>77</sup> *District Courts Act 1963*, s 20 (note that the jurisdiction of District Courts is greater if a Principal Magistrate is sitting). For further details on the nuances of the jurisdiction of District Courts see *District Courts Act 1963* s 20 and Part VII (the latter sets out the procedures applicable to summary offences); see also various sections of the *Criminal Code Act 1974* which identify various offences that are triable summarily.

<sup>78</sup> *District Courts Act 1963* s 21.

<sup>79</sup> Except where administrative proceedings have been taken in accordance with Part VII of the Act. As noted above, procedures applicable to offences that are triable summarily are set out in Part VII of the *District Courts Act 1963*.

<sup>80</sup> FM Act s 30(3) empowers the Board to declare a range of prohibitions by notice in the National Gazette.

<sup>81</sup> As amended by the *Village Courts (Amendment) Act 2014*. The VC Act is made pursuant to s 172 of the Constitution; see also definition of "village court" in Schedule 1.2 of the Constitution.

obtain just and amicable settlement of disputes'.<sup>82</sup> Shortly after their establishment they became a primary source of legal-recourse for two-thirds of PNG's population.<sup>83</sup>

Village Courts exist largely outside PNG's formal court hierarchy and are relatively informal affairs:

- there are no set rules of evidence or procedure;
- they are able to sit at any time and in any place;
- lawyers are not allowed to represent parties in criminal, civil, or enforcement proceedings;
- Village Magistrates are not required to hold legal qualifications;<sup>84</sup>
- Village Magistrates are required to apply any relevant custom (VC Act s 57);
- matters are decided in accordance with substantial justice (VC Act ss 57-58);<sup>85</sup>
- decisions are not always 'formal' and not usually recorded;
- there are limited rights of appeal; and
- there is a focus on mediation of disputes.

### ***Jurisdiction of Village Courts***

- **General jurisdiction:** Essentially, Village Courts have jurisdiction in relation to disputes in relation to people and disputes that arise within the Court's relevant geographic area.<sup>86</sup>
- **Criminal jurisdiction:**
  - In criminal matters, Village Courts have jurisdiction in relation to:
    - prescribed criminal matters;<sup>87</sup> and

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<sup>82</sup> VC Act s 52.

<sup>83</sup> PNG Post-Courier, 15 April 1983; W Clifford, L Morauta & B Stuart, Law and Order in Papua New Guinea, vol 1, Report and Recommendations, Waigani, 1984, 177.

<sup>84</sup> According to the Magisterial Service of PNG, they are appointed on the basis of their standing in the community and their knowledge of custom: *Magistrates of the District Courts of Papua New Guinea*, Magisterial Service of Papua New Guinea <<http://www.magisterialservices.gov.pg/magistrates.aspx>> (accessed 2 February 2016). Village Magistrates are appointed on the recommendation of the Secretary, after consultation with relevant Local-Level Government and other bodies, persons or groups that the Secretary thinks it desirable to consult, or whom the Minister directs the Secretary to consult: see VC Act ss 7, 16, 17.

<sup>85</sup> This requirement is subject to the requirement to apply relevant customary law and the presumption of innocence until proven guilty. 'Substantial justice' is not defined in the VC Act. The *Papua New Guinea – Magistrates' Manual*, says the following on determining matters in accordance with 'substantial justice': 'It is helpful to think of "substantial justice" as the justice of the decision itself – the outcome of the case – while "natural justice", discussed below, relates to the process or procedures leading to the decision.': <<http://www.paclii.org/pg/Manuals/Magistrates/Part1Chap2.htm>> (accessed 23 February 2016).

<sup>86</sup> For more detail on jurisdiction, see VC Act Pt V, in particular ss 36 & 56. The area of a Village Court is required to be specified in the notice establishing the Court, to be published in the National Gazette: VC Act ss 4, 36(a).

<sup>87</sup> Prescribed criminal matters include striking a person, using insulting words, damage to property, and drunkenness in the village area, failure to perform customary duties or obligations, and sorcery: VC Act s 3.

- contraventions or failures to comply with LLG laws, or laws made under an Act of a Provincial Legislature, if that law provides for the offence to be dealt with by a Village Court (VC Act s 41).
  - Whilst Village Courts are empowered to make an order for imprisonment, such orders are of no force or effect until endorsed by a Magistrate (s 68).<sup>88</sup> This provision may have implications for any recommendation to increase the jurisdiction of Village Courts in relation to the BDM fishery.
  - General fines cannot exceed PGK300.00 for an adult or PGK200.00 for a child (s 42(1)). These fines may be paid by cash, traditional money, animals, food or other things to the value of the fine, or combination of the two (s 42(1A)).
- **Civil jurisdiction:**
  - In civil matters, the jurisdiction of Village Courts is defined by the sorts of orders they are empowered to make (see ss 43-47). These include:
    - orders to perform work (s 44);<sup>89</sup> and
    - orders for compensation, damages and debt, to a maximum of PGK2,000 in cash or value (s 45);<sup>90</sup>
- **Land ownership disputes:** A Village Court has no jurisdiction in relation to land ownership (s 48). However, where a dispute concerns customary land ownership or customary rights to use land, a Village Court may make an order pending a decision by the Local or Provincial Land Court (s 43):
  - authorizing the use or occupation of the land by one of the parties to the dispute;
  - prohibiting the use or occupation of the land; and
  - restraining the other party from interfering with the authorized use or occupation.

#### 2.4.5 Application of customary law by the courts

The *Customs Recognition Act 1963 (CR Act)*, the more recent UL Act, and the VC Act, address aspects of how the courts are required to determine and apply customary law (including settling disputes about customary law and land ownership). The UL Act appears to supplement the CR Act, although areas of overlap do not appear to have been dealt with

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<sup>88</sup> Once endorsed, the *Correctional Services Act 1995* and all other laws that apply to and in relation to a sentence of imprisonment apply 'in the same way that they apply to an in relation to a sentence of imprisonment imposed under any other law': VC Act 1989 s 71.

<sup>89</sup> Failure to comply with a community work order is an offence punishable by imprisonment for a term not exceeding two days for each eight hours of work not performed: s 72(1).

<sup>90</sup> Except for matters relating to bride price, custody of children, or death, in which case a Village Court may award such an amount as the Court considers just: VC Act s 46.

explicitly in the laws.<sup>91</sup> These Acts provide that the courts are to recognise and enforce customary law with limited exceptions, for example, where the application of customary law would be inconsistent with the Constitution or a written law.<sup>92</sup>

### 3. FISHERIES LAW

This section of the legal overview outlines PNG fisheries legislation with some discussion as to how they are relevant to the BDM fishery. The legislation that is considered is the FM Act<sup>93</sup> and the FM Regulation.<sup>94</sup>

Fisheries are regulated at a national level, by the FM Act, on the basis that the FM Act regulates ‘a matter of national interest’ (s 1(2)). The FM Act ‘prevails over any law made under Section 42 or 44 to the extent of any inconsistency’ (s 1(3)) (i.e. any law(s) made by a Provincial or Local-level Government under their respective heads of power).

#### 3.1 The Fisheries Management Act 1998 (as amended)

This section discusses provisions of the FM Act that are most relevant to management of the BDM fishery.

##### 3.1.1 Overview

The Preamble to the FM Act states that it is an Act to ‘give effect to the National Goals and Directive Principles and in particular to promote the management and sustainable development of fisheries, and for related purposes’. It applies to all fishing activities, including fishing by citizens and non-citizens, and to all vessels, including foreign vessels (s 3(1)). Among other things, it:

- provides for a National Fisheries Authority (**NFA**) and a National Fisheries Board (**Board**);
- sets out details regarding the functions, powers and administration of the NFA and the Board;
- addresses ‘fisheries management, conservation and development’, including providing for the establishment of Fishery Management Plans (**FMPs**), fisheries prohibitions, and access agreements;

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<sup>91</sup> See, e.g., *Maggie v Beggie (No. 2)* [2005] PGLawRp 30; see also comments on Jessep, O. (2012) ‘The Underlying Law of Papua New Guinea [2012] *The Underlying Law Journal* 4.

<sup>92</sup> For more detail see, in particular: UL Act ss 1, 3, 4, 6, 7, 16, 17; CR Act ss 1, 2, 3, 4, 7; VC Act s 57.

<sup>93</sup> As amended by the *Fisheries Management (Amendment) Act 2015* and the *Fisheries Management (Amendment) Act 2012*.

<sup>94</sup> Made pursuant to s 76(1) of the FM Act.

- deals with fisheries licences and related offences;
- contains enforcement provisions and establishes an ‘observer programme’;
- sets out relevant offences and penalties; and
- provides for some offences to be dealt with via ‘Summary Administrative Proceedings’ and, to this end, establishes a ‘Summary Administrative Panel’.

The *Fisheries Management Regulation 2000* is intended to aid in the implementation of the FM Act, as discussed below.

### 3.1.2 Statutory objectives and decision making principles

Section 25 of the FM Act sets out the Act’s fundamental objective, being

*‘to promote long-term conservation, management, and sustainable use of the marine living resources of Papua New Guinea for the people of Papua New Guinea’.*<sup>95</sup>

Section 25 also sets out principles and measures that are intended to guide decisions and activities made or conducted under the FM Act. Some relevant examples are as follows:<sup>96</sup>

- The Minister, the Board, and the Managing Director are required to take into account a range of principles and measures ‘when performing functions or exercising powers’ under the Act (s 25(2)). These include:
  - conducting fishing in a manner that is commensurate with the sustainable use of fishery resources;
  - taking measures and making decisions ‘based on the best scientific information available’, ‘to maintain or restore stocks at levels capable of producing maximum sustainable yield, or any other approved reference points...’;
  - preventing and eliminating overfishing and excess fishing capacity;
  - pursuing enforcement and compliance to protect biodiversity;
  - improving the welfare and livelihoods of fishers and the fishing community; and
  - applying the precautionary approach and an ecosystem approach (principles relating to the precautionary approach are detailed further in s 25(3) and the ecosystem approach .

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<sup>95</sup> This ‘fundamental objectives’ was added by the *Fisheries Management (Amendment) Act 2015*.

<sup>96</sup> Note however that ‘[t]he issue of whether or not the fundamental objectives and the principles and measures set out in [section 25] are being achieved’ is not justiciable in a court of law or in summary proceedings under Part VII [Administrative Proceedings] of the FM Act: s 25(5).

Further detail on the ecosystem approach is provided in s 25(4) as follows:

*An ecosystem approach shall be applied widely to the conservation and management of marine living resources with a view to balance diverse societal objectives, by taking account of the knowledge and uncertainties of biotic, abiotic and human components of ecosystems and their interactions, and in an integrated manner that addresses the multiple needs and desires of societies, without jeopardising the options for future generations to benefit from the full range of goods and services provided by the marine ecosystems.*

### **3.1.3 National Fisheries Authority (NFA)**

The NFA is responsible for the management and development of the fisheries sector (s 4). It is a body corporate, may acquire, deal with and dispose of property, and may sue and be sued in its own name (s 5). Its functions include (s 6):

- management of fisheries;
- recommendations to the Board on the grant of licences and implementation of the licensing scheme;
- liaising with other agencies and persons on matters concerning fisheries;
- operating research facilities aimed at the assessment of fish stocks;
- control and regulation of storage, processing and export of fish and fish products subject to the *Food Sanitation Act 1991*, the *Commerce (Trade Descriptions) Act 1952*, the *Customs Act 1951*, the *Customs Tariff Act 1990*, and the *Exports (Control and Valuation) Act 1973*;
- collecting data relevant to aquatic resources;
- recommendations on policy; and
- monitoring, control, and surveillance.

The NFA receives funds from a range of sources, including (s 22):<sup>97</sup>

- grants and subscriptions;
- monies received for services provided;
- rents, fees, levies and charters, including access agreements; and
- payments from administrative determinations or other settlements for fisheries offences, sale or lease of forfeited vessels and other forfeited items, sale of fish, gear or equipment or related costs.

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<sup>97</sup> The NFA is one of only three fisheries authorities in the Pacific that retains its own revenue: see Benson, above n 19'. Revenues in other authorities go to central government first before a percentage is returned to the authority.

### 3.1.4 National Fisheries Board

The National Fisheries Board (**the Board**) is responsible for providing general control and guidance over the exercise of the functions and powers of the NFA (s 7(1)(a)). In addition it:

- may, on the recommendation of the Managing Director, make decisions on licences (s 7(1)(b)); and
- is required to undertake 'such other functions, and exercise such powers as may be conferred on it' by the FMA Act or any other law (s 7(1)(c)).

The Board consists of the following nine members (s 8(1)):<sup>98</sup>

- (a) a Chairman appointed by the National Executive Council; and*
- (b) the Managing Director, ex officio; and*
- (c) the Departmental Head of the department or office responsible for Environment and Conservation matters ex officio or his nominee; and*
- (d) The Departmental Head of the department responsible for commerce matters ex officio or his nominee; and*
- (e) The Departmental Head of the department responsible for the treasury ex officio or his nominee; and*
- (f) The President of the Fishing Industry Association, ex officio; and*
- (g) one person nominated by fisheries resource owners; and*
- (h) two persons nominated by the Minister.*

### 3.1.5 Fishery Management Plans

Section 28 of the FM Act gives the Managing Director the power to create Fishery Management Plans (**FMPs**), either at the Managing Director's discretion or on the direction of the Minister.

FMPs must (s 28(3)):

- (a) identify the fishery and its characteristics, including its current state of exploitation; and*
- (b) specify the objectives to be achieved in the management of the fishery; and*

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<sup>98</sup> Membership of the Board was modified by both the *Fisheries Management (Amendment) Act 2012*, and the *Fisheries Management (Amendment) Act 2015*. Comparing the original 10-member Board with the current 9-member Board, positions that were in the original Act but have been removed are the Departmental Head of the Department responsible for Provincial affairs, a person nominated by the Fishing Industry Association (in addition to the President of the Fishing Industry Association); and a person nominated by non-government organisations. In their place, the Minister has been given authority to make two unspecified appointments. This change seems to remove the earlier guarantee that Provincial concerns and the interests of non-government organisations would be represented on the Board.

- (c) *identify any possible adverse environmental effects of the operation of fishing activities in the fishery; and*
- (d) *identify where appropriate any relevant customary fishing rights or practices.*

Each FMP must be endorsed by the Board and submitted to the Minister for approval. Once approved, FMPs are published in the PNG Government Gazette, at which time they become laws which can be enforced (s 28(5)). The provisions of FMPs have the same effect as a licence (s 28(7)).

The draft BDM Management Plan is described in detail in PART C, below.

### **3.1.6 Regulatory arrangements**

#### ***Total Allowable Catch (TAC) limits***

In addition to (and independent from) the power to create FMPs, the Board has the power, on the recommendation of the Managing Director, and on the advice of the NMAC, to set either a total allowable catch (**TAC**) or total allowable effort, or both. A **TAC** or total allowable effort may be declared with respect to fisheries or areas (s 27).

#### ***Prohibitions***

The Board has the power, on the recommendation of the Managing Director, to issue a range of prohibitions on fishing and related activities. The following examples are potentially relevant to the BDM fishery (s 30(3)):

- specified classes of fish (s 30(3)(b)(i));
- fish within in a specified class of fish that are less or greater than a specified size or dimension (s 30(3)(c)(i)&(ii));
- taking fish (generally, or fish within a specified class):
  - by a specified method or gear; or
  - by persons other than a specified class of persons; or
  - by vessels other than a specified class of vessels (s 30(3)(d));
- buying, selling, landing, selling, receiving, possessing or exporting fish (generally, or fish within in a specified class) (s 30(3)(e));
- conducting a specified type of related activity, either:
  - at all; or
  - by persons other than a specified class of persons; or
  - in a specified manner (s 30(3)(i));
- taking protected or endangered species of fish (s 30(3)(j));

- other prescribed activities (s 30(3)(k)); and
- landing, selling, receiving, or having in one's possession any fish that one knows, or has reasonable grounds to believe, was taken in breach of a prohibition (s 31(5)-(6)).

Breach of a s 30 prohibition is an offence (s 31). Section 30-31 offences can be committed by a person:

- acting on their own account, or as the partner, agent or employee of another person;
- causing or permitting another person acting on their behalf to act; or
- using a vessel (s 31(2)).

Section 31 applies to 'all persons, all vessels and all fishing and related activities' (s 31(1)). In other words, the exemptions set out in s 3(2) do not apply, and so the s 31 breach of prohibition provision applies to both customary and artisanal fishing.

### ***Licensing***

The Board is authorised (on recommendation of the Managing Director) to grant licences in accordance with the FM Act for any prescribed purpose (s 41(1)). Engaging in an activity for which a licence is required, without a licence, is an offence (s 46(1)), as is failing to comply with the terms and conditions of a licence (s 46(2)). Both offences apply to persons acting on their own account, or as the partner, agent or employee of another person (s 46(1)-(2)).

Licence types that are relevant to the BDM fishery are:

- exporter, buyer and storage facility licences;
- collector vessel licences;
- processing licences; and
- aquaculture licences.<sup>99</sup>

Otherwise, FM Act licensing provisions appear to be directed towards the licensing of fishing vessels; these are not relevant to the BDM fishery as BDM fishers are village based and use canoes, which do not require a licence.

Licence application requirements are addressed in the recently amended s 42. Licences may be granted subject to terms, conditions and endorsements; these are imposed by the Board (s 43(1)(a)).

### ***Monitoring and enforcement***

Part V of the FM Act deals with monitoring and enforcement. For the purposes of Part V, any references to offences against the FM Act or fisheries offences include offences related

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<sup>99</sup> BDM Management Plan cl 8(a)(i).

to a fishing or a related activity under any law of a provincial, district or local government authority' (s 47(a)).

*(i) Monitoring, control, and surveillance (MCS)*

The FM Act states that the NFA will implement any monitoring, control, and surveillance (**MCS**) scheme (s 6(1)(l)). It goes on to state that MCS can be regulated via the FM Regulation (s 76(1)(m)). In practice, the NFA and Provincial Fisheries Officers of particular Provincial Governments have entered into Memoranda of Agreement (MoA) that potentially clarify the role of the provinces in MSC.<sup>100</sup>

*(ii) Observer program*

The FM Act makes provision for establishing an 'observer program', the purpose of which is to collect and report reliable and accurate information for scientific, management, and compliance purposes (s 50(1)). At this stage it does not appear to be utilized or intended for the BDM fishery.

*(iii) Appointment and powers of Fishery Officers*

Enforcement is carried out by Fishery Officers (**FOs**). FOs are appointed by the Managing Director (s 48(1)). Members of the Police Force and Defence Force are also deemed to be FOs for the purposes of the FM Act (s 48(3)).

Section 49 sets out the powers of FOs in carrying out enforcement action. They are wide ranging and include:

- searching any vessel (s 49(2)(a));
- entering and searching premises (s 49(2)(b));
- examining gear and equipment (s 49(2)(e));
- seizing fish and fish products, logs charts and other documents (s 49(2)(f));
- arresting a person whom the FO has reason to believe has committed an offence against the FM Act (s 49(2)(g));
- bringing a vessel or requiring a master to bring a vessel to any place in PNG, and remaining in control of the vessel pending the taking and determination of proceedings for the offence. This power exists where the FO has reason to believe the vessel has been used, is being used or is intended to be used to commit, or in relation to the commission of, a fisheries offence (s 49(2)(h));
- securing or immobilising a vessel that has been brought to any place in PNG in accordance with the relevant provisions (s 49(2)(i));

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<sup>100</sup> Experience on the ground suggests that MCS roles may be clearly defined in job descriptions so that officers are fully aware of their specific roles in relation to MCS.

- requiring the master to produce their licence and any other documents (s 49(2)(j)); and
- selling any fish seized under the Act with prior written approval of the Managing Director (s 49(2)(n)).

### ***Jurisdiction***

As discussed earlier, contraventions of the FM Act fall within the jurisdiction of the District Court (s 56(1)).

### ***Relevant offences***

Section 58(1) of the FM Act sets out a list of other offences under the Act. Those that may be relevant to the BDM fishery include:

- in relation to **information**:
  - failure to maintain or furnish information (s 58(1)(a));
  - maintaining or furnishing information that is false, misleading or inaccurate (s 58(1)(a));
  - knowingly making a statement or otherwise giving information required for the purposes of the FM Act that is false, incorrect or misleading, either:
    - for any purposes under the Act (s 58(1)(s)); or, more specifically,
    - in relation to any fish taken, bought, sold, processed, exported or otherwise dealt with by such person or by an agent, employee or other representative of the person (s 58(1)(t));
  - refusing to provide any information, report or return required by the FM Act (s 58(1)(v)); and
  - knowingly making or causing to be made any entry or writing that is false, incorrect or misleading in any material particular, in any book, log, record, return, declaration or statement required by the FM Act to be kept, made or given (s 58(1)(u)).
- committing an offence in relation to breach of a **prohibition** (ss 38 & 58(1)(b));
- committing an offence without a **licence**, when one is required (ss 46 & 58(1)(h));
- committing an offence in relation to **obstructing** FOs and/or observers (ss 55 & 58(1)(n));
- committing an offence in relation to **interfering with evidence** (ss 72 & 58(1)(p));
- **falsely representing** oneself to as being lawfully licensed (s 58(1)(w)); and
- **in any other way contravening** or not complying with the FM Act (s 58(1)(cc)).

## **Penalties**

The FM Act divides offences into two categories, with the more serious offences receiving a higher penalty (s 58(5)-(6)).

Higher penalty offences are listed in s 58(5).<sup>101</sup> For these offences, the applicable penalties (as at February 2016) are:

- in respect of a crew member, a fine not exceeding PGK25,000;
- in respect of a natural person, a fine not exceeding PGK500,000; and
- in respect of a corporation, a fine not exceeding PGK5,000,000.

Lower penalty offences are listed in s 58(6).<sup>102</sup> For these offences, the applicable penalties (as at February 2016) are:

- in respect of a crew member, a fine not exceeding PGK10,000;
- in respect of a natural person, a fine not exceeding PGK250,000; and
- in respect of a corporation, a fine not exceeding PGK500,000.

In addition to the penalty determined in accordance with the above, the court may order imprisonment in relation to any offence for a term not exceeding five years (s 58(7)).<sup>103</sup> A default penalty also applies if a person fails to pay fines that have been issued for an offence (s 58(8)).

If a natural person is found guilty of committing the same offence within 24 months, a court may impose a penalty not exceeding twice the maximum amount for the first offence (s 58(9)).

## **Penalty notices**

Section 58A establishes a system of issuing penalty notices. The offences to be the subject of penalty notices and penalties are to be set out in regulations (s 58A(6)). The effect of the provisions is that an authorised officer may serve a penalty notice on a person if it appears to the officer that the person has committed an offence (s 58A(1)). This recipient then has the option of paying the penalty prescribed by the regulations rather than having the matter determined by a court (s 58A(2)). Payment is not an admission of liability and neither will it affect or prejudice any civil claim (s 58A(5)).

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<sup>101</sup> More severe penalties apply to the offences set out in s 58(1) (b), (c), (d), (e), (f), (g), (h), (n), (p), (r), (x), (y), (z), (bb) and (cc).

<sup>102</sup> Offences with lower penalties are as set out in s 58(1) (a), (i), (j), (k), (l), (m), (o), (q), (s), (t), (u), (v) and (aa).

<sup>103</sup> If the offence involves a weapon or a threat to a FO or an observer, the maximum term is 10 years: s 58(7).

### **Summary administrative proceedings**

Part VII of the FM Act sets up an alternative administrative enforcement system in the form of summary administrative proceedings (ss 64-66). These are less formal than court proceedings and offer the prospect of lower penalties than those specified in the Act (s 66(1)). Summary administrative proceedings are expressly permitted where an accused person admits the alleged violation but may also be in the absence of an admission, under conditions (s 65).

### **Data collection**

Section 29(1) gives the Managing Director the power to require certain persons to maintain and furnish:

- (a) all relevant data and information, including fishing time and effort, landing, processing, sales and other related transactions; and*
- (b) accounts, records, returns, documents and other information additional to that specified under this Act.*

The purpose of this power is to enable the Managing Director to 'assess and recommend appropriate management, development and conservation for any fishery, and to prepare any Fishery Management Plan, and for carrying out his responsibilities' under the FM Act (s 29(1)).

The people who the Managing Director may require to maintain and furnish such records is listed at s 29(2) and includes:

- holders of licences, or other authorities or approvals;
- owners, operators, representatives, boat agents, and masters of licenced vessels;
- owners and persons in charge of any premises where fish are received, purchased, stored, transported, processed, sold, or otherwise disposed of;
- persons engaged in the receiving, purchasing, transporting, processing, storage, sale, or disposal of fish; and
- persons who provide vessels for hire for the purpose of enabling persons to take fish.

### **Regulations under the FM Act**

The FM Act provides a broad list of topics that can be the subject of regulations (s 76), including regulations for:

- allowable levels of fishing , including the maximum sustainable yield of fish;
- implementation of provisions of an FMP (which would include the BDM Management Plan);
- regulating or prohibiting gear used and methods of fishing;

- regulating, controlling and managing research, surveys, study and education regarding fish, fisheries resources and the marine, coastal and aquatic environments;
- licensing;
- monitoring, control and surveillance; and
- penalties.

### 3.2 Fisheries Management Regulation 2000

The *Fisheries Management Regulation 2000* (the **FM Regulation**) contains detailed provisions on the following:

- licence requirements for fishing vessel, trial fishing, aquaculture, fish buyers, fish storage, and fish exporter facility licences;
- licensing applications, procedures, issuance, fees, and other payments;
- validity and variation of licences;
- reporting, port calls and transshipment;
- export requirements;
- miscellaneous; and
- offences and penalties.

The FM Regulation is relevant to all licence-types that are identified in the BDM Management Plan.

#### 3.2.1 Provincial Governments and LLGs

All procedures mentioned in the FM Regulation concern the Managing Director and the Board. There is no reference to actions being taken by Provincial Governments or LLGs.

#### 3.2.2 Monitoring, control and surveillance

Despite having been envisaged in the FM Act as a subject matter for a regulation, there are no provisions on MCS. The only mention of ‘monitoring’ concerns vessel monitoring systems.<sup>104</sup>

## 4. PROVINCIAL AND LOCAL-LEVEL MARINE PROTECTION LAWS

The national government passed the FM Act, relying on its power to legislate on matters that are of ‘national interest’. However, the OPGLLG specifically grants law-making powers

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<sup>104</sup> Other kinds of monitoring require a coastguard or other similar service. PNG has a very limited capacity for this. Vessel Monitoring Systems (**VMS**) are used for tuna. There are sometimes regional international initiatives involving Australian vessels.

relevant to fishing and fisheries to Provincial Governments (s 42). Hence, a Provincial Government is authorized to pass complementary legislation that is harmonious with the objectives and framework established under the FM Act; if there is any inconsistency, the national law will prevail.<sup>105</sup> One way of addressing potential conflicts between the FM Act and legislation passed by lower level governments may be by making arrangements through Memoranda of Agreement.

In relation to LLGs, National and Provincial Governments may delegate their law-making powers to LLGs (s 50(2)). Furthermore, law-making powers allocated directly to LLG through the OPGLLG may overlap in some respects with the power to regulate fishing and fisheries, particularly the power to make law for the local environment (s 44).

Examples of both Provincial and Local-level laws on marine protection and the local environment are discussed below. It should be noted that these laws have been passed not as fishery laws but as environmental laws on marine protection. They are relevant in that they show the sort of measures that are and could be available alongside the FM Act and any BDM Management Plan.

#### 4.1 Provincial law on marine protection

An example of a Provincial law on marine protection is the Manus Provincial Government's *Marine Resources Protection Act 1989 (Manus Act)*. The Manus Act predates the OPGLLG but, relevantly, does not conflict with the FM Act.

The Manus Act operates by enabling the Minister to declare particular marine organisms to be 'marine protected organisms' for the purpose of the Act (s 2). Once an organism has been declared a 'marine protected organism', the Minister can 'prohibit or prescribe as a restricted activity, the taking, disposal, acquiring or export' of that organism' (s 3). The Manus Act enables some nuance to this restriction by providing for licenses and export permits, enabling restricted extraction and trade of protected organisms.

In terms of monitoring and enforcement, the Manus Act provides that engagement in any restricted activity without a relevant licence, or engagement in an activity in a manner that is not authorised by or consistent with a licence, is an offence (s 18(1)). To enable monitoring, the Manus Act provides for the appointment of marine inspectors; they have various powers including, for example, to seize and remove vessels and protected marine organisms, and

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<sup>105</sup> In this regard, it is notable that the FM Act does not have any specific provision on implementation at the Provincial or Local-Level.

require the provision of information (s 9). Penalties for offences are set out at s 18 and include fines and/or imprisonment for individuals, and fines for companies.

#### **4.2 Local-level laws on marine protection of the local environment**

LLGs have the power to make laws in relation to the local environment, among other things. A small number of LLGs have taken the opportunity to make regulations of this nature that are relevant to the BDM fishery. As already discussed, each of these laws is subject to any national and Provincial fisheries laws.

##### **4.2.1 Nali Sopat Penabu Rural LLG *Environment and Conservation Law 2007* (Manus Province)**

The Nali Sopat Penabu Rural LLG in the Manus Province has passed the *Environment and Conservation Law 2007*. This law specifically states that it is made 'subject to any national and Provincial fisheries and environment and conservation and traditional cultural sites laws (s 1(1)).

The law is broadly expressed as being made for the purpose of 'protecting and preserving the natural environment and cultural sites' (s 1(2)); this includes coastal and marine ecosystems, which both fall within the meaning of 'environment' under the law (s 5). It has two main relevant methods of operation:

- it provides for the declaration of areas as being of 'high conservation value' which are also deemed to be 'conservation areas' for the purpose of the law; and
- it sets out a range of general prohibitions and penalties.

##### ***Areas of high conservation value***

Areas of high conservation value are identified 'based on scientific research findings and information, and traditional knowledge made available to it that such an area or areas require protection and supervision by the Rural Local-level Government' (s 6). The law specifically states that (s 7(1)):

*a clan or clans in a Ward or Ward may request the Local-level Government to consider their customary land or marine area or areas for protection and management under this Act.*

Such a request triggers a requirement that the LLG refer the matter to the Environment and Conservation Area Committee (see below).

Once an area has been declared under the law, a management plan must be put in and approved by the Local-level Government within six months (s 7(5)).

An important element of the *Environment and Conservation Law* is the creation of the Environment and Conservation Area Committee, which is required to comprise a number of local and resource-owner representatives (s 9). The Committee has a range of functions, including (s 11):

- coordinating the management of the Area;
- making recommendations to the Local-level Government to declare areas of high conservation value;
- facilitating the preparation of management plans for the Area;
- negotiating with the land and marine resources owners and making recommendations to the Local-level Government to enter into contract(s) with landowners to protect and manage their area or areas; and
- enforcing the law.

### ***General offences and penalties***

Breach of a management plan made under the law is an offence (s 24). In addition, Part 4 sets out a range of general offences to which penalties apply, including:

- restriction on collecting, taking and killing of fish, shellfish and other marine and aquatic resources in the Area (s 17);
- restriction on acceptable methods of fishing (ss 17-18);
- prohibition against damaging reefs (s 19); and
- prohibition on the use of 'dynamite, poisonous and other noxious substances', or derris roots, for killing, stunning, stupefying or disabling fish in any way (ss 22-23).

### ***The Pere Environment and Conservation Area Management Plan***

An example of a management plan under the Nali Sopat law is the *Pere Environment and Conservation Area Management Plan*.<sup>106</sup> It is directed towards protecting reef fish, increasing fish stock, recovery of reef fisheries, and protection of marine habitats. The management area refers to the environment and conservation area that has been declared pursuant to s 8 of the *Environment and Conservation Law*. According to the plan, the reef fish and invertebrates that the community thinks are important include BDM.

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<sup>106</sup> The copy available to the writers is dated 17 August 2015.

#### 4.2.2 Other examples: Hoskins, Bialla, and Talasea Rural LLGs (Western New Britain Province)

Three rural LLGs in Western New Britain Province have implemented Marine Environmental Management Laws that are largely identical:

- Hoskins LLG;
- Bialla Rural LLG; and
- Talasea Rural LLG.

In each, the relevant laws are called the *Marine Environment Management Law 2004*.<sup>107</sup>

The laws are similar in structure and function to the Nali Sopat law, with the key difference being that these laws focus on marine environments rather than seeking to encompass all natural environments.

Each provide for the identification and declaration of areas of 'high marine value' and for requests for protection by clan or clans (ss 6-8). If areas are declared as being of high marine value, they must also be declared as locally managed areas (ss 7-8). The laws provides for the creation of a Locally Managed Marine Area Committee; this Committee's members, powers and functions appear to be equivalent to the Environment and Conservation Area Committee under the Nali Sopat law. As with the Nali Sopat law, these laws set out a range of general offences and penalties, including all of those listed above in relation to the Nali Sopat Law (s 17).

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<sup>107</sup> Lavnongai Rural LLG has also prepared a draft law in the same terms. Maramatana Rural LLG (Milne Bay Province) has prepared a draft *Local Environment Law 2009*. It is less directed towards protection of marine resources but does provide for the declaration of community managed conservation areas. At the time of writing, it does not appear that either the Lavnongai or Maramatana draft laws have been passed.

## **PART C. OVERVIEW OF THE DRAFT BECHE-DE-MER MANAGEMENT PLAN**

### **1. THE BECHE-DE-MER MANAGEMENT PLAN<sup>108</sup>**

This document provides an overview of the National Beche-de-Mer Fishery Management Plan (**BDM Management Plan**) developed pursuant to s 28 of the *Fisheries Management Act 1998 (FM Act)*. As at February 2016, the BDM Management Plan had not been gazetted.<sup>109</sup>

For more background on the legislation underpinning the draft BDM Management Plan, and the legal system in which it will operate, see PART B.

#### **1.1 Overview**

The draft BDM Management Plan has been developed in response to a decline in the catch-rate of BDM each year which required closure of the BDM fishery in 2009. Prior to the closure, the BDM fishery had been managed under the 2001 *National Beche-de-Mer Management Plan*.

The draft BDM Management Plan has undergone extensive consultation over a number of years. At the time of writing (February 2016), it had not been gazetted. This review relates to the version that was approved in November 2015.

The introduction to the draft BDM Management Plan states that:

*Despite its importance in terms of foreign revenue generation for PNG and cash income to some 500,000 fishers scattered in coastal and island villages, the sea cucumber fishery and beche-de-mer trade faces many management and monitoring issues. This is being improved by decentralising management to the provinces, Local-level Governments (LLGs) and communities. The involvement of LLGs and communities is anticipated to improve management of the fishery.*

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<sup>108</sup> The BDM Management Plan uses the term 'sea cucumber' in relation to 'all animals belonging to the Class Holothuroidea' in its live form, and 'beche-de-mer or trepang' in its processed form: cl 2(b).

<sup>109</sup> At the time of writing in February 2016, the BDM Management Plan had not been finally signed off by the NFA Board and had not been gazetted.

The draft BDM Management Plan (cl 2(c)):

*...applies to the sea cucumber fishery and includes all fishing and activities associated with the collection, processing, storage, buying, selling and exporting of beche-de-mer products.*

Clause 3 of the draft BDM Management Plan sets out its overarching objectives, as follows:

- (a) To manage the sea cucumber fishery for the long-term economic benefit of coastal and island communities throughout Papua New Guinea.*
- (b) To ensure the use of sea cucumber stocks is biologically sustainable and that sea cucumber populations are maintained at levels that will allow them to continue to play their role in the marine ecosystem.*
- (c) To ensure the co-operative implementation of this Management Plan and associated governance involves the support and input from relevant government, industry, resource owners, other civil society actors and research institutions.*

Clause 4 of the draft BDM Management Plan sets out the management principles stating that the BDM fishery will be managed in a manner that is consistent 'with relevant international fisheries instruments that PNG has formally ratified, as well as the objectives and principles of the Fisheries Management Act 1998 (amended in 2012)'. The five management principles that will be applied are:

- (d) Resource owners will be involved in the management of the sea cucumber fishery.*
- (e) Relevant government, industry, other civil society actors and research institutions will also be involved in the management of the sea cucumber fishery and the beche-de-mer trade.*
- (f) The ecosystem approach to fisheries management will inform the implementation of the Management Plan.*
- (g) Conservation of non-target species and the protection of habitats of special concern will also be taken into account.*
- (h) Implementation of the Management Plan at all levels will take into account the latest scientific and other relevant information to refine management actions.*

The remainder of the draft BDM Management Plan addresses the following issues:

- joint management of the fishery (cl 5);
- the establishment of a National Management Advisory Committee (**NMAC**) (cl 6);
- the establishment of Provincial and Local-level Government Management Advisory Committees (**PMAC** and **LLGMAC**) (cl 7);

- management measures, broken into the following major subject areas (cl 8):
  - licensing (including licence types, conditions, eligibility, and requirements);
  - Total Allowable Catch (**TAC**);
  - exporting BDM;
  - other use;<sup>110</sup>
  - prohibitions;
  - closure of the fishery; and
  - reporting;
- research and assessments (cl 9);
- specific licensing requirements applicable to persons ‘interested in aquaculture, pond farming and sea ranching’ (cl 10); and
- the role and significance of existing customary rights (cl 11).

## 1.2 Management under the BDM Management Plan: Towards joint management of the BDM Fishery

### 1.2.1 Joint Management (cl 5)

The draft BDM Management Plan demonstrates a move away from management by central government, with the BDM fishery to ‘be primarily managed jointly’ by the NFA, Maritime Provincial Governments, LLGs, and resource owners (cl 5(a)). The roles of each are described in cl 5(b) of the BDM Management Plan as follows:

- i. *The **National Fisheries Authority** will be responsible for formulating and implementing the Management Plan and will provide resources for obtaining, analysing data and determining management measures which will include the minimum size limits, closed seasons, TACs, the maximum number of exporters and buyers per province, licensing criteria and guidelines for licences, aquaculture and sea ranching guidelines, as well as the establishment of the National Management Advisory Committee (NMAC).*
- ii. *The **Maritime Provincial Governments and Maritime LLGs** will be responsible for implementing the Management Plan at their respective levels; this includes the ability to set lower TACs (only at the Provincial level or split amongst LLGs but only as long as it does not exceed the Provincial TAC), higher size limits, longer closed seasons, advising the National Fisheries Authority on licenses, supporting resource owners in their management actions and will also have the option to establish Management Advisory*

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<sup>110</sup> ‘Other Use’ relates to restaurants that wish to serve BDM to their dining customers.

*Committees at either or both the Provincial and LLG level if they feel that this will enhance the legal and management framework at those levels for the sea cucumber fishery, and any other fisheries of importance. Any new Maritime Provincial Government and Maritime LLG management strategies, must not conflict with the Management Plan.*

- iii. **Resource owners will be responsible for implementing the Management Plan** at their respective levels, as well as developing management strategies at their level or with the support of the LLG and Provincial governments or other civil society actors. Any management strategies developed by resource owners, must not conflict with the Management Plan.

### **1.2.2 Provincial, Local-level, and community management plans**

Under the draft BDM Management Plan, Provincial and Local-level Governments may prepare their own management plans and strategies.<sup>111</sup> However, the draft BDM Management Plan will prevail over all other management plans, and a provincial-level management plan will prevail over an LLG management plan (cl 2(h)). Notably, cl 8(f)(vi) allows the specification of no harvesting areas in a ‘Province or LLG specific or community management plans that are endorsed by a PMAC or LLGMACs or gazetted by other legislation’.

### **1.2.3 National Management Advisory Committee**

Clause 6 provides for the formation of the National Management Advisory Committee (NMAC).

#### ***Membership of the NMAC:***

The draft BDM Management Plan provides that the NMAC will consist of the following persons (cl 6(g)):

- two NFA representatives (one of whom will be the NMAC Chair);
- one reputable fishery scientist;
- two industry representatives nominated by consensus of industry stakeholders involved in the BDM trade;
- one representative from a non-government organization whose objectives include conservation of the marine environment and management of fisheries resources; and
- the Chairpersons of the respective PMACs.

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<sup>111</sup> The BDM Management Plan refers both to regional/local management plans and strategies; these appear to be referencing to the same thing. See, e.g., cl 2(h), 5(b)(iii) & 8(f)(vi),

### **Role and responsibilities of the NMAC**

The role and responsibilities of the NMAC are set out in cl 6(f)), as follows:

- i. Review the Management Plan every two (2) years or as required by the NFA Managing Director or the NFA Board.*
- ii. Set the annual Provincial TACs each year before the opening of the season based on the advice from the NFA.*
- iii. Set the upper limit on the number of exporters that is allowed for each province for each year.*
- iv. Set the upper limit on the number of buyers that can be employed by Provincial exporters for each province for each year.*
- v. Review licensing guidelines and criteria for exporters as recommended by the NFA.*
- vi. Review fishery survey results and advice provided by NFA and Provincial Fisheries Administrations.*
- vii. Review any Maritime Provincial Government and Maritime LLG specific management strategies.*
- viii. Review closed seasons, reporting, restrictions, trade, and any other relevant issues that the NFA Managing Director or the NFA Board may request from time to time.*
- ix. Advise on the implementation of the ecosystem approach to fisheries management as part of the Management Plan.*
- x. Review guidelines for best practices for sea cucumber aquaculture and associated activities.*
- xi. The NMAC will take on responsibility for advising and formulating advice on the management of other inshore fisheries as directed by the NFA Managing Director or the NFA Board on a needs basis. The NFA Managing Director or the NFA Board will specify in writing what the specific responsibility of NMAC will be in respect to these other inshore fisheries.*

The NMAC is also charged with advising the Managing Director on management measures, as specified and directed by the Managing Director. This may include TACs, closed seasons, reporting, restrictions, and trade (cl 6(b)).

#### **1.2.4 Provincial and Local-level Government Management Advisory Committees**

Clause 7 provides for the establishment of Provincial Management Advisory Committees (**PMACs**) and Local-level Management Advisory Committees (**LLGMACs**); the draft BDM Management Plan envisages the NFA liaising and working with Provinces to establish the PMACs and LLGMACs.

##### ***Roles and responsibilities of PMACs and LLGMACs***

The roles and responsibilities of both PMACs and LLGMACs are set out in cl 7(a) and are as follows:

- i. Facilitate the implementation of the Management Plan at their respective Maritime Provincial and Maritime LLG levels.*
- ii. Advise on any specific Provincial and LLG management strategies for example, higher size limits, longer closed season, TACs for specific LLGs (the sum of which shall not exceed the TAC for the respective Province as set by the NMAC); or any other management arrangements using other legislations.*
- iii. Provide guidelines for resource owners to formulate specific management strategies, and where applicable, assist with using other legislation.*
- iv. Review and endorse export licence applications for final approval by the NFA Board.*
- v. Provide advice to the NMAC on the effectiveness of the Management Plan, including implementation, monitoring, reporting and enforcement.*
- vi. Take on responsibility where warranted for providing management advice for the other inshore fisheries.*

##### ***Membership of PMACs***

PMACs will consist of the following persons:

- the Provincial Administrator or their delegate;
- all Maritime Local-level Government Council Presidents (one of whom must be the Chairman of the Economic Sector or their equivalent);
- one nominated women's representative;
- three resource owner representatives;
- two exporter representatives;
- the Provincial Fisheries Advisor or their delegate (who will be the PMAC Chair);
- the Provincial Legal Advisor or the Provincial Planner; and

- one representative from a non-government organization or community group whose objectives include conservation of the marine environment or management of fisheries resources and has programs in the respective Province (cl 7(b)).

### ***Membership of LLGMACs***

LLGMACs will consist of the following persons:

- the District Administrator or their delegate;
- relevant Maritime LLG Managers who will be the LLGMAC Chair;
- relevant Maritime Ward Councillors( these will also be the resource owner representatives);
- one nominated Women's representative;
- one nominated Youth representative; and
- one Provincial or District Fisheries Officer or their delegate who will be the Deputy LLGMAC Chair (cl 7(e)).

### **1.2.5 Provincial Fisheries Officers**

In day to day operations, Provincial Fisheries Officers (**PFOs**) have been involved in carrying out some of the functions of the NFA at a local level. The only mention of PFOs in the draft BDM Management Plan is found in relation to membership of LLGMACs (cl 7(e)(vi)), where it states that LLGMACs will include one Provincial or District Fisheries Officer or their delegate, who will be the LLGMAC Chair. There are numerous references to Provincial Fisheries Administrations which will work with the NFA in relation to many of its activities. It is likely that reference to a Provincial Fishery Administration includes a Provincial Fisheries Offices as well as a Provincial Fisheries Authority (as in Morobe Province), and captures Provincial Fisheries Officers. However, this has not been explained in the Management Plan.

### **1.2.6 Management measures (cl 8)**

Clause 8 of the draft BDM Management Plan sets out management measures applicable to the BDM fishery as discussed below:

#### ***Licensing***

##### *(i) Types of licences*

The draft BDM Management Plan identifies the following licences that will be required in order for a person to participate in the fishery and BDM trade (cl 8(a)(i)):

- **Exporter, buyer and storage facility licences:** for any person or company who wishes to export, buy, or store BDM. Buyer licence holders are 'to be employed only

by a respective exporter and must buy only in that respective Province that the exporter licence is valid for’.

- **Collector vessel licences:** for exporters who use vessels as part of their operations. Collector vessel licences can only be used in the Province in which the exporter licence is valid.
- **Processing licence:** for downstream or value-adding activities.
- **Aquaculture licences:** for hatchery production, pond farming or sea ranching (see also cl 10).

*(ii) Licence conditions*

The NMAC is to set a limit to the number of **export** and **buyers licences** available for maritime Provinces (cl 8(a)(ii)(a)). All licence applications will be screened using set criteria set out in Schedule 1 (cl 8(a)(ii)(b)). Licences will be valid for five (5) years and renewed each year subject to a performance review and compliance with all reporting criteria and conditions of the licence (cl 8(a)(ii)(c)). All licences will become non-operational when the fishery is closed, either when a Provincial TAC has been reached, or by the compulsory seasonal closure, whichever is reached first (cl 8(a)(ii)(e)).

*(iii) Licence eligibility*

Non-citizens are prohibited from taking part in any aspect of the BDM fishery (cl 8(a)(iii)).

*(iv) Licence obligations*

There are stringent licence obligations for all holders of an export licence. In particular, exporters must provide all purchasing data every week (using the form as set out in Schedule 2 of the draft BDM Management Plan) (cl 8(a)(iv)(a)) along with the advertised buying prices.

Exporters are also required to provide export price lists to the respective Provincial Fisheries Administrations and the NFA when an export has occurred (cl 8(a)(iv)(a)).

*(v) Licence enforcement*

In the event that a licensee is under investigation for an infringement of a condition of the draft BDM Management Plan or any illegal activity, their licence will be immediately suspended (cl 8(a)(iv)(c)). In the event that a licensee is found guilty of any offence in relation to conditions of the draft BDM Management Plan, or any provision of the FM Act or *Fisheries Management Regulation 2000 (FM Regulation)*, their licence will be terminated (Pt 8(a)(iv)(d)).

### **Total Allowable Catch (TAC)**

#### *(vi) TAC allocation and resetting*

The NFA has recently conducted a national stock assessment to set the TACs that will operate when the BDM fishery reopens.

The draft BDM Management Plan creates a system in which each maritime Province will have its own TAC for each season/ twelve month period. It is calculated yearly, 'based on the number of harvestable size animals, taking into account the density of individual species', (cl 8(b)(i)). It will be set 'based on the current status of the sea cucumber stocks for that year and be set at the lower confidence limit of the estimated Maximum Sustainable Yield for sea cucumber stocks for that respective Province' (cl 8(b)(i)(a)). The annual TAC will be the maximum upper harvest limit which cannot be exceeded by any Province in any one year (cl 8(b)(i)(b)).

The annual TAC will be reset each year after the fishery closes and prior to it re-opening the following year. In circumstances where a TAC for a Province is considered too low for the fishery to open, an extended closure shall be recommended in that Province (cl 8(b)(i)(b)).

If a Province exceeds its allocated annual TAC in a given season, 'that excess amount will be taken off the next season's TAC for that Province' (cl 8(b)(i)(c)).

#### *(vii) TAC monitoring*

The NMAC will review the TAC in each province annually, taking into consideration any new and relevant research or information (cl 8(b)(ii)(b)). It is proposed that Provincial Fisheries Administrations and the NFA will monitor provincial annual TACs, with the primary mechanism being the **weekly buyer summary reports** using the form set out in Schedule 2 (cl 8(b)(ii)(a)).

The form located at Schedule 2 is actually titled 'Daily Receipt Purchase Book' and, although licensed exporters are required to provide purchasing data each week (cl 8(a)(iv)) and both clauses 8(b)(ii)(a) and 8(d)(i)<sup>112</sup> refers to 'weekly buying reports', the form states that it 'should report all beche-de-mer product bought within a month'. The form requires a range of details, including:

- exporter name and licence number;
- buyer name and licence number;
- buying location;
- province;

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<sup>112</sup> This applies to restaurants wanting to serve BDM.

- product type;
- species;
- weight;
- fishermen-name; and
- the ward where the BDM was collected.

### ***Closure of the fishery***

A key management measure is closure of the BDM fishery.

#### *(viii) Timing of closure*

BDM fishing will be closed each year from 1 October until 31 March of the following year (cl 8(f)(ii)); this is known as the compulsory season closure date.

However, the NFA is required to close the fishery before this date in any province if/when the TAC for that province has been reached. It is stated that the NFA will notify the media of the final closure date of a Provincial fishery when it is estimated that 70 percent of the Provincial TAC has been reached (cl 8(b)(ii)(c)).

Other provinces may continue to take BDM until their TAC is reached, or until the compulsory season closure date (whichever occurs first). The NFA may also close a specific provincial BDM fishery if the annual TAC is considered too low for opening the fishery and subsequent recovery of the fishery (cl 8(f)(i)).

#### *(ix) Obligations after closure*

Once a closure notice has been given for a respective Province or nationally in the case of the compulsory seasonal closure, exporters must report all holdings of BDM or BDM products to Provincial Fisheries Administrations and the NFA on the form set out in Schedule 7. This report must be furnished ten (10) days after the closure date (cl 8(g)(iv)). Failure to submit the required reports within ten (10) days, or submitting incorrect data, including incorrect trade names, may result in confiscation of the holdings of BDM or BDM products, a fine and termination of the licence (cl 8(g)(v)).

#### *(x) Prohibitions and obligations after closure*

There is a prohibition against provincially-based exporters purchasing BDM from another province whose BDM fishery has been closed (cl 8(f)(iii)).

All declared holdings of BDM must be exported within three weeks of the fishery closure date. If this is not possible due to shipping service delays, the container must be locked, and

proof of shipping documentation provided to the Provincial Fisheries Administrations, the NFA and PNG Customs (cl 8(f)(v)).

### **Export requirements**

BDM exporters are required to comply with a mixture of obligations and prohibitions (cl 8(c)). Permitted sizes, species groups and trade names are set out in Schedule 4 (cl 8(c)(i)). Trade of undersized BDM is prohibited and any undersized product will be confiscated, a fine incurred and the licence cancelled (cl 8(c)(iii)). Trade in parts of, or broken BDM is also prohibited and any parts or broken BDM will be confiscated, a fine incurred and the licence cancelled (cl 8(c)(iv)).

Other export obligations include the following:

- The export of frozen BDM must be consistent with the standards as advised by the NFA (cl 8(c)(ii)) .
- BDM for export must be packed by species and clearly labelled with the name as set out in Schedule 4 of the draft BDM Management Plan, grade and quantity of the species and product, the name and licence number of the exporter, and the name of the importer (cl 8(c)(v)).
- BDM bound overseas for personal use shall be limited to two pieces, and requires authorization from the NFA Managing Director using the certificate issued by NFA called a “Certificate for Personal Consumption of Fish and Fishery Products” (cl 8(c)(vi)).

### **Movement of BDM between provinces**

The draft BDM Management Plan prohibits intra-Provincial transfers of BDM or BDM products (cl 8(e)(iv)),

*...unless suitable justification is provided to the National Fisheries Authority, and approved by the Managing Director.*

In cases where intra-Provincial transfers are approved, licensees are required to provide the NFA with (cl 8(g)):

*...full details of all beche-de-mer or beche-de-mer products exported from their Province of operation to the buying company based in another Province ...*

Other relevant provisions provide as follows:

- a buyer can only buy in the province of their respective exporter (cl 8(a)(i)(a)); and
- a collector vessel licence for exporters requires that a vessel must only operate in the respective Province that the exporter licence is valid for (cl 8(a)(i)(b)).

As a result, a system has been put in place whereby a buyer-exporter relationship is established within a particular province. Where an exporter uses a collector vessel it cannot collect BDM from another province and then claim it as BDM from the province for which the exporter has been licensed.

### ***Overarching prohibitions on fishers***

The following prohibitions apply to all BDM fishers (cl 8 (e)):

- the use of underwater breathing devices such as hookah and SCUBA;
- the use of underwater lights or surface lights;
- the taking and trade in BDM when the relevant Provincial TAC has been reached, during the compulsory closed season, or in a prohibited area of harvest.

### ***Reporting obligations***

Standard trade names as per the FAO Sea Cucumber Identification Guide must be used in all reporting of species bought and exported. These names are listed in Schedule 4 of the draft BDM Management Plan (cl 8(g)(i)).

It is stated in cl 8(g)(ii) that both exporters *and* buyers must submit weekly buying summary reports to Provincial Fisheries Administrations and the NFA. This requirement overlaps with clause 8(a)(iv), which requires licensed exporters to provide all purchasing data every week. Both clauses require the data to be provided using the form located at Schedule 2 to the draft BDM Management Plan. It seems most likely that, in practise, the form will be completed by exporters, who will have access to all of the necessary information to complete and submit the form.

Exporters are also required to declare to the NFA all BDM or BDM products that they intend to export on the form as set out in Schedule 6 before the NFA will issue an approval for export (cl 8(g)(iii)).

## **1.2.7 Ongoing Assessments (cl 9)**

### ***Stock Assessment and Fisheries Data collection***

Clause 9(a) enables Provincial Fisheries Administrations to conduct yearly stock assessments with technical support from the NFA and the assistance of relevant stakeholders or research organisations. This information will be supplied to the NFA to refine the annual Provincial TACs. It is stated that Provincial Fisheries Administrations and the NFA will collaborate with exporters and buyers to analyse fishery data using the buyers' and exporters' purchasing records. Provincial Fisheries Administrations will also commission, or

encourage, research to identify negative environmental impacts and develop mitigation methods against them.

### ***Socio-economic assessment***

Clause 9(b) enables Provincial Fisheries Administrations to commission and encourage socio-economic research to establish socio-economic baselines and, where applicable, to make comparisons between existing/baseline data and the assessments. This will be done with technical support from the NFA and assistance of relevant stakeholders or research organisations.

#### **1.2.8 Customary management measures (cl 11)**

Those seeking to assert customary management measures that are consistent with the BDM Management Plan will be encouraged to notify the NFA and Provincial Fisheries Administrations so that the measures can be incorporated into PMAC and LLGMAC management strategies (cl 11(a)). However, customary open seasons that are inconsistent with the official closed seasons are prohibited (cl 11(b)).

## PART D. LAWS RELEVANT TO IMPORT OF BECHE-DE-MER IN MAINLAND CHINA & HONG KONG

### 1. LAWS RELEVANT TO IMPORT OF BECHE-DE-MER IN MAINLAND CHINA

#### 1.1 Overview

The key laws that apply to a bêche-de-mer (**BDM**) importer in China arise from customs and quarantine law, the framework for which is established at the national level. Theoretically, these laws could provide the basis for tracing the quantities and types of BDM that are imported into China.<sup>113</sup>

There are locally specific regulations for each province which are subsidiary to the national laws. The Legislation Law of the People's Republic of China authorises the National People's Congress, State Council and special economic zones to make laws as a 'general power'.<sup>114</sup> Local regulations are made by provincial people's congresses and their standing committees. Some large cities have provincial status (they are municipalities but have their own legal/governance systems) such as Shanghai, Beijing and Tianjin.<sup>115</sup>

So far as Chinese customs and quarantine laws relate to BDM, the key points to note are as follows:

- China's customs management system has three layers"
  - national customs, which is administered by the General Administration of Customs Peoples Republic of China (**GACC**);
  - regional customs; and
  - local customs.
- Customs processes can vary depending on the port of entry, the customs officer and the location of processing; this can have significant impacts on importers.
- The GACC regularly issues statistics covering a range of details about imported and exported goods.

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<sup>113</sup> Characteristics that can distinguish imported BDM include species and type of processing (e.g. dried, smoked, in brine and frozen).

<sup>114</sup> *Legislation Law of the People's Republic of China* (People's Republic of China ) National People's Congress, Order No 31, 15 March 2000, translation at <<http://www.cecc.gov/resources/legal-provisions/legislation-law-chinese-and-english-text>> (accessed 18 February 2016).

<sup>115</sup> For general information about law making in China, see, e.g.: Zhang, L., *A Guide to Chinese Legal Research: Who Makes What?* (30 January 2014) Library of Congress <<http://blogs.loc.gov/law/2014/01/a-guide-to-chinese-legal-research-who-makes-what/>> (accessed 18 February 2016).

- China applies the Harmonized Commodity Description and Coding System, as does PNG. As such, both should use the same codes when describing BDM for customs purposes.
- There are a range of different tax regimes applicable to imported goods. The applicable important duty to BDM is likely to depend on the country of origin and applicable multi- and bi-lateral trade agreements.
- Quarantine law is likely to apply to BDM as an 'animal product'. Quarantine is administered by the General Administration of Quality Supervision, Inspection and Quarantine (**GAQSIQ**). Inspection occurs of both imports and exports to satisfy requirements for safety, sanitation, health, environmental protection, prevention of fraud, etc.

## 1.2 Customs law

### 1.2.1 What is Customs Law?

Customs law controls the import of goods into a country and the duties (or import taxes) paid on such goods. There is often a national customs and border protection agency as a regulatory agency tasked with overseeing a country's customs laws. This agency may also be tasked with regulating and facilitating international trade, collecting import duties, and enforcing trade, customs, and immigration regulations (for example the United States Customs Border Protection Agency).

### 1.2.2 Customs law in China

The GACC<sup>116</sup> is the ministry-level administrative agency within the government of the People's Republic of China responsible for the collection of value added tax (**VAT**), customs duties, excise duties, and other indirect taxes such as air passenger duty, a climate change levy, insurance premium tax, a landfill tax and an aggregates levy.

It is also responsible for managing the import and export of goods and services into China.

China's customs management system has 3 layers:<sup>117</sup>

- the GACC, which is one of 16 institutions situated directly under the State Council - China's top administrative body;
- regional customs; and
- local customs (there are 580 local customs offices).

<sup>116</sup> Home, General Administration of Customs Peoples Republic of China <<http://english.customs.gov.cn/>> (accessed 18 February 2016).

<sup>117</sup> Export Council of Australia, *Exporting to China? Customs Insights from a Chinese Perspective* (26 June 2013) Export Council of Australia <<http://www.export.org.au/eca-news/exporting-to-china-customs-insights-from-a-chinese-perspective>> (accessed 18 February 2016).

The customs clearance procedure in China requires imported goods to be declared, documents to be examined, and goods to be physically inspected before taxes are collected and the goods are released.

As an example, the following documentation is required using export from Australia:<sup>118</sup>

- declaration form;
- import contract;
- invoice;
- packing list;
- bill of lading/air waybill;
- license for import goods under restriction and control;
- certificate issued by GAQSIQ, the Goods Quality Supervision, Inspection and Quarantine Institution;
- certificate of origin and other related documents, account books;
- customs declaration agency agreement;
- processing trade registration manual, certificate for tax exemption and reduction and inspection exempt permit; and
- other related documents.

It is well known that many companies seeking to export to China face issues because the customs requirements and processes can vary depending on the port of entry, the customs officer, and the location in which the goods are processed. These delays can be costly and may even result in goods, particularly perishable goods, becoming unfit for sale.<sup>119</sup>

It has been suggested that these processing discrepancies occur because regional customs bodies have some degree of discretion, resulting in slight variations in customs procedures and processes around the country. Moreover, as the GACC is located in Shanghai, it is possible that information and customs updates, which have to reach remote locations far removed from Shanghai, can sometimes be slightly misconstrued.

Exporters are generally recommended to engage a broker legally registered with customs and who holds an AA or A classification.<sup>120</sup> AA and A rated brokers are said to have an excellent compliance record and are offered facilitation measures. If an exporter's broker has AA classification, goods will receive special facilitation treatment, including.<sup>121</sup>

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<sup>118</sup> Ibid.

<sup>119</sup> Ibid.

<sup>120</sup> Brokers are classified on a scale from AA to D: Ibid.

<sup>121</sup> Ibid.

- credit guarantee;
- quick release for low risk goods;
- less intrusive inspection;
- no requirement for a bank deposit for AA level enterprises processing trade; and
- priority status in many customs areas including declaration, inspection and release.

Brokers with a B-rating receive ordinary treatment and those with a C or D rating face strict controls.<sup>122</sup>

### 1.2.3 Customs statistics

According to the GACC 2009 Annual Report,<sup>123</sup> customs statistics refers to:

*the process where Customs conducts statistics compilation and comprehensive analysis of such items as the description, quantity, weight, price, country (region) of origin, legal entity, domestic destination, domestic place of origin, trade method, transport means and relevant Customs districts (houses) of the import and export goods by collecting, sorting and processing import & export declarations or other documents verified and approved by Customs so as to reflect comprehensively and accurately the faring tendency of foreign trade, conduct early-warning import & export monitoring and provide information services for national macro-economic decision-making and the development of foreign trade.*

Customs statistics are one of the categories of State statistics prescribed by law. The GACC issues monthly basic statistical data of China's foreign trade and provides statistical data and consultancy services.

It periodically provides monthly and yearly data of China's foreign trade for the United Nations Statistics Bureau, the International Monetary Fund (IMF), the World Trade Organisation (WTO) and other relevant international organizations. The GACC states that it has improved its work on statistics compilation steadily and 'it has realized real-time monitoring, fast response, scientific anticipation, and dynamic early warning over imports and exports. The work has gained wide attention from the society.'<sup>124</sup>

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<sup>122</sup> Ibid.

<sup>123</sup> 2009 Annual Report, General Administration of Customs People's Republic of China <<http://english.customs.gov.cn/Uploads/Reports/2009%20China%20Customs.pdf>> (accessed 18 February 2016).

<sup>124</sup> Ibid.

According to the Regulations of the People's Republic of China on Customs Statistics (2005):<sup>125</sup>

*All goods that actually pass through customs territory, which leads to increase or decrease in the stock of the materials in customs territory, shall be recorded in customs statistics. The import and export articles that exceed the reasonable quantity for personal use shall be recorded in customs statistics (article 4).*

The statistical items of import and export goods include (article 6):<sup>126</sup>

- a) *description and code;*
- b) *quantity and statistical value;*
- c) *trading enterprises;*
- d) *customs regime;*
- e) *the mode of transport;*
- f) *the country (region) of origin, country (region) of consignment, and domestic locations of*
- g) *importers for import goods;*
- h) *the country (region) of final destination, country (region) of consignment, and domestic*
- i) *locations of exporters for export goods;*
- j) *the date of import or export;*
- k) *customs districts; and*
- l) *other statistical items as prescribed by the General Administration of Customs.*

The GACC may, in light of the need of the national economic development and customs supervision and control, adjust the statistical items.

#### **1.2.4 Customs coding**

China applies the Harmonized Commodity Description and Coding System that is set out in the 'The International Convention on the Harmonized Commodity Description and Coding

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<sup>125</sup> *Regulations of the People's Republic of China on Customs Statistics* (People's Republic of China ) State Council, Order No 454, 25 December 2005, <<http://english.customs.gov.cn/Statics/55dd0995-11de-4e05-a7e3-0dd5c4364f27.html>> (accessed 18 February 2016) (see also <[http://www.fdi.gov.cn/1800000121\\_39\\_371\\_0\\_7.html](http://www.fdi.gov.cn/1800000121_39_371_0_7.html)> (accessed 18 February 2016)).

<sup>126</sup> *Ibid.*

System' (**HS**).<sup>127</sup> Hong Kong is also a contracting party, as is PNG and, accordingly, they should all be using the same codes to describe BDM.

The HS is a multipurpose international product nomenclature developed by the World Customs Organization (**WCO**). As described on the WCO website, the HS:<sup>128</sup>

*comprises about 5,000 commodity groups; each identified by a six digit code and arranged in a legal and logical structure. It is supported by well-defined rules to achieve uniform classification.*

According to the WCO, the system is used by more than 200 countries and economies as a basis for their Customs tariffs and for the collection of international trade statistics. Over 98% of the merchandise in international trade is classified in terms of the HS. The HS contributes to the harmonization of customs and trade procedures and the non-documentary trade data interchange in connection with such procedures, thus reducing the costs related to international trade.

The HS is also extensively used by governments, international organizations and the private sector for many other purposes such as internal taxes, trade policies, monitoring of controlled goods, rules of origin, freight tariffs, transport statistics, price monitoring, quota controls, compilation of national accounts, and economic research and analysis. The HS is considered to be a universal economic language and code for goods, and an indispensable tool for international trade.

The WCO has published the accepted amendments to the HS nomenclature that will enter into force on 1 January 2017. It includes 233 sets of amendments, divided as follows: agricultural sector 85; chemical sector 45; wood sector 13; textile sector 15; base metal sector 6; machinery sector 25; transport sector 18; other sectors 26.

Environmental and social issues of global concern are said to be the major feature of the HS 2017 amendments. The majority of these changes to the HS have been reviewed by the

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<sup>127</sup> World Customs Organisation, 'List of 207 countries, territories or customs or economic unions applying the Harmonized System' (12 June 2015) <<http://www.wcoomd.org/en/topics/nomenclature/overview/~media/4236F2D774364330BF0ECD6FCB79A6D5.ashx>> (accessed 18 February 2016).

<sup>128</sup> *What is the Harmonized System (HS)?*, World Customs Organization <<http://www.wcoomd.org/en/topics/nomenclature/overview/what-is-the-harmonized-system.aspx>> (accessed 18 February 2016).

FAO.<sup>129</sup> A review of these amendments shows that there will be no amendments to coding applicable to BDM.

### 1.2.5 Taxes and duties

The subject of taxes and duties imposed on goods imported into and exported out of China is very complex. The key taxes applied to imports are value added tax, consumption tax, and import customs duties; of these, value-added tax (**VAT**) and import customs duties appear to be applicable to the import of BDM.<sup>130</sup>

In relation to VAT, a flat rate of 13% applies to BDM.<sup>131</sup>

In relation to customs duties, the China Tariff Implementation Plan for 2015 sets out customs duties. These include import and export duties and are calculated on an ad valorem or quantity basis. There are a number of types of import custom duty rates:

- Most-favoured-nation duty (**MFN**) rates;
- conventional duty rates;
- special preferential duty rates;
- general duty rates;
- Tariff Rate Quota (**TRQ**) duty rates; and
- temporary duty rates.<sup>132</sup>

The import duty type and rate applicable to BDM is likely to depend principally on the country of origin and any applicable trade agreements.

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<sup>129</sup> *Amendments effective from 1 January 2017*, World Customs Organization <<http://www.wcoomd.org/en/topics/nomenclature/instrument-and-tools/hs-nomenclature-2017-edition/amendments-effective-from-1-january-2017.aspx>> (accessed 18 February 2016) .

<sup>130</sup> See Zhang, C. *Import-Export Taxes and Duties in China* (11 March 2013) China Briefing, Business Intelligence from Dezan Shira & Associates <<http://www.china-briefing.com/news/2013/03/11/import-export-taxes-and-duties-in-china.html>> (accessed 18 February 2016). See also *China's Current Tax System – Consumption Tax*, Kaizen Corporate Services Limited <<http://www.by-cpa.com/html/news/20076/583.html>> (accessed 18 February 2016).

<sup>131</sup> The actual calculation is more complex than this and is described here: *How Does the VAT Works in China?* (13 March 2007) China.org.cn <<http://www.china.org.cn/english/LivinginChina/202770.htm>> (accessed 18 February 2016). See also USDA Foreign Agricultural Service

<sup>132</sup> For further discussion and description of each duty rate, see: Zhang, C. *Import-Export Taxes and Duties in China* (11 March 2013) China Briefing, Business Intelligence from Dezan Shira & Associates <<http://www.china-briefing.com/news/2013/03/11/import-export-taxes-and-duties-in-china.html>> (accessed 18 February 2016).

## 1.3 Quarantine Law

### 1.3.1 What is Quarantine law?

Quarantine refers to measures that are adopted by a country to reduce the risk that imported items will introduce infectious diseases (caused by viruses, bacteria, or other micro-organisms) that then spread and establish in that country.<sup>133</sup>

Most countries have a quarantine and inspection service that manages quarantine controls at their borders. The goal is to minimise the risk of diseases and exotic pests entering the country. This will usually be done by import and export inspection and certification.

The service is likely to work closely with the customs and border protection services and operate at airports, seaports and mail centres. There may also be a connection with the government department responsible for food standards.

### 1.3.2 Quarantine law in China

Article 2 of the Law of the People's Republic of China on the Entry and Exit Animal and Plant Quarantine (1991) reads as follows:<sup>134</sup>

*Animals and plants, their products and other quarantine objects, containers and packaging materials used for carrying animals and plants, their products or other quarantine objects, as well as means of transport from animal or plant epidemic areas shall, on entry or exit, be subject to quarantine inspection in accordance with this Law.*

In the law, 'animal' refers to a live animals. The definition of 'animal products', which includes 'non-processed and processed product from animals still liable to spread epidemic diseases, such as .... aquatic animal products' (article 46(1)-(2)) would cover BDM.

GAQSIQ is the ministerial administrative organ operating directly under the State Council in charge of import and export commodity inspection countrywide.<sup>135</sup> It exercises its functions on the basis of a wide range of laws. It has established 35 entry-exit inspection and quarantine bureaus in China's 31 provinces, and has around 300 branches and more than 200 local offices.

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<sup>133</sup> See, e.g., *Quarantine*, The Department of Health <<http://www.health.gov.au/quarantine>> (accessed 18 February 2016).

<sup>134</sup> *Law of the People's Republic of China on the Entry and Exit Animal and Plan Quarantine* (People's Republic of China) National People's Congress, Order No. 53, 30 October 1991, at <[http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content\\_1383874.htm](http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content_1383874.htm)> (accessed 18 February 2016).

<sup>135</sup> *What is the function on aqsiq*, AQSIQ <<http://www.aqsiq.net/what-is-aqsiq.htm>> (accessed 18 February 2016).

GAQSIQ has established and regulates a Catalogue of Import and Export Commodities Subject to Compulsory Inspection (**the Catalogue**).<sup>136</sup> Inspection of imports and exports is to satisfy requirements for safety, sanitation, health, environmental protection, prevention of fraud, etc. This may involve looking at quality, quantity and weight.<sup>137</sup>

Verification and certification is carried out as part of the licensing system for importation. The consignees must provide 'contracts, invoices, packing lists, bills of lading and other necessary credence and the related approval documents when applying for inspection to the entry-exit inspection and quarantine bodies at the place of customs declaration'. Consignees are required to 'apply for inspection to the entry-exit inspection and quarantine bodies within 20 days after the commodities are released by the customs houses'. A commodity that is subject to statutory inspection that has not been inspected may not be sold or used.<sup>138</sup>

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<sup>136</sup> As required by *Regulations for the Implementation of the Law of the People's Republic of China concerning Import and Export Commodity Inspection* (People's Republic of China) State Council, Decree No. 447, 31 August 2005, Article 3 (at <[http://www.fdi.gov.cn/1800000121\\_39\\_739\\_0\\_7.html](http://www.fdi.gov.cn/1800000121_39_739_0_7.html)> (accessed 18 February 2016)). See also, e.g., *Entry-exit Inspection for Different Categories of Commodities* (18 March 2015) HKTDC Research <<http://china-trade-research.hktdc.com/business-news/article/Guide-to-Doing-Business-in-China/Entry-exit-Inspection-for-Different-Categories-of-Commodities/bgcn/en/1/1X000000/1X002LGT.htm>> (accessed 18 February 2016).

<sup>137</sup> *Regulations for the Implementation of the Law of the People's Republic of China concerning Import and Export Commodity Inspection*, *ibid*, Article 9.

<sup>138</sup> *Regulations for the Implementation of the Law of the People's Republic of China concerning Import and Export Commodity Inspection*, *ibid*, Article 16.

## 2. LAWS RELEVANT TO IMPORT OF BECHE-DE-MER IN HONG KONG

### 2.1 Hong Kong's trade policy: No customs tariff; minimal licences

Hong Kong 'has long operated as a major importing location and entrêpot for the BDM trade', in part attributable to 'its status as a freeport'.<sup>139</sup>

*Hong Kong follows a free trade policy and hence maintains basically no barriers on trade. There is no customs tariff on goods imported into or exported from Hong Kong. Import and export licensing are kept to a minimum. Most products do not need licences to enter or leave Hong Kong, and where licences or notifications are required, they are only intended to fulfil obligations under various international undertakings, or to apply for public health, safety or security reasons.*<sup>140</sup>

The Trade and Industry Department is the body responsible for import and export. The Department website sets out a summary of the Honk Kong Policy on Import and Export of Goods. It reads, in part, as follows:<sup>141</sup>

#### **Tariff**

*Hong Kong is a free port and does not levy any Customs tariff on imports or exports.*

#### **Rules of Origin**

*The certification system in Hong Kong is to facilitate local products to be exported outside Hong Kong by certifying their origins. Imports do not require origin certification.*

...

#### **Import and Export Licensing and Control**

*Certain goods are subject to import/export control in Hong Kong ...*

*The HKSAR Government Trade and Industry Department is the body responsible for conducting of Hong Kong's external commercial relations,*

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<sup>139</sup> Dr M Fabinyi and WorldFish, 'Fieldwork Report from Hong Kong SAR and Mainland China, 15-27 September, 2015', 3, citing various other sources.

<sup>140</sup> *Hong Kong's Trade Policy* (12 June 2015) HKTDC Research <<http://hong-kong-economy-research.hktdc.com/business-news/article/Small-Business-Resources/Hong-Kong-S-Trade-Policy/sbr/en/1/1X46GO2Y/1X006MVB.htm>> (accessed 18 February 2016).

<sup>141</sup> *Policy on Import and Export of Goods: A Quick Glance*, Trade and Industry Department, The Government of the Hong Kong Special Administrative Region", <[https://www.tid.gov.hk/english/import\\_export/ie\\_policy.html](https://www.tid.gov.hk/english/import_export/ie_policy.html)> (accessed 18 February 2016).

*certification of origin, and import / export licensing for textiles, strategic commodities and reserved commodities.*<sup>142</sup>

## 2.2 Import and export licensing and control: Controlled articles

### 2.2.1 List of the Controlled Goods in Hong Kong

Controlled goods refer to any goods the imports or exports of which is regulated under the Hong Kong's import and export regulations or any laws of HKSAR. The importation / exportation of such products must be covered by valid license, permit and / or certificate issued in advance by the relevant Hong Kong SAR Government departments or subject to other conditions.<sup>143</sup>

The Trade and Industry Department website sets out tables that list articles that are subject to import or export control in Hong Kong.<sup>144</sup>

Under the Harmonised System (discussed below), BDM (referred to in the Harmonised System as sea cucumbers) fall within the categories of:

- Live animals; animal products (Chapters 1-5), namely sea cucumbers that are:
  - for cultivation;
  - live (other than those for cultivation), fresh or chilled;
  - frozen, including those smoked; and
  - dried, salted or in brine, including those smoked; and
- Prepared foodstuffs; beverages; spirits & vinegar; tobacco (Chapters 16-24), namely sea cucumbers that are prepared or preserved.<sup>145</sup>

The table below identifies some examples of controls that apply to specific 'articles' that may be relevant to the import/export of BDM and BDM products.

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<sup>142</sup> *Hong Kong's Trade Policy* (12 June 2015) HKTDC Research <<http://hong-kong-economy-research.hktdc.com/business-news/article/Small-Business-Resources/Hong-Kong-S-Trade-Policy/sbr/en/1/1X46GO2Y/1X006MVB.htm>> (accessed 18 February 2016).

<sup>143</sup> *Hong Kong's Import/Export Control Requirements* (12 June 2015) HKTDC Research <<http://hong-kong-economy-research.hktdc.com/business-news/article/Small-Business-Resources/Hong-Kong-s-Import-Export-Control-Requirements/sbr/en/1/1X000000/1X006MNJ.htm>> (accessed 18 February 2016).

<sup>144</sup> The tables are organised by categories ('Article', 'Type of Control', 'Document Name/Form Number', and 'Control Authority' and can be located here: <[https://www.tid.gov.hk/english/import\\_export/oielc.html](https://www.tid.gov.hk/english/import_export/oielc.html)> (accessed 18 February 2016).

<sup>145</sup> *Finding Commodity Codes* (18 January 2016) Census and Statistics Department, The Government of the Hong Kong Special Administrative Region <<http://www.censtatd.gov.hk/trader/hscodex/index.jsp>> (accessed 18 February 2016).

### 2.2.2 Customs coding

Hong Kong has an Imports and Exports Classification List (Harmonized System) which is a full adoption of the Harmonised System (HS) that has been developed by the World Customs Organisation.<sup>146</sup> The HS is discussed further above, at 1.2.4.

### 2.3 Quarantine laws

In order to bring animals into Hong Kong, including animals in transit, the importer must hold a Special Permit to do so from the Agriculture, Fisheries and Conservation Department. The relevant ordinance is the *Public Health (Animals and Birds) Ordinance Cap 139*.<sup>147</sup> The other major quarantine law, as identified by the Agriculture, Fisheries and Conservation Department, is the *Rabies Ordinance Cap 421*.<sup>148</sup>

However, BDM does not appear to be regulated by these quarantine laws as it appears to fall outside of the relevant definitions:

- Under the *Public Health (Animals and Birds) Ordinance Cap 139*, 'animals' means 'cattle, sheep, goats, all other ruminating animals, swine, equines, and all other warm-blooded vertebrates except man and birds, and reptiles': s 2.
- For the purposes of *Rabies Ordinance Cap 421*, 'animal' means 'All members of the class Mammalia (mammals), except human beings'; 'animal products' means 'Parts or derivatives of' a dog, cat, or 'any animal that has been infected with rabies'; and 'carcasses' means carcasses of dogs, cats, 'any animal that has died on the journey to Hong Kong', and the 'undressed carcass of any animal': Schedules 1-3.<sup>149</sup>

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<sup>146</sup> *Hong Kong Imports and Exports Classification List (Harmonized System)* (16 June 2012) Census and Statistic Department, The Government of Hong Kong Special Administrative Region <<http://www.censtatd.gov.hk/hkstat/un/class/hkhs/index.jsp>> (accessed 18 February 2016).

<sup>147</sup> *Public Health (Animals and Birds) Ordinance Cap 139* (Hong Kong Special Administrative Region), Ch. 139 <[http://www.legislation.gov.hk/blis\\_pdf.nsf/6799165D2FEE3FA94825755E0033E532/194DC4B24628B17C482575EE0043DAB8/\\$FILE/CAP\\_139\\_e\\_b5.pdf](http://www.legislation.gov.hk/blis_pdf.nsf/6799165D2FEE3FA94825755E0033E532/194DC4B24628B17C482575EE0043DAB8/$FILE/CAP_139_e_b5.pdf)> (accessed 18 February 2016).

<sup>148</sup> *Rabies Ordinance Cap 421* (Hong Kong Special Administrative Region), Ch. 421 <[http://www.legislation.gov.hk/blis\\_pdf.nsf/6799165D2FEE3FA94825755E0033E532/6E042BF51B05B1D6482575EF00066184/\\$FILE/CAP\\_421\\_e\\_b5.pdf](http://www.legislation.gov.hk/blis_pdf.nsf/6799165D2FEE3FA94825755E0033E532/6E042BF51B05B1D6482575EF00066184/$FILE/CAP_421_e_b5.pdf)> (accessed 18 February 2016).

<sup>149</sup> This is supported, in part, by the (now over 20 years old) *Report on a Regional Study and Workshop on the Environmental Assessment and Management of Aquaculture Development* (1995): see P.S. Wong, 'Annex II-4 Hong Kong', which states: 'Presently there are no laws in Hong Kong requiring quarantine of imported live fish. Although the importance of quarantining fish is fully realised, such a system would be difficult to set up in view of the large volume of fish entering Hong Kong from different countries via different forms of transport. A quarantine service would not be cost-effective to run and is beyond the financial means of the industry' <<http://www.fao.org/docrep/field/003/ac279e/AC279E10.htm>> (accessed 18 February 2016).

### 3. EXCERPTS FROM CUSTOMS LAWS (MAINLAND CHINA)

#### 3.1 Customs Law of the People's Republic of China<sup>150</sup>

##### *Chapter 1 – General Provisions*

**Article 1** This Law is formulated for the purpose of safeguarding state sovereignty and national interests, strengthening Customs supervision and control, promoting exchanges with foreign countries in economic affairs, trade, science and technology, and culture and ensuring socialist modernization.

**Article 2** The Customs of the People's Republic of China is a governmental organization responsible for supervision and control over all arrivals in and departures from the Customs territory (hereinafter referred to as the territory). It shall, in accordance with this Law and other related laws and administrative regulations, exercise control over means of transport, goods, travellers' luggage, postal items and other articles entering or leaving the territory (hereinafter referred to as inward and outward means of transport, goods and articles), collect Customs duties and other taxes and fees, prevent and combat smuggling, compile Customs statistics and handle other Customs operations.

**Article 4** In the Customs General Administration, the State sets up a special police department responsible for the investigation of smuggling crimes, which is staffed with special anti-smuggling police officers and charged with the responsibility of conducting investigations, making detentions and arrests, and carrying out preliminary inquiries related to smuggling cases under its jurisdiction.

The police department responsible for the investigation of smuggling crimes shall fulfill its responsibility of conducting investigations, making detentions and arrests and carrying out preliminary inquiries in accordance with the Criminal Procedure Law of the People's Republic of China.

The police department responsible for the investigation of smuggling crimes may, based on relevant regulations of the State, set up its branch offices, which shall, in accordance with the law, hand over to the competent People's Procuratorate for prosecution of the smuggling cases of which they have completed investigations under their jurisdiction.

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<sup>150</sup> There appear to be a number of slightly varying translations available online. The extracts here are taken from the version published on the GACC website: <<http://english.customs.gov.cn/Statics/644dcaee-ca91-483a-86f4-bdc23695e3c3.html>> (accessed 18 February 2016). Another translation is available on the website of the World Intellectual Property Organisation: <<http://www.wipo.int/edocs/lexdocs/laws/en/cn/cn139en.pdf>> (accessed 18 February 2016).

Local public security organs at all levels shall assist the Customs police department responsible for the investigation of smuggling crimes to perform its duty according to law.

**Article 5** The State maintains a counter-smuggling mechanism of joint suppression, unified handling and comprehensive governance. The Customs General Administration is responsible for organizing, coordinating and managing counter-smuggling initiatives. Detailed regulations in this regard shall be formulated by the State Council.

Smuggling cases discovered by the concerned administrative enforcement departments and involving administrative penalties shall be handed over to the Customs for its settlement according to law; Those cases suspected of involving a crime shall be transferred to the Customs police department and local police department to be dealt with according to the division of their jurisdiction and following a legal procedure.

**Article 6** Customs shall exercise the following powers:

(a) to check inward and outward means of transport, examine inward and outward goods and articles, and detain those in violation of this Law or other relevant laws and administrative regulations;

(b) to examine the identification documents of persons entering or leaving the territory, interrogate the suspects violating this Law or other relevant laws and administrative regulations, and investigate the illegal activities thereof;

(c) to examine and replicate contracts, invoices, accounts, bills, records, documents, business letters and cables, audio and video products and other materials related to the inward and outward means of transport, goods and articles, and detain those relevant to the inward and outward means of transport, or goods and articles found in violation of this Law or other laws and administrative regulations;

(d) to search, within Customs surveillance zones and the designated coastal or land border area in the vicinity of a Customs office, the means of transport suspected of involving in smuggling activities, and the places suspected of concealing smuggled goods and articles, and search the body of smuggling suspects; to detain, subject to approval from the head of a regional Customs office or the head of its subordinate Customs office authorized by the former, the means of transport, and the goods and articles suspected of involving in smuggling activities, and the persons suspected of having committed a crime in smuggling; the length of detention of smuggling crime suspects shall be no longer than 24 hours, which may be extended to 48 hours under special circumstances; to search, while investigating a smuggling case beyond Customs surveillance zones and the designated coastal or land border area in the vicinity of a Customs office, subject to approval from the head of a

regional Customs or that from the head of its subordinate Customs authorized by the former, and with the presence of the persons concerned, the means of transport suspected of involving in smuggling activities, and the places suspected of concealing smuggled goods and articles other than citizens' residences. Provided a witness is present, the Customs is entitled to effect such examination without the presence of the person concerned and may detain the means of transport, goods, articles suspected of smuggling, as proved by evidence.

The designated coastal or land border areas shall be defined by the Customs General Administration and the public security department under the State Council in collaboration with the concerned provincial governments.

(e) to inquire while investigating a smuggling case, subject to approval from the head of a regional Customs or the head of its subordinate Customs authorized by the former, about the bank accounts and remittances of the suspected persons in financial institutions or postal services.

(f) to pursue, and continue to pursue beyond, Customs surveillance zones and the designated coastal or land border area in the vicinity of a Customs office, the means of transport or persons defying and escaping from Customs control for seizure and bring them back to be properly dealt with;

(g) to be equipped weapons to ensure proper fulfilment of its responsibility. Rules governing carriage and use of arms by Customs officers shall be formulated by the Customs General Administration in collaboration with public security department under the State Council, and approved by the State Council.

(h) to exercise other powers that is afforded to the Customs by the law and administrative regulations.

## ***Chapter II – Inward and outward goods (Articles 14-22)***

**Article 23** Import goods, throughout the period from the time of arrival in the territory to the time of accomplishment of all Customs formalities, export goods, throughout the period from the time of declaration to the Customs to the time of departure from the territory; and transit, transshipment and through goods, throughout the period from the arrival in the territory to the time of departure from the territory, shall be subject to Customs control.

**Article 24** The importer of import goods and the exporter of export goods shall make an accurate declaration and submit the import or export licensing documents and relevant papers to the Customs for examination. In the absence of import or export licensing

documents; goods subject to import or export restrictions by the State shall not be released. Specific measures for handling such matters shall be enacted by the State Council.

Declaration of import goods shall be made to the Customs by the importer within 14 days of the declaration of the arrival of the means of transport; declaration of export goods shall be made by the exporter upon the arrival of the goods at Customs surveillance zone, and 24 hours prior to loading unless otherwise specially approved by the Customs.

Where the importer fails to declare the import goods within the time limit prescribed in the proceeding paragraph, a fee for delayed declaration shall be imposed by the Customs.

**Article 25** Declaration for import and export goods shall be made in paper form and by electronic means.

**Article 26** After the acceptance by the Customs, goods declaration and the relevant documents as well as their contents are not allowed to be amended or withdrawn unless the reason is deemed valid and approved by the Customs.

**Article 27** Prior to the declaration, the importer of the import goods, upon the approval of the Customs, may check goods or draw samples. The goods required for quarantine according to law, shall not be drawn samples unless they are qualified for the quarantine standard.

**Article 28** All import and export goods shall be subject to Customs examination. While the examination is being carried out, the importer of the import goods or the exporter of the export goods shall be present and responsible for moving the goods and opening and restoring the package. The Customs shall be entitled to examine or re-examine the goods or take samples from them without the presence of the importer or the exporter whenever it considers this necessary.

Import and export goods may be exempted from examination if an application has been made by the importer or exporter and approved by the Customs General Administration.

**Article 29** Unless specially approved by the Customs, import and export goods shall be released upon Customs endorsement only after the payment of duties and taxes or the provision of security by the importer or exporter.

#### ***Chapter V – Customs Duties (Articles 53-65)***

**Article 53** Customs duties shall be collected on goods permitted to be imported or exported and on articles permitted to enter or leave the territory by the Customs according to law.

**Article 54** The importer of import goods, the exporter of export goods and the owner of inward and outward articles shall be the persons obliged to pay Customs duties.

**Article 55** The Customs valuation of import and export goods shall be determined by the Customs on the basis of the transaction value of the goods. If the transaction value cannot be ascertained, the Customs valuation shall be determined by the Customs according to law.

The Customs valuation of import goods shall include the value of the goods, cost of transport, charges associated with transport of the goods and cost of insurance occurred before the goods are unloaded at the entering point of the territory of the People's Republic of China; the Customs valuation of export goods shall include the value of the goods, cost of transport, charges associated with transport of the goods and cost of insurance occurred before the goods are loaded at the leaving point of the territory of the People's Republic of China, from which the amount of export duties shall be deducted.

The Customs valuation of inward and outward articles shall be determined by the Customs according to law.

#### ***Chapter VIII – Legal Responsibilities (Articles 82-99)***

**Article 82** Breach of this Law and relevant laws and administrative regulations, evasion of Customs control, defraud payable impost, elusion of national inward and outward prohibition or restriction in any of the situations listed below shall be deemed as smuggling:

(a) to transport, carry or mail into or out of the territory goods or articles the importation or exportation of which is prohibited or restricted by the State or goods or articles for which duties are payable according to law;

(b) to sell within the territory, without Customs permission and without payment of the payable duties or without producing relevant licenses, bonded goods, goods listed for specific duty reduction or exemption and other goods, articles or inward foreign means of transport under Customs control;

(c) to have other acts evading Customs supervision and control that constitute smuggling;

If any of the acts listed in the preceding paragraph does not constitute the crime of smuggling, the Customs may, while confiscating the smuggled goods, articles and illegal proceeds obtained therefrom, concurrently impose a fine on the person or persons concerned; goods or articles that are specially or repeatedly used for smuggling, means of transport that are specially or repeatedly used for smuggling shall be confiscated, equipment

specially made for concealing smuggled goods or articles shall be demolished or confiscated.

Where any of the acts listed in the first paragraph of this Article that constitutes a crime, the person or persons concerned shall be investigated for criminal liability according to law.

**Article 83** Any of the following acts shall be dealt with as smuggling and punished in accordance with the provisions of Article 82 of this Law:

(a) whoever purchases the imported goods or articles by smuggling directly and illegally from the smugglers;

(b) vessels and their crew members which transport, purchase or sell goods or articles prohibited or restricted by the State from being imported or exported, or transport, purchase or sell goods subject to duties and taxes according to law without legal certificates in inland sea, territorial waters, boundary rivers and boundary lakes.

**Article 92** Goods, articles or means of transport detained by Customs according to law shall not be disposed of before the People's Court makes a judgement or Customs makes a decision of punishment. However, hazard goods or such goods and articles not suitable for storage for a long time as fresh and live ones, perishable ones or easy to be expired ones and goods or articles that the owner applies to sell off in advance may, on approval of director of regional Customs or the authorized director of a subordinate Customs, be sold off in advance according to law, and Customs shall keep the money thus obtained and inform the owner of the goods or articles.

The smuggled goods or articles, illegal proceeds obtained therefrom, means of transport or equipment specially made for smuggling being confiscated by judgement of the People's Court or punishment decision of Customs shall be disposed by Customs according to law, the money thus obtained and the fine imposed by Customs shall be turned over to the State Treasury.

### 3.2 Regulations of the People's Republic of China on Import and Export Duties (2003)<sup>151</sup>

#### ***Chapter I – General Provisions (Articles 1-8)***

**Article 3** The State Council shall formulate the Customs Import and Export Tariff of the People's Republic of China (hereinafter referred to as the Tariff) and the Flat Duty Rates on Inward Articles of the People's Republic of China (hereinafter referred to as the Flat Duty Rates on Inward Articles), providing for tariff items, tariff headings and duty rates, which constitute component parts of these Regulations.

**Article 4** The State Council shall establish the Tariff Commission, which is responsible for making adjustment to and interpretation of tariff items, tariff headings and duty rates in the Tariff and the Flat Duty Rates on Inward Articles and implementing such adjustment and interpretation after they are submitted to and approved by the State Council; determining the goods subject to temporary duty rates and the rates and duration thereof; determining tariff quota rates; determining the imposition of anti-dumping duty, countervailing duty, safeguard duty, retaliatory duty or other tariff measures; determining the application of duty rates under special circumstances; and performing other functions and responsibilities prescribed by the State Council.

#### ***Chapter II – Composition and Application of Duty Rates (Articles 9-18)***

**Article 9** Duty rates on import goods are composed of most-favored-nation duty rates, conventional duty rates, special preferential duty rates, general duty rates, tariff quota duty rates, etc. Temporary duty rates may apply to import goods within a specific time limit.

Duty rates on export goods are designed to collect export duty. Temporary duty rates may apply to export goods within a specific time limit.

**Article 10** The most-favored-nation duty rates shall apply to import goods originated from members of the World Trade Organization that are subject to the common application of the most-favored-nation clause, import goods originated from countries or regions with which the People's Republic of China has concluded a bilateral trade agreement for reciprocally granting of most-favored-nation treatment, and import goods originated from the Customs territory of the People's Republic of China.

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<sup>151</sup> The extracts here are taken from the version published on the GACC website <<http://english.customs.gov.cn/Statics/d30338b4-2f6a-47ea-a008-cff20ec0a6d2.html>> (accessed 18 February 2016).

The conventional duty rates shall apply to import goods originated from countries or regions with which the People's Republic of China has concluded a regional trade agreement that comprises preferential duty clauses.

The special preferential duty rates shall apply to import goods originated from countries or regions with which the People's Republic of China has concluded a trade agreement that comprises special preferential duty clauses.

The general duty rates shall apply to import goods originated from countries or regions other than those specified in Paragraphs 1, 2 and 3 of this Article or to the import goods of undetermined origins.

### **3.3 Decree No. 2013: Measures of Customs of the People's Republic of China for Assessing and Determining the Duty-paid Value of Imported and Exported Goods (2014)<sup>152</sup>**

#### ***Chapter I – General Provisions (Articles 1-4)***

Article 1 The Measures are formulated, in accordance with the “Customs Law of the People's Republic of China” (hereinafter referred to as the "Customs Law") and the “Regulations of the People's Republic of China on Import and Export Duties”, for the purpose of correctly assessing and determining the duty-paid value of imported and exported goods.

Article 2 Custom houses shall observe the principles of objectiveness, fairness and unification when assessing and determining the duty-paid value of imported and exported goods.<sup>153</sup>

Article 3 Custom houses shall be governed by the Measures when assessing and determining the duty-paid value of imported and exported goods.

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<sup>152</sup> Available at

<http://tax.mofcom.gov.cn/tax/taxfront/en/article.jsp?c=30111&tn=1&id=882f648c51164f94ab86505a4b0ac627> (accessed 18 February 2015). Two research notes published by the Law Library of Congress provide insight into the authority and nature of such ‘Measures’ and ‘Decrees’: see <http://blogs.loc.gov/law/2014/01/a-guide-to-chinese-legal-research-who-makes-what/?loclr=bloglaw> and <http://blogs.loc.gov/law/2014/04/a-guide-to-chinese-legal-research-administrative-regulations-and-departmental-rules/> (accessed 18 February 2016). In summary, it appears that this measure is a Departmental Rule rather than an Administrative Regulation, as it appears to have been promulgated by the General Administration of Customs, not the State Council.

<sup>153</sup> The Chinese version of the law does not actually use the term “customs houses” rather they simply refer to ‘customs examination’ or ‘customs’. This translation is from the Ministry of Commerce and is not an official legal translation.

## **Chapter VII – Supplementary Provisions (Articles 51-55)**

Article 53 Whoever violates these Measures by constituting smuggling or any act of violating the customs surveillance provisions or commits other activities of violating the “Customs Law” shall be dealt with by the customs in light of the “Customs Law of the People’s Republic of China” and the “Detailed Rules of the Customs of the People’s Republic of China for the Implementation of Administrative Punishments”. Where a crime is constituted, the offender shall be subject to criminal liabilities.

### **3.4 Regulations of the People’s Republic of China on the Origin of Import and Export Goods (2004)<sup>154</sup>**

**Article 3** A country (region) shall be determined as the origin of the goods if these goods have been wholly obtained in such country (region); when more than one country (region) is concerned in the production of the goods, the country (region) where the last substantial transformation has been carried out shall be determined as the origin of these goods.

**Article 4** For purposes of Article 3 of these Regulations, the goods that have been wholly obtained in a country (region) refer to:

...

(2) animals captured, fished and gathered in the wild of the said country (region);

(3) products obtained from live animals of the said country (region) without further processing;

...

(9) products of sea fishing and other products taken from the sea outside the territorial waters of the said country by the vessels entitled to fly its flag;

(10) products processed on board the factory ships entitled to fly the flag of the said country exclusively from the products referred to in Item (9) of this Article;

(11) products taken from the seabed or subsoil beneath the seabed outside the territorial waters of the said country, provided that the country has the exclusive rights to exploit such seabed or subsoil;

(12) goods produced in the said country (region) exclusively from the products referred to in Items (1) to (11) of this Article.

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<sup>154</sup> This Regulation was promulgated by the State Council of the People’s Republic of China: <<http://english.customs.gov.cn/Statics/05f62cd8-aea3-49e6-9827-cdd88b351ed1.html>> (accessed 18 February 2016).

### 3.5 Regulations of the People's Republic of China on Customs Statistics (2005)<sup>155</sup>

**Article 4** All goods that actually pass through customs territory, which leads to increase or decrease in the stock of the materials in customs territory, shall be recorded in customs statistics.

The import and export articles that exceed the reasonable quantity for personal use shall be recorded in customs statistics.

**Article 6** The statistical items of import and export goods include:

- (1) description and code;
- (2) quantity and statistical value;
- (3) trading enterprises;
- (4) customs regime;
- (5) the mode of transport;
- (6) the country (region) of origin, country (region) of consignment, and domestic locations of importers for import goods;
- (7) the country (region) of final destination, country (region) of consignment, and domestic locations of exporters for export goods;
- (8) the date of import or export;
- (9) customs districts; and
- (10) other statistical items as prescribed by the General Administration of Customs.

The General Administration of Customs may, in light of the need of the national economic development and customs supervision and control, adjust the statistical items.

**Article 7** The description and code of import and export goods shall, in accordance with the Commodity Classification for Customs Statistics of the People's Republic of China, be classified and recorded.

The quantity of import and export goods shall be recorded in terms of the measurement units specified in the Commodity Classification for Customs Statistics of the People's Republic of China.

The Commodity Classification for Customs Statistics of the People's Republic of China shall be published by the General Administration of Customs.

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<sup>155</sup> Available at <<http://english.customs.gov.cn/Statics/55dd0995-11de-4e05-a7e3-0dd5c4364f27.html>> (accessed 18 February 2016).

**Article 9** For import goods, the countries (regions) of their origin, countries (regions) of their consignment and domestic locations of their importers shall be recorded respectively.

For export goods, the countries (regions) of their final destination, countries (regions) of their consignment and domestic locations of their exporters shall be recorded respectively.

**Article 10** The trading enterprises of import and export goods shall be recorded in terms of the legal persons, other organizations or individuals that register with the customs and engage in imports and exports.

**Article 12** The mode of transport of import and export goods shall be recorded in terms of the inward and outward modes of transport of the goods, including waterway transport, railway transport, road transport, air transport and other modes of transport.

**Article 13** The importing date of goods shall be recorded in terms of the date when the goods are released by the customs. The exporting date of goods shall be recorded in terms of the date when customs formalities are completed.

**Article 16** The General Administration of Customs shall, on a regular basis and free of charge, provide relevant comprehensive statistical data to the relevant departments of the State Council.

The customs directly under the General Administration of Customs shall, on a regular basis and free of charge, provide the relevant comprehensive statistical data to the relevant departments of the people's government of the province, autonomous region or municipality directly under the Central Government where the customs is located.

**Article 17** The customs shall establish a system for regular publication of statistical data and publish information on customs statistics.

The customs may provide statistical services according to the need of the public.

#### 4. EXCERPTS FROM QUARANTINE LAWS (MAINLAND CHINA)

##### 4.1 Law of the People's Republic of China on the Entry and Exit Animal and Plant Quarantine (1991)<sup>156</sup>

**Article 2** Animals and plants, their products and other quarantine objects, containers and packaging materials used for carrying animals and plants, their products or other quarantine objects, as well as means of transport from animal or plant epidemic areas shall, on entry or exit, be subject to quarantine inspection in accordance with this Law.

**Article 46** As used in this Law, the following terms respectively mean:

(1) "Animals" mean the live animals, whether domesticated or wild, such as livestock, poultry, beasts, snakes, tortoises, fishes, shrimps and prawns, crabs, shellfishes, silkworms and bees;

(2) "Animal products" mean the non-processed products or the processed products, from animals, still liable to spread epidemic diseases, such as raw hides, hairs, meats, viscerae, fat and grease, aquatic animal products, dairy products, eggs, blood, semens, embryos, bones, hoofs and horns;

...

##### 4.2 The Frontier Health and Quarantine Law of the People's Republic of China (2007)<sup>157</sup>

**Article 3** Infectious diseases specified in this Law shall include quarantinable infectious diseases and infectious diseases to be monitored.

Quarantinable infectious diseases shall include plague, cholera, yellow fever and other infectious diseases determined and announced by the State Council.

Infectious diseases to be monitored shall be determined and announced by health administration departments under the State Council.

**Article 4** Persons, conveyances and transport equipment, as well as articles such as baggage, goods and postal parcels that may transmit quarantinable infectious diseases,

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<sup>156</sup> Available at <[http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content\\_1383874.htm](http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content_1383874.htm)> (accessed 18 February 2016).

<sup>157</sup> Available at <[http://www.npc.gov.cn/englishnpc/Law/2009-02/25/content\\_1472449.htm](http://www.npc.gov.cn/englishnpc/Law/2009-02/25/content_1472449.htm)> (accessed 18 February 2016).

shall undergo quarantine inspection upon entering or exiting the country. No entry or exit shall be allowed without the permission of a frontier health and quarantine office. Specific measures for implementation of this Law shall be stipulated in detailed regulations.

#### **4.3 Regulations for the Implementation of the Law of the People's Republic of China concerning Import and Export Commodity Inspection (2005)<sup>158</sup>**

##### ***Chapter I – General Rules (Articles 1-16)***

**Article 2** The General Administration of Quality Supervision, Inspection and Quarantine of the People's Republic of China (hereinafter referred to as the GAQSIQ) shall be in charge of import and export commodity inspection countrywide.

The entry-exit inspection and quarantine bureaus and their organs which are established by the GAQSIQ at the provinces, autonomous regions, and municipalities directly under the Central Government, as well as at the ports, and the distribution centers of import and export commodities (hereinafter referred to as the entry-exit inspection and quarantine bodies) shall be responsible for the import and export commodity inspection at the place under their jurisdictions.

**Article 3** In accordance with the provisions of Article 4 of the Commodity Inspection Law, the GAQSIQ shall establish and regulate the Catalog of Import and Export Commodities Subject to Compulsory Inspection (hereinafter referred to as the Catalog), and shall propagate the Catalog for implementation as well.

**Article 9** The contents of inspection on import and export commodities that is conducted by the entry-exit inspection and quarantine bodies shall comprise: whether the commodities satisfy such requirements as safety, sanitation, health, environmental protection, prevention of fraud, etc., and the related quality, quantity and weight, and other items.

**Article 10** In accordance with the provisions of the Commodity Inspection Law, the entry-exit inspection and quarantine bodies shall implement verification administration on the import and export commodities subject to the license system and the compulsory certification as prescribed by the state, check and examine the documentations and verify whether the documentations and the commodities comply with each other or not.

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<sup>158</sup> Available at <[http://www.fdi.gov.cn/1800000121\\_39\\_739\\_0\\_7.html](http://www.fdi.gov.cn/1800000121_39_739_0_7.html)> (accessed 18 February 2016). Another translation is available here: <<http://www.asianlii.org/cn/legis/cen/laws/irftlotprocoioiaec1072/>> (accessed 18 February 2016).

## ***Chapter II – Inspection on Import Commodities (Articles 16-23)***

**Article 16** The consignees of the import commodities subject to statutory inspection shall provide contracts, invoices, packing lists, bills of lading and other necessary credence and the related approval documents when applying for inspection to the entry-exit inspection and quarantine bodies at the place of customs declaration; and the consignees shall, in light of the provisions of Article 18 of these Regulations, apply for inspection to the entry-exit inspection and quarantine bodies within 20 days after the commodities are released by the customs houses. If any import commodity subject to statutory inspection has not been inspected, it may not be sold or used.

**Article 17** The import commodities subject to statutory inspection and the import commodities subject to verification administration shall handle customs clearance formalities with the customs clearance form of goods issued by the entry-exit inspection and quarantine bodies.

**Article 19** If any import commodity subject to statutory inspection fails to satisfy the requirements after inspection in terms of personal or property safety, health and environmental protection, the parties concerned shall be ordered by the entry-exit inspection and quarantine body to destroy the aforesaid commodity, or be issued a notice on returning the commodity and customs house shall be informed in written form, and then the customs house shall handle the formalities for returning the shipment upon the said notice, unless it is otherwise specified by any law or administrative regulation. If other items of the commodity fail to meet the standards, technical treatment shall be performed on it under the surveillance of the entry-exit inspection and quarantine body, no commodity may be sold or used until it has met the standard after re-inspection. In case of any application of the party concerned to the entry-exit inspection and quarantine body for issuing certificate, the entry-exit inspection and quarantine body shall issue the certificate timely.

**Article 20** Where the import commodities that are not subject to statutory inspection fail to pass the random inspection of the entry-exit inspection and quarantine bodies, they shall be disposed in accordance with the provisions of Article 19 of these Regulations

Where any import commodities subject to verification administration fail to pass the verification of the entry-exit inspection and quarantine body, they shall be disposed pursuant to the provisions of Article 19 of these Regulations or forwarded to the related departments for disposal.

## PART E.INTERNATIONAL LAWS & POLICIES RELEVANT TO THE BECHE-DE-MER FISHERY

### 1. TABLE OF INTERNATIONAL LAWS & POLICIES RELEVANT TO THE BECHE-DE-MER FISHERY

Law/policy name	Year	Extract/summary and comments
<b>1.1 International Conventions<sup>159</sup></b>		
<b>Convention on International Trade of Endangered Species of Wild Fauna and Flora (CITES)<sup>160</sup></b>	1973	<ul style="list-style-type: none"> <li>• PNG acceded to CITES in 1975.<sup>161</sup></li> <li>• CITES seeks to protect certain species of wild fauna and flora against over-exploitation through international trade.<sup>162</sup></li> <li>• CITES applies to the trade of species that are listed in Appendices I-III to the Convention:               <ul style="list-style-type: none"> <li>○ Appendix I: Species threatened with extinction and which are or may be affected by trade. Trade in these species is subject to particularly strict regulation and must only be authorised in exceptional circumstances (Art II.1).</li> <li>○ Appendix II: Species which may become threatened with extinction unless trade is strictly regulated, and any other species whose regulation is necessary to protect those which may become threatened by extinction (Art II.2)</li> </ul> </li> </ul>

<sup>159</sup> This document does not discuss agreements of the World Trade Organisation (**WTO**) that may be relevant to regulation of the BDM fishery in PNG.

<sup>160</sup> *Convention on International Trade in Endangered Species of Wild Fauna and Flora*, 993 UNTS 243 (3 March 1973)

<<https://www.cites.org/eng/disc/text.php>> (accessed 21 December 2015) ('CITES').

<sup>161</sup> *List of Contracting Parties*, Convention on International Trade in Endangered Species of Wild Fauna and Flora,

<<https://www.cites.org/eng/disc/parties/chronolo.php>> (accessed 21 December 2015).

<sup>162</sup> *CITES*, Preamble.

Law/policy name	Year	Extract/summary and comments
		<ul style="list-style-type: none"> <li>○ Appendix III: All species which any party identifies as being subject to regulation within its jurisdiction for the purpose of prevention or restricting exploitation, and as needing the co-operation of other parties in the control of trade (Art II.3).</li> <li>• The only species of beche-de-mer (<b>BDM</b>) listed in an appendix to CITES is <i>Isostichopus fuscus</i> (brown sea cucumber) in Ecuador, which is categorised in Appendix III.</li> <li>• There has been some discussion about the benefits listing BDM found in PNG under CITES. According to Bruckner, Johnson and Field (2003) and Sant (2006), sea cucumber in PNG could qualify for an Appendix II listing.<sup>163</sup> At present, the International Union for the Conservation of Nature (<b>IUCN</b>) has listed some species of BDM on its red list,<sup>164</sup> of which six are identified as being found in PNG.<sup>165</sup></li> </ul>
<b>United Nations Convention on the Law of the Sea (UNCLOS)</b> <sup>166</sup>	1982	<ul style="list-style-type: none"> <li>• PNG signed UNCLOS in 1982 and ratified in 1975.<sup>167</sup></li> <li>• PNG falls with the UNCLOS definition of an 'archipelagic state', meaning it is 'a State constituted wholly by one or more archipelagos and may include other islands', where</li> </ul>

<sup>163</sup> Jeff Kinch, Steve Purcell, Sven Uthicke and Kim Friedman, 'Papua New Guinea: a hotspot of sea cucumber fisheries in the Western Central Pacific' in Toral-Granda, Lovatelli and Vasconcellos (eds) *Sea cucumbers: A global review of fisheries and trade* (Food and Agricultural Organisation of the United Nations, 2008) 57-77, 70, <<http://www.fao.org/3/a-i0375e/i0375e02.pdf>> (accessed 17 December 2015).

<sup>164</sup> International Union for Conservation of Nature and Natural Resources, *The IUCN Red List of Threatened Species* (Version 2015-3), IUCN Red List <[www.iucnredlist.org](http://www.iucnredlist.org)> (accessed 5 November 2015).

<sup>165</sup> *Actinopyga caerulea* (Blue Sea Cucumber), *Bohadschia marmorata* (Chalky Cucumber), *Holothuria cinerascens* (Ashy Sea Cucumber), *Holothuria impatiens* (Bottleneck Sea Cucumber), *Pearsonothuria graeffei* (Blackspotted Sea Cucumber), *Stichopus horrens* (Selenka's Sea Cucumber): Ibid.

<sup>166</sup> *United Nations Convention on the Law of the Sea*, <[http://www.un.org/depts/los/convention\\_agreements/texts/unclos/unclos\\_e.pdf](http://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf)> (entered into force from 16 November 1994) (accessed 21 December 2015).

<sup>167</sup> United Nations, 'Status of the United Nations Convention on the Law of the Sea', <[http://www.un.org/depts/los/reference\\_files/status2010.pdf](http://www.un.org/depts/los/reference_files/status2010.pdf)> (accessed 21 December 2015).

Law/policy name	Year	Extract/summary and comments
		<p>'archipelago' means 'a group of islands, including parts of islands, interconnecting waters and other natural features which are so closely interrelated that such islands, waters and other natural features form an intrinsic geographical, economic and political entity, or which historically have been regarded as such' (Art 46).</p> <ul style="list-style-type: none"> <li>• Part IV of UNCLOS deals specifically with archipelagic States (Arts 46-54).</li> <li>• PNG has sovereignty over its archipelagic waters, being the waters enclosed by its archipelagic baselines (drawn in accordance with Art 47), regardless of the depth of its archipelagic waters or their distance from the coast (Art 49(1)). Sovereignty over the archipelagic waters includes 'their bed and subsoil, and the resources contained therein' (Art 49(2)).</li> <li>• Nevertheless, PNG is required to respect existing agreements with other States and must recognize traditional fishing rights and other legitimate activities of the immediately adjacent neighbouring states in certain areas falling within archipelagic waters. The terms and conditions of such rights are to be regulated by bilateral agreements with the relevant other State (Art 51(1)).</li> <li>• PNG has entered into such agreements with Australia (the Torres Strait Treaty), Indonesia, Solomon Islands, and the Federated States of Micronesia.<sup>168</sup></li> </ul>

<sup>168</sup> Papua New Guinea National Assessment Report on the Implementation of the Barbados Programme of Action (BPoA) for the Sustainable Development of Small Islands Developing States, Mauritius 2005, <[http://www.sprep.org/att/IRC/eCOPIES/Countries/Papua\\_New\\_Guinea/6.pdf](http://www.sprep.org/att/IRC/eCOPIES/Countries/Papua_New_Guinea/6.pdf)> (accessed 17 December 2015).

Law/policy name	Year	Extract/summary and comments
<b>Convention on Biological Diversity (CBD)</b> <sup>169</sup>	1992	<ul style="list-style-type: none"> <li>• PNG ratified the CBD in 1993.<sup>170</sup></li> <li>• All parties must, in accordance with their conditions and capabilities: <ul style="list-style-type: none"> <li>○ develop national strategies, plans or programmes for the conservation and sustainable use of biological diversity, or adapt existing strategies, plans or programmes for this purpose; and</li> <li>○ integrate, as far as possible and appropriate, the conservation and sustainable use of biological diversity into relevant sector or cross-sectoral plans, programmes or policies.<sup>171</sup></li> </ul> </li> <li>• All parties must present reports to the Conference of the Parties (COP) at intervals to be determined by the COP. These reports must detail measures the party has taken to implement the provisions of the CBD and their effectiveness at meeting the CBD's objectives.<sup>172</sup></li> <li>• <b>National strategy:</b> PNG's National Biodiversity Strategy and Action Plan was submitted in 2007.<sup>173</sup> It does not make any reference to BDM.</li> <li>• <b>National reports:</b> PNG's fourth National Report, submitted in 2010, refers to BDM as a species present in the 'Trobriand Reef and Drop' marine priority area, an area within the Milne</li> </ul>

<sup>169</sup> *Convention on Biological Diversity (CBD)*, opened for signature 5 June 1992 (entered into force 29 December 1993), <<https://www.cbd.int/convention/text/>> (accessed 21 December 2015).

<sup>170</sup> *List of Parties*, Convention on Biological Diversity <<https://www.cbd.int/information/parties.shtml>> (accessed 21 December 2015).

<sup>171</sup> CBD, Art 6.

<sup>172</sup> CBD, Art 26,

<sup>173</sup> *Papua New Guinea National Biodiversity Strategy and Action Plan (2007)* <<https://www.cbd.int/doc/world/pg/pg-nbsap-01-en.pdf>> (accessed 17 December 2015).

Law/policy name	Year	Extract/summary and comments
		Bay Area ecoregion identified as in need of protection and integrated management. <sup>174</sup>
<b>Agreement for the implementation of the provisions of the United Nations Convention on the Law of the Sea (1995 Fish Stocks Agreement)<sup>175</sup></b>	1995 <small>176</small>	<ul style="list-style-type: none"> <li>• The 1995 Fish Stocks Agreement was adopted in 1995 and came into force in December 2001.<sup>177</sup></li> <li>• PNG ratified the 1995 Fish Stocks Agreement in 1999.<sup>178</sup></li> <li>• The purpose of the 1995 Fish Stocks Agreement is to facilitate the implementation of provision of UNCLOS that relate to the conservation and management of straddling fish stocks and highly migratory fish stocks.<sup>179</sup></li> <li>• Among other things, Article 5 (General principles) requires Parties to:               <ul style="list-style-type: none"> <li>○ ‘adopt, where necessary, conservation and management measures for species belonging to the same ecosystem or associated with or dependent upon the target stocks’ (Art 5(e));</li> <li>○ ‘protect biodiversity in the marine environment’ (Art 5(g));</li> <li>○ ‘take measures to prevent or eliminate overfishing and excess fishing capacity’ (Art 5(h)); and</li> </ul> </li> </ul>

<sup>174</sup> Papua New Guinea’s Fourth National Report to the Convention on Biological Diversity (2010) <<https://www.cbd.int/doc/world/pg/pg-nr-04-en.pdf>> (accessed 17 December 2015).

<sup>175</sup> 1995 Fish Stocks Agreement, UN Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks 6<sup>th</sup> sess, UN Doc A/Conf 164.37 (8 September 1995) [http://www.un.org/Depts/los/convention\\_agreements/texts/fish\\_stocks\\_agreement/CONF164\\_37.htm](http://www.un.org/Depts/los/convention_agreements/texts/fish_stocks_agreement/CONF164_37.htm) (accessed 21 December 2015).

<sup>176</sup> Entered into force in 2001.

<sup>177</sup> See *Fisheries and aquaculture governance*, Food and Agriculture Organization of the United Nations <<http://www.fao.org/fishery/topic/13701/en>> (accessed 21 December 2015).

<sup>178</sup> See <[https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XXI-7&chapter=21&lang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXI-7&chapter=21&lang=en)> (accessed 21 December 2015).

<sup>179</sup> See *Fisheries and aquaculture governance*, above n 177.

Law/policy name	Year	Extract/summary and comments
		<ul style="list-style-type: none"> <li>○ 'take into account the interests of artisanal and subsistence fishers' (Art 5(i)).</li> <li>● 'It is considered to be the most important legally binding global instrument adopted for the conservation and management of fishery resources since the adoption of [UNCLOS]'.<sup>180</sup></li> </ul>
<b>1.2 Regional Laws</b>		
<b>Convention on the Protection of the Natural Resources and Environment of the South Pacific Region (Noumea Convention)<sup>181</sup></b>	1986	<ul style="list-style-type: none"> <li>● PNG ratified the Noumea Convention in 1989.<sup>182</sup></li> <li>● The Noumea Convention has two protocols, both of which PNG has ratified: <ul style="list-style-type: none"> <li>○ The Protocol for the Prevention of Pollution of the South Pacific Region by Dumping (1990); and</li> <li>○ Protocol Concerning Co-operation in Combating Pollution Emergencies in the South Pacific Region (1990).<sup>183</sup></li> </ul> </li> <li>● The 'Convention Area' is defined in Article 2(a); it includes (among others) the 200 nautical mile zone off PNG established in accordance with international law.</li> <li>● Parties have committed to conclude bilateral or multilateral agreements, including regional and sub-regional agreements, for the protection, development and management of the marine and</li> </ul>

<sup>180</sup> Above n 175.

<sup>181</sup> *Noumea Convention for the Protection of the Natural Resources and Environment of the South Pacific Region*, opened for signature on 25 November 1986, entered into force 22 August 1990, <[https://www.sprep.org/attachments/Legal/Files\\_updated\\_at\\_2014/NoumeaConvProtocols.pdf](https://www.sprep.org/attachments/Legal/Files_updated_at_2014/NoumeaConvProtocols.pdf)> (accessed 21 December 2015). The Noumea Convention is also known as the SPREP Convention.

<sup>182</sup> See *Status as at March 2014 of the Apia, Noumea (or SPREP) and Waigani Conventions for which SPREP is the Secretariat*, SPREP <[http://www.sprep.org/attachments/Legal/Files\\_updated\\_at\\_2014/Parties\\_to\\_the\\_Regional\\_Conventions\\_copy.pdf](http://www.sprep.org/attachments/Legal/Files_updated_at_2014/Parties_to_the_Regional_Conventions_copy.pdf)> (accessed 21 December 2015).

<sup>183</sup> There are two more protocols, signed by the parties in 2006, although they are not yet in force: see *The Convention*, SPREP <<https://www.sprep.org/legal/the-convention>> (accessed 22 February 2016) and *Countries: Parties and Signatories of the Conventions and Protocols*, SPREP <<https://www.sprep.org/legal/countries-noumea>> (accessed 22 February 2016).

Law/policy name	Year	Extract/summary and comments
		<p>coastal environment of the Convention Area (which includes PNG).<sup>184</sup></p> <ul style="list-style-type: none"> <li>• Parties are required to ensure sound environmental management and development of natural resources, using the best practical means at their disposal and in accordance with their capabilities.<sup>185</sup> In doing so, Parties are required to ‘endeavour to harmonize their policies at the regional level’.<sup>186</sup></li> <li>• Article 14 specifically deals with ‘Specially protected areas and protection of wild flora and fauna’. It requires the Parties to: <ul style="list-style-type: none"> <li>individually or jointly, take all appropriate measures to protect and preserve rare or fragile ecosystems and depleted, threatened or endangered flora and fauna as well as their habitat in the Convention Area. To this end, the Parties shall, as appropriate, establish protected areas, such as parks and reserves, and prohibit or regulate any activity likely to have adverse effects on the species, ecosystems or biological processes that such areas are designed to protect. ...<sup>187</sup></li> </ul> </li> <li>• Other obligations include: <ul style="list-style-type: none"> <li>○ Co-operate with other states to adopt other protocols to the Convention to promote environmental management (Article 5 (3)).</li> <li>○ Co-operate with competent global regional and sub-regional organisations to establish and adopt recommended practices, procedures and measures (Article 5 (4)).</li> </ul> </li> </ul>

<sup>184</sup> Noumea Convention, Article 4(1).

<sup>185</sup> Noumea Convention, Article 5(1).

<sup>186</sup> Noumea Convention, Article 5(1).

<sup>187</sup> Noumea Convention, Article 14.

Law/policy name	Year	Extract/summary and comments
		<ul style="list-style-type: none"> <li>○ Establish laws and regulations for the effective discharge of the obligations prescribed in the Convention (Article 5 (5)).</li> </ul>
<b>Apia Convention for the Conservation of Nature in the South Pacific<sup>188</sup> (Apia Convention)</b>	1990 <sup>189</sup>	<ul style="list-style-type: none"> <li>• The Apia Convention was signed in 1976 and came into force in 1990. The Convention stresses the creation of protected areas, and the continued existence of national parks, restricting their exploitation for commercial profit.</li> <li>• The Apia Convention has been ratified by only five countries, comprising four countries within the region (Australia, Cook Islands, Fiji and Samoa), together with France. PNG signed the Apia Convention in 1976 but has not ratified it.<sup>190</sup></li> <li>• The Apia Convention is a document of declining significance within the region. The Convention has been overtaken in many respects by an increasing perception within the South Pacific that the aspirations of the Apia Convention can be better pursued under the Environment Action Plan for the region.<sup>191</sup></li> <li>• <i>NB: The Apia Convention was suspended until future notice in 2006, at the Eighth Meeting of the Parties in 2006.</i></li> </ul>
<b>Niue Treaty on Cooperation in Fisheries Surveillance and Law</b>	1992	<ul style="list-style-type: none"> <li>• PNG ratified the Niue Treaty in 1994.<sup>193</sup></li> <li>• The Niue treaty is an agreement between the members of the Pacific Islands Forum Fisheries</li> </ul>

<sup>188</sup> See: *Apia Convention*, Secretariat of the Pacific Regional Environment Programme <<https://www.sprep.org/legal/meetings-apia-convention>> (accessed 22 February 2016) ('*Apia Convention*').

<sup>189</sup> Signed in 1976; entered into force in 1990.

<sup>190</sup> See *Status as at March 2014 of the Apia, Noumea (or SPREP) and Waigani Conventions for which SPREP is the Secretariat*, above n 182.

<sup>191</sup> See B Boer et al, *International Environmental Law in the Asia Pacific* (Kluwer Law International, 2008), 115.

Law/policy name	Year	Extract/summary and comments
<b>Enforcement in the South Pacific Region (Niue Treaty)</b> <sup>192</sup>		<p>Agency (<b>FFA</b>). The FFA has 17 members. It was ‘established to help countries sustainably manage their fishery resources that fall within their 200 mile Exclusive Economy Zones (EEZs)’.<sup>194</sup></p> <ul style="list-style-type: none"> <li>• ‘Fishing’ is defined quite broadly (Art I) and would encompass fishing by hand of BDM.</li> <li>• Parties are required to (among other things): <ul style="list-style-type: none"> <li>○ ‘cooperate in the enforcement of their fisheries laws and regulations in accordance with this Treaty’;<sup>195</sup> and</li> <li>○ ‘cooperate in the implementation of harmonised minimum terms and conditions of fisheries access.’<sup>196</sup></li> </ul> </li> <li>• The Niue Treaty also provides for: <ul style="list-style-type: none"> <li>○ Information-exchange between parties and with the FFA;<sup>197</sup></li> <li>○ cooperation in fisheries surveillance and law enforcement;<sup>198</sup></li> <li>○ cooperation between Parties in prosecution of offences against national fisheries laws.<sup>199</sup></li> </ul> </li> </ul>

<sup>193</sup> See *Niue Treaty Subsidiary Agreement Development Workshop: FFA Report 04/16*, (2004), 3, <[http://www.spc.int/DigitalLibrary/Doc/FAME/FFA/Reports/FFA\\_2004\\_016.pdf](http://www.spc.int/DigitalLibrary/Doc/FAME/FFA/Reports/FFA_2004_016.pdf)> (accessed 21 December 2015).

<sup>192</sup> *Niue Treaty on Cooperation in Fisheries Surveillance and Law Enforcement in the South Pacific Region* (entered into force 20 May 1993) <[https://www.ffa.int/system/files/Niue%20Treaty\\_0.pdf](https://www.ffa.int/system/files/Niue%20Treaty_0.pdf)> (accessed 21 December 2015).

<sup>194</sup> *Who we are*, Pacific Islands Forum Fisheries Agency (FFA) <<https://www.ffa.int/about>> (accessed 21 December 2015).

<sup>195</sup> Niue Treaty, Article III.1.

<sup>196</sup> Niue Treaty, Article IV.

<sup>197</sup> Niue Treaty, Article V.

<sup>198</sup> Niue Treaty, Article VI.

<sup>199</sup> Niue Treaty, Article VII-VIII.

Law/policy name	Year	Extract/summary and comments
<b>1.3 International policies</b>		
<b>UN Resolutions on Sustainable Fisheries</b>	Various	<ul style="list-style-type: none"> <li>The UN General Assembly has adopted a number of resolutions on sustainable fisheries. Prior to 2004, these referred to 'unauthorised fishing in zones of national jurisdiction and its impact on the living marine resources of the world's oceans and seas'; since 2004, these resolutions have referred to illegal, unreported and unregulated fishing' and its threat to sustainable fisheries.</li> </ul>
<b>Agenda 21<sup>200</sup></b>	1992	<ul style="list-style-type: none"> <li>PNG attended the United National Conference on Environment and Development in 1992 at which Agenda 21, a non-binding action plan for sustainable development, was adopted.<sup>201</sup></li> <li>Chapter 17 of Agenda 21 is of particular relevance as it deals with: <ul style="list-style-type: none"> <li>Protection of the oceans, all kinds of seas, including enclosed and semi-enclosed seas and coastal areas and the protection rational use and development of their living resources.<sup>202</sup></li> </ul> </li> <li>Chapter 17 identifies seven programme areas which area identified as necessary to pursue the obligation under UNCLOS for States to 'pursue the protection and sustainable development of the marine and coastal environment and its resources' (Ch 17. cl 17.1). One of these areas is 'sustainable use and conservation of marine living resources under national</li> </ul>

<sup>200</sup> *Agenda 21*, United Nations Conference on Environment & Development, <<http://www.unep.org/Documents.Multilingual/Default.asp?documentid=52>> (accessed 21 December 2015).

<sup>201</sup> *Report of the United Nations Conference on Environment and Development*, A/CONF.151/26 (28 September 1992), Ch II (Attendance and organization of work) <<http://www.un.org/documents/ga/conf151/aconf15126-4.htm>> (accessed 21 December 2015).

<sup>202</sup> *Agenda 21*, Ch 17, <<http://www.unep.org/Documents.Multilingual/Default.asp?DocumentID=52&ArticleID=65&I=en>> (accessed 17 December 2015).

Law/policy name	Year	Extract/summary and comments
		<p>jurisdiction' (Ch 17, cl 17.1(d)).</p> <ul style="list-style-type: none"> <li>This programme area is dealt with in more detail in clauses 17.70-17.96. In clause 17.75, States 'commit themselves to the conservation and sustainable use of marine living resources under national jurisdiction'. The clause goes on to recognise a number of actions and outcomes that are necessary to achieving this, including the maintenance or restoration of 'populations of marine species at levels that can produce the maximum sustainable yield as qualified by relevant environmental and economic factors, taking into consideration relationship among species' (Cl 17.5(c)).</li> </ul>
<b>Barbados Programme of Action for the Sustainable Development of Small Island Developing States (Barbados Programme of Action) and Declaration of Barbados</b> <sup>203</sup>	1994	<ul style="list-style-type: none"> <li>PNG attended the Global Conference on the Sustainable Development of Small Island Developing States, at which the Barbados Programme of Action and the Declaration of Barbados were adopted.<sup>204</sup></li> <li>Relevant parts of the Barbados Programme of Action include Part IV which deals with 'Coastal and Marine Resources', and part IX, which deals with 'biodiversity resources'. Both contain activities around national action, policies and measures, regional action and international action.<sup>205</sup></li> </ul>
<b>CBD: Decision V/6 of the Fifth Ordinary Meeting of the</b>	2000	<ul style="list-style-type: none"> <li>At the Fifth Ordinary Meeting of the COP to the CBD, the COP adopted the 'ecosystem approach', including recognition of the need to integrate the ecosystem approach into fisheries</li> </ul>

<sup>203</sup> See *Report of the Global Conference on the Sustainable Development of Small Island Developing States*, Global Conference on the Sustainable Development of Small Island Developing States, UNGA A/Conf 167/9, <[http://www.un.org/esa/dsd/dsd\\_aofw\\_sids/sids\\_pdfs/BPOA.pdf](http://www.un.org/esa/dsd/dsd_aofw_sids/sids_pdfs/BPOA.pdf)> (accessed 21 December 2015).

<sup>204</sup> Ibid, see *Chapter I: Resolutions Adopted by the Conference, Resolution 1*.

<sup>205</sup> Ibid, see *Barbados Programme of Action*, paras 25-26 (Part IV) and 41-45 (Part IX).

Law/policy name	Year	Extract/summary and comments
<b>Conference of the Parties to the Convention on Biological Diversity (COP 5)</b>		'and other production systems that have an effect on biodiversity' in Decision V/7 of that meeting. <sup>206</sup>
<b>Johannesburg Declaration on Sustainable Development (Johannesburg Declaration) and the Plan of Implementation of the World Summit on Sustainable Development (Johannesburg Plan of Implementation)<sup>207</sup></b>	2002	<ul style="list-style-type: none"> <li>• PNG was represented at the 2002 World Summit on Sustainable Development, at which the Johannesburg Declaration and the Johannesburg Plan of Implementation were adopted.<sup>208</sup></li> <li>• Part IV of the Plan of Implementation deals with 'protecting and managing the natural resource base of economic and social development'. Paragraph 31 lists actions required to 'achieve sustainable fisheries'.</li> </ul>
<b>CBD: Decision VII/5 of the Seventh Meeting of the COP: Programme of Work on Marine</b>	2004	<ul style="list-style-type: none"> <li>• At the Seventh Meeting of the COP to the CBD, the COP adopted Programme of Work on Marine and Coastal Biodiversity, set out as Annex I to Decision VII/5.</li> <li>• The Programme of Work has five key programme elements, the second of which deals with</li> </ul>

<sup>206</sup> Conference of the Parties to the Convention on Biological Diversity, *Decision V/6. Ecosystem approach*, 5<sup>th</sup> Meeting, UNEP/CBD/COP/5/23, [12], <<https://www.cbd.int/decision/cop/?id=7148>> (accessed 17 December 2015).

<sup>207</sup> *World Summit on Sustainable Development: Johannesburg Declaration on Sustainable Development*, A/CONF.199/20 (4 September 2002) <<http://www.un-documents.net/jburgdec.htm>> (accessed 17 December 2015) ('*Johannesburg Declaration*'); *World Summit on Sustainable Development: Plan of Implementation of the World Summit on Sustainable Development*, A/Conf.199/20 (4 September 2002) <<http://www.un-documents.net/jburgpln.htm>> (accessed 17 December 2015) ('*Johannesburg Plan of Implementation*').

<sup>208</sup> *Report of the World Summit on Sustainable Development, Johannesburg Declaration*, UN A/Conf 199/20 (4 September 2002) Ch II (Attendance and organization of work) <<http://www.un-documents.net/jburgdec.htm>> (accessed 17 December 2015).

Law/policy name	Year	Extract/summary and comments
<b>and Coastal Biological Diversity</b> <sup>209</sup>		marine and coastal living resources, the goal being to ensure the conservation and sustainable use of these resources. To achieve this goal, it suggests eliminating destructive fishing practices and restoring and maintaining fisheries stocks to sustainable levels by 2015, including through financial assistance to developing countries, in particular SIDS, for improved enforcement, surveillance and patrolling, and recognises the importance of sustainable fishing practices, including traditional fishing practices. <sup>210</sup>
<b>Mauritius Strategy for the Further Implementation of the Programme of Action for the Sustainable Development of Small Island Developing States (Mauritius Strategy)</b> <sup>211</sup>	2005	<ul style="list-style-type: none"> <li>• PNG attended the Second International Conference on SIDS, which led to the adoption of the Mauritius Declaration and the Mauritius Strategy.<sup>212</sup></li> <li>• Part IV of the Mauritius Strategy deals with coastal and marine resources. <ul style="list-style-type: none"> <li>○ Paragraphs 27 and 28 set out in detail the actions required by SIDS ('with the necessary support of the international community') concerning coastal and marine resources, including actions directed to 'prevent, deter and eliminate illegal, unreported and unregulated fishing and to manage fishing capacity.</li> </ul> </li> </ul>

<sup>209</sup> Conference of the Parties to the Convention on Biological Diversity, *Decision VII/5. Marine and coastal biological diversity*, 7<sup>th</sup> Meeting, Agenda item 18.2, UNEP/CBD/COP/DEC/VII/5 (13 April 2004) <<https://www.cbd.int/doc/decisions/cop-07/cop-07-dec-05-en.pdf>> (accessed 17 December 2015) ('COP Decision VII/5').

<sup>210</sup> COP Decision VII/5, Operational objective 2.1 (h)

<sup>211</sup> *Mauritius Strategy for the Further Implementation of the Programme of Action for the Sustainable Development of Small Island Developing States, Report of the International Meeting to Review the Implementation of the Programme of Action for the Sustainable Development of Small Island Developing States*, A/Conf. 207/11 (10-14 January 2005), Ch 1, Annexure II, <<http://unohrlls.org/UserFiles/File/SIDS%20documents/mauritius.pdf>> (accessed 18 December 2015) ('Mauritius Strategy').

<sup>212</sup> *Report of the International Meeting to Review the Implementation of the Programme of Action for the Sustainable Development of Small Island Developing States*, A/Conf. 207/11 (10-14 January 2005), Ch II (Attendance and organisation of work), 41, <<http://unohrlls.org/UserFiles/File/SIDS%20documents/mauritius.pdf>> (accessed 18 December 2015).

Law/policy name	Year	Extract/summary and comments
		<ul style="list-style-type: none"> <li>• Part XX of the Mauritius Strategy deals with implementation. <ul style="list-style-type: none"> <li>○ Paragraph 84(g) deals expressly with marine resources. It requires SIDS, ‘with the necessary support of the international community’, to take action to promote national and regional efforts in the sustainable management of their marine resources, through appropriate assessment and management of fish stocks and effective monitoring and surveillance of fishing efforts, including appropriate enforcement measures to minimize illegal, unreported and unregulated fishing and overharvesting and improving and strengthening existing regional mechanisms, where appropriate.<sup>213</sup></li> </ul> </li> </ul>
<b>CBD: Decision X/2 of the Tenth Meeting of the COP: Strategic Plan for Biodiversity 2011-2020 and the Aichi Biodiversity Targets<sup>214</sup></b>	2010	<ul style="list-style-type: none"> <li>• At the Tenth Meeting of the COP to the CBD, the COP adopted the Strategic Plan for the Implementation of the CBD and the (20) Aichi Biodiversity Targets.</li> <li>• The 20 Aichi Biodiversity Targets are organised under five strategic goals, the second of which is to ‘Reduce the direct pressures on biodiversity and promote sustainable use’, which captures Targets 5-10. Relevantly, target 6 aims for: <p style="margin-left: 40px;">all fish and invertebrate stocks and aquatic plants [to be] managed and harvested sustainably, legally and applying ecosystem based approaches, so that overfishing is avoided, recovery plans and measures are in place for all depleted species, fisheries have no significant adverse impacts on threatened species and vulnerable ecosystems and the</p> </li> </ul>

<sup>213</sup> *Mauritius Strategy*, [84 (g)].

<sup>214</sup> Conference of the Parties to the Convention on Biological Diversity, *Decision X/2. The Strategic Plan for Biodiversity 2011-2020 and the Aichi Biodiversity Targets*, 10<sup>th</sup> Meeting, UNEP/CBD/COP/10/27 (20 January 2011) <<https://www.cbd.int/doc/meetings/cop/cop-10/official/cop-10-27-en.pdf>> (accessed 18 December 2015) (*‘Strategic Plan for Biodiversity 2011-2020 and the Aichi Biodiversity Targets’*).

Law/policy name	Year	Extract/summary and comments
		impacts of fisheries on stocks, species and ecosystems are within safe ecological limits [by 2020].
<b>Transforming our world: the 2030 Agenda for Sustainable Development<sup>215</sup></b> <b>(Sustainable Development Goals)</b>	2015	<ul style="list-style-type: none"> <li>• The Sustainable Development Goals were adopted by the UN General Assembly on 25 September 2015 and came into effect on 1 January 2016.</li> <li>• There are 17 Sustainable Development Goals, and the associated 169 targets sitting within the 17 goals are set out in a summary list outlined in para 51 of the Agenda.</li> <li>• Goal 14, specifically concerns marine-ecosystems; its aim is to ‘conserve and sustainably use the oceans, seas and marine resources for sustainable development’.<sup>216</sup></li> <li>• There are 10 targets that sit under for Goal 14 (14.1-14.7 &amp; 14.a-14.c). The following are of particular relevance to the BDM fishery in PNG: <ul style="list-style-type: none"> <li>14.2 By 2020, sustainably manage and protect marine and coastal ecosystems to avoid significant adverse impacts, including by strengthening their resilience, and take action for their restoration in order to achieve healthy and productive oceans.</li> <li>14.4 By 2020, effectively regulate harvesting and end overfishing, illegal, unreported and unregulated fishing and destructive fishing practices and implement science-based management plans, in order to restore fish stocks in the shortest time feasible, at least to levels that can produce maximum sustainable yield as determined by their biological characteristics.</li> </ul> </li> </ul>

<sup>215</sup>Transforming our world: the 2030 Agenda for Sustainable Development, GA Res 70/1, Agenda items 15 and 116, UN Doc A/RES/70/1 (21 October 2015) <[http://www.un.org/ga/search/view\\_doc.asp?symbol=A/RES/70/1&Lang=E](http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/70/1&Lang=E)> (accessed 19 January 2016) ('Sustainable Development Goals').

<sup>216</sup> Sustainable Development Goals, Goal 14.

Law/policy name	Year	Extract/summary and comments
		<p>14.5 By 2020, conserve at least 10 per cent of coastal and marine areas, consistent with national and international law and based on the best available scientific information.</p> <p>14.7 By 2030, increase the economic benefits to Small Island developing States and least developed countries from the sustainable use of marine resources, including through sustainable management of fisheries, aquaculture and tourism [by 2030].</p> <p>14.b Provide access for small-scale artisanal fishers to marine resources and markets</p> <p>14.c Enhance the conservation and sustainable use of oceans and their resources by implementing international law as reflected in UNCLOS.</p>
<p><b>1.4 Codes, policies, and technical guidelines of the UN Food and Agriculture Organisation (FAO)</b>  <i>PNG is a member of the FAO and so codes, policies and technical guidelines of the FAO have been included here. The work of the GAO Committee on Fisheries (COFI) is particularly important. These are all voluntary instruments<sup>217</sup></i></p>		
<p><b>Code of Conduct for Responsible Fisheries<sup>218</sup> (1995 FAO Code of Conduct)</b></p>	<p>1995</p>	<ul style="list-style-type: none"> <li>• This code was adopted at the 28<sup>th</sup> Session of the Conference of the FAO. PNG was not represented at the conference; however, it attended a number of international meetings which led to the adoption of other texts which refer to the Code.<sup>219</sup></li> <li>• This is a voluntary code that sets out 'principles and international standards of behaviour for responsible practices with a view to ensuring the effective conservation, management and</li> </ul>

<sup>217</sup> In addition to the documents listed in this section, the FAO has issued a number of Declarations relevant to fisheries management, including the 2005 Rome Declaration on Illegal, Unreported, and Unregulated Fishing: FAO, Hundred and Twenty-Eighth Session, Outcome of the Ministerial Meeting on Fisheries (12 March 2005), <<http://www.fao.org/docrep/meeting/009/j5030e.htm>> (accessed 22 February 2016).

<sup>218</sup> *FAO Code of Conduct for Responsible Fisheries*, FAO Doc 95/20/Rev/1, Introduction <<http://www.fao.org/docrep/005/v9878e/v9878e00.htm>> (accessed 18 December 2015) ('1995 FAO Code of Conduct').

<sup>219</sup> See, e.g. *Johannesburg Plan of Implementation*, [31]; ('COP Decision VII/5', [7] (among others); *Mauritius Strategy*, [28].

Law/policy name	Year	Extract/summary and comments
		<p>development of living aquatic resources, with due respect for the ecosystem and biodiversity'.<sup>220</sup></p> <ul style="list-style-type: none"> <li>• The 'General Principles' of the Code include: <ul style="list-style-type: none"> <li>○ the conservation of aquatic resources;</li> <li>○ management that promotes 'the maintenance of the quality, diversity and availability of fishery resources in sufficient quantities for present and future generations in the context of food security, poverty alleviation and sustainable development'; and</li> <li>○ prevention of overfishing and sustainable utilisation of fishery resources.<sup>221</sup></li> </ul> </li> <li>• The Code has been 'translated' into non-technical language in a booklet entitled 'What is the Code of Conduct for Responsible Fisheries?'<sup>222</sup> The booklet has been translated into several languages, including Tok Pisin.<sup>223</sup></li> <li>• The Code of Conduct is referred to in the 2004 CBD Programme of Work on Marine and Coastal Biodiversity.<sup>224</sup></li> </ul>
<b>International Plan of Action for</b>	1997	<ul style="list-style-type: none"> <li>• This voluntary instrument was adopted by the COFI under the 1995 FAO Code of Conduct.</li> </ul>

<sup>220</sup> 1995 FAO Code of Conduct, Introduction.

<sup>221</sup> 1995 FAO Code of Conduct, General Principles.

<sup>222</sup> *What is the Code of Conduct for Responsible Fisheries* (FAO, 2001) <<http://www.fao.org/docrep/003/x9066e/x9066e00.HTM>> (accessed 22 February 2016).

<sup>223</sup> *Wanem Em Strepela Pasin Nawei Bilong Lukautim, Kisim Na Salim Pis? – Papua New Guinea* (Translated by Vagi Rei) (FAO, 2001) <<http://www.fao.org/docrep/008/x9066o/x9066pg00.htm>> (accessed 22 February 2016).

<sup>224</sup> *COP Decision VII/5*, Operational objective 2.1.

Law/policy name	Year	Extract/summary and comments
<b>the Management of Fishing Capacity<sup>225</sup> (FAO Fishing Capacity Plan of Action)</b>		<ul style="list-style-type: none"> <li>• Its immediate objective was to achieve ‘worldwide ... an efficient, equitable and transparent management of fishing capacity’ by 2005 at the latest.<sup>226</sup> The plan of action has four major strategies, one of which is to prepare and implement ‘national plans to effectively manage fishing capacity and of immediate actions for coastal fisheries requiring urgent measures’<sup>227</sup></li> <li>• The FAO Fishing Capacity Plan of Action was restated at the 2002 World Summit on Sustainable Development in 2002.<sup>228</sup></li> <li>• The Mauritius Strategy also refers to the importance of SIDS implementing international plans of action to prevent, deter and eliminate illegal and unreported and unregulated fishing and to manage fishing capacity<sup>229</sup></li> </ul>
<b>International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing<sup>230</sup> (FAO</b>	2001	<ul style="list-style-type: none"> <li>• This voluntary instrument was adopted by the COFI in 2001.</li> <li>• The Plan requires States to develop and implement national plans of action to achieve the objectives of the Plan by 2004. The Plan also requires reporting to the FAO on progress regarding elaboration and implementation of their plans to prevent, deter and eliminate illegal,</li> </ul>

<sup>225</sup> *International Plan of Action for the Management of Fishing Capacity* (FAO, 1999) (accessed 22 February 2016) (‘FAO Fishing Capacity Plan of Action’).

<sup>226</sup> *FAO Fishing Capacity Plan of Action*, [7].

<sup>227</sup> *FAO Fishing Capacity Plan of Action Part II*.

<sup>228</sup> *Johannesburg Plan of Implementation*, [31(d)].

<sup>229</sup> *Mauritius Strategy*, [27(a)].

<sup>230</sup> *International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing* (FAO, 2001)

<<http://www.fao.org/docrep/003/y1224e/y1224e00.htm>> (accessed 18 December 2015) (‘FAO IUU International Plan of Action’).

Law/policy name	Year	Extract/summary and comments
IUU International Plan of Action)		<p>unreported and unregulated fishing.</p> <ul style="list-style-type: none"> <li>As noted above, the Mauritius Strategy refers to the importance of SIDS implementing international plans of action<sup>231</sup></li> </ul>
<b>FAO Technical Guidelines for Responsible Fisheries: Ch 2</b> <i>The ecosystem approach to fisheries</i> <sup>232</sup>	2003	<ul style="list-style-type: none"> <li>These Technical Guidelines defines the ecosystem approach to fisheries (<b>EAF</b>) as follows:  An ecosystem approach to fisheries strives to balance diverse societal objectives, by taking into account the knowledge and uncertainties about biotic, abiotic and human components of ecosystems and their interactions and applying an integrated approach to fisheries within ecologically meaningful boundaries.<sup>233</sup></li> <li>EAF extends the conventional principles for sustainable fisheries development to cover the ecosystem as a whole. It aims to ensure that, despite variability, uncertainty and likely natural changes in the ecosystem, the capacity of the aquatic ecosystems to produce fish food, revenues, employment and, more generally, other essential services and livelihood, is maintained indefinitely for the benefit of the present and future generations. A primary implication is that EAF must cater for ‘both human as well as ecosystem well-being.’</li> <li>This Technical Guideline identifies a range of key elements necessary to achieve successful ecosystem management.</li> </ul>

<sup>231</sup> Mauritius Strategy, [27(a)] <<http://unohrls.org/UserFiles/File/SIDS%20documents/mauritius.pdf>> (accessed 18 December 2015).

<sup>232</sup> FAO Technical Guidelines for Responsible Fisheries: Supplement 2. The Ecosystem Approach to Fisheries (FAO, 2003)

<<http://www.fao.org/docrep/005/y4470e/y4470e00.htm#Contents>> (accessed 21 December 2015) (FAO Technical Guidelines: The Ecosystem Approach’).

<sup>233</sup> FAO Technical Guidelines: The Ecosystem Approach, Executive Summary.

Law/policy name	Year	Extract/summary and comments
<b>Model Plan for a Pacific Island Country: National plan of action to prevent, deter and eliminate illegal, unreported and unregulated fishing<sup>234</sup></b>	2005	<ul style="list-style-type: none"> <li>• This document was prepared by the FAO specifically for the Pacific Islands region, to help Pacific Island countries in elaborating a National Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing. It was developed in accordance with the FAO IUU International Plan of Action.</li> </ul>
<b>FAO Voluntary Guidelines for Securing Sustainable Small-Scale Fisheries in the Context of Food Security and Poverty Eradication<sup>235</sup> (FAO SSF Guidelines)</b>	2014	<ul style="list-style-type: none"> <li>• The FAO SSF Guidelines were endorsed by the Thirty First Session of COFI in June 2014.</li> <li>• The FAO SSF Guidelines were developed to complement the 1995 FAO Code of Conduct.</li> <li>• The FAO SSF Guidelines apply to all living aquatic resources, in both marine and fresh waters, that are subject to harvesting and cover pre-harvest, harvest, and post-harvest activities.</li> <li>• There are a number of provisions relevant to BDM fisheries in PNG, including relating to <ul style="list-style-type: none"> <li>○ Governance of tenure of land</li> <li>○ Sustainable resource management</li> <li>○ Value chains, post-harvest and trade</li> <li>○ Policy coherence, institutional coordination and collaboration</li> <li>○ Information, research and communication</li> <li>○ Capacity development</li> <li>○ Implementing support and monitoring</li> </ul> </li> </ul>

<sup>234</sup> *Model Plan for a Pacific Island Country: National plan of action to prevent, deter and eliminate illegal, unreported and unregulated fishing* (FAO, 2005) <<ftp://ftp.fao.org/docrep/fao/008/a0126e/a0126e00.pdf>> (accessed 21 December 2015).

<sup>235</sup> *Voluntary Guidelines for Securing Sustainable Small-Scale Fisheries in the Context of Food Security and Poverty Eradication* (FAO, 2015) <<http://www.fao.org/3/6a80106c-d579-4fdc-876c-04ff29c3d106/i4356e.pdf>> (accessed 22 February 2016) ('FAO SSF Guidelines').

Law/policy name	Year	Extract/summary and comments
<b>1.5 Regional policies</b>		
<b>A New Song for Coastal Fisheries - Pathways to Change: The Noumea Strategy<sup>236</sup> (New Song Strategy)</b>	2015	<ul style="list-style-type: none"> <li>• The ninth Heads of Fisheries meeting focused on the future of coastal/inshore fisheries management. Participants included the Secretariat of the Pacific Community (<b>SPC</b>).</li> <li>• The New Song Strategy was approved by the ninth Heads of Fisheries Meeting, in March 2015. It was also endorsed by the 11th Ministerial Forum Fisheries Committee (<b>FFC</b>) Meeting in July 2015.</li> <li>• The overarching vision of the New Song Strategy is the:  ‘Sustainable well-managed inshore fisheries, underpinned by community-based approaches that provide food security and long-term economic, social and ecological benefits to our communities’.<sup>237</sup></li> <li>• The New Song Strategy identifies eight key medium-term outcomes necessary for achieving this vision. These outcome statements are further split into short-term outcomes to be addressed within the next five years, activities, and responsibilities. The strategy is designed in a non-prescriptive fashion, attempting to provide direction and encourage coordination and cooperation.</li> <li>• Of the eight key outcome areas, the following are particularly relevant to the BDM fishery in PNG:  <p style="margin-left: 40px;">Area 1: Informed, empowered coastal communities with clearly defined user rights.</p></li> </ul>

<sup>236</sup> A New Song for Coastal Fisheries - Pathways to Change: The Noumea Strategy (Secretariat of the Pacific Community, 2015) <[http://www.spc.int/DigitalLibrary/Doc/FAME/Reports/Anon\\_2015\\_New\\_song\\_for\\_coastal\\_fisheries.pdf](http://www.spc.int/DigitalLibrary/Doc/FAME/Reports/Anon_2015_New_song_for_coastal_fisheries.pdf)> (accessed 19 January 2016) ('New Song Strategy').

<sup>237</sup> New Song Strategy, 8.

Law/policy name	Year	Extract/summary and comments
		<p>Area 2: Adequate and relevant information to inform management and policy.</p> <p>Area 3: Recognition of, and strong political commitment and support for, coastal fisheries management on a national and sub-national scale.</p> <p>Area 4: Re- focused fisheries agencies that are transparent, accountable and adequately resourced, supporting coastal fisheries management and sustainable development underpinned by CEA FM.<sup>238</sup></p> <p>Area 8: Diverse livelihoods reducing pressure on fisheries resources, enhancing community incomes and contributing to improved fisheries management.<sup>239</sup></p>
<p><b>South Pacific Regional Environment Programme Strategic Plan 2011-2015<sup>240</sup></b>  <b>(2011-2015 SPREP Strategic Plan)</b></p>	<p>2011</p>	<ul style="list-style-type: none"> <li>• PNG is a member of the South Pacific Regional Environment Programme (<b>SPREP</b>).</li> <li>• The 2011-2015 SPREP Strategic Plan establishes four strategic priorities for SPREP, including Biodiversity and Ecosystem Management, and Environmental Monitoring and Governance.</li> <li>• The goal of the strategic priority ‘Biodiversity and Ecosystem Management’ is: <ul style="list-style-type: none"> <li>By 2015, all Members have improved their sustainable management of island ecosystems and biodiversity, in support of communities, livelihoods, and national sustainable</li> </ul> </li> </ul>

<sup>238</sup> CEA FM refers to ‘community-based ecosystem approaches to fisheries management’: *New Song Strategy*, 1.

<sup>239</sup> *New Song Strategy*, 10.

<sup>240</sup> *South Pacific Regional Environment Programme Strategic Plan 2011-2015* (SPREP, 2010)

<[https://www.sprep.org/att/publication/000921\\_SPREPStrategicPlan2011\\_2015.pdf](https://www.sprep.org/att/publication/000921_SPREPStrategicPlan2011_2015.pdf)> (accessed 21 December 2015) (‘2011-2015 SPREP Strategic Plan’).

Law/policy name	Year	Extract/summary and comments
		<p>development objectives, through an improved understanding of ecosystem-based management and implementation of National Biodiversity Strategic Action Plans.<sup>241</sup></p> <p>This goal includes a range of strategies, including to 'promote and support the management of island, coastal and marine ecosystems and the region's unique biodiversity.'<sup>242</sup></p>
<p><b>Regional Plan of Action (RPOA) to Promote Responsible Fishing Practices including Combating Illegal, Unreported and Unregulated (IUU) Fishing in the Region<sup>243</sup></b></p>	<p>2007</p>	<ul style="list-style-type: none"> <li>• PNG was represented at the 2007 meeting of Ministers at which a Joint Ministerial Statement was made committing the Minister and their Representative for fisheries in PNG to the RPOA.</li> <li>• The RPOA 'is a commitment by the respective Fisheries Ministers of 11 south east Asian countries to promote responsible fishing practices and combat illegal, unregulated and unreported IUU fishing'.<sup>244</sup></li> <li>• The objective of the RPOA is (in part): <ul style="list-style-type: none"> <li>to enhance and strengthen the overall level of fisheries management in the region, in order to sustain fisheries resources and the marine environment, and to optimise the benefit of adopting responsible fisheries practices.<sup>245</sup></li> </ul> </li> <li>• The RPOA is a voluntary instrument and takes its core principles from existing instruments including UNCLOS, the 1995 Fish Stocks Agreement, and the 1995 FAO Code of Conduct.</li> </ul>

<sup>241</sup> 2011-2015 SPREP Strategic Plan, 20.

<sup>242</sup> 2011-2015 SPREP Strategic Plan, 21.

<sup>243</sup> Regional Plan of Action (RPOA) to Promote Responsible Fishing Practices including Combating IUU Fishing in the Region, <[http://rpoaiuu.org/images/pdf/Regional%20Plan%20of%20Action\\_final.pdf](http://rpoaiuu.org/images/pdf/Regional%20Plan%20of%20Action_final.pdf)> (accessed 22 February 2016).

<sup>244</sup> RPOA Evaluation Paper (Draft), (RPOAIUU, 2013), 1, <<http://rpoaiuu.org/index.php/en/rpoa-evaluation-paper>> (accessed 22 February 2016) ('RPOA Draft Evaluation paper').

<sup>245</sup> Regional Plan of Action (RPOA) to Promote Responsible Fishing Practices including Combating IUU Fishing in the Region, [3].