

**A CRITICAL ANALYSIS OF THE LACK OF CONSIDERATION OF SMALL-
SCALE FISHERIES IN THE ALLOCATION OF FISHING RIGHTS
IN SOUTH AFRICA**

Hansa Ruhomah

LLB (Hons) (London)

Barrister-at-Law (The Honourable Society of Lincoln's Inn, London)

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DEDICATION

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Thank you Mum and Dad!

DECLARATION

I, **HANSA RUHOMAH**, declare that

The research reported in this dissertation, except where otherwise indicated, is my original work.

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Signed:

Date: _____

HANSA RUHOMAH

As the candidate's Supervisor I agree to the submission of this dissertation.

Date: _____

Ed Couzens

Associate Professor, School of Law, University of KwaZulu-Natal

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ABSTRACT

Marine resources, in particular the fishing industry, continue to play a major role in sustaining South Africa's economy and social development and contribute to employment and security of the local community. Historically, the allocation of fishing rights was conferred upon predominantly white-owned commercial companies by the South African apartheid government. However, with the advent of democracy in 1994, the government had the responsibility to draft a fisheries policy that would aim to redress historical imbalances and this resulted in the introduction of the Marine Living Resources Act 18 of 1998. This dissertation aims critically to analyse whether this statute has been successful in remedying the issue of unequal fishing rights amongst commercial, subsistence, recreational and artisanal fishers. In undertaking this, an evaluation of the several policies that are attached to this statute will be presented and comments will be made in relation to the constitutional and political aspects of this subject. Allied to this, there will be a consideration of how international law influences the introduction of statutes relating to marine living resources. The main approach for this dissertation has been a literature review which included the use of both electronic databases and books available in libraries. The research shows that in spite of the enactment of the Marine Living Resources Act of 1998, artisanal fishers or small-scale fisheries continue to face discrimination and large commercial fisheries continue to dominate the industry. A Small-Scale Fisheries Policy was adopted in June 2012 to remedy the situation but there is currently no implementation plan in place. The major issue however is that the Act itself does not provide a definition for small-scale fishing and it would therefore have to be amended, in order to accommodate this category.

CHAPTER ONE

GENERAL BACKGROUND

“All our natural living marine resources and our marine environment belong to all the people of South Africa.” - Marine Living Resources Act, 1998

Marine living resources are an important part of South Africa’s biological diversity¹ and also play a significant role for the South African economy. South Africa’s marine life has been described as

similarly diverse, partly as a result of the extreme contrast between the water masses on the East and West coast. Three water masses – the cold Benguela current, the warm Agulhas current, and oceanic water – make the region one of the most oceanographically heterogeneous in the world.²

It is therefore essential that appropriate laws are set up in order to regulate the fishing industry and to ensure that the marine living resources are sustainably used. The Marine Living Resources Act³ (as amended by the Marine Living Resources Amendment Act 68 of 2000) is the main statute which aims to ensure the equitable distribution of fish stocks amongst citizens. South Africa’s fishing industry makes a contribution of R4,5 billion to gross domestic product (GDP) every year and also employs about 36,000 people both on land and at sea.⁴ South Africa is currently home to a variety of fisheries and they are regulated by the Department of Agriculture, Forestry and Fisheries (DAFF).⁵

It is essential to note that prior to the 1st of April 2010, the Department of Environmental Affairs and Tourism (now the Department of Environmental Affairs)⁶ and in particular the division of Marine and Coastal Management (hereafter ‘MCM’)⁷ regulated and managed the

¹ They can also be referred to as marine biodiversity.

² White Paper on the Conservation and Sustainable Use of South Africa's Biological Diversity, May 1997 Available at: <http://www.environment.gov.za/PolLeg/WhitePapers/Biodiversity/Contents.htm> (Accessed on 5th August 2012).

³ Act 18 of 1998.

⁴ McLean B., Glazewski J.I., ‘Marine Systems’, Strydom H.A & King N.D., *Environmental Management in South Africa*, 2nd Edition, Juta Law (2009) 455-512 at 464.

⁵ See Department of Agriculture, Forestry and Fisheries at: <http://www.nda.agric.za/>.

⁶ See Department of Environmental Affairs at <http://www.environment.gov.za/?q=content/home>.

⁷ The Marine Living Resources Act was administered nationally by the Marine and Coastal Management Branch, with its head office in Cape Town. The only exception to this was Kwa-Zulu Natal, where some of the functions under the Act such as compliance, monitoring and enforcement procedures, were delegated to

South African fishing industry. Subsequent to the cabinet's reshuffling in 2009, any fisheries-related decisions including their management, allocations, administration procedures and policies are under the auspices of DAFF.⁸ The MCM branch ceased to exist after the 31st of March 2010 and any functions or activities formerly carried out by the latter were split between the DAFF and the Department of Environmental Affairs (hereafter 'DEA').⁹

The DEA does not completely eliminate marine-related issues from its agenda but is instead more focussed on the conservation of the latter. It has an 'ocean and coasts'¹⁰ branch whose main purpose is the 'establishment, management and maintenance of ecologically representative national and cross-border systems of protected areas to advance the heritage of humankind as well as contribute to the three objectives of the CBD and Millennium Development Goals.'¹¹ It can be seen therefore that the DAFF focusses more on the regulation of fisheries while the DEA focusses on the protection of the marine biodiversity as part of its environmental conservation objectives.

There are three main categories of fishers that are currently recognised by the law and are the only ones who are legally allowed to carry out fishing activities. The government has failed to recognise another category of fishers known as the small-scale fishers or commonly referred to as artisanal fishers. Because of this exclusion, this group of fishers often faced prejudice and inequality in the fishing industry. It is essential to note that the right to fishing is not a guaranteed right but instead requires the allocation of fishing right or permit by the Minister. The focal point of this dissertation will be on the lack of consideration towards small-scale and artisanal fishers in the distribution of fishing rights in South Africa.

Ezemvelo KZN wildlife. See Craigie F., Snijman P., Fourie M., 'Environmental Compliance and Enforcement Institutions', Paterson A.R., Kotzé L., *Environmental compliance and Enforcement in South Africa: legal perspectives*, 1st Edition, Juta Law (2009), 65-102 at 76.

⁸ See the Parliamentary Monitoring Group website, Marine and Coastal Management: Minister and Departmental briefing at: <http://www.pmg.org.za/report/20100601-minister-and-departmental-briefing-marine-coastal-management> (Accessed on 12th of December 2012).

⁹ Marine and Coastal Management (MCM) - Marine Living Resources Fund (MLRF), Annual Report 2009/10 – Summary, Oceans and Coasts information, March 2011.

¹⁰ See the Department of Environmental Affairs website, Home, Branches, Oceans and Coasts at: http://www.environment.gov.za/?q=content/branches/oceans_coast (Accessed on 12th of December 2012).

¹¹ Ibid.

1.1 Definitions

In order to gain a better understanding of the recurrent terms that will be used in this dissertation, definitions of those are provided. Nonetheless, it would be impractical to consider different interpretations of such terms and therefore are all restricted to the statutory definitions. The only exception is the definition of ‘small-scale fishing’ which does not feature in any legislation at present but only in the *Government Gazette*.

1.1.1 Allowable commercial catch

The Marine Living Resources Act provides that an allowable commercial catch is that part of the total allowable catch available annually for commercial fishing rights in terms of section 14.¹²

1.1.2 Biological diversity (Biodiversity)

The National Environmental Management: Biodiversity Act (NEMBA)¹³ defines biodiversity as ‘the variability among living organisms from all sources including terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part and also includes diversity within species, between species and of ecosystems.’¹⁴

1.1.3 Broad-based Black Economic Empowerment

Broad-based Black Economic Empowerment is defined as the economic empowerment of all black people including women, workers, youth, people with disabilities and people living in rural areas through diverse but integrated socio-economic strategies that include but are not limited to – (a) increasing the number of black people that manage, own and control enterprises and productive assets; (b) facilitating ownership and management of enterprises and productive assets by communities, workers, cooperatives and other collective enterprises; (c) human resource and skills development; (d) achieving equitable representation in all occupational categories and levels in the workforce; (e) preferential procurement; (f) and investment in enterprises that are owned or managed by black people.¹⁵ It is worth noting

¹² Section 1(ii) of the Marine Living Resources Act 18 of 1998.

¹³ Act 10 of 2004.

¹⁴ Section 1(1) of the National Environmental Management: Biodiversity Act 10 of 2004.

¹⁵ Section 1 of the Broad-Based Black Economic Empowerment Act 53 of 2003.

that ‘black’ people are not restricted to people with black racial background but include altogether Africans, Coloureds and Indians.

1.1.4 Fish

It is important to note that the Marine Living Resources Act does not provide for ‘fish’ in the literal sense only, but that it caters for ‘the marine living resources of the sea and the seashore, including any aquatic plant or animal whether piscine or not, and any mollusc, crustacean, coral, sponge, holothurian or other echinoderm, reptile and marine mammal, and includes their eggs, larvae and all juvenile stages, but does not include sea birds and seals.’¹⁶ It is clear from this definition that the government is committed in the conservation of several living species present in our marine environment and also extends its protection to aquatic plants.

1.1.5 Fishery

By virtue of the Marine Living Resources Act a fishery ‘means one or more stock or stocks of fish or any fishing operations based on such stocks which can be treated as a unit for purposes of conservation and management, taking into account geographical, scientific, technical, recreational, economic and other relevant characteristics.’¹⁷

1.1.6 International conservation and management measures

International conservation and management measures refer to measures used to conserve or manage one or more species of marine living resources contained in international conventions, treaties or agreements, or that are adopted or applied in accordance with the relevant rules of international law as reflected in the United Nations Convention on the Law of the Sea, whether by global, regional or sub-regional fishery organisations and which measures are binding on the Republic in terms of international law.¹⁸ International law has had a big influence on South African legislation and having ratified several marine-related conventions, South Africa is bound by the latter. There will be an assessment of the extent to

¹⁶ Section 1(xiii) of the Marine Living Resources Act 18 of 1998.

¹⁷ Section 1(xvi) of the Marine Living Resources Act 18 of 1998.

¹⁸ Section 1(xxxii) of the Marine Living Resources Act 18 of 1998.

which South Africa is implementing the marine conventions into its national laws and how those are being implemented effectively.

1.1.7 Marine Protected Areas

The Minister may, by notice published in the *Gazette*, declare an area to be a marine protected area— (a) for the protection of fauna and flora or a particular species of fauna or flora and the physical features on which they depend; (b) to facilitate fishery management by protecting spawning stock, allowing stock recovery, enhancing stock abundance in adjacent areas, and providing pristine communities for research; or (c) to diminish any conflict that may arise from competing uses in that area.¹⁹

1.1.8 Small-scale fishing

The small-scale fishing is defined as the use of marine living resources on a full-time, part-time or seasonal basis in order to ensure food and livelihood security. For the purposes of this policy, fishing also means the engagement (by men and women) in ancillary activities such as, (pre and post harvesting, including preparation of gear for harvesting purposes), net making, boat-building, (beneficiation, distribution and marketing of produce) which provide additional fishery-related employment and income opportunities to these communities).²⁰

1.1.9 Total allowable catch

Total Allowable Catch (hereafter ‘TAC’) means the maximum quantity of fish of individual species or groups of species made available annually, or during such other period of time as may be prescribed, for combined recreational, subsistence, commercial and foreign fishing in terms of section 14.²¹

1.1.10 Total applied effort

Total Applied Effort (hereafter ‘TAE’) means the maximum number of fishing vessels, the type, size and engine power thereof or the fishing method applied thereby for which fishing vessel licences or permits to fish may be issued for individual species or groups of species, or

¹⁹ Section 43(1) of the Marine Living Resources Act 18 of 1998.

²⁰ Definitions in GN474 in *Government Gazette* 35455 dated 20-6-2012.

²¹ Section 1(lviii) of the Marine Living Resources Act 18 of 1998.

the maximum number of persons on board a fishing vessel for which fishing licences or permits may be issued to fish individual species or groups of species.²²

1.2 Major South African fisheries

As stated above, South Africa's fishing industry consist of many fisheries and some of the most known ones are the demersal fishery, the pelagic fishery, the line fishery, the rock lobster and the abalone fishery amongst others. Those fisheries are an example of how rich and diverse the fish stocks along the South African coastline are and need to be managed to prevent the extinction of certain species. The Act does provide for management tools to be used in order to effectively manage the South Africa fisheries. Those include the TAE, the TAC, a combination of TAE and TAC management methods and marine protected or closed areas.²³ A brief summary of the aforementioned fisheries will be presented in the next paragraphs.

1.2.1 *The pelagic fishery*

The pelagic fishery handles small fish that live near the surface and are usually caught within sight of land. Anchovy (*Engraulis encrasicolus*), sardine, or pilchard (*Sardinops sagax*), lantern fish, and lightfish are all examples of such species. The fish are usually localised using an echo-sounder and once found they are normally caught with purse-seine net. Most of the catch are not suitable for human consumption and are typically reduced to fish meal, fish paste and fish oil. Sardines and round-herring are the only two species that can be used for human consumption.²⁴

1.2.2 *The demersal fishery*

The demersal fishery is also known as White fish and normally catches the Cape hake, kingklip, and sole. From a commercial point of view, such fisheries are seen as the most valuable fishing sector. The industry is divided into three main sectors namely deep sea trawling, inshore trawling and long-lining. Deep-sea trawling is carried out in waters between 110 metres to 700 metres. A cone-shaped net is generally lowered to the ocean floor and

²² Section 1(lix) of the Marine Living Resources Act 18 of 1998.

²³ McLean and Glazewski, *supra* note 4.

²⁴ McLean and Glazewski, *supra* note 4 at 467.

trawled and once caught; the fish are brought to the surface.²⁵ Smaller vessels are used for inshore trawling and the fish caught are varied comprising of hake, sole, horse mackerel amongst others. In the case of long-lining, alternative methods are used to capture demersal species.²⁶ Lines up to 15 km in length are suspended at sea and from those lines, there are one and a half nylon tracers with hooks.²⁷ Examples of long-lining catch are Kingklip and large size hake.

1.2.3 The line fishery

The commercial line fishery plays an important role in the fishing industry. There are about 450 commercial vessels that currently operate from North Polloth in the West Coast to Richards Bay on the East Coast. Rod and reel or hard lines with a maximum of ten hooks per line are typically used for line fishing. Species that are normally taken are resident reef-fish, coastal migrants and nomadic species and those are generally consumed locally. Management methods are also in place for line fishery and those consist of the Total Applied Effort, specific bag limits amongst others. However, overexploitation of stocks has led to line fishes being seriously depleted and there is a high risk of a collapse of the fishery.

1.2.4 The rock lobster fishery

The rock lobster fishery is worth about R520 million annually.²⁸ The west coast rock lobsters (WCRL) are normally caught in shallow water with rocky bottoms and kelp beds inside the 200 metres depth contour.²⁹ The methods used are usually the traditional use of hoop nets. Most of the catch amounts to 3000 tonnes. Another type of lobsters known as the south coast lobster is also caught in the lobster fishery. Approximately 380 tonnes of those lobsters are landed and this catch is currently valued at R57 million. This fishery was booming between 1950 and 1965 producing over 16,000 tonnes of lobsters annually.³⁰ However, destructive

²⁵ Glazewski J., 'Living Marine Resources', *Environmental Law in South Africa*, 1st Edition, LexisNexis Butterworths (2000) 459-506 at 462.

²⁶ Ibid.

²⁷ Ibid.

²⁸ Hara M., De Wit M., Crookes D., Jayiya T., 'Socio-economic contribution of South African fisheries and their current legal, policy and management frameworks', Working paper 6, Institute of Poverty, Land and Agrarian Studies (2009), 1-84 at 28.

²⁹ McLean and Glazewski, *supra* note 4 at 472.

³⁰ Ibid.

fishing practices³¹ have led to a dramatic decrease in the number of lobsters being landed. Commercial, subsistence and recreational fishers are allowed to fish rock lobsters provided they have a permit and adhere to the management methods determined by the government. Examples of those are Total Allowable Catch, minimum size limit, closed season, the restriction of fishing hours.³²

1.2.5 The abalone fishery

Abalone or perlemoen (*Haliotis midae*) are usually caught by divers in shallow bed less than 10 metres deep. Most of the catch is exported and because of its value, most abalone fisheries have been subject to illegal fishing. It has been challenging to estimate how many tonnes of abalone have been illegally taken but an indication of how serious the matter is, in 2002, more abalone in terms of numbers were seized by the law enforcement agency.³³ This meant that the abalone resources saw a dramatic collapse over recent years. In relation to the commercial industry, the Total Allowable Catch has dropped from 693 tonnes in 2000 to 240 tonnes 2003-2004. Pre-2003, recreational fishers were allowed to fish abalone, however, since the collapse, recreational permits have all been ended for an indefinite period of time.

1.2.6 The Patagonian toothfish fishery

Patagonian toothfish (*Dissostichus eleginoides*), Chilean Sea Bass, or black hake as it is commonly referred to occur in the South African Exclusive Economic Zone (EEZ) around Prince Edward and Marion Islands. It is one of the most lucrative marine species and is in high demand by countries like the United States and Japan, making this fishery vulnerable to illegal and unregulated fishing (IUU). This species is slow-growing, long-lived and usually reaches sexually maturity only after about 10 years. Over-exploitation of the Patagonian toothfish has been such a common occurrence during the past decades that it was suggested at one point that the species would be commercially extinct in 2007.³⁴

³¹ According to the FAO, the term ‘destructive fishing’ has often been used in many circumstances ranging from ‘classical overfishing (non-sustainable use) to outright destruction of the resource and its environment.’ Examples are using explosives or any similar methods with ecological impact. The main methods used in destructive fishing, as cited by literature, are poisons, explosives and muroami. For further information see the FAO’s website at: <http://www.fao.org/fishery/topic/12353/en>.

³² Ibid.

³³ Cochrane K., ‘B7. Southeast Atlantic, FAO statistical area 47’, Review of the state of world marine fishery resources, FAO fisheries technical paper 457, Food and Agriculture Organisation of the United Nations, Rome 2005, 76-86 at 81.

³⁴ McLean and Glazewski, *supra* note 4 at 475.

In describing the above-mentioned fisheries, the issue of threatened marine species and the constant depletion of marine living resources is recurrent. Previously, white-owned companies caught the majority of fish in South African waters³⁵ and controlled those fisheries but the new government aimed to transform and restructure the fishing industry which resulted in the issue of fishing rights to fishers. Unfortunately, in recent years, due to the destructive fishing practices, permits have been terminated for certain fishers. Very often, it is those who are classified under the categories of ‘subsistence’ and ‘recreational’ fishers have had their permits revoked. There is a slight decrease in the number of fishing rights awarded to commercial fishers; nonetheless, they are the one who continue to dominate the fishing industry. Consequently, the debate of whether or not fishing rights will ever be allocated on an equal basis to the small-scale fishers, in particular historically disadvantaged individuals, is raised.³⁶

1.3 The fishing industry during the apartheid era

Historically, the fishing industry was managed by the division of Sea Fisheries which was established in 1929. On the 1st of August 1982, this division officially became a branch of the Department of Environmental Affairs and Tourism (now Department of Environmental Affairs)³⁷ and its main responsibility was to manage the fisheries survey operations.³⁸ The division also consisted of scientists who were responsible to advise the Minister with regards to policy making and the preparation of regulations and statutes on matters relating to fisheries management in South Africa.³⁹

Shortly afterwards, the Report of the Commission of Inquiry into the Allocation of Quotas for the Exploitation of Living Marine Resources (the 1986 *Diemont Commission*)⁴⁰ was published. This report examined the administrative process around determining TAC and

³⁵ Section 1(liv) of the Marine Living Resources Act provides that ‘South African waters’ are the seashore, internal waters, territorial waters, the exclusive economic zone, and in relation to the sedentary species as defined in Article 77 of the United Nations Convention on the Law of the Sea, the continental shelf as defined in section 7 of the Maritime Zones Act, 1994, and such waters include tidal lagoons and tidal rivers in which a rise and fall of the water level takes place as a result of the tides.

³⁶ Isaacs M., ‘Small-scale fisheries reform: Expectations, hopes and dreams of “a better life for all”’ Programme for Land and Agrarian Studies, University of the Western Cape *Marine Policy* 30 (2006) 51–59 at 52

³⁷ See the Department of Environmental Affairs website at: <http://www.environment.gov.za/>.

³⁸ Mbane, Nontuthuzelo Nosisa, "The South African marine fisheries policy since 1994" (2004). *Cape Technikon Theses & Dissertations*. Paper 61 Available at: http://dk.cput.ac.za/td_ctech/61, Unpublished source, (Accessed on 2nd August 2012).

³⁹ Ibid.

⁴⁰ Glazewski, *supra* note 25 at 469.

made recommendations in relation to the allocation of TAC. Those proposals were subsequently implemented in the Sea Fisheries Act⁴¹ (provisions relating to fisheries have been repealed and replaced by specific provisions in the Marine Living Resources Act). It is interesting to note that despite being over 20 years old, the findings of this commission are still pertinent to the current fisheries management regime. There are provisions in the Marine Living Resources Act which deal with the regulation and administrative process of TAC.⁴²

In addition to the emphasis placed on the allocation of quotas and the administrative process, another significant feature highlighted in the *Diemont Commission* is the rights of 'coastal communities' in the report. The Commission was required to enquire and report on the 'different population groups in the existing and/or recommended dispensation should be allowed as entrepreneurs in the Industry.'⁴³ It was established that there was a 'deep concern for the coastal communities, their economic plight and their deteriorating situation.'⁴⁴ It was further stressed that there was a conflict of two philosophies in regards to coastal fishing communities. On the one hand, it was essential for fishing companies to prosper which meant that they were the ones who would make money and feed the nation with 'protein-rich food' at reasonable prices. On the other hand however, it was as important to ensure that coastal fishers were allowed to catch fish in order to provide for their families and have a decent livelihood. The Commission goes on to state that 'if the big corporations must have security, it must not be at the expense of the small communities.'⁴⁵ It is therefore clear that the plight of struggling coastal fishing communities have been recognised a long time ago.

The Sea Fisheries Act⁴⁶ was the last statute regulating marine living resources during the apartheid period. It took into consideration the *Diemont Commission's* recommendations by setting up a statutory board (Quota Board) in November 1990 and this independent board would principally manage the allocation of quotas.⁴⁷ The granting of rights was based on an

⁴¹ Act 12 of 1988.

⁴² Section 14 of the Marine Living Resources Act 18 of 1998 is an example.

⁴³ Diemont M.A., Barrie F.G., Stoops W.H., Ramsay R., Goldschmidt E.H.B., Chapter 13 'Coastal Communities' *Diemont Commission: Report of the Commission of Inquiry into the allocation of quotas for the exploitation of living marine resources*, (1986) Government Printer, Pretoria, South Africa, 84-90 at 84.

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*

⁴⁶ Act 12 of 1988.

⁴⁷ Isaacs M., 'Individual transferable quotas, poverty alleviation and challenges for small-country fisheries policy in South Africa' Institute for Poverty Land and Agrarian Studies, University of Western Cape *MAST* 2011, 10(2) 63-84 at 64.

eighty/twenty ratio in which eighty per cent of the TAC would be conferred to established companies and the remaining twenty per cent allocated to new entrants.⁴⁸ The rationale was that it would ensure stability and predictability in the fishing industry whilst allowing for long-term investment and accommodating new entrants at the same time. This is clearly prejudiced against black fishers since most fisheries were white owned or operated. There is also the fact that a ratio of 80:20 shows how discriminated against black people used to be and most of the new entrants were probably white people since they possessed more resources at the time.

In addition to that, in May 1992, the Minister of Environmental Affairs and Tourism commissioned an inquiry about the conditions of fishing communities along the west coast of South Africa and following the findings, he directed the allocation of TAC for those fishing communities. It has been claimed that the allocation of TAC in the west coast of South Africa was merely a political pretence used to win the Western Cape Provincial elections in 1994.⁴⁹ Irrespective of the justifications, discrimination continued to exist on a large scale and in different spheres of the society and change was necessary in order to redress the situation. That ‘change’ came with the general elections held in April 1994.

1.4 Post-1994 policies for the fishing industry

Along with the decisive democratic transformation in 1994, the African National Congress (ANC) committed itself to the eradication of past inequalities in different spheres of the society including the fishing industry. The first important document that was drafted in relation to marine resources was the White Paper on Marine Fisheries policy for South Africa in May 1997. The White Paper presented a new fishing policy which would entail major transformation in the fishing industry. The main aims of the latter were: ‘the use of marine resources in a manner that optimises long-term social and economic benefits to the nation, the management and development of fisheries in compliance with the constitution, and the promotion of fair and equitable access to marine resources.’⁵⁰ The White Paper also acknowledges the fact that historically the access to marine resources has largely been

⁴⁸ Ibid.

⁴⁹ Isaacs M., *supra* note 36.

⁵⁰ McLean and Glazewski, *supra* note 4 at 501.

dominated by the formerly advantaged ethnic groups in South Africa, being mainly the whites.⁵¹

However, despite advocating for the redress of the past inequalities in the fishing industry, the White Paper has also highlighted the risk of ‘overexploitation, depletion or even extinction of stocks, wasteful overcapitalization of the industry and consequent loss of income and jobs.’⁵² It can therefore be seen that in theory the government is on one hand committed to promote equal access to the marine resource and on the other hand concerned about the sustainability of those highly-valued resources. However, in reality it is quite a different story when it comes to the current state of certain fisheries. An example of a fishery that has been severely depleted and is on the verge of extinction is the Abalone Fishery. The White Paper is the ‘forerunner’⁵³ of the principal statute regulating marine living resources in South Africa, the Marine Living Resources Act.

In May 1998, the Marine Living Resources Act was enacted with the view to expand access to marine resources while maintaining a stable fishing industry and encouraging the sustainable use of marine living resources. This statute is considered as a legislative milestone since it promotes ideologies that were previously rejected. Section 2 of the Act compels all organs of state to have regard to certain conditions when exercising a power under the Act.⁵⁴ The latter in effect summarises the provisions detailed in the Act.

⁵¹ Ibid.

⁵² Paragraph 4.1 of the White Paper: A Marine Fisheries Policy for South Africa, May 1997.

⁵³ McLean and Glazewski, *supra* note 4 at 501.

⁵⁴ Section 2 of the Marine Living Resources Act 18 of 1998 provides that:

The Minister and any organ of state shall in exercising any power under this Act, have regard to the following objectives and principles:

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

In addition to the legislation, there have been other policies which have been developed in order to give further clarification on the allocation of fishing rights. Examples of those include the General Policy on the Allocation and Management of Long-term Fishing Rights 2005, the Policy on the allocation of and the Management of Commercial Fishing Rights in the Hake Longline Fishery 2005 amongst others. It is also worth noting that if South Africa is party to a number of fisheries-related treaties and conventions which therefore implies that it will be bound on an international level. The relevance and importance of the above-mentioned fishing policies and international instruments will be thoroughly analysed in subsequent chapters.

1.5 Broad-Based Black Economic Empowerment

After the apartheid era, South Africa was left with inequalities in several spheres of the society and the government sought to redress this situation by establishing the Broad-based Black Economic Empowerment (hereafter “BEE”). The BEE is considered as ‘an integrated and coherent socio-economic process that directly contributes to the economic transformation of South Africa and brings about significant increases in the numbers of black people that manage, own and control the country’s economy, as well as significant decreases in income inequalities.’⁵⁵ Since South Africa has a high level of unemployment, the fishing industry can be regarded as a sector that can assist in alleviating the situation by creating additional jobs for the historically disadvantaged people.⁵⁶ In circumstances involving the allocation of fishing rights, it is expected that the principles of BEE would be taken into account given that the fishing industry was once broadly dominated by a minority.

1.6 Categories of fisher/fishing

The legislation officially recognises three main categories of fishers. The first one is commercial fishing which means fishing for any of the species which have been determined by the Minister in terms of s 14 to be subject to the allowable commercial catch or total

(j) the need to restructure the fishing industry to address historical imbalances and to achieve equity within all branches of the fishing industry.

⁵⁵ Paragraph 3.2.2 of South Africa’s Economic Transformation: A strategy for Broad-based Black Economic Empowerment, (2003) Department of Trade and Industry, at: <http://www.kznhealth.gov.za/TED/strategy.pdf> (Accessed on 13th August 2012).

⁵⁶ As mentioned in the first part of this chapter, ‘blacks’ are not restricted to people with a black racial background, but include Indians and coloured people too.

applied effort, or parts of both.⁵⁷ The second one is recreational fishing which essentially means any fishing done for leisure or sport and not for sale, barter, earnings or gain⁵⁸ and finally the Act provides for the definition of a subsistence fisher who is a natural person who regularly catches fish for personal consumption or for the consumption of his or her dependants, including one who engages from time to time in the local sale or barter of excess catch, but does not include a person who engages on a substantial scale in the sale of fish on a commercial basis.⁵⁹ For the first time in South African history, subsistence fishers were included as a category in the law.⁶⁰ It is clear from the above definitions that there are no specific reference to small-scale fishers/fishing or artisanal fishing. As mentioned at the outset of this chapter, the focus of this dissertation will be on the exclusion of artisanal fishers in the Act.

1.7 Allocation of fishing rights

The primary legal framework for the allocation of fishing rights is s 18 of the Marine Living Resources Act. Unlike the Sea Fisheries Act, the allocation of fishing rights was placed back in the fishing policy context and the power to allocate such rights is vested on the Minister of Agriculture, Forestry and Fisheries. An application for a fishing right need to be submitted to the Minister in the manner in which he/she determine⁶¹ and in granting any right under this provision, the Minister must have regard to ‘new entrants, particularly those from historically disadvantaged sectors of society.’⁶² Any right that has been granted by virtue of s 18 of the Act are valid for a period not exceeding 15 years. There is also the fact that if the Minister deems that an environmental impact assessment (EIA) is required, he/she may compel the applicant to provide one. The significance of such provision is that the Minister does take into account ecological impacts that fishing activities may have on South Africa’s marine biodiversity before issuing any fishing right. It is also interesting to note that section 18 is only applicable to ‘commercial’ and ‘subsistence’ fishers. Instead ‘recreational’ fishers need to obtain a fishing permit⁶³ as opposed to a fishing right. Such permits are not transferable

⁵⁷ Section 1(iv) of the Marine Living Resources Act 18 of 1998.

⁵⁸ Section 1(xlvii) of the Marine Living Resources Act 18 of 1998.

⁵⁹ Section 1(iv) of the Marine Living Resources Act 18 of 1998.

⁶⁰ Witbooi E, ‘Subsistence Fishing in South Africa: Implementation of the Marine Living Resources Act’, (2002) 17 (3), *The International Journal of Marine and Coastal Law*, 431-40 at 431.

⁶¹ Section 18(2) of the Marine Living Resources Act 18 of 1998.

⁶² Section 18(5) of the Marine Living Resources Act 18 of 1998.

⁶³ Section 20(2) of the Marine Living Resources Act 18 of 1998.

under the Act.⁶⁴ Therefore it can be seen that not all fishing rights are given on an equal basis and that a significant discretionary power is vested upon the Minister to determine the allocation of such rights.

This aim of this chapter was to provide a general overview of the South African fishing industry including a brief description of the main fisheries, the past and current legal framework regulating marine resources in general and relevant provisions with regard to the allocation of fishing rights. The next chapter will analyse in more depth the position of the allocation of fishing rights in South Africa by reflecting on its success and failure.

⁶⁴ Ibid.

CHAPTER TWO

ALLOCATION OF FISHING RIGHTS IN SOUTH AFRICA

2.1 Overview

The coastline of South Africa extends to approximately 3,000 km with an Exclusive Economic Zone (EEZ) of 200 nautical miles and is home to a rich marine biodiversity of about 10,000 species, representing some 16% of the world's marine species.⁶⁵ This rich biodiversity is heavily threatened by human activities where it faces on-going pressure from climate change, marine alien and invasive species, coastal development, fishing and overexploitation of marine resources amongst others. According to the National Biodiversity Assessment (2011), fishing continues to remain the greatest pressure in marine biodiversity.⁶⁶ The most vulnerable and overharvested species are the linefish species and the abalone.

It is therefore important that fishing activities are regulated so as to ensure the sustainable use of the marine biodiversity. The allocation of fishing rights is one approach taken by both the apartheid government and the current government to control fishing activities in South African waters. This was to ensure that individuals and companies carry out fishing activities in a fair and sustainable fashion. At a first glance it appears to be the most appropriate method to regulate fishing activities but upon further analysis, it can be seen that there is a lot of controversy and unfairness in the allocation process. The following sections will provide a chronological order of the structure in which the allocation of fishing rights has been done from 1994 up until now. There will also be an evaluation of the different allocation processes seen in South Africa throughout the years.

2.2 Fisheries Policy Development Committee

On the 24th of October 1994, the Minister of Environmental Affairs and Tourism (now the Minister of Environmental Affairs) initiated the Fisheries Policy Development Committee whose primary aim was to 'develop a new fisheries policy with the participation of all sectors

⁶⁵ South Africa's fourth national report to the Convention of Biological Diversity, Department of Environmental Affairs and Tourism, Republic of South Africa, March 2009, 1-128 at 2.

⁶⁶ National Biodiversity Assessment 2011: Technical Report. Volume 4: Marine and Coastal Component. South African National Biodiversity Institute, Pretoria, 1-329 at 244.

in the fishing industry.’⁶⁷ This committee was introduced as a result of consecutive unrest and dissatisfaction amongst fishers over the former policy under the Sea Fishery Act and 1993 guidelines.⁶⁸ They argued that such policy was ‘corrupt and insensitive to the very difficult situation of most coastal communities’⁶⁹ and pleaded for a fairer distribution of access rights to the marine resources.

Following its first meeting in Cape Town in December, it was agreed that a plenary committee consisting of 5 representatives from the 13 different sectors of the fishing industry would be set up.⁷⁰ Thereafter stakeholders were asked to submit their ideas in an attempt to set up the scene for an integrated document. Unsurprisingly, there were complex issues that were not unanimously agreed upon and in those cases, technical teams were formed with the prospect of providing comprehensive solutions.⁷¹ In June 1996, the final document was handed over to the Minister of Environmental Affairs and Tourism (now Minister of Environmental Affairs) who pledged to prepare a white paper. It is essential to note that in its final document, the committee made recommendations only on non-disputed matters.

2.2.1 Controversies around the first draft policy

In terms of the access rights to marine resources, it was the first official policy document that considered this matter after apartheid. It was therefore expected that a document promoting equality in the allocation of fishing rights or access to marine resources would be published. However, what was handed over was anything but fair and impartial. Instead, the Fisheries Policy Development Committee proposed the ‘introduction of long-term transferable rights and the use of independent bodies for the allocation of rights in order to remove political interference.’⁷² It also proposed that there should be no

⁶⁷ Martin R., Nielsen J.R., ‘Creation of a new fisheries policy in South Africa: The development process and achievements’ Institute for Fisheries Management and Coastal Community Development (IFM), (1996) Available at: <http://hdl.handle.net/1834/429> (Accessed on 15th August 2012).

⁶⁸ The Guidelines according to which the Quota Board, established under the 1988 Act were approved by the Minister of Environmental Affairs in 1993 and is commonly referred to as the ‘1993 guidelines’. (See Glazewski J., ‘Living Marine Resources’, *Environmental Law in South Africa*, 1st Edition, LexisNexis Butterworths (2000) 459-506 at 472).

⁶⁹ Hersoug B., ‘Fishing in a sea of sharks – reconstruction and development in the South African Fishing industry’, *Transformation* 35 (1998), 77 – 102 at 84.

⁷⁰ *Ibid.*

⁷¹ *Ibid.*

⁷² Raakjær J., Hara M., ‘Policy evolution in South African Fisheries: the governance of the sector for small pelagics’ *Development Southern Africa* Vol . 26, No.4 October 2009, 649-662 at 653.

arbitrary or sudden removal or decrease of access rights to any holder, current or future, and that restructuring and broadening of participation would be carried out while maintaining stability within the fishing industry in order to minimise adverse effects on existing rights holders, the associated labour force and other legitimate stakeholders.⁷³

It is evident from the above-mentioned recommendations that no consideration was really given to historically disadvantaged people, especially small-scale fishers. Instead, the focus is on previous fishing right holders, who have had a history of dominating the fishing industry. It may perhaps be argued that a sudden or arbitrary removal of an access right could disturb the stability of the fishing industry and should therefore be avoided. But it remains incomprehensible as to why the committee would propose that no decrease in access rights take place. It had already been recognised at the time that the majority of access rights belonged to few large white-owned companies but this document failed to acknowledge this fact and failed to promote the equitable redistribution of access rights.

2.2.2 Nonetheless a step forward?

The significance of the Fisheries Policy Development Committee is that for the first time in South African history, there was public participation from different spheres. It is evident that during the apartheid era blacks did not have much say in the decision-making process but in this instance there was wider participation. Being the first document drafted in relation to access of rights to marine resources, there was a great deal of expectations from people engaged in the fishing industry, in particular the subsistence and artisanal fishers. However, there must have been a feeling of disappointment throughout the communities when they realised that the main focus was on established fishers and not those who were formerly marginalised. This would have been regarded as a let-down by the artisanal fishers but has nevertheless set the scene for the current government to produce more substantial policies. An example of such policy is the Marine Fisheries White Paper. The following paragraph gives an overview and brief analysis of the White Paper.

2.3 Marine Fisheries White Paper

The Marine Fisheries White Paper laid the foundations for the new statute, the Marine Living Resources Act. It recognises that historically access to marine resources has not always been

⁷³ Ibid.

fair and equitable.⁷⁴ In addition to this, it also acknowledges that in order to ensure the sustainability of those resources, it is essential to develop certain mechanisms which would achieve three main objectives namely a fairer system of allocation of access to rights to harvest living marine resources; a system which ensures greater access to the resource by those who have been denied access previously; and a reduction in the current levels of pressure on the resources, which in some cases threaten the very sustainability of a resource.⁷⁵ Compared to the Fisheries Policy Development Committee, it can be seen that the White Paper took into account pressing issues such as the allocation of fishing and access rights to further historically disadvantaged people. The urgency of the situation is referred to again when it is stated that ‘the present system of access rights has to be restructured fundamentally.’⁷⁶

Moreover, another distinct provision which has had an effect in the current legislation is the section that highlights the three different categories of fishers. More importantly, this provision⁷⁷ emphasises the existence of subsistence fishers which was ignored in the past and gives clear explanation on how those subsistence fishers (usually poor and needy) rely on their catch in order to survive. The different provisions of the White Paper show commitment towards the eradication of inequality and poverty in the fishing industry. However, despite being the forerunner to the Marine Living Resources Act, few provisions of the White Paper have found concrete reality in the Act. The following paragraphs will analyse how the current statute deals with the allocation of fishing rights and will evaluate whether or not this process was done without proper attention.

2.4 MLRA and accompanying policies and regulations

The Marine Living Resources Act of 1998 is the direct outcome of the Marine Fisheries White Paper and is complemented by the ‘Regulations in terms of the MLRA, 1998’. This statute is perhaps the most comprehensive and pronounced Act ever enacted in South Africa in terms of the allocation of fishing rights. An innovative feature of the Marine Living Resources Act is that at the outset the objectives and principles are laid out.⁷⁸ The Act also

⁷⁴ Paragraph 4.1 of the White Paper: A Marine Fisheries Policy for South Africa, May 1997.

⁷⁵ Ibid.

⁷⁶ Ibid.

⁷⁷ Paragraph 4.9 of the White Paper: A Marine Fisheries Policy for South Africa, May 1997.

⁷⁸ Section 2 of the Marine Living Resources Act 18 of 1998.

provides for the establishment of a Consultative Advisory Forum for Marine Living Resources (CAF) and its function is to advise the Minister on the management of marine living resources and the development of the fishing industry.⁷⁹ In addition to the CAF, the Act provides for another important institution known as the Fisheries Transformation Council whose main objective is to ‘facilitate the achievement of fair and equitable access to fishing rights’,⁸⁰ but this was abolished in September 2000 as a result of alleged corruption and maladministration.⁸¹ It is interesting to note that the above-mentioned institutions only assist the Minister to make informed decisions about the fishing industry but ultimately the decision to allocate fishing rights is exclusively on the Minister. There is a large discretionary power that is vested to the Minister by virtue of s 18 of the Marine Living Resources Act.

Since the Minister has such power under the Act, one would assume that he/she would take into account the historically disadvantaged people when allocating fishing rights. But then again, it can be seen that commercial fishers continue to retain the majority of fishing rights. It is worth noting that commercial fishing companies are no longer exclusively owned by whites, as it has been in the past, but are now also held by blacks.⁸² The Minister continued to allocate fishing rights to the latter with the view of promoting the principles of BEE while on the surface of it failing to give sufficient consideration to the interest of poor and marginalised coastal fishers in the process.

2.4.1 Legal nature of fishing rights and permits

The relevant provisions for the allocation of fishing permits and rights can be found at ss 13 and 18 respectively. In order lawfully to carry out any commercial or subsistence fishing, engage in mariculture or operate a fish processing establishment, the right to undertake such activities must be granted by the Minister.⁸³ The Minister may also require an accompanying environmental impact assessment to be submitted by the applicant before a fishing right is granted.⁸⁴ In establishing the commitment to transform the South African fishing industry, the Act provides that when granting a right by virtue of s 18(1), the Minister also shall ‘have particular regard to the need to permit new entrants, particularly those from historically

⁷⁹ Section 6(a) of the Marine Living Resources Act 18 of 1998.

⁸⁰ Section 30 of the Marine Living Resources Act 18 of 1998.

⁸¹ Isaacs, *supra* note 47 at 71.

⁸² Isaacs, *supra* note 47 at 69.

⁸³ Section 18(1) of the Marine Living Resources Act 18 of 1998.

⁸⁴ Section 18(3) of the Marine Living Resources Act 18 of 1998.

disadvantaged sectors of society.’⁸⁵ This is particularly significant since the Minister has the power to make informed decisions to allocate fishing rights to historically disadvantaged people and consequently assist in transforming the fishing industry in a more equitable industry.

It is worth noting however, that despite recognising ‘recreational fisher’ as one category of fisher under the Act, there is no mention of a recreational right but instead a recreational permit and such permit shall not be transferable.⁸⁶ In addition to that, s 13 provides that ‘no person shall exercise any right granted in terms of s 18 or perform any other activity in terms of this Act unless a permit has been issued by the Minister to such person to exercise that right or perform that activity.’ This means that before carrying out any fishing activities, both a permit and a right need to be obtained excluding recreational fishing. It is important to point out that a fishing permit is valid only for a year⁸⁷ while a fishing right is valid for a period not exceeding 15 years.⁸⁸ It is not clear why commercial and subsistence fishers are allocated fishing rights for such a long period of time but one potential reason might be to ensure that human resources focus on more pressing matters than issuing fishing rights every year. In the long run, this ensures that the Department uses its limited human and financial resources in an efficient manner.

2.4.2 Challenges in the allocation of fishing rights

It has not always been straightforward in allocation cases under the new legal regime. There have been several companies which have appealed against the decision of the Minister or the Chief Director of the Marine and Coastal Management⁸⁹ (power delegated by the Minister in terms of s 79 of the Marine Living Resources Act). As mentioned previously⁹⁰, in exercising any power under the Act, the Minister and any organ of state need to take into consideration the several provisions under s 2 of the Act. In cases relating to allocation of fishing rights, the

⁸⁵ Section 18(5) of the Marine Living Resources Act 18 of 1998.

⁸⁶ Section 20 of the Marine Living Resources Act 18 of 1998.

⁸⁷ Section 13(2) (a) of the Marine Living Resources Act 18 of 1998.

⁸⁸ Section 18(6) of the Marine Living Resources Act 18 of 1998.

⁸⁹ Previously known as the Sea Fisheries Research Institute.

⁹⁰ Section 2, *supra* note 54.

Minister has a duty to take into account all the listed principles in s 2 particularly principle 2(j)⁹¹ which has primacy in this regard.

The principle in s 2(j) was further reinforced in the case of *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others*.⁹² This case raised the question of the extent to which there could be a judicial review in a decision to allocate fishing rights.⁹³ The applicant, Bato Star Fishing (Pty) Ltd was not satisfied with the allocation it received in the 2001 allocation process and thus sought to review this decision. The arguments put forward by the applicant were that firstly the Chief Director failed to give considerations to s 2(j) and 18(5) of the Marine Living Resources Act and secondly failed to comply with s 6(2) (h) of the Promotion of Administrative Justice Act⁹⁴ and the Constitution itself. Judge O'Regan rejected all three grounds of appeal by the applicant.

2.4.3 Significance of the *Bato Star* case

The *Bato Star* case is considered as one of the most important South African decision on judicial review of administrative action in recent years and also the first case where the Constitutional court deals with the provisions of the Promotion of Administrative Justice Act.⁹⁵ It is clear that all principles in s 2 of NEMA need to be taken into account and that there is no evident hierarchy among those principles. However, the *Bato Star* case stressed the importance of transforming the industry through the Marine Living Resources Act and s 2(j) in particular. The principle under s 2(j) of the Act was recognised as having primacy and was described as a 'foundational' principle in successfully achieving transformation in the fishing industry. This case has further highlighted that transformation of the fishing industry is an extensive process and that there are certain challenges that the Minister or organs of state will face in giving effect to the constitutional commitment of achieving equality.⁹⁶ Neither the Marine Living Resources Act nor the Constitution provides specific ways in which this objective must be reached.

⁹¹ Section 2(j) of the Marine Living Resources Act 18 of 1998 provides for 'the need to restructure the fishing industry to address historical imbalances and to achieve equity within all branches of the fishing industry.'

⁹² *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2004 (4) SA 490 2004 7 BCLR 687 (CC), hereafter '*Bato Star*'.

⁹³ Vrancken P., 'Legal Challenges of Fisheries Management' (2005) 30 *South African Year Book of International Law*, 264-276 at 265.

⁹⁴ Act 3 of 2000.

⁹⁵ De Ville J.R., 'Deference as respect and deference as sacrifice: A reading of *Bato Star Fishing v Minister of Environmental Affairs*' (2004) 20 *SAJHR*, 577-615 at 577.

⁹⁶ Vrancken, *supra* note 93 at 266.

Nevertheless, the Constitutional court articulates that this is at the discretion of the decision-maker, as long as he/she takes appropriate measures towards the transformation of the fishing industry every time an allocation is made.⁹⁷ This is a significant interpretation by the court since each case is different and it therefore would be wrong to set a precedent on how the decision-maker should attempt to transform the industry. Another observation from this case is that the court recognises that in reaching his decision, the Chief Director's was 'fair and consistent' and it can therefore be assumed that the allocation of fishing rights in most cases is done in an equitable manner.

Undoubtedly this case portrays the fishing industry as a fairer industry compared to what it used to be in the past. However, statutes, general policies and case laws demonstrate that the new government transformed the fishing industry on racial background instead of transforming the rights of impoverishing black artisanal fishers. It was not until 2004 (nearly a decade after the Marine Living Resources Act was enacted) that the existing system of the allocation of fishing rights to artisanal fishers was challenged in court.⁹⁸ The significance of this case will be discussed in the next chapter and how it has helped to develop a new policy regarding the fishing rights of small-scale fishers.

2.4.4 Subsistence Fisheries Task Group (SFTG)

A Subsistence Fisheries Task Group (SFTG) was set up in 1999 to advise the Minister on several matters relating to subsistence fishing and make relevant recommendations thereafter. The task group had the responsibility to:

1. Define subsistence fishers, and recognise different categories
2. Identify functional zoning areas that would be appropriate for subsistence fishers, after consideration of the nature of (a) local fishing communities and (b) specific stocks.
3. Ensure that mechanisms exist to produce recommendations on the proportions of individual stocks that should be allocated to subsistence fishers, and procedures for allocation.
4. Identify the Protocol necessary to involve local communities and relevant authorities in the procedures developed above, and in their implementation.
5. Recommend management models and processes of implementation which include management, monitoring, compliance, training and research that will be appropriate for each subsistence category, zone or resource.
6. In cases where resources can sensibly sustain such activities, develop guidelines and mechanisms to consider the formation of small-scale commercial fishing groups as an alternative to subsistence

⁹⁷ Ibid.

⁹⁸ *Minister of Environmental Affairs and Tourism v George* 2007 (3) SA 62 (SCA).

harvesting for food and provide on advice on how the Chief Directorate Marine and Coastal Resources can assist in this process.⁹⁹

The SFTG was the first report which highlighted that the category of small-scale fisher was different from the category of subsistence fisher. Moreover, it admitted that the present definition excludes an important group of people who might previously have been considered as *subsistence fishers* or *artisanal fishers* but who would prefer to gain commercial rights.¹⁰⁰

The Task Group went on to recommend that another category should be formed in order to accommodate small-scale fishers who might want to sell their catches to earn a living.¹⁰¹ Following recommendations of the Task Group, a ‘limited’ commercial sector was recognised as a subcategory within the commercial sector by means of regulations.¹⁰² It would therefore appear that small-scale fishers were finally given equal rights as commercial fishers and were no longer singled out. However, this was in fact far from being an accurate reflection of the situation in South Africa. Small-scale fishers failed to benefit from the system during the allocation process despite being labelled as ‘limited’ commercial operators. This was due to the challenges they faced, namely lack of financial resources and limited ability fully to understand the paperwork involved in the allocation process amongst others.

2.4.5 Transitional phase

During the period of 1999/2000, the DEAT continued to allocate fishing rights on an annual basis while a new system for long-term rights could be developed. During this time, the Department received approximately 11,000 applications which completely exceeded the state’s administrative capacity and consequently resulted in allocation delays, reduced captures and hardship faced by people dependent on fishing as an income.¹⁰³ It was also alleged that the Marine and Coastal Management (MCM) was corrupted and mismanaged.¹⁰⁴ Following such allegations and maladministration of the system, the MCM was forced to come up with a better solution which would provide transparency and also enable poor fishermen to participate in any decision-making process.

⁹⁹ Glazewski, *supra* note 25 at 497.

¹⁰⁰ Isaacs, *supra* note 47 at 74.

¹⁰¹ *Ibid.*

¹⁰² Witbooi E., ‘Law and fisheries reform: Legislative and policy developments in South African fisheries over the decade 1994-2004’, (2006) 30 *Marine policy*, 30- 42 at 39.

¹⁰³ Isaacs, *supra* note 36 at 53.

¹⁰⁴ *Ibid* 54.

2.4.6 Policy for the allocation of medium-term rights (2002-2005)

Following the chaotic management of the fishing industry in 1999/2000, the Deputy Director-General of the MCM invited applications for commercial fishing rights across all sectors on a four year quota allocation.¹⁰⁵ The DEAT also issued policy guidelines in relation to the allocation stating that such policy was to ‘reward those ex-right holders who have performed and taken steps to transform and admit suitable new HDP entrants that demonstrate both a capacity to catch, process and harvest the right applied for and a willingness to invest in the industry.’¹⁰⁶

Despite not including small-scale fisheries in its allocation process, this policy had managed to distribute allocation of access rights in a fairly equitable manner. In 2002, there were 541 applications for abalone access rights, 83 for full commercial rights and 458 for ‘limited’ commercial rights. Out of these applications, 41 were allocated full commercial rights and 232 were allocated ‘limited’ commercial rights.¹⁰⁷ In terms of the West Coast Rock Lobster access rights, there were 1959 applications, 353 for full commercial rights and 1606 ‘limited’ commercial rights and out of these, 233 received full commercial while 481 received ‘limited’ commercial rights.¹⁰⁸ On the surface of it, it appears that there has been a major shift in access rights from white-owned companies exclusively to the HDI companies and therefore benefitted a wider category of fishers.

However, it has been argued that quantifying transformation in this way can be problematic since it does not reveal how many HDI companies are facades for the apartheid era industry.¹⁰⁹ Despite the allocation of access rights to ‘limited’ commercial operators, there were many poor coastal communities who did not manage to get any fishing rights. Those who got the fishing rights were not allocated viable rights.¹¹⁰ Under this allocation process, there were many *bona fide* fishers who were left out of the system and consequently did not have access to the marine resources. It must once again be reiterated that the whole focus of the transformation process has been mainly based on race instead on other socio-economic

¹⁰⁵ Huang C., ‘Judicial deference to legislative delegation and administrative discretion in new democracies: recent evidence from Poland, Taiwan and South Africa’ Rose- Ackerman S., Lindseth P., *Comparative Administrative Law*, 1st Edition, Edward Elgar Publishing Limited (2011) 466-481 at 474.

¹⁰⁶ Ibid.

¹⁰⁷ Isaacs, *supra* note 36 at 55.

¹⁰⁸ Ibid.

¹⁰⁹ Ibid.

¹¹⁰ Isaacs, *supra* note 47 at 72.

related aspects. One positive aspect of this new system was that there has been more distribution of access rights between the commercial and ‘limited’ commercial industry than it has been in the past.

2.4.7 Case study of Kalk Bay Village and fisher community

In order to get a further understanding of how the medium allocation process in 2001 affected local villages, there will be a brief account of how the new system is perceived in Kalk Bay, one of the coastal communities.¹¹¹ Kalk Bay was founded in the 17th century when lime (kalk) was extracted in the area. It was unoccupied at the time but Philippines sailors settled down in the 1840s after a shipwreck. They were soon joined by East Indian slaves and Malaysian settlers. It was established as a fishing village and whaling station in the 19th century. Segregation has not been an unusual occurrence in the village with wealthier skippers and boats owners living in the ‘village’ and the poorer fishers living on ‘die land.’¹¹² However, with the new system of allocation of fishing rights in 2002, it became blatant that the wealthier boat-owners stood on one side and the poorer fishers on another side. The small-scale fishing communities felt that the boat-owners ‘block the free flow of information between fishers and MCM, that they unfairly in some way have rights while the ordinary fishers remain poor, working hard for a pittance with no chance of getting their own rights.’¹¹³

It appears that the allocation of fishing rights, as claimed by the locals, was not based on equal access rights to marine living resources. Accordingly, it seemed that the government was not fully committed towards small-scale fisheries when implementing the medium term allocation process. It failed its objective of transforming the fishing industry and the new allocation system was viewed as corrupted and improperly managed. The head of the MCM, Horst Kleinschmidt explained that there ‘that there are too many fishers and not enough fish’¹¹⁴ and that it was necessary to impose a cutback on line fishing.

¹¹¹ Joubert A., Stewart, T., Scott, L., Mathee, J., De Vries, L., Gilbert, A., Janssen, R., and van Herwijnen, M., ‘An evaluation of the rights of allocation process and the utilisation of fishing rights in South Africa’, The Poverty Reduction and Environmental Management (PREM) programme, Institute for Environmental Initiative, Minister of Foreign Affairs of Netherlands, (2005) 1-156 at 33.

¹¹² Ibid.

¹¹³ Ibid.

¹¹⁴ Le May J., Bamford H., ‘Line fishing cutback hits Kalk Bay hard’, IOL news 13 July 2003 at: <http://www.iol.co.za/news/south-africa/line-fishing-cutback-hits-kalk-bay-hard-1.109671> (Accessed on 13th of December 2012).

However, Mr Kleinschmidt's justification was not well-received by local boat-owners in Kalk Bay. Kenny Kingma, a local fisher, explained how many applications were rejected because the fishers failed to fill the forms correctly.¹¹⁵ He further related how 20% to 30% of those who were allocated rights had other sources of income while those who were not allocated rights were left with nothing. Some infuriated fishers have even stated that they would carry out illegal fishing activities if the need arises.¹¹⁶ Mr Kingma was one of the many distraught fishers in Kalk Bay. Kalk Bay is one example of the many coastal communities who continue to struggle with segregation and discrimination in the fishing industry, especially in relation to access and fishing rights.

2.4.8 Policy for the allocation of long-term rights (2006-2010)

In 2005, the government allocated long-term fishing rights for periods between 8 to 15 years. A total number of 3019 commercial rights were allocated in 2006. Once again, many perhaps even the majority, of apparently *bona fide* fishers were excluded from this system due to language and the complex nature of the application form.¹¹⁷ The General Policy on the Allocation and Management of Long Term Commercial fishing rights further entrenched the rights of small-scale fishers. This policy was more focussed on policy and the criteria used were not beneficial to small-scale fisheries.¹¹⁸ It also failed to consider the option of community or collective allocations.¹¹⁹

As mentioned above, the Subsistence Fisheries Task Group (SFTG) had already made recommendations regarding small-scale fisheries in 1999 but this was totally ignored in this policy. Despite the fact that small-scale fishers could apply for individual rights, no specific allocations were set aside for the latter in the main inshore sectors.¹²⁰ In addition to that, fishers had to form companies in order to be able to compete with established companies. It became challenging for those newly created fishing companies since they lacked in technical

¹¹⁵ Ibid.

¹¹⁶ Ibid.

¹¹⁷ Isaacs, *supra* note 47 at 74.

¹¹⁸ The Transformation Status of Marine Commercial Fisheries and Marine Aquaculture in South Africa, Department of Agriculture, forestry & fisheries, Republic of South Africa, 1-9 at 1.

¹¹⁹ Ibid.

¹²⁰ Ibid.

and management skills and did not usually have enough start-up capital.¹²¹ This meant that established companies had a competitive advantage over the new entrants. There is also the fact that it seems that there was an assumption by the government about the level of literacy and skills levels. Many, if not most, fishers are illiterate with limited ability to fill in application forms and this can be a deterrent to those looking to apply for a fishing right. Therefore, it can be seen that this long-term policy did not benefit the small-scale fisheries in any way but instead further isolated them.

2.5 General observations

It is apparent from the above sections that the government has attempted to transform the fishing industry; but, in the process, has failed to take small-scale fishers sufficiently into consideration. Policies and regulations are usually published to provide clearer guidelines to existing laws. However, in this instance, both policies for the allocation of medium-term rights and long-term rights have put a damper on ‘artisanal’ fishers. The allocation of fishing rights system has essentially failed to enhance the access rights of many apparently *bona fide* fishers. By excluding small-scale fishers, it may be argued that there is also a breach of the provisions of the National Environmental Management Act¹²² and a breach of fundamental constitutional rights.

2.5.1 Breach of Constitutional rights

The Constitution of South Africa¹²³ (hereafter the Constitution) is the supreme law and no other law or conduct can supersede its provisions. Section 22 of the Constitution provides that ‘every citizen has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law.’ This is hardly the case for small-scale fishers. By virtue of the Marine Living Resources Act, in order to carry out any fishing activities they require a right granted by the Minister. Hence, it would simply be unlawful for them to choose their occupation freely. It may be argued therefore that there is a breach of their constitutional right since they need permission from the Minister prior to carrying out any sort of fishing activities. It is totally appropriate for the government to promote the sustainable use of marine living resources but this should not be done at the cost

¹²¹ Ibid.

¹²² Act 107 of 1998.

¹²³ Act 108 of 1996.

of the constitutional rights of South African citizens. It can be seen therefore that it can be challenging for the government to ensure the sustainable use of marine resources while and promoting constitutional rights.

In addition to the above, the Constitution provides that ‘everyone has the right to have access to sufficient food and water.’¹²⁴ Sections 22 and 27(1) (b) are interrelated. Without the right to be able to carry out fishing activities freely, it is very unlikely that poor coastal fishers would have sufficient access to food. It has been mentioned previously that most coastal fishers rely heavily on their catch to both sustain themselves and to sell their catch to earn a living. Many small-scale fishers are usually inadequately educated and therefore by default they choose fishing as their profession. It is therefore impossible to think that without having the right to fish how the artisanal fishers would survive and have adequate right to food. This usually impacts on their standard of living whereby they continue to remain poor and underprivileged.

In addition to the above, South Africa’s environmental right can be found in s 24 of the Constitution.¹²⁵ It is clear from the wording of s 24 that the government gives emphasis to the conservation on the environment but as Kotzé argues, being a developing country, the government still needs to address pressing matters such as ‘poverty, unemployment, housing backlogs and infrastructure development.’¹²⁶ As mentioned previously, South Africa has a rich biodiversity and it is therefore essential that it is adequately preserved. However, because of the inequalities faced in the past by many, it is as significant for the government to ensure that a balance is achieved between the conservation of our marine biodiversity and the socio-economic development of poor and marginalised citizens.

¹²⁴ Section 27(1) (b) of the Constitution.

¹²⁵ Section 24 of the Constitution provides that:

Everyone has the right to:

- a) Have an environment that is not harmful to their health or well-being; and
- b) Have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that:
 - (1) Prevent pollution and ecological degradation; and
 - (2) Promote conservation; and
 - (3) Secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.

¹²⁶ Kotzé L J., ‘The constitutional court’s distribution to sustainable development in South Africa’, *Potchefstroom Electronic Law Journal*, (2003) Volume 6 No 2, 81-96 at 85.

In relation to small-scale fishers and fishing communities, S-s 24(b)-(3) of the Constitution is imperative as it distinctly provides that ‘everyone has the right to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that secure ecologically sustainable development and use of natural resources while promoting economic and social development.’ Undoubtedly, the Marine Living Resources Act makes provision for the sustainable development and use of fish but then again ignores the needs and rights of coastal fishing communities. It can be argued therefore that certain constitutional rights of many of the small-scale fishers have been disregarded by the government.

However, it is also essential to note that rights in Chapter 2 of the Constitution are all subject to the limitations clause. S 36 provides that:

- (1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors including –
 - (a) the nature of the right;
 - (b) the importance of the purpose of the limitation;
 - (c) the nature and extent of the limitation;
 - (d) the relation between the limitation and its purpose; and
 - (e) less restrictive means to achieve the purpose.
- (2) Except as provided in subsection (1) or in any other provision of the Constitution, no law limit any entrenched in the Bill of Rights.

It has been claimed up to this point that the rights and needs of small-scale fishers have been overlooked by the government. Nonetheless, based on the above-mentioned limitation clause, it could be argued that the State has ‘reasonable’ and ‘justifiable’ explanations for the non-allocation of fishing rights to the latter category of fishers. For example, the government may argue that the level of fish stocks in South African waters is depleting rapidly and there is an urgent need for recovery and consequently permits would not be issued for a certain period of time. It may cause discontentment amongst commercial, subsistence, recreational and small-scale fishers but it would still be regarded as a valid reason to limit such rights.

As stated in the previous paragraph, the Constitution is the supreme law of South Africa and no other law can supersede the Constitution. It is apparent that by not including the small-scale fishers as a category, parts of the Marine Living Resources Act may be unconstitutional and should either be heavily amended or repealed to cater for the latter category. On one

hand, there is an infringement of the constitutional rights of the artisanal fishers which consequently has severe impacts on their survival and standard of living. While on the other hand, the government has a responsibility to ensure that the marine resources are used in a viable manner, thereby ensuring a long-term sustainable fishing industry.

2.5.2 Possible Breach of the National Environmental Management Act

The National Environmental Management Act gives effect to s 24 of the Constitution and the White Paper on National Environmental Management Policy for South Africa.¹²⁷ NEMA contains a number of provisions to ‘promote and give effect to the principle of co-operative governance and sets a framework for integrated environmental management in all development activities in the country.’¹²⁸ The principles contained in chapter 1 of NEMA are central to the successful environmental management of South Africa. All principles apply throughout the country and bind the actions of all organs of state that may significantly affect the environment. Such principles shall apply alongside all ‘other appropriate and relevant considerations, including the State’s responsibility to respect, protect, promote and fulfil the social and economic rights in chapter 2 of the Constitution and the basic needs of categories of persons of disadvantaged by unfair discrimination.’¹²⁹ Moreover, s 2(2) of NEMA stipulates that ‘environmental management must place people and their needs at the forefront of its concern, and serve their physical, psychological, developmental, cultural and social interests equitably.’

In addition, the Act provides that any development made must be ‘socially, environmentally and economically sustainable.’¹³⁰ It is evident that sustainable development is at the heart of NEMA. As mentioned throughout this dissertation, the conservation of marine biodiversity is imperative for the benefit of South Africa as a whole. It is clear that all social, environmental and economic aspects need to be considered alongside each other when undertaking any development. However, by denying artisanal fishers and small-scale fishers access rights to South Africa’s marine resources, it could be argued that their interests are currently not taken

¹²⁷ GN 749 in GG 18894 of 15 May 2008).

¹²⁸ Van der Linde M., ‘National Environmental Management Act 107 of 1998 (NEMA)’, Strydom H.A., King N.D., *Environmental Management in South Africa*, 2nd Edition, Juta Law (2009) 193-221 at 197.

¹²⁹ Section 2(1) of the National Environmental Management Act 107 of 1998.

¹³⁰ Section 2(3) of the National Environmental Management Act 107 of 1998.

into account. At both a 'social' and 'economic' development, it can be seen that such 'development' has been slow¹³¹ and artisanal fishers continued to be marginalised.¹³²

Another important provision relevant to the subject matter of this dissertation is s 2(4) (o) which stipulates that 'the environment is held in public trust for the people, the beneficial use of environmental resources must serve the public interest and the environment must be protected as the people's common heritage.' The two concepts that can be highlighted in this provision is firstly the need to ensure that South African citizens benefit from using the natural resources and secondly that such natural resources ought to be protected for the people as their heritage. On one hand, it can be seen that the government is really committed to the protection of marine resources, especially with the presence of an 'ocean and coasts' branch at the Department of Environmental Affairs. However, on the other hand, the inconsideration of the government against the artisanal fishers in the previous allocation processes reflects that the latter has not adequately allowed the artisanal fishers to benefit from natural resources. In this case, small-scale fishers and artisanal fishers have been denied the right to benefit from marine resources.

Furthermore, another principle of NEMA provides that 'equitable access to environmental resources, benefits and services to meet basic human needs and ensure human well-being must be pursued and special measures may be taken to ensure access thereto by categories of persons disadvantaged by unfair discrimination.'¹³³ Yet again, there are no special measures that have been taken in order to cater for artisanal fishers who have been subject to unfair discrimination in the past. Also, by not granting the latter fishing rights, it further portrays how the Marine Living Resources Act has failed to ensure that traditional fishers get equitable access to environmental resources, being marine living resources.

There is also the fact that NEMA provides that any decisions must take into consideration the 'interests, needs and values of all interested and affected parties, and this includes recognizing all forms of knowledge, including traditional and ordinary knowledge.' It appears that the Department of Environmental Affairs and Tourism (regulatory Department at

¹³¹ Sowman M., 'Subsistence and small-scale fisheries in South Africa: a ten-year review' *Marine Policy* (2006), Volume 30 (1), 60-73 at 61.

¹³² Ibid.

¹³³ Section 2(4) (2) of the National Environmental Management Act 107 of 1998.

the time) did not consider the interests and needs of most small-scale fishing communities when allocating right in 2001 and in 2006. Many, if not most, small-scale fishers were denied allocation and access rights.

2.6 Summary

In the light of the above, it can be seen that the government has failed, at least to a certain extent, to promote equitable access and fishing rights to small-scale traditional fishers. It has been argued that small-scale fishers have been explicitly recognised as a separate and defined category in both the medium and long term allocation process in 2001 and 2005 respectively.¹³⁴ Then again, the issue that has been raised is that it is necessary not merely to acknowledge their existence but to give them fishing rights close to what the commercial fishers are allocated. It is important to note however that commercial fishers have always received greater rights in the allocation of fishing rights because of their contribution to South Africa's economy. Currently the commercial fishing industry is valued at about R2 billion annually and employs about 27,000 people.¹³⁵ It is clear from such figures that the commercial industry is serving the country as a whole instead of few small coastal communities. This may arguably be one of the reasons why the government has favoured the commercial fishing industry over the last decade.

The Department of Agriculture, Forestry and Fisheries has failed to honour the constitutional rights of the coastal fishers by not allocating fishing rights to them, under the Marine Living Resources Act and its accompanying policies. Undoubtedly, there has been a significant shift from the allocation of rights during the apartheid era to the current allocation of rights. However, this shift has not benefitted in the least the artisanal fishers. If anything, it further entrenched their disadvantaged position within the fishing industry.

¹³⁴ Small Scale Fishing Policy contradicted by NDP, Shaheen Moolla, Available at: <http://feikemanagement.blogspot.com/2012/04/small-scale-fishing-policy-contradicted.html> (Accessed on 12th September 2012).

Note that Mr Shaheen Moolla was the Chief Director of Monitoring, Control and Surveillance and Mr Horst Kleinschmidt was the Deputy Director General at the Marine and Coastal Management Branch at the Department of Environmental Affairs and Tourism. Mr Moolla and Mr Kleinschmidt opened their own consultancy and therefore their views do not necessarily reflect those of the government. Information obtained from: Jordan B., 'Graft-buster accused of fishy-deal fraud', IOL news, 31 July 2011, Available at: <http://www.timeslive.co.za/news/2011/07/31/graft-buster-accused-of-fishy-deal-fraud> (Accessed on 15th of December 2012).

¹³⁵ See the South African Government Information website at: <http://www.info.gov.za/aboutsa/fisheries.htm> (Accessed on 15th of December 2012).

The exclusion of the small-scale fishers can have further ecological impacts on marine living resources. For example, many artisanal fishers have threatened that, in order to survive, they will carry out illegal, unregulated and unreported (IUU) fishing activities in South African waters.¹³⁶ Consequently this can have impacts on the whole marine system of South Africa. There is also the fact that some marine zones in South Africa have been declared as Marine Protected Areas because of the depleted level of stocks. In order to improve the Marine Protected Areas, there have been several strategies put in place focussing on the curtailing the extraction of overexploited stocks and the recovery of stocks.¹³⁷ Examples of such areas are the Tsitsikamma, St Lucia and De Hoop Marine Protected Areas.¹³⁸ But it becomes counterproductive if artisanal fishers carry out fishing activities in such areas. For that reason, there is an urgent need for small-scale fishers to obtain fishing rights.

However, since marine living resources in South Africa are depleting rapidly, it would not be appropriate for the Minister of Agriculture, Forestry and Fisheries to continue allocating the same number of fishing rights. Instead, commercial and subsistence fishing rights would have to be reduced in a reasonable manner thereby ensuring both the sustainable use of marine resources and the sustenance of the small-scale fishers and communities.

The struggle for artisanal fishers to access rights has been a long one but the first step towards a promising future started in 2004 in the case of *Minister of Environmental Affairs and Tourism v George*.¹³⁹ The relevance and facts of this case will be detailed in the next chapter. After eight extensive years of litigation, drafting of policies, consultation with different spheres of the government and public participation, a policy for the small scale fisheries sector in South Africa was finally published.¹⁴⁰

The following chapter will give an overview of the initial stages of developing this new small-scale policy and will also seek to analyse the state's approach to the implementation of

¹³⁶ Le May J., Bamford H., *supra* note 114.

¹³⁷ Moolla S., 'Contextualising Illegal, Unregulated and Unreported fishing of Marine Resources in South African Waters', Paper commissioned by the Institute for security studies, Cape Town, (2009) 1-20 at 5 Available at: <http://www.feike.co.za/web/news/AbaloneISS%20Paper.pdf> (Accessed on 23rd September 2012).

¹³⁸ *Ibid.*

¹³⁹ 2007 (3) SA 62 (SCA).

¹⁴⁰ GN474 in *Government Gazette* 35455 dated 20-6-2012.

this policy. It will also consider the challenges that the government is likely to face in the implementation phase of this document.

CHAPTER THREE

TOWARDS A SMALL-SCALE FISHERIES POLICY

3.1 General

There is currently a global resurgence of concern and empathy for small-scale fisheries.¹⁴¹ One of the reasons why small-scale fisheries are now getting so much attention is because of its capability to eradicate poverty and achieving food security for all. Small-scale fisheries has proven to contribute more in achieving those goals than commercial fisheries even though the economic contribution of the latter is often more significant at a national level.¹⁴² It is strongly arguable based on the analysis in the previous chapter regarding the Marine Living Resources Act and its accompanying policies that the South African government failed to assess the benefits of small-scale fisheries. More consideration has been given by government to the commercial fisheries since these appear to boost the economy more than do small-scale fisheries.¹⁴³ Nonetheless, it is important to note that government priorities will not change if the importance of small-scale fisheries for food security and poverty alleviation is not recognized.¹⁴⁴ It is only when this has been realised that the small-scale fisheries will be considered in the scope of national policies.¹⁴⁵ The following sections will provide a brief overview of the advantages of promoting the expansion of small-scale fisheries in developing countries.

3.2 Contribution of small-scale fisheries to the economy

As mentioned above, small-scale fisheries can have significant advantages over industrial fisheries in economic, social, environmental and cultural terms and are also perceived as ‘extremely profitable’ in certain situations.¹⁴⁶ Small-scale fisheries can make substantial

¹⁴¹ Willmann R., Kurien J., ‘Special considerations for small-scale fisheries management in developing countries’ Cochrane K.L., Garcia S.M., *A Fishery Manager’s Guidebook*, 2nd Edition, Wiley-Blackwell (2009) 404 – 425 at 404.

¹⁴² Ibid.

¹⁴³ Hersoug B., *supra* note 69 at 83.

¹⁴⁴ De Graaf G.J., Grainger R.J.R., Westlund L., Willmann R., Mills D., Kelleher K., Koranteng K., ‘The status of routine fishery data collection in Southeast Asia, central America, the South Pacific, and west Africa, with special reference to small-scale fisheries’, (2011) *ICES Journal of Marine Science*, Vol. 68 (8), 1743-1750 at 1748.

¹⁴⁵ Ibid.

¹⁴⁶ Béné, C., Macfadyen G., Allison E.H., ‘Increasing the contribution of small-scale fisheries to poverty alleviation and food security’, FAO Fisheries Technical Paper 481, Food and Agriculture Organisation of the United Nations, Rome 2007, 1-125 at 15.

contributions towards economic growth at a national level, to rural developments at local level and aim for household poverty alleviation and food security.¹⁴⁷

3.2.1 Socio-economic performance

In many developing countries short of investment funds, small-scale fisheries can play an important role in that they help to ensure that the fish that are being caught are harvested in an effective manner combining the ‘salubrious blessing of natural resources, scarce financial-capital resources and abundant labour resources in an optimal manner.’¹⁴⁸ Small-scale fisheries usually indicate a better performance compared to medium and large commercial fisheries based on ‘physical output per unit of investment, unit of energy consumed and unit of cost incurred.’¹⁴⁹ They also have the potential to boost the national economy. The direct contribution made by small-scale fisheries to the GDP ranges from 0.5% to 2% but has been up to 7% in some countries such as Senegal.¹⁵⁰

3.2.2 Local economic development

At a local level, small-scale fishing can be regarded as a powerful tool for reducing poverty. Benefits of small-scale fishing can be direct, indirect or induced.¹⁵¹ Small-scale fishers benefit directly from their fishing activities since they can consume freshly caught marine living species, they can choose to sell the products and earn a living out of this income and it also provides the artisanal fishers with employment.

Indirect benefits of small-scale fishing include the ability to sell fresh produce to local communities and businesses at a reasonable price and certain fishers can exchange their catch for other products or services. This can have a positive impact on the livelihoods of many small-scale fishers and their families whilst their standard of living improves. Induced benefits are the ‘sales, income and employment effects resulting from changed levels of income and expenditure throughout the local economy as a result of direct and indirect impacts.’¹⁵² This essentially means that small-scale fishers can use their earning to buy

¹⁴⁷ Ibid.

¹⁴⁸ Willmann R., Kurien J., *supra* note 141 at 407.

¹⁴⁹ Ibid.

¹⁵⁰ Béné, C., Macfadyen G., Allison E.H, *Supra* note 146 at 15.

¹⁵¹ Ibid 19.

¹⁵² Ibid.

groceries, household items or new equipment for fishing. Once more, it can be seen that the small-scale fishers can advance with small-scale fishing as their occupation and ensure that they have a better and more comfortable lifestyle.

3.2.3 Foreign exchange earnings

In some cases, small-scale fisheries can make contributions towards the national economy by way of foreign exchange generated by regional or international trade. Over the last 20 years, international trade in fish has grown substantially in which export values went from US\$15 billion in 1980 to US\$56 billion in 2001.¹⁵³ At the same time, there has been a 40-50% increase in exports' share by developing countries, with net revenues from fish trade by developing countries from less than US\$4 billion to US\$18 billion.¹⁵⁴ With industrialised and well-established economies in the United States and Europe, there is an increasing consumer demand for fish and fishery products and therefore if small-scale fisheries are given better opportunities to expand in South Africa, they can assist in generating more foreign exchange.

3.2.4 Food security

During the Rome Declaration on World Food Security and World Food Summit Plan of Action in 1998,¹⁵⁵ food security was defined as 'condition when all people, at all times, have physical and economic access to sufficient, safe and nutritious food to meet their dietary needs and food preferences for an active and healthy life.'¹⁵⁶ In many developing countries, the major share of fish consumed locally has been caught by small-scale fisheries. Most coastal households in South Africa rely on fish for their own consumption and for sale purposes. One positive feature of small-scale fisheries is the 'decentralised nature of the fish supplied because of the geographically spread-out production structure.'¹⁵⁷ What this means is that the distance between the points of catch and the points where the fish is consumed are

¹⁵³ In 2012, the export values for fish and fishing products are expected to hit about \$US72 billion. Data calculated on the CPI inflation calculator at: http://www.bls.gov/data/inflation_calculator.htm (Accessed on 15th December 2012).

¹⁵⁴ Ibid 18.

¹⁵⁵ Rome Declaration on World Food Security and World Food Summit Plan of Action (1998), Food and Agriculture Organisation of the United Nations, Available at: <http://www.fao.org/docrep/003/w3613e/w3613e00.htm> (Accessed on 1st October 2012).

¹⁵⁶ See World Health Organisation website, Programmes and projects, Trade, Foreign policy, diplomacy and health, Food security at: <http://www.who.int/trade/glossary/story028/en/> (Accessed on 1st October 2012).

¹⁵⁷ Willmann R., Kurien J., *supra* note 141 at 408.

normally shorter, therefore making the distribution costs lower, readily available and more affordable to poorer communities.

In addition to the above, more than 1 billion of people rely on fish as an important source of protein around the world.¹⁵⁸ In parts of East Asia and Africa, fish is essential since it supplies about more than 50 per cent of the animal protein intake for about 400 million people in the poorest countries worldwide (examples of those countries are Gambia, Ghana, Indonesia, Sierra Leone and Cambodia amongst others).¹⁵⁹ Fish has highly nutritious values including essential ‘micro-nutrients, vitamins, iodine, polyunsaturated fatty acids like omega-3.’¹⁶⁰ It is clear from researches carried out that including fish in one’s diet can be highly beneficial to one’s health. Also, many developing countries in Africa and Asia have high levels of famine and fish being a free natural resource can be used to alleviate this.

3.2.5 Poverty prevention and safety-net function

Currently, the most important contribution of small-scale fisheries to poverty alleviation is probably through their role in poverty prevention. Past experiences have shown that despite not generating high economic returns, small-scale fisheries and their fishing activities help to sustain livelihoods and hence prevent such communities from falling into further deprivation.¹⁶¹ From an economic point of view, poverty prevention mechanisms or ‘fisheries as a safety net’ mechanism seem less appealing since there is no income generated or fiscal incentives involved.

However, such mechanisms are significant from a social point of view. Small-scale fisheries can play an important role in remote areas where employment and social security programmes are scarce.¹⁶² They provide employment for people who are poor and illiterate who consider fishing as their only means to an income. As mentioned above, many fishers exchange their catch or fishery products in order to get other services and goods. By carrying out bartering activities, this indirectly prevents a rise in poverty. In relation to the safety-net

¹⁵⁸ Béné, C., ‘Small-scale fisheries: Assessing their contribution to rural livelihoods in developing countries’, FAO Fisheries Circular No. 1008 Food and Agriculture Organisation of the United Nations, Rome 2006, 1-46 at 39.

¹⁵⁹ Ibid.

¹⁶⁰ Willmann R., Kurien J., *supra* note 141 at 408.

¹⁶¹ Béné, C., Macfadyen G., Allison E.H, *supra* note 146 at 24.

¹⁶² Ibid.

functions, small-scale fisheries can provide an important fall-back for vulnerable households in case there is a decline in their income.¹⁶³ For instance, if a head of a household loses his job, he can always start fishing in order to sustain himself and his family.

In the light of the above, it is clear that small-scale fishing can contribute significantly to a country's economy and can help developing countries to alleviate poverty and ensure food security. It is disappointing that the South African government has seemingly failed to give proper recognition to the various benefits of small-scale fisheries for nearly a decade after the Marine Living Resources Act was enacted. It is only after 2004 as a result of litigation and court orders that the government decided to recognise the existence of small-scale fisheries officially. The next paragraph will explain the facts of the landmark case of *Minister of Environmental Affairs and Tourism v George* and will also explain the importance of this lawsuit in the chain of events that eventually followed.

3.3 Landmark case: Minister of Environmental Affairs and Tourism v George

In 2004, the Artisanal Fishers Association, Masifundise, and the Legal Resources Centres, with the support of academics started proceedings against the Minister of the DEAT on the grounds of an unfair allocation process of fishing rights.¹⁶⁴ The appellants used the Constitution and the Promotion of Equality and Prevention of Unfair Discrimination Act¹⁶⁵ as their legal bases for litigation. Applications were lodged by the appellants both in the High Court and in the Equality Court at Cape Town, where they claimed that the Minister had failed to provide them with just access to fishing rights, and sought an order giving them equitable access to marine resources.¹⁶⁶ They requested that the equality court carried out an enquiry into their causes of action under the Promotion of Equality and Prevention of Unfair Discrimination Act¹⁶⁷ before their High Court claims be considered.¹⁶⁸

¹⁶³ Ibid.

¹⁶⁴ Isaacs M., 'Creating action space: small-scale fisheries policy in South Africa', Jentoft S., Eide A., *Poverty Mosaics: Realities and prospects in small-scale fisheries*, 1st Edition, Springer (2011), 359-384 at 362.

¹⁶⁵ Act 4 of 2000.

¹⁶⁶ Paragraph 1 of *Minister of Environmental Affairs and Tourism v George* 2007 (3) SA 62 (SCA).

¹⁶⁷ Act 4 of 2000.

¹⁶⁸ *Minister of Environmental Affairs and Tourism v George* 2007 (3) SA 62 (SCA), *supra*note 166.

However, the Minister sought to block the above-mentioned applications.¹⁶⁹ The Court held that the Minister's appeal was flawed for two reasons. Firstly, 'the equality court's refusal to refer the matter to the High Court, which entailed a discretionary decision entrusted to it, did not embody a judgment or order capable of being appealed, and the order the Minister sought was incompetent.'¹⁷⁰ Secondly, the Court overruled the Minister's argument that the Equality Act created an automatic right of appeal without leave.¹⁷¹

The court further held that the Minister of Environmental Affairs and Tourism could not deny the fishers their right to appear in the Equality Court since they are entitled to claim the 'assistance and protection the legislature afforded to litigants who wished to press equality claims when it enacted the Equality Act.'¹⁷² The court also stated that it would be more appropriate for the matter to be referred to the same High Court judge, who in his capacity as an Equality Court judge, would preside in that court.¹⁷³ The court ordered that the application for condonation be refused with costs and the appeal be struck from the roll with costs.¹⁷⁴ The judgment handed down in this case is significant since it has made clear that every South African citizen, regardless of their occupation, is allowed to have *locus standi* in the equality court.

In May 2007, shortly before the commencement of the inquiry in the Equality Court, the Minister agreed with the appellants to find a 'long-term policy solution for more than 1,000 artisanal fishers'¹⁷⁵ and also to provide 'relief mechanisms to allow fishers to subsist and reserved 120-140 tonnes of west coast lobster for poor fishers.'¹⁷⁶ The High Court made several orders, one of which ordered the Minister of Environmental Affairs and Tourism (now Minister of Environmental Affairs) to appoint an interim task relief team that would develop a 'new legislative and policy framework to accommodate traditional fishers more effectively.'¹⁷⁷ In addition to that, the Department was required to take into consideration the

¹⁶⁹ Ibid.

¹⁷⁰ Paragraph 2 of *Minister of Environmental Affairs and Tourism v George* 2007 (3) SA 62 (SCA).

¹⁷¹ Ibid.

¹⁷² Paragraph 18 of *Minister of Environmental Affairs and Tourism v George* 2007 (3) SA 62 (SCA).

¹⁷³ Paragraph 19 of *Minister of Environmental Affairs and Tourism v George* 2007 (3) SA 62 (SCA).

¹⁷⁴ Order from *Minister of Environmental Affairs and Tourism v George* 2007 (3) SA 62 (SCA).

¹⁷⁵ Isaacs M., 'Governance reforms to develop a small-scale fisheries policy for South Africa', Cheunpagdee R., *World Small-Scale Fisheries: Contemporary Visions*, Eburon Publishers, Delft (2012), 222-233 at 222.

¹⁷⁶ Ibid.

¹⁷⁷ Paragraph 8 of *Kenneth George and others v Minister of Environmental Affairs and Tourism*, in the Equality Court held at the High Court of South Africa (Cape of Good Hope provincial division), file EC 1/2005.

objectives and principles in s 2 of the Marine Living Resources Act as well as accommodating the socio-economic rights of small-scale fishers when drafting the new policy.¹⁷⁸ Following the court orders, the Minister of Environmental Affairs and Tourism (now Minister of Environmental Affairs) initiated a joint task team at the Small-scale Fisheries Summit in 2007¹⁷⁹ in order to implement a new policy.

The role and involvement of this task team will be discussed in the next section (National Summit on Small-Scale Fisheries). This case is such a significant step towards the integration of small-scale fishers in the allocation of fishing rights. It was the start of a long course of action for the production of a small-scale fisheries policy. Predominantly this policy's objectives would be to cater for the formerly poor and marginalised fishers.

However, not every stakeholder in the fishing industry was enthusiastic and satisfied with this outcome. The out-of-court settlement including the granting of interim relief caused so much frustration and discontentment from large commercial fisheries that a number of them started proceedings against the Minister and the DEAT. In *West Coast Rock Lobster Association v The Minister of Environmental Affairs and Tourism*¹⁸⁰ the appellants¹⁸¹ appealed to the court arguing that the Minister's discretionary power under s 81 was an abuse of the provisions under the Marine Living Resources Act, hence precluding the latter from using this provision to grant fishing rights and also sought to set aside the decision by the respondents to grant subsistence fishers the right to catch and sell West Coast Rock Lobsters. The appeal was dismissed and the appellants were ordered to pay the respondents' costs.

¹⁷⁸ Ibid.

¹⁷⁹ The Department of Environmental Affairs and Tourism (as it was called then) hosted the first national Summit on Subsistence and Small-scale Fisheries in South Africa on the 1st and 2nd of November 2007 in Port Elizabeth. For more information see the South African Government Information website at: <http://www.info.gov.za/speeches/2007/07110110451001.htm> (Accessed on 15th of December 2012).

¹⁸⁰ (532/09) [2010] ZASCA 114 (22 September 2010).

¹⁸¹ The first appellant, the West Coast Rock Lobster Association, described itself as a non-profit organisation whose members all hold long-term fishing rights in terms of s 18(1) of the Marine Living Resources Act 18 of 1998 (the MLRA), to undertake commercial fishing for WCRL. The second appellant, Stephan Francois Smuts, was the holder of long-term commercial fishing rights in the WCRL Nearshore fishery. The third appellant was Sahra Luyt, who also held long-term commercial fishing rights in the WCRL Nearshore fishery. The fourth appellant, Sparkor (Pty) Ltd, was a company that held long-term commercial fishing rights in the WCRL Offshore fishery. [Paragraph 4 of *West Coast Rock Lobster Association v The Minister of Environmental Affairs and Tourism* (532/09) [2010] ZASCA 114 (22 September 2010)].

The arguments put forward in this case are noteworthy since it demonstrates the commitment by the Minister of Environmental Affairs and Tourism's commitment to promote access rights and rights to artisanal fishers who have been discriminated in the past. In his answering affidavit the Minister affirmed that:

[F]rom a humanitarian and socio-economic perspective understood in the context . . . of the MLRA and the considerations that led to the settlement of the Equality Court case, it was very important that the affected group of fishers be accommodated, inter alia, with access to WCRL. Time did not permit a process of rights allocations to them under s 18 coupled with a possible re-allocation for commercial TAC under s 14. The development of the policy had been held up longer than expected, not due to the fault of the interim relief fishers. Not addressing their needs could, and probably would, cause very severe hardship for the interim relief fishers. . . . In my opinion, these were sound reasons for addressing this issue by way of exemptions under s 81.¹⁸²

From the above, it seems apparent that there is now a shift in the mentality of government officials, who are genuinely looking to redress past inequalities in the fishing industry. There is also the fact that the Minister acknowledged that the small-scale fisheries could not be perceived as competition for the commercial fisheries since 'their impact would probably be minimal and would in any event not be in a market sector in which the large commercial interests participated meaningfully.'¹⁸³ Hence, it can be seen that there was no valid and compelling reason as to why small-scale fisheries should be excluded from the granting of interim reliefs until the new small-scale fisheries policy was implemented.

3.4 National Summit on Small-Scale Fisheries

Following the Equality Court order in the case of *Minister of Environmental Affairs and Tourism v George* in 2007, the DEAT initiated a national Summit on small-scale fisheries to discuss key issues regarding small-scale fisheries and fishers.¹⁸⁴ There were several representatives from fishing communities in the four different coastal provinces who were elected to manage and develop a new policy. A National Task Team (NTT) was created shortly afterwards and it included representatives from fishing communities, non-governmental organisations, academics and government officials.¹⁸⁵ In its drafting process, the NTT distinguished the small-scale fishers, small-scale community and small-scale sector from the large commercial fisheries.

¹⁸² Paragraph 27 of *West Coast Rock Lobster Association v The Minister of Environmental Affairs and Tourism* (532/09) [2010] ZASCA 114 (22 September 2010).

¹⁸³ Paragraph 28 of *West Coast Rock Lobster Association v The Minister of Environmental Affairs and Tourism* (532/09) [2010] ZASCA 114 (22 September 2010).

¹⁸⁴ Isaacs, *supra* note 175 at 228.

¹⁸⁵ *Ibid.*

Furthermore, key issues emanated from the NTT. It was suggested that in addition to the need to meet basic livelihood needs, small-fishers could engage in activities such as ‘harvesting, selling and semi-commercial activities.’¹⁸⁶ For the first time since South Africa became a democratic nation, the impacts of excluding small-scale fisheries were discussed and put down in black and white. The policy contemplated the ‘complex nature and structural impacts of forced removals on coastal communities.’¹⁸⁷ It has also acknowledged the importance of small-scale fisheries in providing employment for the local communities. In many coastal communities, fishers engage in further activities such as net-making and boat-building and this usually generated other sorts of fishery related jobs.

As mentioned at the outset of this chapter, small-scale fisheries provide several socio-economic benefits to developing countries and it appears that the government has finally become conscious of such benefits. Finally after 3 years of extensive consultation and preparation, a draft of the small-scale fisheries policy was published for public comments in September 2010.

3.5 Small-scale fisheries policy

At long last the draft small-scale fisheries policy was published in September 2010 for public comments, after an intensive lawsuit and the input of a diverse but well-represented task team in the preparation of the latter. The following paragraphs will provide an evaluation of both the draft version and the final version of the small-scale fisheries policy. The final version of the small-scale fisheries policy was gazetted on the 20th June 2012. Does this mean that the struggle of small-scale fishers to carry out fishing activities has now come to an end? The following paragraphs will evaluate to what extent the publication of this new policy is intended help small-scale fishers and communities in general.

3.5.1 *Draft small-scale fisheries policy*

There is no doubt that the draft small-scale fisheries policy is an innovative document and seeks to change how the allocation of fishing rights is allocated. The draft policy’s objectives

¹⁸⁶ Ibid.

¹⁸⁷ Ibid.

are seemingly based on human rights principles.¹⁸⁸ It acknowledges the fact that coastal communities are heavily reliant on small-scale fisheries in order to secure a livelihood. There is a strong understanding of the need to promote gender equality and social security for small-scale fishers in order to ensure food security and poverty alleviation.¹⁸⁹

In addition to that, the draft policy encourages the development of community organisations also known as community-based legal entities¹⁹⁰ where the fishers are urged to join the latter. The main objective of such legal entities would be to act as ‘local management structure and formalise co-management and the community-based approach’¹⁹¹ supported in the draft policy. Those structures will ensure that activities related to the harvesting of marine living resources are adequately coordinated and regulated.¹⁹² The importance of such entities is that it provides a platform for the small-scale fishers and artisanal fishers to raise any concerns they may have.

Furthermore, the establishment of legal entities could promote ‘self-governance to co-manage marine resources, implementation of the new small-scale fisheries policy regulations, economic development through value-added post-harvest activities and market on the domestic and international market.’¹⁹³ The draft small-scale fisheries policy seems to reiterate the findings of the FAO¹⁹⁴ about the benefits of having small-scale fisheries in developing countries. There is also the fact that this document supports the collective rights approach rather than the individual transferable quotas. It therefore appears that the small-scale fisheries policy is well-drafted and took into account the socio-economic aspects and benefits of such fisheries.

The draft policy was completed in August 2010 and was out for public consultation between October and November 2010 where approximately 100 meetings had been held around the

¹⁸⁸ Ibid.

¹⁸⁹ Ibid.

¹⁹⁰ Definitions in GN852 in *Government Gazette* 33530 dated 3-9-2010: Community-based legal entity is defined as ‘an association of small-scale fishers from an identified and listed small-scale fishing community that is established in terms of laws and has legal capacity to enter into agreements or contracts, assume obligations, incur and pay debts, sue and be sued in its own right, and to be held responsible for its actions.’ Examples of community-based legal entities envisaged under this policy include a Section 21 Company, a cooperative or a trust.

¹⁹¹ Ibid at 43.

¹⁹² Ibid.

¹⁹³ Ibid.

¹⁹⁴ Béné, C., Macfadyen G., Allison E.H., *supra* note 146.

coastal areas.¹⁹⁵ The comments and feedbacks received were consolidated by the National Economic Development and Labour Council (hereafter NEDLAC).¹⁹⁶ Mr Richard Seleke, the Acting Deputy Director General for the Department of Agriculture, Forestry and Fisheries¹⁹⁷ (hereafter DAFF) explained that the NEDLAC had started the consolidation process on the 4th November 2010 and once concluded, the final policy would be presented to the Cabinet.¹⁹⁸ At the time Mr Seleke made his announcement, the final version of the small-scale fisheries policy was expected to be introduced in June 2011.¹⁹⁹

However, unsurprisingly, this time scale turned out to be optimistic. The final small-scale fisheries policy was gazetted in June 2012, nearly two years after the draft was published. In many cases, the government has been incompetent, inefficient and failed to implement policies and statutes within the time frame it originally pledged for. However, producing this policy within such a short timeframe demonstrates that the government is really committed to give equal access rights and fishing rights to the previously marginalised small-scale fishers. Not only does it show commitment by the Department of Agriculture, Forestry and Fisheries, but also displays efficiency and competency.

3.5.2 Final small-scale fisheries policy

At last, the small-scale fisheries policy was gazetted on the 20th June 2012.²⁰⁰ The aims of this policy are to provide 'redress and recognition to the rights of Small Scale fisher communities in South Africa previously marginalised and discriminated against in terms of racially exclusionary laws and policies, individualised permit-based systems of resource allocation and insensitive impositions of conservation-driven regulation.'²⁰¹ For the first time in South African history, the definition of small-scale fishers was expressed in an official

¹⁹⁵ See Parliamentary Monitoring Group website, 'Small-scale fisheries & Abalone Experimental Fisheries: Report back by Department', Available at: <http://www.pmg.org.za/report/20110208-report-back-department-agriculture-forestry-and-fisheries-small-scale> (Accessed on 6th November 2012).

¹⁹⁶ NEDLAC is described as the 'vehicle by which government, labour, business and community organisations will seek to cooperate, through problem-solving and negotiation, on economic, labour and development issues, and related challenges facing the country.' See NEDLAC website, Available at: <http://www.nedlac.org.za/> (Accessed on 10th November 2012)

¹⁹⁷ As from the 1st April 2010, the management of fisheries was transferred from the Department of Environmental Affairs and Tourism to the Department of Agriculture, Forestry and Fisheries.

¹⁹⁸ Parliamentary Monitoring Group, *supra* note 195.

¹⁹⁹ *Ibid.*

²⁰⁰ GN474 in *Government Gazette* 35455 dated 20-6-2012.

²⁰¹ Policy for the small-scale fisheries sector in South Africa, Department of Agriculture, Forestry and Fisheries, GN474 in *Government Gazette* 35455 dated 20-6-2012, Page 1.

document.²⁰² As mentioned previously, the State has formally recognised three categories of fishers only under the Marine Living Resources Act and this change can therefore be perceived as a revolutionary step by the government.

In addition to that, the several benefits of small-scale fisheries to the economy and their contribution to food security are highlighted.²⁰³ This is another significant feature of this policy document since it acknowledges that there are other non-conventional ways to contribute towards economic development, in this instance, the expansion of small-scale fisheries. The poverty level in South Africa continues to remain high in most provinces²⁰⁴ and the inclusion of small-scale fisher communities could help to alleviate such situations in the coastal areas.

Additionally, the principal objective of this document is to advance certain fundamental shifts in the government's approach to the small-scale fisheries sector.²⁰⁵ There are several goals that this policy seeks to achieve but due to space constraints, only a few of those will be mentioned here. The provisions of this document stipulate that there is the need to provide formal and appropriate legal protection to small-scale fishers through the allocation of fishing rights, the need to take into account the historical background of fishers when allocating fishing rights and also the need to ensure that those who are categorised as 'small-scale fishing communities' get the maximum benefits of the marine resources amongst others.²⁰⁶

The goals are far-reaching and also include the necessity to ensure that the marine living resources are used in a sustainable fashion while ensuring that mechanisms and structures which promote co-management and community-based approach in small-scale fisheries sector are available.²⁰⁷ On the surface of it, it appears to be a well-thought through and well-crafted document which takes into consideration the numerous aspects influencing small-scale fisheries. However, there are fourteen challenging objectives which the government is

²⁰² Ibid.

²⁰³ Paragraph 1.4 of the Policy for the small-scale fisheries sector in South Africa.

²⁰⁴ Luyt D., 'Governance, Accountability and Poverty Alleviation in South Africa', Centre for Social Accountability, Rhodes University, Paper delivered at the United Nations Social Forum (28 September 2008), Geneva, Switzerland, 1-7 at 2.

²⁰⁵ Policy for the small-scale fisheries sector in South Africa, *supra* note 140 at 15.

²⁰⁶ Ibid.

²⁰⁷ Ibid.

seeking to achieve in a short period of time and this inevitably indicates that this policy is far too ambitious, unrealistic and is unlikely ever to be fully accomplished.

Another important part of this policy document is the incorporation of the mechanisms and instruments for the management of small-scale fisheries.²⁰⁸ There is a variety of management instruments and tools that the policy proposes to use in the small-scale fishing sector. Examples of those mechanisms and instruments are ‘the assessment of the status of marine living resources, management plans, demarcating areas that are prioritised for small-scale fishers and agreements.’²⁰⁹ The significance of such mechanisms is that it provides vital information to the government in terms of the stock levels of fish in South African waters. Accordingly the latter may regulate species and determine which ones can be caught and which ones need recovery, in that way avoiding significant depletion.

Moreover, the small-scale fisheries policy proposes that areas along the coast are demarcated as ‘areas prioritized for small-scale fishers.’²¹⁰ Once the area has been designated as a small-fishing community area, a number of management mechanisms shall be available in this region. For example, access rights in certain areas may be reserved exclusively for small-scale fishers on a spatial basis.²¹¹ This may perhaps be a method used by the government to ensure that large commercial fisheries, with more funding and advanced technologies, do not compete against small-scale fishing communities and hence assists the latter to derive benefits from marine living resources in the best possible way.

Other mechanisms that the policy provides for are management plans. The government has the duty to ‘introduce a system of management plans to guide and facilitate the implementation and management of activities at the local level and to ensure coordinated action in a particular area.’²¹² In drafting those management plans, the government must take into consideration the needs of the small-scale fishers in a particular area. Such management plans have to be formalised by the law (by means of policy instruments or accompanying regulations). Any sort of content, information requirements and procedures of those

²⁰⁸ Paragraph 5 of the Policy for the small-scale fisheries sector in South Africa.

²⁰⁹ Ibid.

²¹⁰ Ibid.

²¹¹ Ibid.

²¹² Ibid.

management plans will have to be determined by regulations if they become statutory requirements.²¹³ The cause for concern here is obviously the different stages that the management plans will have to go through before being approved and implemented by the government. Such process typically takes a long time to be finalised and in the meantime the lack of management plans can potentially cause chaos amongst local fishing communities.

Besides this, vague guidelines are provided relating to the needs and interests of fishers under the age of 18, the issues surrounding gender equality within the fisheries sector and the need to ensure that safe labour practices are present in the fishing communities. Other mechanisms include technical control measures such as TAC and TAE, co-management agreements between the government and small-scale fishing communities. Co-management agreements have become increasingly popular in recent years and are considered to represent a 'more democratic governance system, because it implies increased involvement of users and delegation of decisions to be taken as close to the users as possible.'²¹⁴ Since the enactment of the Marine Living Resources Act in 1998, the government and its branches have at all times been the sole decision-maker in matters regarding fisheries management. Co-management is one of the mechanisms that encourage both small-scale fishers and the government to work alongside each other in order to ensure that fisheries are managed in an effective manner. Serious commitment and cooperation between the two parties can to some degree result in positive results in the management of small-scale fisheries in the coming years.

Furthermore, the small-scale fisheries policy provides specifically for the allocation of small-scale fishing rights. This is arguably the most important part of this document. There is proposed to be a shift from the individual allocation of fishing rights to collective fishing rights.²¹⁵ This means that no rights will be given to an individual but will instead be awarded to individuals belonging to a community. The policy provides clearly that the relevant regional and international instruments, the fundamental human rights provided under the

²¹³ Ibid.

²¹⁴ Nielsen J.R., Degnbol P., Viswanathan K., Ahmed M., Hara M., Abdullah N.M.R., 'Fisheries co-management – an institutional innovation? Lessons learnt from South East Asia and Southern Africa' (2004) 28 *Marine Policy*, 151 – 160 at 154.

²¹⁵ Policy for the small-scale fisheries sector in South Africa, *supra* note 140 at 33.

Constitution and the general principles of the Marine Living Resources Act need to be taken into account when allocating fishing rights.

Under the new policy, fishing rights will be allocated to community-based legal entities which will be made of individuals who meet the criteria of being a small-scale fisher.²¹⁶ The criteria that need to be met are provided at paragraph 6.2.4 of the policy document. Once the Department issues the right to fish, the small-scale fishing community determines the manner in which the fishing rights are to be exercised by its members. During this phase they have a duty to keep the Minister and the Department up to date with the reasons, manner and methods used in selecting the fishers.²¹⁷

Also, the Department acknowledges the fact that small-scale fishers have historically harvested a wide variety of species and attention will still be given to this by letting fishers have ‘access to multiple species within an area or a particular prioritised area.’²¹⁸ The type and number of species which would now be included in the allocation will depend primarily on factors such as ‘quantity of the marine living resources available given the TAC, zone allocations and TAE of particular species.’²¹⁹ There are also several factors that the Department will take into consideration and those listed in the policy are not exhaustive.

Along with the factors to be taken into account, the policy provides further guidelines on the procedure to be followed in order to obtain community based rights. In brief, the Minister has to satisfy him or herself that the small-scale fishing community is a *bona fide* one and defines its extent. Once this is done, the community-based entity has to identify genuine small-scale fishers who meet the criteria as per the policy and becomes part of the small-scale fishing community. The list is then submitted to the Minister who then verifies the latter and consequently the small-scale fishers are informed that the community-based legal entity may be established. After its establishment, the community-based legal entity produces a list of its members who may exercise its allocation and thereafter applies for the fishing right. Finally, the Minister considers the application and makes his or her decision as to whether or not to grant or reject the rights.

²¹⁶ Paragraph 6.2 of the Policy for the small-scale fisheries sector in South Africa.

²¹⁷ Ibid.

²¹⁸ Paragraph 6.2.3 of the Policy for the small-scale fisheries sector in South Africa.

²¹⁹ Ibid.

The new system of the allocation of fishing rights is apparently comprehensive and appears to be more focussed on the small-scale fishing community in general instead of individual fishing rights. Some would argue that this is a positive change towards the integration of all members of small-scale fishing communities, however, the collective approach has been a failure in the past and a repetition of the latter is not unconceivable. One of the latest examples is the South African Commercial Fishing Corporation (SACFC) which matter showed how problematic communal rights allocations can be.²²⁰

Briefly the particulars of this case are that the SACFC board had apparently ‘made off’ with millions of rand earned from ‘paper quota’ sale.²²¹ This corporation consisted of about 3,000 members along the West Coast, Southern Cape Coast and the Eastern Cape Coast and the members were basically promised jobs and wealth creation which never occurred. Instead of earning a decent living, lobster fishers would earn R20 per kilogram whilst the co-operative would keep R80 and R100 for itself.²²² There were several conflicts that arose between members and the directors in regards to the allocation of jobs and the use of dividends.

Furthermore, the members were not happy about the size of the quotas allocated to the Company.²²³ As a result, several members in Eland’s Bay were submitting individual application for subsistence (later limited commercial) fishing permits.²²⁴ In Hout Bay, the corporation invested about R 2,5 million in a ‘joint venture agreement’ with Oceana Fishing Group. However, members of the SACFC were not allowed to harvest this quota as it was deemed to be the responsibility of existing Oceana staff.²²⁵ The member of the SACFC made several requests for them to be, what they believed, rightfully allocated species but such requests was rejected and the members had to live with the small returns they received from the pooled quotas in Oceana Fishing Group.²²⁶ Based on such past experience with that community-based legal entity, it is uncertain why the government reintroduced the collective

²²⁰ ‘The analysis of the draft small-scale fisheries policy in South Africa: Highlight areas of concern within the policy’, Research Unit, Parliament of the Republic of South Africa, (February 2011) 1-14 at 11. Also see: Loring-van Beeck K., ‘Fishing for sustainable solutions: Towards a communal system of rights allocation’, (2012) *Elsa Law Malta Review*, Edition II, 187-207 at 197.

²²¹ Ibid.

²²² Ibid.

²²³ Affidavit filed in by Naseegh Jaffer (Masifundise) in the case of *Kenneth George and others v Minister of Environmental Affairs and Tourism*, in the High Court of South Africa (Cape of Good Hope provincial division), file EC 1/2005.

²²⁴ Ibid.

²²⁵ Ibid.

²²⁶ Ibid.

approach but one can only hope that appropriate implementation and enforcement mechanisms are set up in order to ensure that history does not repeat itself.

Finally, another significant aspect of the small-scale fisheries policy is the fact that it includes a section dealing with the review of this policy.²²⁷ Since the economic stability is constantly changing worldwide including in South Africa, there is the need for continuous review of the small-scale fisheries policy in order to ensure that it continues to effectively address issues such as socio-economic needs of small-scale fishers and the ecological sustainability. Periodical review is imperative considering that marine living resources are not unlimited and often faces threat from fishing activities. This ensures that the policy is an up to date and true reflection of the current situation in South African small-scale fisheries.

This section goes on to state that the government will ensure that there will be on-going research by the latter and by relevant stakeholders so as to identify any flaws or weaknesses present in this policy.²²⁸ This is important as it demonstrates that the government is taking a flexible approach rather than an authoritarian approach, to ensure that the policy adapts to different scenarios. South Africa has both limited financial and human resources and by adopting a flexible approach the small-scale fisheries policy ensures that such resources are used competently and effectively. In addition to that, the policy also states that DAFF will put in place a monitoring and evaluation system as to make sure that reliable and timely feedback is available to the government and relevant stakeholders. Monitoring and evaluation systems will ensure that the government keeps track with the success of the policy and aspects that are not thriving may undergo changes accordingly.

3.5.3 Inconsistency with the National Development Plan - 2030

In my view, nonetheless, the most life-threatening flaw of this policy is arguably the fact that it is in contradiction with the National Development Plan (NDP) 2030. A draft NDP was produced in November 2011 and after extensive consultation, the revised document was handed down in Parliament on the 15th August 2012 by Planning Minister Trevor Manuel to President Jacob Zuma. This plan aims to eliminate poverty and reduce inequality by 2030. According to the NDP, ‘South Africa can realise these goals by drawing on the energies of its

²²⁷ Paragraph 7 of the Policy for the small-scale fisheries sector in South Africa.

²²⁸ Ibid.

people, growing an inclusive economy, building capabilities, enhancing the capacity of the state, and promoting leadership and partnerships throughout society.’²²⁹ For the purpose of the subject matter of this dissertation, the most relevant section of the NDP is chapter 6.

The title of Chapter 6 of the NDP is ‘an integrated and inclusive rural economy.’ The main points of this chapter are that rural communities need better social, political and economic opportunities in order to surmount poverty and provides ways in which this can be achieved. There are also significant provisions that the NDP specifies in relation to the fishing industry, in particular to the small-scale fishing industry. The NDP does not seem to agree with DAFF that the promotion and empowerment of small-scale fisheries would assist in poverty alleviation and the creation of jobs. It instead argues that ‘capital-intensive industrial fisheries’ play a better role in the creation of jobs which offer a better salary and better work conditions than small-scale fisheries.²³⁰ According to this document, small-scale and artisanal fishers operate at low-cost but often harvest high-value resources²³¹ which may consequently severely deplete certain species, for example the abalone. It goes on to state that the large commercial industries provide jobs approximately to 27,000 people in South Africa and they are usually employed on better terms. The NDP proposes that there should be other means to develop economic opportunities in order to sustain the livelihoods of fishing communities.

The relevant section that deals with small-scale and artisanal fishers is relatively short but is long enough to demonstrate that it completely opposes the notion of empowering small-scale fisheries proposed by DAFF. The NDP is an overarching document with a national vision for South Africa and the dilemma for the State therefore is which document prevails in such an instance. It is obvious that the two of documents are of different line of reasoning and cannot be applied to small-scale fisheries concurrently.

Up to now, this dissertation has argued for the needs and rights of small-scale fishers to be taken into consideration. However, as mentioned in the previous paragraph the NDP is an

²²⁹ See the South African Government Information website, Key Issues, National Development Plan 2030, Available at: <http://www.info.gov.za/issues/national-development-plan/index.html> (Accessed on 10th November 2012).

²³⁰ National Development Plan 2030, Chapter 6 ‘An integrated and inclusive rural economy’, 217-234 at 229, at: <http://www.npc.gov.za/MediaLib/Downloads/Home/Tabs/NDP%202030-CH6-An%20integrated%20and%20inclusive%20rural%20economy.pdf> (Accessed on 12th November 2012)

²³¹ Ibid.

overarching document with a national vision to make South Africa a better country. Its aim is to encourage every South African citizen to embrace their full potential. The plan makes it clear that small-scale fisheries do not boost South Africa's economy. However, by no means does this mean that the plan fails to take into account the poverty and food security of the small-scale fishers. It does make provision for the growth of jobs, education and skills of citizens regardless of their background. It further presents a long-term strategy to increase 'employment and to broaden opportunities through education, vocational training and work experience, public employment programmes, health and nutrition, public transport and access to information.'²³²

Small-scale fishers have argued over the years that the failure of allocation rights by the government has resulted into poverty and a low standard of living. On the surface of it, it would appear that the small-scale fisheries policy would be the best plan for the government to implement but it can be seen that the NDP covers agendas like poverty alleviation, food security, education and training at a larger scale. It could be therefore more beneficial for the government to invest its resources in the introduction of the NDP as it would benefit more citizens than the small-scale fisheries policy which would assist few coastal fishing communities only.

The other issue here is that the supreme law of South Africa, the Constitution, provides that all spheres of the government must 'cooperate with one another in mutual trust and good faith by informing one another of, and consulting one another on, matters on common interest.'²³³ It seems that there has not been any sufficient information sharing between the two Departments and this may amount to a breach of the Constitution. Co-operative governance would have ensured that the outcome of the NDP and the small-scale fisheries policy is different whilst providing for a better and more integrated plan for artisanal fishers.

²³² National Development Plan 2030 – Our future – make it work, Executive Summary, National Planning Commission, Department of the Presidency, Republic of South Africa, 1-67 at 27, Available at: <http://www.npconline.co.za/MediaLib/Downloads/Downloads/Executive%20Summary-NDP%202030%20-%20Our%20future%20-%20make%20it%20work.pdf> (Accessed on 18th December 2012).

²³³ Section 41 (1) (h) (iii) of the Constitution.

3.5.4 An optimistic or uncertain future for the small-scale fishers?

Based on the above description and analysis of the small-scale fisheries policy, it indicates that the Minister and the DAFF's approach has been innovative but not necessarily a realistic one. It is definitely a step forward in terms of the allocation of rights to small-scale fishers but the new policy appears to be, to a certain degree, flawed. As pointed out in the previous paragraphs, the government has not thought through this policy carefully whereby details regarding implementation have been omitted. As mentioned previously, the notion of 'community-based' allocation of fishing rights has proved to be unsuccessful in the past and it is beyond understanding as to why the government would seek to take such an approach for a second time. It therefore raises the issue of whether the government produced a policy only because it faced pressure by the courts to do so.²³⁴

The establishment of the small-scale fisheries policy represents undoubtedly a sea-change in the government's approach to fisheries management. As discussed in the previous sections, this policy seeks to empower fishing communities by allowing the latter to manage the fisheries alongside the government. In doing so, this ensures that this historically disadvantaged group gets equal consideration in respect of fishing rights. However, the fact remains that this document is inconsistent with a fundamental national plan and there is no implementation plan currently in place. Until the DAFF start working on ways in which this policy can be implemented, the small-scale fisheries policy remains more or less a dead letter. Therefore, after several years of campaign, on paper there is something for small-scale fishers to cheer about but then again in practice, it is still at a very early stage.

3.6 Challenges in regards of the new small-scale fisheries policy

In addition to the above inconsistencies regarding the small-scale fisheries policy, there are several other challenges that the government faces in relation to the successful implementation of the latter.

²³⁴ Section 165 of the Constitution provides that the judicial authority of South Africa is vested in the courts. Decisions of the Constitutional Court, the Supreme Court of Appeal and the high courts are an important source of law. These courts uphold and enforce the Constitution, which has an extensive Bill of Rights binding all state organs and all persons.

3.6.1 Exclusion of vital definitions under the Act

Perhaps the immediate cause for concern is the fact that the Marine Living Resources Act does not currently provide for important definitions such as small-scale fishers and fishing community amongst others. Despite the fact that explanations of the latter are provided in the small-scale fisheries policy, the reality is that it still remains an accompanying policy and does not have any weight until characterised by the law. Such exclusions reiterate the fact that the Marine Living Resources Act fails to recognise small-scale fishers/ fishing community as a distinct category of fisher. In addition to that, such omissions further suggest that the current provisions of the Act are not applicable to the small scale fisher/fishing community. Therefore, this document does not have much value until the Marine Living Resources Act is either amended with the relevant changes or repealed and then replaced by a new statute. The possibility of a repeal or an amendment of the Act will be analysed in Chapter 6 of this dissertation.

3.6.2 Inadequate financial Resources

Another recurrent constraint that the DAFF faces is the lack of adequate funding. South Africa continues to face limited access to financial resources which has consequent impacts on the effective implementation of strategies and in this instance will have impacts the small-scale fisheries policy. Limited funding also usually implies that the government cannot develop appropriate monitoring and evaluation mechanisms. The importance of such mechanisms is often neglected. Monitoring and evaluation programmes are essential since they provide the government with useful indication of what is suitable and what is not in the current structure. Hence, in this case, having monitoring programmes would assist the government in determining whether the small-scale fisheries policy is efficient.

3.6.3 Capacity and capability constraints

Capacity building is about ‘promoting the ability of government to perform its core delivery objectives, to implement successful programmes and to achieve its mandates in a progressively deepening and sustainable way.’²³⁵ Like most developing countries worldwide, South Africa needs to develop a literate and technically skilled population in this rapidly

²³⁵ Bloch G., Favis M., Hargovan J., ‘Evaluation of ODA to Capacity Building’, International Development Organisation, (2000) Available at: http://www.treasury.gov.za/publications/other/devco-op/section_2/01.pdf (Accessed on 13th of November 2012).

globalising era. However, studies have shown that there is a ‘mismatch’ between the skills base that are available currently and the skills that are actually needed for the country to be globally competitive.²³⁶ The DAFF is no exception to this trend and if the government wants to manage better small-scale fisheries, there will need to be more training of personnel which would take time and would consequently slow the delivery of effective services.

3.6.4 *Fine line between conservation and poverty prevention*

There is also the fact that there is a fine line between conservation of marine living resources and poverty prevention.²³⁷ Studies carried out have demonstrated that biodiversity conservation can sometimes be a barrier to people’s resource rights and poverty reduction.²³⁸ Critics have had a tendency to blame the loss of biodiversity on alleged excessive use of natural resources by residents of poor countries.²³⁹ Therefore, the government faces the dilemma of improving the livelihoods of small-scale fishers and coastal communities and at the same time trying to conserve the rich South African biodiversity. The DAFF faces a tough challenge ahead in ensuring that marine living resources are harvested in a sustainable manner and at the same time promoting a better standard of living for thousands of local communities. Then again, this is where monitoring programmes will be practical as they may provide assistance to the government in determining the success and failures of the new policy.

3.6.5 *Lack of Transparency*

A further problem faced by the different spheres of the government (local and national) is the lack of transparency. Lack of transparency is often believed to be a ‘deliberate state of affairs; information is obscured from the public to hide corruption, insufficiencies and crime.’²⁴⁰ In the fishing industry, many cases relating to the lack of transparency occur in the allocation of fishing rights. Large commercial industries owned by whites usually use black people as their

²³⁶ South African Country Report for the eighteenth session of the United Nations Commission on sustainable development (CSD-18), Department of Environmental Affairs, January 2010, 1-93 at 77.

²³⁷ Kobokana S., ‘Reconciling poverty reduction and biodiversity conservation: The case of expanded public works programme (EPWP) in Hluleka and Mkambati Nature Reserves, South Africa’, Thesis submitted for Master of Philosophy in Land and Agrarian Studies, University of Western Cape, Unpublished source, May 2007, 1-95 at 2.

²³⁸ Kepe T., Sauchera M., and Whande W., ‘Poverty alleviation and biodiversity conservation: a South African Perspective’, *Oryx: The International Journal of Conservation*, (2004) Vol. 38, No. 2, 143-5 at 143.

²³⁹ Ibid.

²⁴⁰ Standing A., ‘Making transparency work in Africa’s marine fisheries’, CHR Michelsen Institute, Anti-corruption Resource Centre, October 2011, No11, 1-31 at 8.

front face in order to obtain fishing rights. This ruse has been a success so far since anecdotal evidence shows that current fishing companies are BEE-owned, when in reality, the dominant shareholders remain whites.²⁴¹ Only recently, the Parliament's Fisheries committee chairperson highlighted once again fraud as one of the major causes for the failure of effective transformation of the industry.²⁴²

Therefore, it can be seen that the government faces further challenges from other spheres of the society. Those are inevitable since all of the above are interrelated and are essential for the effective management of the fishing industry. That is why there is an urgent need for Departments across the government to work in collaboration and can subsequently make significant progress as a country.

3.7 General observations

The next long-term allocation process is due in December 2013. It is becoming more obvious that the government, in particular the DAFF will not be able to amend²⁴³ the Marine Living Resources Act before that time. It is simply unconceivable how the Minister will be able to undertake the required procedures to amend the Act within the next 12 months and implement the small-scale fisheries policy concurrently. What this means, therefore, is that the small-scale fishers will yet again not form part of the next long-term allocation process and the policy remains a dead letter.

Overall, the core principles of the small-scale fisheries policy are rational and valid. Nevertheless, the lack of a definite implementation plan is quite alarming and it remains to be seen how the government accommodates this marginalised group. It has been a lengthy struggle for the small-scale fishers and local fishing communities and after 6 extensive years, this process appears to be a never-ending one. There is no doubt that this policy is a first step

²⁴¹ Submission to the Portfolio Committee on Agriculture and Fisheries: Transformation & Development in the Fishing Industry, Executive Summary, Masifundise Development Trust (June 2011), 1-14 at 7.

²⁴² See the Parliament of the Republic of South Africa, 'Call for transformation in Fishing industry' Available at: http://www.parliament.gov.za/live/content.php?Item_ID=1567 (Accessed on 13th November 2012).

²⁴³ The Department of Agriculture, Forestry and Fisheries had a meeting on 29 June 2012 in Cape Town and the main agenda was to propose amendments to the Marine Living Resources Act. See Dawson Edwards & Associates website, DAFF Review of legislation project, Available at: <http://www.dawsons.co.za/daff-review-of-legislation-project/> (Accessed on 26 November 2012).

towards the empowerment of small-scale fishers but the clock is ticking and actions need to be taken in order to avoid undesirable social, economic and ecological impacts.

The next chapter will look at the relevant regional and international instruments in relation to the access and fishing rights of small-scale fishers.

CHAPTER FOUR

RELEVANT REGIONAL & INTERNATIONAL INSTRUMENTS

4.1 General

A number of domestic environmental laws worldwide have been influenced by international law and South Africa is no exception.²⁴⁴ The main reason for this is that environmental issues are not restricted to geographical areas and usually have to be regulated by several different states collectively. On one hand, it can be said that over the last decades, the South African approach towards international environmental law has been fairly positive²⁴⁵ since it has signed and ratified several conventions. However, on the other hand, it has been argued that South Africa does not have a uniform approach to incorporating international environmental law,²⁴⁶ and that it is uncertain why some international conventions are incorporated expressly while others are not. The following paragraph will evaluate South Africa's position in relation to international agreements.

The legal status of international agreements is provided to the Constitution which provides that any 'negotiating and signing of all international agreements is the responsibility of the national executive.'²⁴⁷ It is stipulated that an international agreement binds South Africa only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement of a technical, administrative or executive nature.²⁴⁸ Also, any international agreement becomes 'law in the Republic when it is enacted into law by national legislation.'²⁴⁹ The significance of these provisions in the Constitution is that, at the outset, it is clear that treaties do not become part of national law without legislative enactment.

²⁴⁴ Glazewski J., 'International Environmental Law', *Environmental Law in South Africa*, 1st Edition, LexisNexis Butterworths (2000) 31-73 at 31.

²⁴⁵ Devine D.J., 'International Environmental Law,' Strydom H.A., King N.D., *Environmental Management in South Africa*, 2nd Edition, Juta Law (2009) 126-164 at 161.

²⁴⁶ Couzens E., 'The incorporation of international environmental law (and multilateral environmental agreements) into South African domestic law: notes and comments (2005)', *South African Yearbook of International Law*, Vol 30, 128-147 at 129.

²⁴⁷ Section 231 (1) of the Constitution.

²⁴⁸ Section 231 (2) of the Constitution.

²⁴⁹ Section 231 (4) of the Constitution.

Throughout the years, South Africa has ratified or has acceded to significant environmental treaties.²⁵⁰ There are a number of regional and international instruments which refer to small-scale/artisanal fishers and their related activities. At a national level, the government has enacted several statutes relating to the protection of South Africa's rich biodiversity, natural resources and marines resources. The following sections will look at the relevant provisions of those instruments and the obligation they impose on South Africa, being a contracting party. As mentioned in the previous paragraph, the instruments do not directly oblige that the South African government allocate fishing rights to small-scale fishers, but reference to the latter clearly demonstrates that they should be formally recognised as another operational category of fisher.

4.2 The regional context

Very often, academics focus largely on international environmental laws on a global scale, thereby omitting regional instruments at which norms are adopted and enforced.²⁵¹ International environmental instruments with a regional scope are equally important since they deal with environmental issues affecting their region. Moreover, the smaller participation of neighbouring countries in a smaller group may encourage a sense of belonging by member states and the willingness to work co-operatively. For the purpose of this dissertation, the most relevant international environmental law at a regional level is that of the Southern African Development Community (hereafter SADC).²⁵²

The SADC was established on the 17th August 1992 and currently has a membership of 15 member states including South Africa.²⁵³ SADC's mission is to promote sustainable 'economic growth and socio-economic development through efficient productive systems, deeper co-operation and integration, good governance, and durable peace and security, so that the region emerges as a competitive and effective player in international relations and the world economy.'²⁵⁴ In their commitment to achieve SADC's mission and vision, the member

²⁵⁰ A treaty is a written agreement between states or between states and international organisations, operating within the field of international law. See Dugard J., 'South Africa and International Law: A historical introduction', *International Law: A south African Perspective*, 3rd Edition (2006), 16-46 at 28.

²⁵¹ Van Der Linde M., 'Regional Environmental Law under the auspices of the African Union (AU)', Strydom H.A., King N.D., *Environmental Management in South Africa*, 2nd Edition, Juta Law (2009) 165-192 at 165.

²⁵² See SADC website, About SADC at: <http://www.sadc.int/english/about-sadc/> (Accessed on 14th November 2012).

²⁵³ Ibid.

²⁵⁴ Ibid.

states signed the SADC treaty. There are several thematic Protocols which supplement the SADC treaty and in this case the most relevant document is the SADC Protocol on fisheries.²⁵⁵ It is worth noting that the Member states have the duty to achieve the different objectives of any such Protocol.²⁵⁶ However, member states are not bound by a Protocol if they are not parties to the latter.²⁵⁷

4.2.1 SADC Protocol on fisheries

The SADC Protocol on Fisheries was signed by Member states, including South Africa in Blantyre, in 2001. South Africa ratified the Protocol on the 24th of July 2003²⁵⁸ and it entered into force in August 2003.²⁵⁹ The objectives of the Protocol are to promote food security and human health, protect the livelihoods of fishing communities, generate economic opportunities for neighbouring countries, ensure that the future generations benefit from the living aquatic resources and aquatic ecosystems and finally alleviate poverty.²⁶⁰

The most relevant provision of this Protocol is Article 12 which caters for artisanal fisheries, subsistence fisheries and small-scale commercial fisheries. Article 12 provides that State parties shall seek to achieve a ‘rational and equitable balance’ between the social and economic objectives in the utilisation of marine living resources that are available to artisanal and subsistence fishers. State parties shall do so by establishing relevant legal, administrative and enforcement measures for the protection of artisanal and subsistence fishers and by taking into consideration the socio-economic needs of the disadvantaged fishers.

Arguably, the Department of Environmental Affairs and Tourism (as it was known as that time), can claim that it included both objectives in the Marine Living Resources Act. The Act does in fact make provisions for sustainable fishers as discussed above and also accommodates for the disadvantaged fishers in section 2(j). However, this would be an

²⁵⁵ See the SADC website > Documents and Publications > Protocol on fisheries (2001) Available at: http://www.sadc.int/documents-publications/show/Protocol_on_Fisheries2001.pdf (Accessed on 14th November 2012).

²⁵⁶ Article 22 of the South African Development Community Treaty, Windhoek, 1992.

²⁵⁷ Article 22(9) of the South African Development Community Treaty, Windhoek, 1992.

²⁵⁸ SADC Treaty and Protocols: Status of Protocols in force, (June 2010), Protocol on Fisheries (2001), 1-28 at 17. Available at: http://www.sadc-tribunal.org/docs/SADC_Legal_Instruments_in_use.pdf (Accessed on 17th of December 2012).

²⁵⁹ Cullinan C., Daniels C., Sowman M., ‘The legal and institutional framework for the artisanal fisheries sector in the BCLME region, Final Report’, BCLME Report (2005), 1-32 at 3.

²⁶⁰ Article 3 of the South African Development Community Protocol on Fisheries, Blantyre, 2001.

implausible assertion in the case of South Africa since it has been made clear in the SFTG (2000) that subsistence and artisanal fishers are two separate categories of fishers. It can be seen therefore that the South African government is, at least strongly arguably, in breach of its obligation in terms of the SADC Protocol on Fisheries.

In addition to that, the Protocol on Fisheries provides that by signing the document, State parties agree to develop small-scale commercial fisheries whilst taking into account the need to optimise the social and economic benefits of such fisheries.²⁶¹ State parties must take appropriate measures to facilitate physical and social infrastructure and also provide support services for the development of artisanal and subsistence fisheries.²⁶² Moreover, they have the duty to initiate comprehensive programmes which will aim to promote education, empowerment and uplifting of those fisheries.²⁶³ Another significant provision of this Article is the obligation it places on State parties to encourage equitable participatory processes by artisanal and subsistence fishers in the control and management of fishing activities.²⁶⁴ The final relevant feature of Article 12 is that all parties shall ensure that their national statutes are consistent with the Protocol and at the same time take into account indigenous knowledge and practice.²⁶⁵

It is arguable that the Department of Environmental Affairs and Tourism (the governing Department at the time) failed to implement such crucial provisions in the national legislation, the Marine Living Resources Act, given that the Protocol was signed after the enactment of the Act. Despite this, the government did not seek to work in the least towards the incorporation of those features until the Department was involved in a lawsuit in 2004. This is disappointing as it reaffirms the notion that the government, especially the DAFF, did not feel the urgency to accommodate the socio-economic needs of the artisanal fishers. It would be expected that after the SFTG in 2000, which distinctly differentiated subsistence fishers from small-scale fishers, the Department would try to find ways to empower the small-scale fisheries but there was no such occurrence. Nevertheless, on a positive note, the

²⁶¹ Article 12(2) of the South African Development Community Protocol on Fisheries, Blantyre, 2001.

²⁶² Article 12(3) of the South African Development Community Protocol on Fisheries, Blantyre, 2001.

²⁶³ Article 12(5) of the South African Development Community Protocol on Fisheries, Blantyre, 2001.

²⁶⁴ Article 12(6) of the South African Development Community Protocol on Fisheries, Blantyre, 2001.

²⁶⁵ Article 12(7) of the South African Development Community Protocol on Fisheries, Blantyre, 2001.

small-scale fisheries policy now incorporates the principles of Article 12 of the SADC Protocol on fisheries.

4.2.2 South East Atlantic Fisheries Organisation (SEAFO)

The South East Atlantic Fisheries Organisation (hereafter SEAFO) is a regional ‘fisheries management organisation in South East Atlantic Ocean established in line with the provisions of the United Nations Law of the Sea and United Nations Fish Stocks Agreement.’²⁶⁶ The Convention on the Conservation and Management of Fishery Resources in the South East Atlantic Ocean was signed in April 2001 in Windhoek and entered into force in April 2003.²⁶⁷ Its objective is to ensure the long-term and sustainable use of fishery resources in the Conservation area through effective implementation of this Convention.²⁶⁸

The most relevant provision in relation to small-scale and artisanal fishers is Article 21 which provides for the recognition of the special requirements of developing states in the region. Contracting parties must take into account the needs of developing countries especially the need to avoid ‘adverse impacts on, and ensure access to fisheries by, subsistence, small-scale and artisanal fishers and women fishworkers.’²⁶⁹ The Convention itself does not contain lengthy obligations from contracting parties towards the small-scale and artisanal fishers, however, specific reference is made to small-scale and artisanal fishers and women fishworkers. SEAFO recognises that the latter categories of fishers must have the right to have access to fisheries and marine resources which therefore suggest that consideration is accorded to the previously disadvantaged fishers.

It is important to note that SEAFO does not oblige its contracting parties to ensure access to fisheries to small-scale fishers and artisanal fishers. Instead contracting parties are required to take into consideration the needs of such categories of fisher and avoid any negative impacts on the latter. Despite being a contracting party to the SEAFO since 2001, South Africa was not obliged to give fishing rights to artisanal fishers. However, it could be argued that it was

²⁶⁶ See the SEAFO website, Home, General Introduction at: <http://www.seafo.org/> (Accessed on the 15th November 2012).

²⁶⁷ Ibid.

²⁶⁸ Article 2 of the Convention on the Conservation and Management of Fishery Resources in the South East Atlantic Ocean.

²⁶⁹ Article 21(2) (b) of the Convention on the Conservation and Management of Fishery Resources in the South East Atlantic Ocean.

expected that some consideration was given to small-scale fishers. Not only did South Africa fail to recognise small-scale fishers as a distinct category but also failed to take into account the needs of the latter. Measures were incorporated in the small-scale fisheries policy in 2010 to avoid ‘adverse impacts’ on those fishers. Small-scale fishers have encountered ‘adverse impacts’ during the last decade which has negatively affected the livelihoods of many families and local communities.

4.2.3 Southwest Indian Ocean Fisheries Commission (SWIOFC)

The Southwest Indian Oceans Fisheries Commission (hereafter SWIOFC) was established in 2004 by ‘Resolution 1/127 of the FAO Council under Article VI of the FAO Constitution.’²⁷⁰ The objective of this commission is to promote the sustainable use of marine living resources in the Southwest Indian Ocean area.²⁷¹ Up till now, the Commission has organised and supported several workshops on ‘bycatch in prawn fisheries, ecosystem approaches to fisheries management and improvement of vessel registration’²⁷² amongst others. The most relevant workshop in relation to small-scale and artisanal fishers was held in December 2006, in the Union of the Comoros. The FAO in collaboration with the SWIOFC published a report on the safety of small-scale fisheries at sea.²⁷³ The objective of this report was to help in the ‘development of regional strategies to improve small-scale fishers’ safety and to guide the Fishing Technology Service of FAO (FIIT) in its examination of global initiatives.’²⁷⁴

It is worth noting that despite being a member of the SWIOFC, South Africa did not make any presentations at the ‘safety of small-scale fisheries at sea’ workshop. The only members who made presentations during this three-day session were the Comoros, Kenya, Madagascar, the Maldives, Mauritius, the Seychelles, the United Republic of Tanzania and Yemen. Once more the position and level of commitment of South Africa in relation to small-scale and artisanal fishers is undermined. The fact that these nations are discussing about improving the safety at sea for artisanal fishers demonstrates that they all have relevant regulations catering to some extent for the latter.

²⁷⁰ See the FAO website, FAO home, Fisheries & Aquaculture, Regional Fishery Bodies Summary Descriptions, Southwest Indian Ocean Fisheries Commission (SWIOFC) at: <http://www.fao.org/fishery/rfb/swiofc/en> (Accessed on 15th November 2012).

²⁷¹ Ibid.

²⁷² Ibid.

²⁷³ Report of the FAO/SWIOFC Regional workshop on safety at sea for small-scale fisheries in the South West Indian Ocean, FAO fisheries Report No. 840, Union of the Comoros, 12-14 December 2006.

²⁷⁴ Ibid at 1.

In addition to that, by not participating in such workshops, South Africa fails to benefit from the several fundamental recommendations made the Committee and contracting parties. It is clear that at the time of the workshop, there were no any applicable provisions in South African law and regulations in terms of the empowerment of small-scale fisheries. However, there was already a lawsuit against the Department of Environmental Affairs and in attending workshops of that nature; the Department could have learnt the systems that other SADC countries are exercising in their respective country. There is also the fact that despite being labelled as the ‘safety at sea workshop’, this session considered several other important issues such as the relationship between fisheries management and safety, safety programmes, data recording, fisheries legislation, boat-building and vessel design and other safety issues including communication systems, navigation equipment and so on.²⁷⁵ It can therefore be seen that the South African government could have benefitted in other ways by attending such meetings.

4.2.4 African Charter on Human Rights and Peoples’ Rights

The African Charter on Human Rights and Peoples’ Rights was adopted by the African Union (or, as it then was, the Organisation for African Unity, or OAU) in 1981 and came into force in 1986. The Charter provides a wide range of rights, ‘including in addition to the traditional civil and political rights, economic, social and cultural rights and various peoples’ rights.’²⁷⁶ The Charter does not directly impose any obligation of Member States in relation to fisheries management. However, as discussed previously, socio-economic and human rights go alongside fishing activities and fisheries management, which therefore signifies that this Charter is equally important in relation to the aforementioned activities. South Africa ratified the Charter on the 9th of July 1996.²⁷⁷

The Charter stipulates that all people ‘shall freely determine their political status and shall pursue their economic and social development according to the policy they have freely

²⁷⁵ Ibid at 3.

²⁷⁶ Shaw M.N, ‘The regional protection of human rights’, *International Law*, 5th Edition, Cambridge University Press (2003), 319-366 at 363.

²⁷⁷ See the African Union website, List of countries which have signed, ratified /acceded to the African Charter on Human and People’s Rights (04/02/2010) Available at: <http://www.africa-union.org/root/au/Documents/Treaties/List/African%20Charter%20on%20Human%20and%20Peoples%20Rights.pdf> (Accessed on 24th December 2012).

chosen.²⁷⁸ In addition to that, the Charter also provides that ‘all peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it.’²⁷⁹ The Charter makes it mandatory for all African citizens to have access to natural resources. Marine living resources are considered as natural resources and for that reason small-scale fishers should be allowed to carry out fishing activities and not be deprived of it. It appears that the South African government disregarded such provisions and denied small-scale fishers of such rights. It can also be argued that for over a decade the government has been in violation of the provisions of the Charter as it did not allow access to natural resources to many coastal communities.

It can therefore be seen that at a regional level, there are several environmental instruments, organisations and committees that deal with small-scale fisheries in one way or another. It appears that the Department of Environmental Affairs and Tourism has failed to take into consideration the relevant provisions at the regional level and as a result of this, it has negatively impacted small-scale fishers, fishing communities and coastal communities. However, as mentioned previously, international agreements are not automatically binding and enforceable in South Africa. What this meant therefore was that, the Minister of Environmental Affairs and Tourism (the regulating Department at the time) could be solely held responsible for the omission of the above-mentioned provisions into national law.

4.3 The global context

International environmental instruments of global scope are also vital in the management of several extensive environmental concerns such as ‘atmospheric pollution, marine pollution, global warming and ozone depletion, the dangers of nuclear and other extra-hazardous substances and threatened wildlife species.’²⁸⁰ In regards to the law of the sea, there are several international conventions that have been acceded and ratified by South Africa which may well be relevant to the rights of small-scale fishers. Several of those instruments such as the United Nations Convention on the Law of the Sea, the FAO code on Responsible fisheries

²⁷⁸ Article 20(1) of the African Charter on Human Rights and People’s Rights.

²⁷⁹ Article 21 of the African Charter on Human Rights and Peoples’ Rights.

²⁸⁰ Shaw M.N, ‘International Environmental Law’, *International Law*, 5th Edition, Cambridge University Press (2003), 753-809 at 754.

amongst others recognise the need to ‘protect access rights of artisanal and small-scale fishing communities.’²⁸¹

4.3.1 United Nations Convention on the Law of the Sea (UNCLOS)

South Africa signed the United Nations Convention on the Law of the Sea (hereafter UNCLOS) on 5 December 1984 and ratified the Convention on the 23 December 1997.²⁸² It is perceived as an all-inclusive treaty which deals with ‘maritime zones, the conservation and exploitation of living marine resources, non-marine living resources and the establishment of an international seabed authority and lays down the general obligations for regulating marine pollution.’²⁸³

The relevant provisions in terms of small-scale and artisanal fishers can be found at Part V of the UNCLOS. Coastal states shall determine the allowable catch of the living resources in its EEZ²⁸⁴ and shall also ensure that marine living resources are not over-exploited through proper conservation and management measures.²⁸⁵ Perhaps the most significant and relevant provision to coastal fishing communities is Article 61(3). It stipulates that the management measures as provided by Article 61(2) should be able to ‘maintain or restore populations of harvested species at levels which can produce the maximum sustainable yield’²⁸⁶ and at the same time take into account the economic needs of coastal fishing communities and developing states.

Moreover, Article 62 provides that the ‘coastal state shall promote the objective of optimum utilization of living resources in the exclusive economic zone without prejudice to article 61.’ It further stipulates that that other States should be able to have access to an appropriate part

²⁸¹ Sharma C., ‘Securing economic, social and cultural rights of small-scale and artisanal fisherworkers and fishing communities’ International Collective in support of Fishworkers, *MAST* 2011, 10(2) 41-61 at 47.

²⁸² See the Department of International Relations and Cooperation website, Available at: <http://www.dfa.gov.za/foreign/Multilateral/inter/unclos.htm> (Accessed on 19th November 2012).

²⁸³ McLean and Glazewski, *supra* note 4 at 494.

²⁸⁴ Article 61(1) of the United Nations Convention on the Law of the Sea.

²⁸⁵ Article 61(2) of the United Nations Convention on the Law of the Sea.

²⁸⁶ Joubert A., Stewart, T., Scott, L., Mathee, J., De Vries, L., Gilbert, A., Janssen, R., and van Herwijnen, M., *supra* note 111 at 11: The concept of the maximum sustainable yield is that fish populations will reproduce at different rates depending on the population size or density. For example, stocks increases more rapidly when it is less than a ‘particular fraction of the “carrying capacity”, but will increase more slowly if the population size is above this fraction.’ Therefore, the aim is to keep the fish stock at approximately the particular fraction modelled for that species and thus to be able to extract the maximum sustainable yield.

of the surplus of marine living resources of the EEZ of the coastal State through agreements or arrangements with such coastal States.²⁸⁷ This can be a cause for concern for the small-scale fisheries.

Small-scale fishers have been excluded for a long time in the allocation process and when they were finally awarded some 'limited' commercial permits to carry out fishing activities, they were restricted in the amount of fish they could take. The main reason for restricting the total catch for commercial fishers, 'limited' commercial fishers and subsistence fishers was to make sure the sustainable use of our marine living resources. This would also ensure that fisheries were not severely depleted by fishing activities.

However, by virtue of Article 61, the government shall give access to other coastal states when there is a surplus of the set allowable catch. There are conservation measures and other terms and conditions attached to such access. However, the issue that arises is that foreign vessels allowed in South African waters are not monitored 24 hours a day by the authorities and therefore may land more fish than what has originally be agreed to. Further, this can give rise to illegal and unregulated fishing and consequently impact small-scale fishers. Stocks of fish will be depleted and as a result the government will have to lower the total allowable catch in order for the fisheries to recover. A decrease in the total allowable catch at a larger scale would inevitably imply a decrease in the total catch for artisanal fishers too.

There is no explicit provision in terms of the allocation of fishing or access rights to small-scale or artisanal fishers under UNCLOS. However, the above-mentioned provisions do stipulate that in managing the marine living resources, States Parties have the duty to take into consideration the economic needs of 'coastal fishing communities.' No definition of what constitutes of 'coastal fishing communities' is provided in UNCLOS but they are by and large regarded as artisanal/small-scale or subsistence fishers.

For that reason therefore, the above provisions may very well be considered as implied provisions. What this means is that South Africa would have had to pay attention to the economic needs of the artisanal/small-scale fishers when implementing such management

²⁸⁷ Article 62(2) of the United Nations Convention on the Law of the Sea.

measures. Yet again, it can be seen that socio-economic needs of most coastal communities (especially small-scale fishing communities) were overlooked previously and such omission could amount to a violation of Article 61(3). Nonetheless, it can be argued that the South African government did take into consideration the category of subsistence fishers and their economic needs since they were included in the Marine Living Resources Act. However, this is a highly contentious matter and is subject to individual interpretation.

4.3.2 United Nations Fish Stock Agreement relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (UNFSA)

The United Nations Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (hereafter UNFSA) provides for the ‘conservation and management of those fish stocks and establishes that such management must be based on the precautionary approach and the best available scientific information.’²⁸⁸ The Agreement reinforces the concept of cooperation amongst member states in order to ensure conservation and promote the objective of optimum utilisation of fisheries resources inside and outside of the EEZ.²⁸⁹

There are few general provisions relating to artisanal and small-scale fishing communities which stipulate that in deciding the participating rights for new members to fisheries management organisations, States shall consider the needs of coastal communities dependent upon fisheries and fish stocks²⁹⁰ as well as the extent to which the coastal States’ economies are reliant on upon the utilisation of marine resources.²⁹¹ There is also the fact that other Member States are requested to take into account the needs and requirements of developing States when establishing conservation measures for straddling and highly migratory fish stocks by avoiding the adverse impacts on, artisanal and small scale-fishers as well as ensuring that the latter categories of fishers, subsistence fishers and women fishworkers are

²⁸⁸ See the United Nations website at: http://www.un.org/Depts/los/fish_stocks_conference/fish_stocks_conference.htm (Accessed on the 15th of November 2012).

²⁸⁹ Ibid.

²⁹⁰ Article 11(d) of the United Nations Fish Stock Agreement relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks.

²⁹¹ Article 11(e) of the United Nations Fish Stock Agreement relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks.

all given access to fisheries.²⁹² It is essential to note however that those provisions do not require contracting parties to give fishing rights or access rights to artisanal and small-scale fishers, subsistence fishers or women fishworkers. There is no legal duty from contracting parties, including South Africa, to grant such rights to fisheries to the above-mentioned categories of fisher. Parties are only requested to take into account the needs and requirements of the fishers when establishing conservation measures.

However, the most important provision in terms of artisanal and small-scale fishers is Article 5(i) which provides that ‘coastal States and States fishing on the High Seas, shall in giving effect to their duty to cooperate in accordance with the convention to take into account the interests of artisanal and subsistence fishers.’ This is a noteworthy part of the Agreement since it is clear that the onus to cater for the interest of artisanal and subsistence fishers is on each respective State. Another significant point to note about this Agreement is that there are further provisions which accommodates for artisanal and small-scale fisheries. As discussed throughout this dissertation, there has not been much attention paid to this category of fisher in the past, but it can be seen that there is now a paradigm shift.

4.3.3 Food and Agriculture Organisation’s 1995 Code for Responsible Fisheries

The FAO code of Conduct for Responsible Fisheries²⁹³ ‘provides a framework of principles and guidelines for ensuring the sustainable exploitation of fishery resources.’²⁹⁴ Despite being based on rules of international law, the Code is a voluntary document and as a result does not establish any legal rights or obligations.²⁹⁵ The Code was unanimously by FAO member states including South Africa in October 1995.²⁹⁶ This document plainly rejects the former notion that the concept of precaution should not be limited to marine pollution but can be

²⁹² Article 24 (2) (b) of the United Nations Fish Stock Agreement relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks.

²⁹³ FAO Code of Conduct for Responsible Fisheries at: <http://www.fao.org/docrep/005/v9878e/v9878e00.HTM>

²⁹⁴ Barnes R., ‘The convention on the Law of the Sea: An effective framework for domestic fisheries conservation?’ Freestone D., Barnes R., Ong D., *The law of the sea: Progress and Prospects*, 1st Edition, Oxford University Press (2006), 233 – 280 at 251.

²⁹⁵ Ibid at 252.

²⁹⁶ See the Food and Agriculture Organization of the United Nations website, Fisheries and Aquaculture, Global Partnerships for responsible fisheries at: <http://www.fao.org/fishery/fishcode/about/en> (Accessed on 17th of December 2012).

used in the management of living resources.²⁹⁷ The core principles are found in Article 6 of the Code.

References to artisanal and small-scale fisheries are recurrent in this document. The first relevant provision stipulates that it is vital for Member States to acknowledge the vital contributions made by artisanal and small-scale fisheries in terms of employment, income and food security.²⁹⁸ They should protect the rights of those fishers adequately so that they have a ‘secure and just livelihood’ and should also be allowed preferential access in certain instances, where it is appropriate to do so.²⁹⁹

In addition to the above, the Code of conduct also provides for appropriate management measures for fisheries. In adopting such measures, States needs to take into consideration the interest of fishers, especially the subsistence, small-scale and artisanal ones.³⁰⁰ There are additional Articles which requires States to pay attention to artisanal and small-scale fishers when making certain decisions, for example when deciding on artificial reefs and fish aggregation devices.³⁰¹

Despite its non-binding nature, the Code is a comprehensive document which provides clear guidelines for Member States. It is evident that the needs of artisanal and small-scale fishing communities have to be protected and catered for by the State. The inclusion of words such as ‘preferential access’ demonstrates that there is an understanding of the historical imbalance between large commercial fisheries and small-scale fisheries and it is a must to remedy this situation. Here again, the Code takes into account the needs of artisanal fishers and seek to avoid any adverse impacts that aggregation devices may have on them. This Code embodies a significant step towards the fairer utilisation of marine living resources in the High Seas, since consideration is given to all fisheries including small-scale ones.

²⁹⁷ Kaye S.M., ‘The precautionary approach and international fisheries management’, *International fisheries management*, 1st Edition, Kluwer Law International (2001), 163-265 at 224.

²⁹⁸ Article 6.18 of the FAO Code of Conduct for Responsible Fisheries.

²⁹⁹ Ibid.

³⁰⁰ Article 7.2.2 (c) of the FAO Code of Conduct for Responsible Fisheries.

³⁰¹ Article 8.11.3 of the FAO Code of Conduct for Responsible Fisheries.

4.3.4 World Summit on Sustainable Development (WSSD)

The World Summit on Sustainable Development (hereafter WSSD)³⁰² was held in Johannesburg in 2002 ten years after the United Nations Conference on Environment and Development (UNCED).³⁰³ The main focus of the WSSD was development so as to eradicate poverty.³⁰⁴ The outcome of the WSSD was the Johannesburg Declaration on Sustainable Development which in essence is a short statement of universal commitment to sustainable development and a Plan of Implementation.³⁰⁵ The Plan of Implementation extensively discussed issues related to marine fisheries but it also briefly addressed the importance of aquaculture and small-scale fisheries.³⁰⁶

Chapter IV of the Johannesburg Plan of Implementation deals with the protection and management of natural resource base of economic and social development.³⁰⁷ The main focus is on the promotion of sustainable fisheries and only one obligation in fact makes reference to small-scale fisheries. It is stipulated that several countries, especially developing ones, rely on the oceans, seas and coastal areas for food security and economic prosperity.³⁰⁸ Hence, for that reason, States should assist developing countries in the coordination of policies and programmes which would aim to conserve, manage fisheries in a sustainable manner and promote sustainable coastal and small-scale fishing activities.

Despite the fact that the main focus of the WSSD was on water, energy, health, agriculture and biodiversity,³⁰⁹ it can be seen that negotiating governments realised it was important to consider small-scale and artisanal fishers in certain decision-making processes. Therefore, it is fair to say that most instruments, regardless of the time it was introduced, highlights small-scale fishers as a separate and distinct category which required extra attention from States.

³⁰² See <http://www.un.org/jsummit/> (Accessed on 17th of December 2012).

³⁰³ See the United Nations website, UN Conference on Environment and Development (1992) at: <http://www.un.org/geninfo/bp/enviro.html> (Accessed on 24th December 2012).

³⁰⁴ Kidd M., 'International Environmental Law', *Environmental law*, 1st Edition, Juta Law (2008), 41-63 at 53.

³⁰⁵ See the Johannesburg Declaration on Sustainable Development at:

<http://www.joburg.org.za/pdfs/johannesburgdeclaration.pdf> (Accessed on 24th December 2012)

³⁰⁶ Satia B., 'The World Summit on Sustainable Development and Fisheries', (2003), *International Fisheries Law and Policy Review*, 11-135 at 12.

³⁰⁷ See the United Nations website, Department of Economic and Social Affairs, Division for sustainable development: http://www.un.org/esa/sustdev/documents/WSSD_POI_PD/English/POIChapter4.htm (Accessed on 19 November 2012).

³⁰⁸ Paragraph 30(g) of the Johannesburg Plan of Implementation.

³⁰⁹ Satia, *supra* note 306.

4.4 Importance of the international environmental instruments

International environmental instruments at both a regional and global scope are important in the management of artisanal and small-scale fisheries. From the above discussion and analysis, it becomes more apparent that these instruments seek to protect and promote the needs of artisanal fishers. Such instruments encourage the expansion and development of small-scale fisheries whilst ensuring that adequate and structured programmes are in place thereby improving the social, cultural and economic benefits from those fisheries. Furthermore, it is evident that the above-mentioned documents encourage the empowerment of small-scale fisheries through informal education and raising awareness. Besides this, another important inference from these instruments is the reinforcement of the concept co-management in small-scale fisheries thereby ensuring that there is sufficient participation from artisanal and small-scale fishers in the control and management of fisheries.

In the light of the above, it can be noted therefore that the inclusion of small-scale and artisanal fishers in regional and international environmental instruments is an indication of the continued significance accorded to this matter by both the regional and international communities. Being contracting parties of these instruments, it is expected that the South African government and the DAFF make allowance for the numerous provisions which relate to small-scale fisheries in order to improve their livelihoods and promote their economic needs. As mentioned at the outset of this chapter, the Constitution describes the three principle ways as to how international agreements can be incorporated in the South African legal system.

The next chapter will provide proposals and recommendations as to how South Africa can successfully implement the small-scale fisheries policy and the appropriate course of action in relation to the amendment or repeal of the Marine Living Resources Act.

CHAPTER FIVE

PROPOSALS & RECOMMENDATIONS

5.1 General

It has been demonstrated in the previous chapters that the allocation of fishing rights to small-scale fishers has been inadequate in the past. Regional and international communities seem to favour the existence of artisanal and small-scale fisheries as a distinct category as well as promoting their role in job creation and poverty alleviation. The present chapter suggests means by which the Department of Agriculture, Forestry and Fisheries can improve the current situation about the allocation process and initiate approaches successfully to implement the small-scale fisheries policy. It is also contended that the Marine Living Resources Act will either have to be amended or repealed in order to accommodate the fisheries policy as any policy making provision for small-scale fishers would be otherwise in contravention of the Act.

5.2 Review of the South African's position

There is no doubt that South Africa, as a developing country, has made significant efforts towards the integration of small-scale fishers in the current fisheries management system. The small-scale fisheries policy is an innovative document which essentially embodies the above-mentioned provisions of the FAO Code of conduct for responsible fisheries. It also highlights the importance of small-scale fisheries in relation to job creation, food security and poverty alleviation. There is also an inclination towards the concept of co-management between artisanal fishers and the Department in order successfully to regulate the coastal fishing communities.

However, there are certain limitations which have been identified in relation to the policy. As discussed in chapter 3, the fisheries policy seems to contradict some provisions of the NDP 2030 which is an overarching document. The NDP has been published recently, only two months after the small-scale fisheries policy was gazetted. Such inconsistency inevitably raises the issue of non-cooperation and non-consultation on pressing matters amongst government Departments. Besides this, there have been other factors associated with the policy which can have negative impacts on the effectiveness of the latter. These are lack of

sufficient funds, lack of efficient human resources and lack of transparency amongst others. It is clear therefore that the Department has a challenging task ahead in the implementation of the small-scale fisheries policy.

5.3 Repeal or amend the Act?

In addition to the above aspects influencing the effective implementation of the small-scale fisheries policy, one important detail has been omitted from the Marine Living Resources Act. There is no definition or any reference to artisanal or small-scale fisher/fisheries/fishing communities which essentially means that such policy is a dead letter unless specific provisions for this category of fishers are incorporated in the Act. In order for the Department of Agriculture, Forestry and Fisheries to successfully implement the small-scale fisheries policy, the Act will have to be either heavily amended or repealed.

The recent development³¹⁰ in this regard seems to be in support of the amendment of the Marine Living Resources Act. As discussed previously, South Africa has a lack of financial and human resources and an amendment of the Act seems to be more cost-effective. In addition to that, it is important to bear in mind that the repeal of the Marine Living Resources Act will inevitably mean a delay of few years before another statute is enacted. The process is a lengthy one which includes drafting, public consultation and integration of public comments amongst several additional steps.

5.4 Recommendations

Based on the assessment in the previous sections and chapters, improvement is needed in certain aspects and it is therefore recommended that the Department of Agriculture, Forestry and Fisheries amend the Marine Living Resources Act by:

- Inserting important definitions in the Act such as ‘community’, ‘fishing community’, ‘small-scale fishing’, ‘sustainable development’, ‘sustainable use’, and other definitions provided in the small-scale fisheries policy that is not part of the Act. Without appropriate definitions, it will be challenging to implement the policy effectively.

³¹⁰ See Dawson Edwards & Associates website, DAFF Review of legislation project, Available at: <http://www.dawsons.co.za/daff-review-of-legislation-project/> (Accessed on 26 November 2012).

- Incorporating a comprehensive section about the nature of small-scale fisheries, i.e. what they consist of, how they operate, allowable means of fishing amongst others. Small-scale fishers have never been included in the past and there is the need to explain why they form part of the Act for a better understanding and application of the statute.
- Allowing for an advisory committee which will seek to monitor and regulate small-scale fisheries and report on their performances to the Minister. It has been demonstrated before that monitoring programmes help the government better to achieve its objective and such a committee will ensure that the policy is delivering what it promised.
- Including relevant support systems which will assist small-scale fisheries in terms of application process. It is important that such systems are in place since small-scale fisheries are new to the current system and are often uninformed about the process. They may well benefit from any assistance in relation to the understanding and filling of application forms.

In addition to the above recommendations, it is further proposed that the Department of Agriculture, Forestry and Fisheries initiates:

- A Task Group or committee to determine how the small-scale fisheries policy will be successfully implemented. The Task Group will be capable of defining a timeline in the implementation process whilst identifying any limitations that may hinder the operation's progress.
- Awareness, training and capacity building programmes amongst coastal communities. It is important to raise the awareness of small-scale fishers on fisheries management as this can improve the state of fisheries and eventually contribute towards sustainable fisheries.
- Sponsorship programmes to fund the infrastructure support such as engine repair and maintenance facilities for small-scale fishers' boats and funding mechanisms which would principally assist them in obtaining capital to expand their business.
- A straightforward application process in which both commercial and small-scale fisheries can determine how the allocation of fishing rights is being carried out. In the past, there have been concerns due to the lack of transparency in that matter and hence the Department should seek to operate in a more open manner.

The next and final chapter will provide a review and concluding remarks on the allocation of fishing rights to small-scale fishers.

CHAPTER SIX

CONCLUSION

The main objective of this dissertation was to evaluate the fishing rights allocation process with specific reference to small-scale fishers. The repeal of former policies and regulations proves that the previous fisheries management system was considered inadequate. The allocation of fishing rights in the apartheid era was solely based on a racial basis, whereby large commercial fishing companies owned by whites dominated the industry. However, with the advent of democracy, the government sought to change the previous management system and ensure that there was no discrimination when allocating fishing rights to both companies and individuals. As part of their transformation of the fishing industry, the Department of Environmental Affairs and Tourism (as it was then) enacted the Marine Living Resources Act in 1998.

The Act contained several provisions in relation to commercial, subsistence and recreational fishers and fishing. Once in force, the Department initiated a Subsistence Fisheries Task Group whose objective was to advise the Minister on matters relating to subsistence fishers. In 1999, the Task Group published a report detailing that a vital category of fishers, namely artisanal fishers, were excluded from the Statute and that their activities were different from that of subsistence fishers. Recommendations were made in this regard but the Department failed to take serious actions towards redressing the plight of small-scale fishers. Policies regarding the allocation of fishing rights were produced twice after the enactment of the Act but in both cases failed to acknowledge artisanal and small-scale fishers' fishing rights.

It seems that it was not until 2004 when proceedings commenced against the Department and the Minister that genuine considerations were given to the problem. The case of *Minister of Environmental Affairs and Tourism v George* was the first action in a lengthy chain of events which eventually produced the small-scale fisheries policy in June 2012. The latter policy methodically echoes most provisions of the FAO Code for responsible fisheries in terms of artisanal fisheries. The small-scale fisheries policy is an innovative document which brings much optimism for coastal communities, especially those who are heavily reliant on fishing activities for food security and a better livelihood.

Nevertheless, despite being an innovative document, there are enormous gaps (such as lack of definitions and provisions in regards to small-scale fishers amongst many more) which have been exposed. Also, as mentioned in the previous chapters, the small-scale fisheries policy appears to be in contradiction with an overarching document, the National Development Plan 2030. It is puzzling that two Departments can produce two important documents but apparently fail in doing so to consult with each other before their respective publication. In addition to that, the Department has gazetted a policy which does not have an implementation strategy. This is a cause of concern for all the stakeholders involved because as it stands, it is just another document gazetted by the Department. This small-scale fisheries policy needs to be handled as a pressing matter so that actual transformation of the industry can occur.

In the light of the above, it does appear that the Department of Agriculture, Forestry and Fisheries is committed to improving the situation about artisanal fisheries. Undoubtedly, efforts are being made but there are still limitations that the Minister and her Department faces. However, what seems to be a challenging task can be overcome with the participation and contribution of all stakeholders. It is therefore proposed that the Department initiate a process in terms of which Parliament firstly, amends the Act so as to accommodate the policy and secondly designs an implementation strategy as soon as possible for the benefit of artisanal fishers and the country as a whole.

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