

UNIVERSITY OF THE WESTERN CAPE

FACULTY OF LAW

**“CO-MANAGEMENT AGREEMENTS WITH SUBSISTENCE FISHING
COMMUNITIES AS A MEANS FOR PROMOTING SUSTAINABLE USE AND
CONSERVATION OF MARINE LIVING RESOURCES IN SOUTH AFRICA”**

A mini-thesis submitted in partial fulfilment of the requirement for the LLM
degree in the Faculty of Law, University of the Western Cape

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DECLARATION

I declare that *Co-management agreements with subsistence fishing communities as a means for promoting sustainable use and conservation of marine living resources in South Africa* is my own work, that it has not been submitted for any degree or examination in any other university, and that all the sources that I have used or quoted have been indicated and acknowledged by complete references.

Signed:.....

Date:.....

This mini-thesis has been submitted for examination with my approval as the designated supervisor

Signed.....

Professor Tobias van Reenen

University of the Western Cape

Date.....

DEDICATION

This work is affectionately dedicated to my parents, Dr. and Mrs Hara, who have supported and encouraged me throughout my studies and to my supervisor, Prof. T.P. Van Reenen for his invaluable advice and input.

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KEY WORDS

Access rights

Conservation

Community participation

Co-management

Co-operative governance

Policy

Law

Subsistence fishers

Strategy

Sustainable use

LIST OF ACRONYMS

UNCED	United Nations Conference on Environment and Development
NEMA	National Environmental Management Act
MLRA	Marine Living Resources Act
WCC	World Conservation Congress
SFTG	Subsistence Fishers Take Group
FPDC	Fisheries Policy Development Committee
RDP	Reconstruction Development Program
FAO	Food and Agriculture Organisation
UNCLOS	United Nations Convention on the Law of the Sea
CBD	Convention on Biological Diversity
EMCA	Environmental Management Co-operation Agreements

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CHAPTER 1

INTRODUCTION: BACKGROUND TO STUDY

1.1 PROBLEM STATEMENT.

Subsistence fishers are communities who live along the coast; they use marine resources in order to ensure their survival.¹ These communities had limited access to coastal resources during the apartheid regime.² Access to marine resources provided for by the democratically elected government to these coastal communities has resulted in the over-exploitation and degradation of coastal areas and resources.³

Most coastal communities depend on marine resources for their livelihood, but the over-exploitation of a number of resources means that some face extinction; this unsustainable exploitation of resources will result in a negative impact on coastal communities who are dependent on these resources.⁴

¹ Glavovic BC & Boonzaier S 'Confronting Coastal Poverty; Building Sustainable Coastal Livelihood in South Africa' (2007) 50 OCM 5.

² Glavovic BC & Boonzaier S 'Confronting Coastal Poverty; Building Sustainable Coastal Livelihood in South Africa' (2007) 50 OCM 5.

³ Hauck M & Sowman M (eds) *Waves of change* (2003) 2.

⁴ Burns M, Connell A, Makhaye S, Monteiro P, Morant P & Taljaard S (1999) '*marine and coastal systems and resources*' <http://www.ngo.grida.no/soesa/nsoer/issues/coast/index.htm> [last accessed on 26/2/2010].

Due to the over-exploitation and degradation of coastal areas and resources, there is an urgent need to educate and assist these communities, emphasizing the value of using marine resources in a sustainable manner.⁵ The long-term results will be a guaranteed food source, as well as a stable source of income and, perhaps most importantly, ensuring the conservation of marine resources.

A number of global initiatives, such as, the United Nations Conference on Environment and Development (UNCED) in 1992, called for greater resource user participation in the management as well as decision making of the management of natural resources.⁶ This has led to an amendment of policies as well as legislation by most states, with the aim of finding alternative marine resources management methods, in which local communities are included in decision making.⁷ In South Africa there have also been changes in environmental legislation and policy, which aim to ensure the effective and efficient management of coastal areas as well as marine resources.⁸

Public pressure as well as international trends have led to a change in approach when it comes to environmental protection, and one of these approaches is the implementation of co-management agreements.⁹

⁵ Hauck M & Sowman M (eds) *Waves of change* (2003) 2.

⁶ Hauck M & Sowman M (eds) *Waves of change* (2003) 2.

⁷ Hauck M & Sowman M (eds) *Waves of change* (2003) 2.

⁸ Burns M, Connell A, Makhaye S, Monteiro P, Morant P & Taljaard S (1999) '*marine and coastal systems and resources*' <http://www.ngo.grida.no/soesa/nsoer/issues/coast/index.htm> [last accessed on 26/2/2010].

⁹ Burns M, Connell A, Makhaye S, Monteiro P, Morant P & Taljaard S (1999) '*marine and coastal*

Co-management agreements is an approach best suited to ensuring the sustainable use and conservation of natural resources as well as educating subsistence fishers on the importance of resource conservation. This is due to the fact that it supports the participation of resource users with regard to decision making, and management of the resource, as well as the sharing of responsibility and authority between authorities and resource users.¹⁰

It is suggested that subsistence fishing communities as well as government must adopt initiatives to ensure the sustainable use of the resources as well as their conservation. This may be done through the implementation of legislation and policies,¹¹ such as, the Environmental Management Co-operation Agreements (EMCA) in section 35¹² of the National Environmental Management Act (NEMA).¹³ Although the use of co-management partnership agreements was actively promoted by the Fisheries Policy Development Committee, it is not expressly provided for by the Marine Living Resources Act (MLRA).¹⁴

systems and resources' <http://www.ngo.grida.no/soesa/nsoer/issues/coast/index.htm> [last accessed on 26/2/2010].

¹⁰ Muphree MW '*Communities as institutions for resource management*' (1991) 4.

¹¹ Hauck M & Sowman M (eds) *Waves of change* (2003) 2.

¹² 35(1) The minister and every MEC and municipality, may enter into environmental management co-operation agreements with any person or community for the purpose of promoting compliance with the principles laid down in this act.

(3) Environmental management co-operation agreements may contain.

(a) An undertaking by a person or community concerned to improve on the standards laid down by law for the protection of the environment which are applicable to the subject matter of the agreement.

¹³ Act 107 of 1998.

¹⁴ Witbooi E '*Law and Fisheries Reform; legislative and policy development in South African Fisheries over the decade 1994 – 2004*' (2006) 30 MP 21.

1.2. ANALYSIS OF CONCEPTS.

1.2.1. Common Pool Resources.

Common pool resources are described as 'resources used by many, with no single person having the power to make a decision unilaterally concerning their use'.¹⁵ Open access is a key factor in determining whether a resource can be described as common or not, which means that a resource available to everyone, to the exclusion of no one, is considered to be a common one.¹⁶ The individual will, however, become an owner of such resource when they have the resource in their possession and exercise control over it.¹⁷ In light of the above, marine resources can be considered to be common as they are available for utilisation by everyone.

Throughout human history the global commons have always been available for human utilisation, but most marine resources, as global commons, are threatened by, and vulnerable to, over-exploitation as utilisation of resources by human's has exceeded the ability of those natural resources to replenish themselves.¹⁸

¹⁵ Wijkman PM 'Managing the global commons' (1982) 36 *International Organization* 512.

¹⁶ Vogler J *The Global Commons; Environmental and technological governance* (2000) 4.

¹⁷ Birnie P & Boyle A *International law and the environment* (2002) 141.

¹⁸ Cairns JR 'Sustainability and the global commons' (2006) 20 *SCI* 2.

Commons may also be jointly owned and managed by a community, which will result in them being excluded from general use, thus user rights may be imposed.¹⁹ This means that vulnerable resources can be regulated by means of quota allocations as well as implementation of control mechanisms to regulate who has access to them.²⁰

The non-existence of property rights to these resources means that resource regulating mechanisms do not exist, resulting in a lack of accountability by a specific individual for the over-utilisation of the resources.²¹

Although open access to resources in most societies is to everyone's advantage, Hardin²² illustrates the dangers posed by allowing open access to natural resources.

'Each man is locked into a system that compels him to increase his herd without limit – in a world that is limited. Ruin is the destination toward which all men rush, each pursuing his own best interest in a society that believes in the freedom of the commons. Freedom in a commons brings ruin to all'.²³

Hardin argues that every individual utilising the common resource is only interested in meeting his or her own needs, therefore he remarks:

¹⁹ Vogler J *The Global Commons; Environmental and technological governance* (2000) 4.

²⁰ Vogler J *The Global Commons; Environmental and technological governance* (2000) 4.

²¹ Snape R & Gunasekera D 'Problems of the global commons' (1997) 2.

²² Hardin G 'The Tragedy of the Common, Science, Vol. 162, No.3859 (December 13, 1968).

²³ Hardin G 'The Tragedy of the Commons (1968) 1224.

‘The inherent logic of the commons remorselessly generates tragedy, as the availability of a free resources leads to over-exploitation and minimizes the interests of any individual state in conservation and restraint’.²⁴

The *Tragedy of the Commons* illustrates that the best way to manage common resources, and prevent their degradation, is by either viewing them as private property, or by allowing the state to take control and regulate the use of the commons.²⁵

1.2.2. Concept of sustainable use of resources.

Biological sustainability in broad terms has three forms: sustainable use, sustainable growth, and sustainable development.²⁶ If renewable resources are used in such a way that they are allowed to replenish themselves naturally, they will be available for the foreseeable future.²⁷ Globally, there has been increasing awareness of the impact that human activity has on marine resources, including the possible over-exploitation of stocks which could result in the extinction of a resource.²⁸

The concept of requiring the sustainable use of natural resources is used in the Rio Declaration on Environment and Development as well as Conventions that followed it,

²⁴ Birnie P & Boyle A *International law and the environment* (2002) 141.

²⁵ Vogler J *The Global Commons; Environmental and technological governance* (2000) 12.

²⁶ Mangel M, Hofman RJ, Norse EA & Twiss JR ‘Sustainability and ecological research’ (1993) 3 EA 573.

²⁷ Mangel M, Hofman RJ, Norse EA & Twiss JR ‘Sustainability and ecological research’ (1993) 3 EA 573.

²⁸ Pauly D, Christensen V, Guenette S, Pitcher TJ, Sumaila R, Walters CJ, Watson R & Ziller D ‘Towards sustainability in world fisheries’ (2004) IWJS 691.

such as, Article 2 of the Biodiversity Convention (CBD)²⁹ and Articles 2³⁰ and 5³¹ of the 1995 Agreement for the Conservation of Straddling and Highly Migratory Fish Stocks. The Earth Summit's Agenda 21 on Integrated Coastal Management contains, in paras 17.72³² and 17.82,³³ provisions which require the sustainable use and conservation of living marine resources under national jurisdiction.³⁴ The above-mentioned Conventions are important as they are concerned with the goal of achieving a balanced use, as well as the conservation of natural resources and the need to strengthen existing conservation law.³⁵

As open access to natural resources was relatively common in the past, and especially in developing countries, over-exploitation was widespread.³⁶ Harvesting of marine resources was not seen to pose any danger to marine fish populations as marine

²⁹ Article 2 provides that: 'sustainable use' means the use of components of biological diversity in a way and at a rate that does not lead to the long-term decline in biological diversity, thereby maintaining its potential to meet the needs and aspirations of present and future generations.'

³⁰ Article 2 provides that: 'The objective of this agreement is to ensure the long-term conservation and sustainable use of straddling fish stocks and highly migratory fish stocks through effective implementation of the relevant provisions of the convention.'

³¹ Article 5 provides that: 'In order to conserve and manage straddling fish stocks and highly migratory fish stocks, coastal states and states fishing on the high seas shall, in giving effect to their duty to cooperate in accordance with the convention

(h) take measures to prevent or eliminate overfishing and excess fishing capacity and to ensure that levels of fishing effort do not exceed those commensurate with the sustainable use of fishery resources;

(i) Take into account the interests of artisanal and subsistence fishers.'

³² Par 17.72: 'Highlights Some fisheries management problems, such as local overfishing, ecosystem degradation.'

³³ Par 17.82 calls for: 'management activities, such as the development of fisheries and Marine aquaculture, with emphases being placed on small-scale and artisanal fisheries.'

³⁴ Cicin-Sain B 'Sustainable development and integrated coastal management' (1993) 21 OCM 20.

³⁵ Birnie P, Boyle A & Redgwell C *International Law and the Environment* (2009) 199.

³⁶ Rosenberg AA, Fogarty MJ, Sissenwine MP, Beddington RJ & Shepherd JG 'Achieving Sustainable use of Renewable Resources' (1993) 262 SCI 829.

resources were thought to be infinite.³⁷ Thus a contributing factor to the depletion and over-exploitation of natural resources was the lack of clarity of or defined user rights.³⁸

Over a period of time, when demand exceeds supply, renewable coastal resources become over-used.³⁹ In order to ensure sustainable use of natural resources, there is a need to ensure that resources are not used to such an extent that they lose their ability to regenerate themselves.⁴⁰ Therefore, in order to meet the needs of the present generation without compromising the ability of future generations to meet their own needs, sustainable use of natural resources is a goal aspired to when it concerns renewable resources.⁴¹

Although there are a number of hurdles to overcome in order to achieve the goal of sustainable use of natural resources, it is possible to achieve this goal when it comes to marine resources by 'addressing fundamental economic biases against sustainability, particularly in open-access management regimes'.⁴²

³⁷ Sissenwine MP 'Recreational fisheries' (1990) 47 SCI 203 – 204.

³⁸ Clark JR 'The status of integrated Coastal Zone management: A global assessment' (1991) 118.

³⁹ Clark JR 'Integrated management of coastal zones' (1992) 327 FAO FTP, Overview section, Section 2.10.http://www.observatoriodellitoral.es/subido/_documentos/ordenacion_del_litoral/doctrina/integrated_management_of_coastal_zones.pdf [accessed 10 December 2010]

⁴⁰ Snedaker SC & Getter CD *Coastal resources management guidelines* (1985) 205.

⁴¹ Rosenberg AA, Fogarty MJ, Sissenwine MP, Beddington RJ & Shepherd JG 'Achieving Sustainable Use of Renewable Resources' (1993) 262 SCI 828.

⁴² Rosenberg AA, Fogarty MJ, Sissenwine MP, Beddington RJ & Shepherd JG 'Achieving Sustainable Use of Renewable Resources' (1993) 262 SCI 829

1.2.3. Concept of co-management.

Due to the high rate of habitat degradation and species decline experienced world-wide, innovative approaches to resource conservation and management were needed.⁴³ Co-management was seen as an option which provided the best solution.⁴⁴

In the past 20 years, co-management has gained world-wide support when it comes to fisheries management.⁴⁵ Co-management as a concept, although popularised world-wide, still lacks a clear definition.⁴⁶

Castro⁴⁷ holds the view that the trend among scholars has been to use the term in a comprehensive manner: the term 'co-management' is used to describe any situation involving the local population or key stakeholders working together (or in partnership) with the state, although it does not necessarily mean that the stakeholders participate in the exercising of power.

⁴³ Granek EF & Brown MA 'Co-management approach to marine conservation in Moheli, *Comores Islands*' (2005) 19 CB 1.

⁴⁴ Granek EF & Brown MA 'Co-management approach to marine conservation in Moheli, *Comores Islands*' (2005) 19 CB 1.

⁴⁵ Raakjaer JA *Fisheries management System in crisis* (2009) 16.

⁴⁶ Hara M 'Co-management of natural resources: Theory and the attendant assumptions' in Hauck M & Sowman M (eds.) *Waves of change* (2003) 19.

⁴⁷ Castro AP & Nielsen E 'Indigenous people and Co-management: implications of conflict Management' (2001) 4 ESP 2.

Wilson, Nielsen and Degnbol⁴⁸ are of the opinion that the concept of co-management is founded 'on the idea of social equality by vesting power of government in the people being governed'. They argue that co-management is similar to processes occurring in other spheres of society in both the private as well as the public sphere, such as, workplace democracy.⁴⁹ Ultimately power sharing and partnership are important elements of co-management; if they do not exist simultaneously when co-management initiatives are implemented, then the concept loses its effectiveness.⁵⁰

If power sharing and partnership are the most important elements of co-management, then the definition of co-management adopted by the World Conservation Congress (WCC)⁵¹ is one of the most complete definitions of the concept. The WCC defines co-management as:

'a partnership in which government agencies, local communities and resource users, non-governmental organizations and other stakeholders share as appropriate to each context the authority and responsibility for the management of a specific territory or a set of resources'.⁵²

⁴⁸ Wilson DC, Nielsen JR & Degnbol P *The fisheries co-management experience; Accomplishments, challenges and prospects* (2003) 2.

⁴⁹ Wilson DC, Nielsen JR & Degnbol P *The fisheries co-management experience; Accomplishments, challenges and prospects* (2003) 3.

⁵⁰ Wilson DC, Nielsen JR & Degnbol P *The fisheries co-management experience; Accomplishments, challenges and prospects* (2003) 3.

⁵¹ World Conservation Congress held in Montreal in October 1996. The WCC, held every four years, is the world's largest and most important conservation event. The WCC's main goal is to change and improve the way we manage our natural environment for the purposes of achieving human, social and economic development. [http://www.iuncn.org/2012_congress/] [last accessed 5/03/2010]

⁵² Hara A 'Co-management of natural resources: Theory and the attendant assumptions' in Hauck M & Sowman M (eds.) *Waves of change* (2003) 19.

From the above-mentioned definition it is clear that the true meaning of co-management entails that all aspects of the governing and conservation of natural resources will be shared equally between government and local communities.⁵³

1.2.4. The purpose of co-management.

The concept of co-management was initiated in order to fulfill certain functions which include: the encouragement of partnerships between the authorities and local communities; the encouragement of sustainable use of the resources; and facilitation of the sharing of power and responsibility.⁵⁴

The effective implementation of these functions would lead to better results when it comes to conservation of natural resources.⁵⁵ Even if co-management agreements have been implemented, as stated above, it does not guarantee that power will be shared between the parties.⁵⁶ The implementation might lead to the strengthening of the state's control over resource policy, management, as well as allocation of those resources, which could ultimately result in the marginalisation of communities, rather than their empowerment.⁵⁷ Clear indications of the benefits as well as the limitations of

⁵³ Normann AK, Nielsen JR & Sverdrup-jansen S *Fisheries Co-management in Africa* (1997) 2.

⁵⁴ Hara M *Could co-management provide a solution to the problem of artisanal fisheries management on the South-East arm of Lake Malawi* (Unpublished LLD thesis UWC 2001) 115.

⁵⁵ Hara M *Could co-management provide a solution to the problem of artisanal fisheries management on the South-East arm of Lake Malawi* (Unpublished LLD thesis UWC 2001) 115.

⁵⁶ Castro AP & Nielsen E 'Indigenous people and Co-management' (2001) 4 ESP 1.

⁵⁷ Castro AP & Nielsen E 'Indigenous people and Co-management' (2001) 4 ESP 1.

co-management are required, not only as a method for the achievement of sustainable development, but also as a means of encouraging conflict resolution and peace building.⁵⁸

There are various factors that could contribute to the unsustainable use of resources, but it is up to government to adopt initiatives and provide assistance in attempting to limit the damage that might be caused to the environment. There have been various approaches taken to ensure resource conservation, and one of the most important approaches is the implementation of EMCA's. These agreements are crucial as it is now recognized that the long-term sustainable use and management of resources is ultimately dependent on managing the human impact on natural resources.⁵⁹

Thus the co-management approach, if correctly implemented, represents the best solution available to achieve a balance between addressing the needs of subsistence fishing communities while also ensuring the sustainable use of marine resources.

1.2.5. Origins of the concept of co-management.

Historically, certain traditional societies implemented systems in which natural resources were managed through principles of reciprocity and solidarity, while in other

⁵⁸ Castro AP & Nielsen E 'Indigenous people and Co-management' (2001) 4 ESP 2.

⁵⁹ Castro AP & Nielsen E 'Indigenous people and Co-management' (2001) 4 ESP 2.

communities (also traditional societies) social values, such as, religious authority and cultural norms, were used to manage natural resources.⁶⁰ In most cases these communities established themselves in as close proximity to natural resources as reasonably possible.⁶¹ With the emergence of colonial power and the nation state, which introduced national authority over natural resources (employed to stop the degradation and over-use of natural resources), traditional natural resource management methods were suppressed in favour of a more scientific method of management by governments. This resulted in indigenous people employing deceptive measures in order to gain access to natural resources.⁶²

Ultimately, conflicts and problems arose between indigenous people and the authorities, which could only be solved by negotiations between them, as both sides understood that co-operation was necessary for the effective and efficient management of natural resources.⁶³

Due to the world-wide degradation of natural resources, prohibitive measures needed to be implemented, as action by government alone would not solve the problem.⁶⁴ The

⁶⁰Borrini-feyeranbend G, Farvar MT, Nguingui JG & Ndanganga VA 'Co-management of Natural Resources; Organising, negotiating and Learning-by-doing' (2007) 1.

⁶¹Borrini-feyeranbend G, Farvar MT, Nguingui JG & Ndanganga VA 'Co-management of Natural Resources; Organising, negotiating and Learning-by-doing' (2007) 1.

⁶²Borrini-feyeranbend G, Farvar MT, Nguingui JG & Ndanganga VA 'Co-management of Natural Resources; Organising, negotiating and Learning-by-doing' (2007) 2.

⁶³Borrini-feyeranbend G, Farvar MT, Nguingui JG & Ndanganga VA 'Co-management of Natural Resources; Organising, negotiating and Learning-by-doing' (2007) 2.

⁶⁴Hara, M 'Co-management of natural resources: Theory and the attendant assumptions' in, Hauck M & Sowman M (eds.) *Waves of change* (2003) 14.

centralised management of natural resources was, therefore, not enough to address the problem of over-exploitation of marine natural resources.⁶⁵ As a result of the ineffectiveness of centralised management of natural resources, as well as the cost implications, interest turned to finding other methods and means of resource conservation.⁶⁶ In the last decade a number states have turned to co-management as a means of addressing the problem posed by over-utilisation of natural resources, with its key requirement being that of community or resource users' involvement in the management of the resource.⁶⁷

1.3. RATIONALE FOR THE STUDY.

In order to meet the needs of the present generation without compromising the ability of future generations to meet their own needs, sustainable use of natural resources is a goal aspired to when it concerns renewable resources.⁶⁸ It is important to realize that, while natural resources are key to achieving economic and social upliftment, they should not be used in such a way that the sustainability of the resources cannot be guaranteed, as this may lead to the depletion of the resources. Therefore, it is up to government to ensure that once subsistence fishing communities have access to these resources, they are used in a sustainable manner.

⁶⁵ Baland JM & plateau JP *Halting degradation of natural resources: is there a role for rural communities* (1996) 28.

⁶⁶ Hara M 'Co-management of natural resources: Theory and the attendant assumptions' in Hauck M & Sowman M (eds.) *Waves of change* (2003) 14.

⁶⁷ Hara M 'Co-management of natural resources: Theory and the attendant assumptions' in Hauck M & Sowman M (eds.) *Waves of change* (2003) 14.

⁶⁸ Rosenberg AA, Fogarty MJ, Sissenwine MP, Beddington RJ & Shepherd JG 'Achieving Sustainable use of Renewable Resources' (1993) 262 *SCI* 828.

If the goal of sustainable resource use is to be achieved, government has to take the initiative to implement policies and legislation.⁶⁹ The implementation of policies and legislation must be done order to ensure that natural resources are not only used for the advancement of the economic position of previously disadvantaged communities, but that these resources are used in such a way that they will also be available for future generations.⁷⁰

The aforementioned principle is entrenched in South Africa's Constitution;⁷¹ it is further articulated in policy which is aimed at restructuring as well as rationalising marine fisheries in South Africa. The White Paper on Marine Fisheries Policy for South Africa⁷² is one such policy as it emphasizes the need to balance increased access to marine resources with the need to ensure the sustainability of marine resources.⁷³ As a result of this policy, legislation, such as, the (MLRA)⁷⁴ and (NEMA),⁷⁵ highlight the need for equitable access to natural resources, as well as sustainable use of natural resources.

⁶⁹ Thorten J & Beckwith S *Environmental law* (2004) 46.

⁷⁰ Thorten J & Beckwith S *Environmental law* (2004) 46.

⁷¹ Constitution of the Republic of South Africa of 1996.

⁷² White Paper on Marine Fisheries Policy for South Africa of 1997.

⁷³ Witbooi E 'Law and Fisheries Reform' (2006) 30 MP29.

⁷⁴ Act 18 of 1998.

⁷⁵ Act 107 of 1998.

Thus, policy, such as, the White Paper for the Conservation and Sustainable Use of South Africa's Biological Diversity,⁷⁶ and the White Paper for Sustainable Coastal Development in South Africa,⁷⁷ and legislation, such as, NEMA along with the MLRA, have led to emphasis being placed on involving local communities, who are now seen as an important component in resource conservation efforts,⁷⁸ as well as resource management decisions.

1.4 HISTORICAL BACKGROUND: IMPACT OF PREVIOUS LAWS ON THE FISHING SECTOR.

1.4.1. The Plight of Subsistence fishers.

This historical background should be read together with chapter three.

Previously, access to marine resources was removed from traditional fishing communities and put in the hands of a few large companies, which resulted in numerous problems.⁷⁹

⁷⁶ Notice 1095 of 1997.

⁷⁷ White Paper for the Sustainable Coastal Development in South Africa of 2000.

⁷⁸ Hauck M & Sowman M 'Co-management of coastal and fisheries resources in South Africa: Policy and legislative framework' in Hauck M & Sowman M (eds.) *Waves of change* (2003) 47.

⁷⁹ Norman AK, Nielsen JR & Sverdrup-jansen S *Fisheries Co-management in Africa* (1997)153.

First, as part of the traditional fishing communities, subsistence fishers were deemed to be 'non-compliant' (which meant that they were considered to be non-existent) in terms of national and provincial law, thus they were denied access to marine resources.⁸⁰ Secondly, legal provisions addressing the needs of subsistence fishers did not exist, which resulted in a lack of attention being paid to this sector from a management point of view.⁸¹ Finally, subsistence fishers were also not seen as a separate and lawful group in legislation governing fisheries management.⁸²

Various problems arose as a result of the lack of recognition given to subsistence fishers as a separate group, such as: the failure to define 'personal use', 'own use' and 'non-commercial purposes': and the failure to distinguish between 'subsistence' and 'recreational' fishers in legislation, which led to subsistence fishers being subjected to regulations meant for recreational fishers.⁸³ It also resulted in a ban on certain fishing methods and equipment, which had an impact on the harvesting techniques used by subsistence fishers, as they were subjected to fishing regulations implemented for recreational fishers.⁸⁴

⁸⁰ Hauck M 'Rethinking small-scale fisheries compliance' (2008) 32 MP 638.

⁸¹ Witbooi E 'Subsistence fishing in South Africa: Implementation of the Marine Living Resources Act' (2002) 431 MCL 432.

⁸² Hauck M & Sowman M 'Co-management of coastal and fisheries resources in South Africa: Policy and legislative framework' in Hauck M & Sowman M (eds.) *Waves of change* (2003) 38.

⁸³ Hauck M & Sowman M 'Co-management of coastal and fisheries resources in South Africa: Policy and legislative framework' in Hauck M & Sowman M (eds.) *Waves of change* (2003) 43.

⁸⁴ Hauck M & Sowman M 'Co-management of coastal and fisheries resources in South Africa: Policy and legislative framework' in Hauck M & Sowman M (eds.) *Waves of change* (2003) 43.

Despite these rules and regulations, subsistence and small-scale fishers continued to utilize marine resources, either contrary to the laws applicable at that time or by operating under the regulations which governed recreational fishers.⁸⁵

Although national and provincial legislation⁸⁶ acknowledged non-commercial fishers, problems existed because the provisions available at the time only applied to recreational fishers. This meant that the failure to recognise subsistence fishers as a legal category often led to them being arrested or fined for harvesting resources without the necessary permits.⁸⁷

1.4.2. Policies and laws applicable before the establishment of a democratic government in South Africa.

Policies and laws enacted during the apartheid period prevented much of the population from gaining access to the seashore, thus contributing to the plight of subsistence fishers, as land next to the seashore was mostly under private or state ownership.⁸⁸

With the exception of the east coast, where harvesting of marine resources by Black South Africans took place as three of the homelands were established in this area by

⁸⁵ Sowman M 'subsistence and small-scale fisheries in South Africa: a ten-year review' (2006) 30 MP 61.

⁸⁶ Examples of the national and provincial legislation are the Sea Fisheries Act of 1988 and the Cape Fishing Ordinance of 1920.

⁸⁷ Hauck M & Sowman M 'Co-management of coastal and fisheries resources in South Africa: Policy and legislative framework' in Hauck M & Sowman M (eds.) *Waves of change* (2003) 43.

⁸⁸ Hauck M & Sowman M 'Co-management of coastal and fisheries resources in South Africa: Policy and legislative framework' in Hauck M & Sowman M (eds.) *Waves of change* (2003) 40.

the apartheid government's land policy and influx control laws,⁸⁹ subsistence fishers were denied access to the rest of South Africa's coastline.⁹⁰

The laws and policies enacted during this time period contributed to the disempowerment of the majority of South Africans and effectively denied subsistence fishers access to South Africa's marine resources.⁹¹

1.4.3. Permit system.

The system used for the allocation of fishing rights was one of the contributing factors which led to the plight of subsistence fishers. A study of subsistence fishers in South Africa conducted by the Subsistence Fishers Task Group (SFTG) which was appointed in 1999 by the Chief Director of Marine and Coastal Management, shows that most of these fishers did not know about the regulations or the procedures to follow in order to obtain permits, or the consequences of going against the provisions of the legislative framework.⁹²

⁸⁹ Some of the laws and policies enacted during apartheid which contributed to the plight of subsistence fishers were: the Black Land Act 27 of 1913, the Development Trust and Land Act 56 of 1936, the Group Areas Act 41 of 1951; the homeland policy; laws governing planning and development along the coast; the Provincial Township Ordinances; and the Reservation of Separate Amenities Act 49 of 1953.

⁹⁰ Witbooi E 'subsistence fishing in South Africa' (2002) 431 MCL 431.

⁹¹ Hauck M & Sowman M 'Co-management of coastal and fisheries resources in South Africa: Policy and legislative framework' in Hauck M & Sowman M (eds.) *Waves of change* (2003) 38.

⁹² Hauck M, Sowman M, Russell E, Clark BM, Harris JM, Venter A, Beaumont J & Maseko Z 'Perceptions of subsistence and informal fishers in South Africa regarding the management of living marine resources.' (2002) 24 SAJMS 467.

Looking at the regulation of the fishing industry during the apartheid era, the legislation⁹³ implemented led to an unfair distribution of access to natural resources; this is illustrated by the fact that, of the 4,000 fishing licenses issued, only 6% were issued to Black persons.⁹⁴

In order to deal with the problems in the fishing industry, the system dealing with the allocation of fishing rights had to be revised, with the aim of ensuring fair and unbiased access to fisheries resources, as well as continuing sustainable use of marine resources.⁹⁵ The Fisheries Policy Development Committee was the starting point for the reconstruction of South Africa's fishing industry.

1.4.4. The Fisheries Policy Development Committee.

As mentioned above, a major contributing factor to the plight of subsistence fishers was the system of allocation of fishing rights which existed prior to the establishment of a democratic government. Once the new government came into power in 1994, it promised:

⁹³ Legislation, such as, the Sea Shores Act of 1935 and the Sea Fishery Act of 1940, contributed to the denial off access to marine resources to subsistence fishing communities.

⁹⁴ Nielsen JR & Martine R 'Creation of a new fisheries policy in South Africa' (1996) 156 Working paper <http://www.ifm.dk/reports/3.PDF> [last accessed 15/12/ 2010]

⁹⁵ Mbane NN *The South African fisheries policy since 1994* (Unpublished LLM thesis, Cape Technikon 2004) 24.

'The upliftment of impoverished coastal communities through improved access to marine resources and the sustainable management of those resources through appropriate strategies'.⁹⁶

The most important and difficult task relating to subsistence fishers was the creation of policies capable of redistributing access rights to those who in the past were denied access to the resources.⁹⁷ In order to formulate policy which would be appealing to everyone, the Fisheries Policy Development Committee (FPDC) was established.⁹⁸

The FPDC was founded on objectives and principles which are crucial when it concerns the sustainable use of marine resources and the implementation of co-management arrangements, which require that:

'The management and development of fisheries in South Africa must comply with the principles of the Constitution as well as the principles and objectives of the Reconstruction and Development Program (RDP)'.⁹⁹

- 'There should be transparency and accountability when it comes to making decisions about the management of marine living resources'.¹⁰⁰

⁹⁶ African National Congress (ANC). The reconstruction and development program (1994).

⁹⁷ Nielsen JR & Martine R 'Creation of a new fisheries policy in South Africa' (1996) 153 working paper <http://www.ifm.dk/reports/3.PDF> [last accessed 15/12/2010]

⁹⁸ Nielsen JR & Martine R 'Creation of a new fisheries policy in South Africa' (1996) 152 working paper <http://www.ifm.dk/reports/3.PDF> [last accessed 15/12/2010]

⁹⁹ Nielsen JR & Martine R 'Creation of a new fisheries policy in South Africa' (1996) 158 working paper <http://www.ifm.dk/reports/3.PDF> [last accessed 15/12/ 2010]

- 'There should be a fair and equitable allocation of marine resources so that those who were denied access in the past are afforded the opportunity to participate'.¹⁰¹

- 'Natural resources should be managed in such a way that they benefit all people due to the fact that they are considered to be national assets and heritage of its people, this means that the state has a duty to enact legislation in order to ensure that resources are used in a sustainable manner; and

- 'States are required to consider international conventions and treaties which they have signed therefore must manage and develop resources in accordance with these international instruments as they are bound to comply with international law'.¹⁰²

South Africa has signed and ratified a number of international conventions¹⁰³ which provide for the sustainable utilisation of resources and community involvement in the management of natural resources.

¹⁰⁰ Nielsen JR & Martine R 'Creation of a new fisheries policy in South Africa' (1996) 158 working paper <http://www.ifm.dk/reports/3.PDF> [last accessed 15/12/2010]

¹⁰¹ Nielsen JR & Martine R 'Creation of a new fisheries policy in South Africa' (1996) 158 working paper <http://www.ifm.dk/reports/3.PDF> [last accessed 15/12/2010]

¹⁰² Nielsen JR & Martine R 'Creation of a new fisheries policy in South Africa' (1996) 158 working paper <http://www.ifm.dk/reports/3.PDF> [last accessed 15/12/2010]

¹⁰³ South Africa has ratified the Convention on Biological Diversity as well as the United Convention on the Law of the Sea which provide for the sustainable utilisation of Natural Resources as well as the participation of local communities in the management of natural resources.

Section 231(2) of the Constitution provides that when government signs an agreement, it will only become binding upon the passing of a resolution to that effect in both the National Assembly and the National Council of Provinces. However, in terms of section 231(4), the provisions will only become binding on an individual once national legislation has been enacted to implement them. The enactment of national legislation which is consistent with the provisions of an international agreement is an indication of whether or not an international agreement has been incorporated into South African law.¹⁰⁴ Examination of the effectiveness of the implementing legislation establishes whether South Africa is complying with the provisions of the agreement or not.¹⁰⁵

South Africa has enacted a number of laws such as, NEMA, the MLR and policies such as the Marine Fishers White Paper¹⁰⁶ and the White Paper for Sustainable Coastal Development¹⁰⁷ in an attempt to comply with its international obligations. However issues remain as to the effectiveness of these instruments, especially when it comes to providing for the needs of subsistence fishers as well as the assurance of sustainable use of marine resources.

NEMA introduces the basis for co-management and co-operation agreements in section 2(4) (f) and section 35(1). NEMA also contains provisions which encourage user

¹⁰⁴ Witbooi E 'Review and audit of the legal provisions and institutional arrangements that impact on the artisanal fisheries sector in BCLME region LMO (2004) Project No. LMR/AFSE/03/01/A.

¹⁰⁵ Witbooi E 'Review and audit of the legal provisions and institutional arrangements that impact on the artisanal fisheries sector in BCLME region' (2004) Project No. LMR/AFSE/03/01/A.

¹⁰⁶ White Paper: A marine fisheries policy for South Africa 5 may 1997.

¹⁰⁷ White paper: for Sustainable Coastal Development in South Africa, April 2000 (Our coast, or future).

participation in the management of resources as well as environmental co-operation agreements. These will be contextualized in Chapter 3. The substantive law introduced by the new fisheries policy, and the MLRA which followed, will also receive attention in Chapter 3.

1.5. THEORETICAL ASSUMPTIONS.

The actions of states in respect of marine environments are governed by international law, which imposes specific rights and responsibilities.¹⁰⁸ In terms of international law states are required to take internal or national action when it comes to the use and protection of marine environments.¹⁰⁹ In addition thereto, states must also incorporate international law into their national legal order to fulfill their obligation to comply with international law.¹¹⁰

The international legal framework, used to govern South Africa's fisheries sector, is comprised of the agreements to which South Africa is a party, as well as the relevant rules of international customary law.¹¹¹

¹⁰⁸ Paterson A & Kotze KJ *Environmental Compliance and Enforcement in South Africa* (2008) 81.

¹⁰⁹ Paterson A & Kotze KJ *Environmental Compliance and Enforcement in South Africa* (2008) 81.

¹¹⁰ Kotze LJ & Paterson AR *The Role of the Judiciary in Environmental Governance* (2009) 562.

¹¹¹ Witbooi E 'Law and Fisheries Reform' (2006) 30 MP 29.

In terms of international law the Stockholm Principles,¹¹² drafted at the 1971 Stockholm Conference, which was the first international conference specifically dedicated to the conservation of the environment, are regarded as crucial in modern international environmental law: In particular Principle 1, which places responsibility for the protection of the environment on human beings, and Principle 21, which places responsibility for the protection of the environment on the national government.

The Rio Conference on Environment and Development produced the Rio Declaration.¹¹³ The Declaration provides for a compromise between environmental protection and development, with a number of its principles seen to be of significant importance when it concerns user participation in resource management, conservation, and sustainable utilization of natural resources.

Agenda 21 is a product of the Rio Conference, it requires the implementation of national strategies, plans and policies in order to protect the environment and improve the lives of all people.¹¹⁴

The Food and Agriculture Organization of the United Nations (FAO) is a body which leads international efforts for the elimination of hunger, in both developed and

¹¹² The Declaration of Principles for the Preservation and Enhancement of the Human Environment, June 16, 1972; (1972) 11 I.L.M.

¹¹³ Rio de Janeiro Declaration on Environment and Development, June 16, 1992, UN Doc.A/CONF.151/5.

¹¹⁴ Agenda 21 <http://habitat.igc.org/agenda21/a21-01.htm> [last accessed on 04/03/2010].

developing countries; one of its main functions is the development of fishing practices.¹¹⁵ One of the FAO challenges is meeting the goal of ensuring responsible fishing.¹¹⁶ Members of the Organisation adopted a Code of Conduct for Responsible Fishing in 1995 in order to ensure that this goal was achieved.¹¹⁷

The United Nations Convention on the Law of the Sea (UNCLOS) contains provisions which require the protection and preservation of the marine environment.¹¹⁸ Thus UNCLOS is crucial for the protection of South Africa's marine environments, as the state obligated to take measures to stop environmental degradation.

The Convention on Biological Diversity (CBD) has been hailed as a landmark development in the environment and development fields, as it take a holistic and integrated approach to conservation, rather than focusing on specific species when it comes to the conservation and sustainable utilization of natural resources.¹¹⁹ The overall objectives are provided for in Article 1.¹²⁰ These objectives must be reached in

¹¹⁵ About FAO <http://www.fao.org/about/en> [last accessed on 04/03/2010].

¹¹⁶ About FAO <http://www.fao.org/about/en> [last accessed on 04/03/2010].

¹¹⁷ About FAO <http://www.fao.org/about/en> [last accessed on 04/03/ 2010].

¹¹⁸ United Nations Convention on the Law of the Sea <http://www.hri.org/docs/LOS/>. [last accessed on 10/03/2010].

¹¹⁹ Glazewski J *Environmental law in South Africa 2 ed* (2005) 259.

¹²⁰ 'The conservation of biological diversity, the sustainable use of its component and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources, including by appropriate access to genetic resources and by appropriate transfer of relevant technologies, taking into account all rights over those resources and to technologies, and by appropriate funding.'

different ways, through guidelines provided for in the Convention.¹²¹ These objectives can also be found in South Africa's Biodiversity Act.¹²²

With regard to fisheries management, the CBD provides for the Jakarta Mandate on Marine and Coastal Biological Diversity (the Jakarta Mandate), which is aimed at promoting the conservation and long-term sustainable use of marine and coastal living resources in a manner that respects both societal interests and the integrity of ecosystems.¹²³

The international legal framework is very crucial to ensuring the conservation as well as the sustainable use of natural resources; therefore, it will be discussed in more detail in Chapter 2.

States are primary actors in the international legal, political and environmental arenas.¹²⁴ All these arenas interface with each other as far as the marine environment is concerned due to the fact that one of the contributing factors to the exploitation of natural resources is economic gain.¹²⁵ States, therefore, have a particular and primary responsibility to align their actions to international law to achieve outcomes in practice that will be to the advantage of the community of states as a whole.¹²⁶

¹²¹ Guidelines are provided for in Article 6 of the Convention on Biological Diversity.

¹²² Biodiversity Act 10, 2004.

¹²³ Witbooi E 'Law and Fisheries Reform' (2006) 30 MP29.

¹²⁴ Cassese A *International Law 2 ed* (2005) 71.

¹²⁵ Cassese A *International Law 2 ed* (2005) 46.

¹²⁶ Cassese A *International Law 2 ed* (2005) 46.

States with constitutions also have a constitutional responsibility, as is the situation in South Africa. In terms of the Bill of Rights contained in South Africa's Constitution,¹²⁷ section 24 provides for the right to have the environment protected and ultimately places primary responsibility on the state to take positive action to ensure environmental protection, prevention of degradation, and promotion of sustainable use of resources. The MLRA¹²⁸ also contains those objectives found in the Constitution, but provides for a focused application on marine resources. In section 2¹²⁹ it provides for principles which are to be observed when an organ of state exercises its powers.

The view is that:

[P]ositive action does not just entail the implementation of legislation; the state will also have to put in place policies and programs implemented by the executive, which have to be reasonable in their conception and implementation'.¹³⁰

¹²⁷ Constitution of the Republic of South Africa 1996.

¹²⁸ Act 18 of 1998.

¹²⁹ (a) The need to achieve optimum utilization and ecologically sustainable development of marine living resources.

(b) The need to conserve marine living resources for both present and future generations.

(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.

¹³⁰ Government of the Republic of South Africa v Grootboom and Others 2001 (1) SA 46 (CC) 33 para 42.

Therefore, the assumption is that the better states comply with their legal duty internationally, constitutionally and legislatively, the better they will be able to perform their obligations.¹³¹

The state has to promote the interests of the public. This means that it has to establish a public legal order which has only one function, which is the protection and promotion of the public interest.¹³² If all the stated assumptions are considered, it would be in the interest of the public for government to implement co-management agreements when it concerns the utilization of marine resources. This would be the positive action required by the Constitution in order to protect natural resources, prevent degradation which occurs due to the unsustainable use of marine resources, as well as address the issue of poverty. All these steps would ensure that there is a continuous source of sustenance.

All these principles have been incorporated into NEMA. In its preamble, a duty is placed on the state to respect, protect, promote and fulfill the social, economic and environmental rights of everyone within the state and to strive to meet the basic needs of previously disadvantaged communities.¹³³

¹³¹ Du Plessis A *Fulfillment of South Africa's Constitutional Environmental Right in the Local Government Sphere* (2008) 45.

¹³² Du Plessis A *Fulfillment of South Africa's Constitutional Environmental Right in the Local Government Sphere* (2008) 47.

¹³³ National Environmental Management Act 107, 1998.

1.6. METHODOLOGY.

The state, in fulfilling its obligations, does so through its different organs of state.

The legislature's role is to enact reasonable legislation and the executive is required to take reasonable legislative and other measures, but legislative measures on their own will not amount to constitutional compliance.¹³⁴ The executive is required to take action in order to achieve the intended results, which means that the legislative measures will have to be supported by well-directed policies and programs.¹³⁵

Therefore, legislative measures would include the promulgation of: NEMA, which translates the rights and principles in the Constitution into legal provisions and identifies procedures and mechanisms for giving effect to these principles;¹³⁶ the MLRA,¹³⁷ which provides for the establishment of marine protected areas; and the National Environmental Management Protected Areas Act, which creates a national system of protected areas for the purpose of conserving ecologically viable areas, but also aims to implement co-operative environmental governance while ensuring the promotion of sustainable and equitable use of the resources, as well as encouraging community participation.¹³⁸

¹³⁴ Government of the Republic of South Africa v Grootboom and Others 2001 (1) SA 46 (CC) 33 para 42

¹³⁵ Government of the Republic of South Africa v Grootboom and Others 2001 (1) SA 46 (CC) 33 para 42

¹³⁶ Hauck M & Sowman M 'Co-management of coastal and fisheries resources in South Africa: Policy and legislative framework 'in Hauck M & Sowman M (eds.) *Waves of change* (2003) 48.

¹³⁷ Act 18 of 1998.

¹³⁸ National Environmental Management Protected Areas Act, 2003.

1.7. HYPOTHESIS.

As states are charged with certain obligations, compliance with the duties placed on them in law (whether these duties are imposed constitutionally or legislatively) is crucial.¹³⁹ These duties have to be performed in accordance with the state's purpose, function and basic nature, which is to promote the interests of the public,¹⁴⁰ which entails the protection of environmental and natural resources as well as human interests.

If a state is able to see to it that its obligations are effectively met, then the state will have complied with its basic nature, purpose and function.¹⁴¹ This means that the state has implemented a program for the administration of marine resources which is effective in its regulation of the resources.

The South African government has taken positive steps over the last decade, beginning with the Marine Fisheries White Paper.¹⁴² This document contained certain key values, three of the most important of which were: (1) the use of marine resources in manner a which would ensure long term social and economic benefit to the country as a whole; (2) the management and development of fisheries in compliance with the constitution;

¹³⁹ Cassese A *International Law 2 ed* (2005) 72.

¹⁴⁰ Cassese A *International Law 2 ed* (2005) 4.

¹⁴¹ Cassese A *International Law 2 ed* (2005) 5.

¹⁴² White Paper on Marine Fisheries Policy for South Africa of 1997.

and (3) the promotion of fair and equitable access to marine resources.¹⁴³ This document emphasized the need to restructure the access system in order to address historical inequalities, and the need to balance increased access to marine resources while at the same time, the sustainable use of the resources.¹⁴⁴

This was followed by the MLRA¹⁴⁵ in which one of the White Paper's policies can be found, as it provides for the recognition of subsistence fishers who were not recognized as users of the resources before.¹⁴⁶

Further steps were taken with the establishment of a specialized task group, called the Subsistence Fishers Task Group, in order to facilitate the implementation of MLRA's subsistence provisions. Its mandate was to define subsistence fishers, identify coastal zones appropriate for their use, and, perhaps most importantly, recommend appropriate management models for the sector.¹⁴⁷ In January 2000, a Report was published containing certain recommendations, one being the co-management of the sector.¹⁴⁸

¹⁴³ Strydom HA & King ND (eds) *Fuggle and Rabie's Environmental Management in South Africa 2 ed* (2009) 501.

¹⁴⁴ Strydom HA & King ND (eds) *Fuggle and Rabie's Environmental Management in South Africa 2 ed* (2009) 502.

¹⁴⁵ Marine Living Resources Act.

¹⁴⁶ Strydom HA & King ND (eds) *Fuggle and Rabie's Environmental Management in South Africa 2 ed* (2009) 502.

¹⁴⁷ Strydom HA & King ND (eds) *Fuggle and Rabie's Environmental Management in South Africa 2 ed* (2009) 507.

¹⁴⁸ SFTG Draft Recommendation for Subsistence Management in South Africa. Prepared for the Chief Director, Marine and Coastal Management, Department of Environmental Affairs and Tourism, South Africa, 200.

The above-mentioned leads to the conclusion that the state, in fulfilling its obligation to promote the public interest, has complied with its basic nature, purpose and function. This is due to the fact that although government has not resolved the problem of unsustainable use of resources, steps have been taken to come up with solutions to address the unsustainable use of marine resources and the promotion of conservation, as well as addressing the needs of subsistence fishers.

1.8. SIGNIFICANCE OF THE RESEARCH.

The research is important because it highlights the urgent need to conserve and ensure the sustainable use of marine resources while at the same time addressing the plight of subsistence fishers. One of the ways in which these communities can be uplifted is by 'providing improved access to marine resources, but at the same time ensuring the sustainable management of these resources by implementing the correct strategies'.¹⁴⁹

The view is, that 'all marine resources are national assets and heritage of all people, but that the custodian of these assets is the state'.¹⁵⁰ And that access to these resources should be 'allocated to existing and prospective users, but that this should be done based on agreed criteria, one of these criteria looks at the historical involvement in the use of the resource'.¹⁵¹

¹⁴⁹ Hersoug B *Fishing in a sea of sharks* (2002) 19.

¹⁵⁰ Hersoug B *Fishing in a sea of sharks* (2002) 29.

¹⁵¹ Hersoug B *Fishing in a sea of sharks* (2002) 19.

It is crucial to find mechanisms which will assist in poverty alleviation in South Africa as not everyone has access to land which they can use for their livelihood. Therefore, government has the responsibility to find creative ways to ensure that it uses natural resources which are available for the benefit of the poor; and one of the ways in which this can be done is through the utilization of marine resources. Government involvement is very crucial when it comes to utilization of marine resources because if government allows open access to marine resources for poor communities to be able to put food on the table, it will directly impact on the sustainability of the resources and this will result in a lack of resources for future generations.¹⁵²

The concept of co-management is very important in this regard because it will ensure that the key goal when it comes to the utilization of marine resources is achieved, which is sustainable use of the resources.

¹⁵² Masifindise Development Trust *Promoting Poverty Alleviation, Food security and gender equality and small-scale Fisheries* (2010) 67.

CHAPTER 2

INTERNATIONAL PERSPECTIVE

2.1. INTRODUCTION.

The following instruments, which will be discussed in more detail in the ensuing paragraphs, the United Nations Conference on Human Environment (the Stockholm Conference);¹⁵³ the Rio Conference on Environment and Development;¹⁵⁴ Agenda 21;¹⁵⁵ as well as organisations such as the Food and Agriculture Organisation;¹⁵⁶ and Conventions, such as, the United Nations Convention on the law of the Sea (UNCLOS),¹⁵⁷ and the Convention on Biological Diversity (CBD),¹⁵⁸ while some are binding and others are non-binding, illustrate how steps have been taken in terms of international law to ensure that natural resources are used in the right way so that they are not only available 'for the present but also for future generations'.¹⁵⁹

¹⁵³ United Nations Conference on Human Environment will be attended to in para 2.2.

¹⁵⁴ Rio Conference on the Environment and Development will be attended to in para 2.3.

¹⁵⁵ Agenda 21 will be attended to in para 2.4.

¹⁵⁶ The Food and Agriculture Organisation will be attended to in para 2.7.

¹⁵⁷ The United Nations Convention on the law of the Sea will be attended to in para 2.5.

¹⁵⁸ Convention on Biological diversity will be attended to in para 2.6.

¹⁵⁹ Rio de Janeiro Declaration on Environment and Development, June 16, 1992, UN Doc.A/CONF.151/5.9.(principle 3) and The Declaration of Principles for the Preservation and Enhancement of the Human Environment, June 16, 1972; (1972) 11 I.L.M (principle 1).

2.2. STOCKHOLM PRINCIPLES.

The Stockholm Conference, held in 1972, was the first intergovernmental conference aimed at addressing environmental problems.¹⁶⁰

This Conference ‘formally recognized the importance of environmental concerns at the national level and transformed environmental affairs into an international political issue.’¹⁶¹

The Stockholm Conference resulted in the production of three initiatives, namely the Action Plan to Protect the Environment, the United Nations Environmental Program and related Environment Fund, and the Stockholm Declaration on the Human Environment.¹⁶² The most important, in terms of the sustainable utilization of resources as well as local user participation in the management of natural resources, is the Stockholm Declaration.

2.2.1 The Stockholm Declaration on the Human Environment (UNEP).

The Stockholm Declaration on the Human Environment (UNEP), which is a non-binding instrument, was meant to ‘inspire and guide the people of the world in the preservation

¹⁶⁰ Birnie P, Boyle A & Redgwell C *International Law and the Environment* (2009) 48.

¹⁶¹ Grubb M, Koch M, Munson A, Sullivan F & Thomson K *The Earth summit agreements; a guide and assessment* (1993) 4.

¹⁶² Hunter D, Salzman J & Zaelke D *International Environmental Law and Policy* (2007) 170.

and enhancement of the human environment.¹⁶³ The Declaration has influenced the development of both national as well as international law.¹⁶⁴ The principles seen as the most important in modern environmental law, which aim at ensuring the sustainable utilization through community involvement, are contained in Principles 1,¹⁶⁵ 2¹⁶⁶ and 21,¹⁶⁷ as they place responsibility for the improvement of the environment as well as the sustainable utilization of resources on mankind, and require the preservation of natural resources through careful planning and management.

2.3. RIO CONFERENCE ON THE ENVIRONMENT AND DEVELOPMENT, AND THE RIO PRINCIPLES.

In 1992 the United Nations Conference on the Environment and Development (the Earth Summit) took place in Rio due to a number of environmental concerns, one being the over-utilization of irreplaceable resources.¹⁶⁸ There was a realization that, since the Stockholm Declaration, progress on the incorporation of environmental issues into

¹⁶³ Birnie P, Boyle A & Redgwell C *International Law and the Environment* (2009) 48.

¹⁶⁴ Hunter D, Salzman J & Zaelke D *International Environmental Law and Policy* (2007) 171.

¹⁶⁵ Principle 1 provides: 'Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of quality that permits a life of dignity and well-being and he bears a solemn responsibility to protect and to improve the environment for present and future generations. In this respect, policies promoting or perpetuating apartheid, racial segregation, discrimination, colonial and other forms of oppression and foreign domination stand condemned and must be eliminated.'

¹⁶⁶ Principle 2 provides: 'Natural resources of the earth, including the air, water, land, flora and fauna and especially representative samples of natural ecosystems, must be safeguarded for the benefit of present and future generations through careful planning or management, as appropriate.'

¹⁶⁷ Principle 21 provides: 'states have, in accordance with the Charter of the United Nations and the principles of environmental law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure activities within their jurisdiction or control do not cause damage to the environment of other states or of areas beyond the limits of national jurisdiction.'

¹⁶⁸ UN Conference on Environment and Development (1992) <http://www.un.org/geninfo/bp/enviro.html> [last accessed 02/12/2010].

developmental policies had not materialized.¹⁶⁹ In order to incorporate the goal of environmental protection with the demand for economic development, the concept 'sustainable development' was proposed.¹⁷⁰ Sustainable development entails that development should not be impeded by environmental concerns, but that in order for development to be sustainable, environmental concerns should be taken into account.¹⁷¹

The Rio Conference resulted in the Rio Declaration, which contains 27 principles setting out the rights and responsibilities of states. Principles applicable in the South African context when it comes to the protection of marine resources, sustainable utilization of resources and the participation of the subsistence fishers in decision making are principles 4, 10, and 22.

Principle 4 provides for the integration of environmental and developmental goals. It is argued that the purpose of Principle 4 is to make sure that developmental decisions do not disregard environmental considerations, as the integration of the competing goals is important in the achievement of sustainable development.¹⁷² Thus, an attempt to improve the lives of subsistence fishers should not come at the cost of irreversible damage to the environment.

¹⁶⁹ Adede AO 'The Treaty System from Stockholm (1972) to Rio de Janeiro (1992)' (1995) 13 PELR 38.

¹⁷⁰ Momtaz D 'The United Nations and the protection of the environment: from Stockholm to Rio de Janeiro' (1996) 15 PG 262.

¹⁷¹ Momtaz D 'The United Nations and the protection of the environment: from Stockholm to Rio de Janeiro' (1996) 15 PG 262.

¹⁷² Birnie P & Boyle A *International Law and the Environment* (2002) 87.

Principle 10 provides for public participation and awareness when it concerns any activities or decisions affecting local communities.

Principle 22 deals with involvement of local communities and Indigenous people in decision making.¹⁷³ Indigenous people are defined as those people who are descendants of pre-invasion inhabitants of lands now dominated by others.¹⁷⁴ Essentially they are indigenous because their ancestral roots are embedded in the lands on which they live.¹⁷⁵ Indigenous people occupy a difficult position in most societies and mostly find themselves in conditions of severe disadvantage, as they are crowded out and excluded from access to valuable resources which are important for their daily livelihood.¹⁷⁶

Subsistence fishing communities may be placed in the category of indigenous people as for generations they have used marine resources as their main source of food. Thus

¹⁷³ Principle 22 provides: 'indigenous people and their communities, and other local communities, have a vital role in environmental management and development because of their knowledge and traditional practices. states should recognize and duly support their identity, culture and interests and enable their effective participation in the achievement of sustainable development.'

¹⁷⁴ A study by the United Nations contains the following definition:

'Indigenous communities, people and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as people, in accordance with their own cultural patterns, social institutions and legal systems.' U.N. Sub-commission on prevention of Discrimination and Protection of Minorities, Study of the problem of discrimination against Indigenous People, U.N. Doc. E/CN.4/ Sub.2/1986/7/Add. 4, Par. 379 (1986).

¹⁷⁵ Anaya SJ *Indigenous people in International Law* (2004) 3.

¹⁷⁶ Anaya SJ *Indigenous people in International Law* (2004) 4.

they are the most important component in the goal of achieving sustainable use of marine resources.

Co-management agreements support the participation of these subsistence fishing communities in decision making and management of the resources, as well as help to ensure the sustainable use of resources.¹⁷⁷ In addition, co-management arrangements which also serve to educate subsistence fishers about the importance of resource conservation have been implemented in South Africa.¹⁷⁸

2.4. THE DEVELOPMENT OF AGENDA 21.

Agenda 21 was agreed upon at the Rio Conference in 1992 and was meant to ensure that the goal of sustainable development was attainable in the future.¹⁷⁹ Agenda 21 recognized that the constant destruction of the world's environment was caused by unsustainable production and consumption practices.¹⁸⁰ This action plan is meant to be implemented globally, nationally and locally by governments in every aspect of human life that has an impact on the environment.¹⁸¹ Agenda 21 only provides a guide for planning, developing and implementing actions for the achievement of sustainable

¹⁷⁷ Hauck M & Sowman M (eds) *Waves of change* (2003) 2.

¹⁷⁸ Hauck M & Sowman M (eds) *Waves of change* (2003) 2.

¹⁷⁹ Grubb M, Koch M, Munson A, Sullivan F & Thomson K *The Earth summit agreements; a guide and assessment* (1993) 97.

¹⁸⁰ Doods F *Earth Summit 2002; A new Deal* (2002) 23.

¹⁸¹ UN Department of Economic and Social Affairs, Division for Sustainable Development. Core Publications, Agenda 21 <http://www.un.org/esa/dsd/agenda21/> [last accessed on 04/03/ 2010].

development, meaning that states are not automatically legally bound by any of its provisions.¹⁸²

Agenda 21's preamble shows the difficulty involved in integrating environmental as well as developmental concerns into a single objective.¹⁸³ The preamble recognizes the continuing deterioration of the eco-system which is very important for our survival, but holds that the integration of environmental and developmental issues will lead to our needs being fulfilled and an improvement in our standards of living which will ultimately result in an eco-system which is better protected and managed.¹⁸⁴ The preamble encourages public participation as well as non-governmental organizations' involvement in the implementation of strategies, plans and policies.¹⁸⁵

Agenda 21 is divided into four sections, with the most important being section 2 which deals with the conservation and management of natural resources.

Section 2 of chapter 17 deals with the protection of oceans, and provides that both marine living resources on the high seas as well as those found in a national states territory should be managed in a sustainable manner in order to prevent over-utilization.¹⁸⁶ This section provides for the rational use, as well as protection, of marine

¹⁸² Witbooi E 'Law and Fisheries Reform; Legislative and policy development in South African fisheries over the decade 1994-2004' (2006) 30 MP 32.

¹⁸³ Grubb M, Koch M, Munson A, Sullivan F & Thomson K *The Earth summit agreements; a guide and Assessment* (1993) 101.

¹⁸⁴ United Nations Conference on Environment and Development, Agenda 21: 1992.

¹⁸⁵ United Nations Conference on Environment and Development, Agenda 21: 1992.

¹⁸⁶ Grubb M, Koch M, Munson A, Sullivan F & Thomson K *The Earth summit agreements; a guide and*

resources, thus indicates how the goals of UNCLOS (the protection as well as the sustainable development of marine and coastal environments and resources) might be achieved through the implementation of program areas.¹⁸⁷ These program areas encompass taking action to achieve sustainable use and conservations of marine resources not just on the high seas but also the coastal waters of a state.¹⁸⁸

In the South Africa context, this part of the Convention is incorporated in sections 15,¹⁸⁹ 19¹⁹⁰ and 24¹⁹¹ of The MLRA, while section 2(4) (a) (vi)¹⁹² of NEMA also contains similar provisions.

Chapter 26 of Agenda 21 contains provision stressing the need to strengthen the role that indigenous people play when it comes to the management of natural resource. To

Assessment (1993) 127.

¹⁸⁷ Witbooi E 'Law and Fisheries Reform; Legislative and policy development in South African fisheries over the decade 1994-2004' (2006) 30 MP32.

¹⁸⁸ Witbooi E 'Law and Fisheries Reform; Legislative and policy development in South African fisheries over the decade 1994-2004' (2006) 30 MP32.

¹⁸⁹ Section 15 provides: (1) 'The minister may by notice in the gazette declare any area of the South African waters to be a fisheries management areas for the management of the species described in the notice.'

(2) 'The minister may in respect of each fisheries management are approve a plan for the conservation, management and development of the fisheries.'

¹⁹⁰ Section 19 provides: 'The minister may, in order to achieve the objectives contemplated in section 9(2) of the Constitution, by notice in the gazette establish areas or zones where subsistence fishers may fish; and after consultation with the forum, declare a specified community to be a fishing community, from which inhabitants may be declared to be subsistence fishers; or any other person to be a subsistence fisher.'

¹⁹¹ Section 24 provides: 'The minister may in respect of any fishery, determine, after consultation with the forum, that the portion of the total allowable catch, the total applied effort, or a combination thereof, allocated in any year to subsistence, local, commercial and foreign fishing, and rights granted in respect thereof, shall be reduced.'

¹⁹² Section 2(4)(a)(iv) provides: 'Sustainable development requires the consideration of all relevant factors including the following

(vi) That the development, use and exploitation of renewable resources and the ecosystems of which they are part do not exceed the levels beyond which their integrity is jeopardized.'

ensure their well-being, as these people are dependent on renewable resources, governments must make sure that they are protected from unsound environmental activities.¹⁹³ Indigenous people must be consulted, must be able to take part in decision making if it affects them, and must be able to participate in the management of their resources: this is the only way that they will be empowered.¹⁹⁴ In terms of South African law and policy, section 2(4) (a) (f)¹⁹⁵ of NEMA is an attempt to meet these objectives.

Chapter 26 also provides that 'governments should incorporate the rights and responsibilities of indigenous people into national legislation'.¹⁹⁶ In terms of South African legislation this has been implemented through the MLRA,¹⁹⁷ as it contains provisions which specifically deal with subsistence fishers in section 18.¹⁹⁸

Finally, the fact that South Africa has adopted and implemented Agenda 21 through national policy illustrates that it is an influential international law document.¹⁹⁹

¹⁹³ Keating M *The Earth Summit's Agenda for Change; A plain language version of agenda 21 and the other Rio agreements* (1993) 45.

¹⁹⁴ Grubb M, Koch M, Munson A, Sullivan F & Thomson K *The Earth summit agreements; a guide and assessment* (1993) 138.

¹⁹⁵ Section 2 (4)(a)(f) provides: 'The participation of all interested and affected parties in environmental governance must be promoted, and all people must have the opportunity to develop the understanding, skills and capacity necessary for achieving equitable and effective participation and participation by vulnerable and disadvantaged persons must be ensured.'

¹⁹⁶ Agenda 21 Chapter 26.

¹⁹⁷ Marine living resources Act 18 of 1998.

¹⁹⁸ Section 18 provides: (1) 'no person shall undertake commercial fishing or subsistence fishing, engage in mariculture or operate a fish processing establishment unless a right to undertake or engage in such an activity or to operate such an establishment has been granted to such a person by the minister.....

(5) 'in granting any right referred to in subsection (1), the minister shall, in order to achieve the objectives contemplated in section 2, have particular regard to the needs to permit new entrants, particularly those from historically disadvantaged sectors of society.'

¹⁹⁹ Witbooi E 'Law and Fisheries Reform; Legislative and policy development in South African fisheries over the decade 1994-2004'(2006) 30 MP 32.

2.5. UNITED NATIONS CONVENTION ON THE LAW OF THE SEA (UNCLOS).

The United Nations Convention on the Law of the Sea (UNCLOS),²⁰⁰ is seen as the first global framework dealing specifically with all matters concerning governance of the oceans, due to the fact that it regulates state behavior by providing for a wide range of rules and directions.²⁰¹ UNCLOS has been incorporated into South Africa's domestic law through the Maritime Zones Act²⁰² as well as the MLRA.²⁰³ UNCLOS imposes duties and obligations on signatory states.²⁰⁴

The objective of UNCLOS is:

'to establish a legal order for the seas and oceans which will facilitate international communication, and will promote the peaceful use of the seas and oceans, the equitable and efficient utilization of their resources, the conservation of their living resources, and the study, protection and preservation of the marine environment.'²⁰⁵

²⁰⁰ U.N.Doc. A/CONF.62/122.

²⁰¹ Hunter D, Salzman J & Zaelke D *International Environmental Law and Policy* (2007) 739.

²⁰² Maritime Zones Act 15 of 1994.

²⁰³ Act 18 of 1998.

²⁰⁴ Scheiber HN 'Ocean Governance and the marine fisheries crisis: two decades of innovation – and frustration' (2001) 20 ELJ 126.

²⁰⁵ Preamble.

Thus, for the first time, there was an attempt to establish a world-wide framework aimed at ensuring the protection of the environment as well as the sustainable use and conservation of marine resources.²⁰⁶

When it comes to marine resources, the imposition of obligations to protect and preserve marine environments, as well as the broad coverage of specific environmental threats posed by pollution and overfishing, are seen as some of the most important achievements of UNCLOS.²⁰⁷ States acquire a number of conservation and sustainable use obligations when it comes to marine living resources found in their respective exclusive economic zones.²⁰⁸

Part XII of the Convention contains provisions dealing with environmental protection, with general obligations imposed in Article 192.²⁰⁹ The sovereign rights of states to exploit their natural resources can be found in Article 193,²¹⁰ which is similar to Principle 21 of the Stockholm Declaration, as it also provides for the sovereign right to exploit natural resources and a duty to protect and preserve those resources.

²⁰⁶ Birnie P & Boyle A *International Law and the Environment* (2002) 383.

²⁰⁷ Hunter D, Salzman J & Zaelke D *International Environmental Law and Policy* (2007) 740.

²⁰⁸ Witbooi E 'Law and Fisheries Reform; Legislative and policy development in South African fisheries over the decade 1994-2004' (2006) 30 MP 31.

²⁰⁹ Article 192 provides: 'States have the obligation to protect and preserve the marine environment.'

²¹⁰ Article 193 provides: 'States have the sovereign right to exploit their natural resources pursuant to their environmental policies and in accordance with their duty to protect and preserve the marine environment.'

2.6. CONVENTION ON BIOLOGICAL DIVERSITY.

The outcome of the Rio Conference indicated a need for the implementation of initiatives aimed at achieving sustainable development, which would ensure the meeting of the needs of present and future generations.²¹¹ The Convention on Biological Diversity (CBD) was adopted in Rio as a means to try and achieve those goals.²¹² The CBD sets out three main goals, which require, the conservation of biological diversity, the sustainable use of its components, and the fair and equitable sharing of the benefits from the use of genetic resources.²¹³

The Convention is important in terms of the conservation of marine resources, as it provides that 'conservation of biological diversity is a common concern of humankind',²¹⁴ and that 'states are responsible for conserving their biological diversity and for using their biological resources in a sustainable manner'.²¹⁵ Thus, in order for states to achieve these objectives, Article 6,²¹⁶ provides for general measures for

²¹¹ Convention on biological diversity <http://www.cbd.int/convention/guide/?id=action> [last accessed 22/03/2011].

²¹² Convention on biological diversity <http://www.cbd.int/convention/guide/?id=action> [last accessed 22/03/2011].

²¹³ Convention on biological diversity <http://www.cbd.int/convention/guide/?id=action> [last accessed 22/03/2011].

²¹⁴ United Nations Convention on Biological Diversity, 1992, 31 ILM 822; 1992 (preamble).

²¹⁵ United Nations Convention on Biological Diversity, 1992, 31 ILM 822; 1992 (preamble).

²¹⁶ Article 6 provides: 'Each contracting party shall, in accordance with its particular conditions and capabilities: Develop national strategies, plans or programs for the conservation and sustainable use of biological diversity or adapt for this purpose existing strategies, plans or programs which shall reflect, inter alia, the measures set out in this convention relevant to the contracting party concerned; and Integrate. As far as possible and as appropriate, the conservation and sustainable use of biological diversity into relevant sectoral or cross-sectoral plans, programs and policies.'

conservation and sustainable use, requiring the development of national strategies, plans or programs, should be followed.

With regard to fisheries management, an agreement by parties to the CBD to implement the Convention in order to protect marine and coastal biodiversity was concluded in Jakarta, Indonesia, in 1995.²¹⁷ The result of this meeting was the Jakarta Mandate on Marine and Coastal Biological Diversity (the Jakarta Mandate) which proposed the sustainable use of marine and coastal living resources as one of its goals.²¹⁸ The Jakarta Mandate proposed the elimination of harmful fishing practices, as well as the return to and preservation of, marine resources at sustainable levels which could be achieved through the implementation of sustainable fishing practices, which include traditional fishing practices.²¹⁹

The most important outcome concerning the utilization of marine resources was Decision 11/10 on the Conservation and Sustainable Use of Marine and Coastal Biological Diversity, which provides for integrated marine and coastal management in section I and the sustainable use of living marine and coastal resources in section II (all these provisions are found in the Annex to recommendations 1/8).²²⁰ When it comes to the goal of achieving sustainable use of living marine and coastal resources, section II

²¹⁷ Convention on Biological Diversity : *Introduction to the Jakarta Mandate on marine and coastal Biodiversity, including the terms of reference of the Meeting of Experts on marine and coastal Biodiversity* (1997) at 2.

²¹⁸ Wynberg R 'International and national policies concerning marine and coastal biodiversity' (2000) MBSR 1.

²¹⁹ Witbooi E 'Law and Fisheries Reform; Legislative and policy development in South African fisheries over the decade 1994-2004' (2006) 30 MP 32.

²²⁰ Decisions adopted by the Second Meeting of the Conference of Parties, Jakarta, Indonesia, 6-17 November 1995.

provides reasons why resource depletion occurs and what the long term goal should be.²²¹ As regards integrated marine and coastal area management, sections 3(e)²²² and 7²²³ are important when it comes to the conservation of marine resources and resource users' participation.

2.7. ROLE OF THE FOOD AND AGRICULTURE ORGANISATION (FAO).

The Food and Agriculture Organization (FAO) recognizes that there are increasing levels of poverty in small-scale, artisanal, and subsistence fishing communities, and that the continuing poverty can be attributed to insecure access to resources, a tendency to deplete resources, and the continued lack of influence of these communities on crucial issues.²²⁴ The FAO has recognised that one way to resolve the poverty problem is by implementing co-management agreements, as 'there is a need for a process approach

²²¹ Section ii of the Jakarta Mandate provides: 'Many of the World's fishery resources are in danger of depletion. The impacts of these activities can be direct and indirect. In addition, other living resources, for example mangroves, coral species and species amenable to bio-prospecting, are subject to or under threat of overexploitation. The principle impact of over-exploitation is unsustainable removal of living marine and coastal resources. The most significant indirect impacts on biodiversity include habitat destruction, bycatch and ancillary impacts on interacting species or ecosystems. The overall goal is to achieve conservation and long-term sustainable use of living marine and coastal resources in a manner that respects both societal interests and integrity of ecosystems.'

²²² Section 3(e) provides: 'The most important present and potential threat to marine and coastal biological diversity are well known:

(e) Over-exploitation of living marine and coastal resources.'

²²³ Section 7 provides: 'Integrated marine and coastal area management is a participatory process for decision-making to prevent, control, or mitigate adverse impacts from human activities in the marine and coastal environment, and to contribute to the restoration of degraded coastal areas. It involves all stakeholders, including: decision makers in public and private sectors; resource owners, managers and users; nongovernmental organizations; and the general public. Community-based management approaches have proven particularly important. Integrated management programs have already demonstrated their potential as an effective tool in developed and developing countries around the world.'

²²⁴ Wijkstorm U, Gummy A & Grainger R *The state of world fisheries and aquaculture* (2002) 70.

to fisheries management that is participatory and flexible enough to adapt to changing conditions'.²²⁵

Due to the over-exploitation of marine resources, it was recognized that something had to be done to stop the problem in order to preserve resources for future generations.²²⁶

Thus, more than 170 members of the FAO adopted the Code of Conduct for Responsible Fisheries, which requires governments to implement the Code with the assistance of industries and fishing communities.²²⁷ Although the Code of Conduct is an influential document, it does not impose any legal obligations on a state, which means that South Africa is not bound or obligated to follow any of its provisions due to the fact that it is voluntary document.²²⁸

The Code of Conduct is seen as a means of understanding, as well as overcoming, world-wide fisheries problems and is described as 'a mixture of high principles and common sense'.²²⁹ It provides

'A framework of principles and standards for efforts to promote responsible fishing worldwide through effective conservation, management and development of marine resources.'²³⁰

²²⁵ Wijkstorm U, Gummy A & Grainger R *The state of world fisheries and aquaculture* (2002) 74.

²²⁶ FAO Code of conduct for responsible fishing <http://www.fao.org/docrep/003/x9066e/x066e01.htm> [accessed 7/12/ 2010]

²²⁷ FAO Code of conduct for responsible fishing <http://www.fao.org/docrep/003/x9066e/x066e01.htm> [accessed 7/12/2010]

²²⁸ Witbooi E 'Law and Fisheries Reform; Legislative and policy development in South African fisheries over the decade 1994-2004' (2006) 30 MP 31.

²²⁹ Pitcher TJ, Kalikoski D & Pramod G 'Evaluation of Compliance with the FAO(UN) Code of Conduct for Responsible Fisheries' (2006) 14(2) FCRR 3.

²³⁰ Witbooi E 'Law and Fisheries Reform; Legislative and policy development in South African fisheries

The objectives of the Code of Conduct are contained in Article 2, and the most important are found in Articles 2(c) and (f) which address issues of providing local communities with a source of food and the implementation of state measures for the sustainable utilization of resources.²³¹

Article 6, contains the general principles of the Code of Conduct. It provides for the responsibilities which come with the utilisation of marine resources in Article 6.1,²³² while the principle of inter-generational equality is also expressed in Article 6.2.²³³ The participation of all those who have an interest in the resource should be promoted when it comes to policy formulation. This is provided for in Article 6.13,²³⁴ while Article 6.18²³⁵ contains provisions requiring the protection of subsistence fisheries rights.

over the decade 1994-2004' (2006) 30 MP31.

²³¹ Articles 2 (c) and (f) states: 'The objectives of the code are to serve as an instrument of reference to help states to establish or to improve the legal and institutional framework required for the exercise of responsible fisheries and in the formulation and implementation of appropriate measures;
(f) Promote the contribution of fisheries to food security and food quality, giving priority to nutritional needs of local communities.'

²³² 'States and users of living aquatic resources should conserve aquatic ecosystems. The right to fish carries with it the obligation to do so in a responsible manner so as to ensure effective conservation and management of the living aquatic resources.'

²³³ Article 6.2 provides: 'Fisheries management should promote the maintenance of the quality, diversity and availability of fishery resources in sufficient quantities for present and future generations in the context of food security, poverty alleviation and sustainable development.'

²³⁴ Article 6.13 provides: 'States Should, to the extent permitted by national laws and regulations, ensure that decision making processes are transparent and achieve timely solutions to urgent matters. states, in accordance with appropriate procedures, should facilitate consultation and the affective participation of industry, fish workers, environmental and other interested organizations in decision-making with respect to the development of laws and policies related to fisheries management, development, international lending and aid.'

²³⁵ Article 6.18 states: 'Recognising the important contributions of artisanal and small-scale fisheries to employment, income and food security, States should appropriately protect the rights of fishers and fish workers, particularly those engaged in subsistence, small-scale and artisanal fisheries, to a secure and just livelihood, as well as preferential access, where appropriate, to traditional fishing grounds and resources in the waters under their national jurisdiction.'

Article 7 deals with fisheries management, and specifically provides for the implementation of co-management arrangements in Article 7.1.2.²³⁶

All these provisions show that those who drafted the Code of Conduct were aware that changes needed to be made in the way fisheries operated in order to ensure that marine resources were used in a sustainable manner for the benefit of future generations.²³⁷ Thus it is recognized that the successful implementation of the Code of Conduct will lead to the availability of marine resources for both present and future generations.²³⁸

2.8. CONVENTION ON THE RIGHTS OF INDIGENOUS PEOPLE IN INTERNATIONAL LAW.

According to Anaya,²³⁹ indigenous land and resource rights are of a collective character and include a combination of possessory, use and management rights. This means that indigenous people may claim property, access and management rights to, natural

²³⁶ Article 7.1.2 provides: 'Within areas under national jurisdiction, states should seek to identify relevant domestic parties having a legitimate interest in the use and management of fisheries resources and establish arrangements for consulting them to gain their collaboration in achieving responsible fisheries.'

²³⁷ Pitcher TJ, Kalikoski D & Pramod G 'Evaluation of Compliance with the FAO(UN) Code of Conduct for Responsible Fisheries' (2006) 14(2) FCRR 5.

²³⁸ FAO Code of conduct for Responsible Fishing <http://www.fao.org/docrep/003/x9066e/x066e01.htm> [Accessed 10/12/2010]

²³⁹ Anaya SJ *Indigenous people in International Law* (2004) 143.

resources. This view is confirmed in Article 14(1)²⁴⁰ of the ILO Convention on Indigenous People.²⁴¹

This Convention further requires that the views of indigenous people are taken into account, especially in connection with the exploitation and extraction of any resources belonging to them, when they are to benefit equally from those activities.²⁴²

Therefore, from an international perspective, indigenous people's rights are protected by Conventions, Declarations as well as international organisations. The Convention Concerning Indigenous and Tribal Peoples in Independent Countries, contains resource rights and user participation in the management of the resource provisions in (Article 7(4)²⁴³ while the Declaration of Principles of Indigenous Rights, Principles 9²⁴⁴ and 10²⁴⁵ are important when it comes to the protection of the rights of indigenous people when it concerns natural resources. International instruments, such as, Agenda 21 provide for protection for the rights of indigenous people when it concerns natural resources in

²⁴⁰ Article 14(1) provides: 'The rights of ownership and possession of indigenous people over the lands which they traditionally occupy shall be recognized. In addition, measures shall be taken in appropriate cases to safeguard the right of the peoples concerned to use land not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities.'

²⁴¹ Act 169 of 1989.

²⁴² Anaya SJ *Indigenous people in International Law* (2004) 143.

²⁴³ Article 7(4) provides that 'Government shall take measures, in co-operation with the people concerned to protect and preserve the environment of the territories by inhabit.'

²⁴⁴ Principle 9 provide: 'Indigenous people shall have exclusive rights to their traditional lands and its resources: where the lands and resources of the indigenous people have been taken away without their free and informed consent such land and resources shall be returned.'

²⁴⁵ Principle 10 provides: 'The land rights of an indigenous people surface and subsurface rights, full rights and interior and coastal waters and rights to adequate and exclusive coastal economic zones within the limits of international law.'

Chapter 26.3²⁴⁶ while the Committee on the Elimination of Racial Discrimination, is an organisation which provides for General Recommendations Concerning Indigenous People, with section 3²⁴⁷ containing key provisions.

2.9 INDIGENOUS RIGHTS IN CANADA AND AUSTRALIA.

Cases that have been decided in Canada and Australia with regard to indigenous people's rights to natural resources establish precedents that indigenous people have a right to natural resources with which they have had a close relationship for generations.

2.9.1 Canada.

In Canada, in *Sparrow v the Queen*,²⁴⁸ the Supreme Court held that the Courts constitutional duty to uphold the rights of aboriginal people included an obligation to

²⁴⁶ Chapter 26.3 provides: 'In full partnership with indigenous people and their communities, government and, where appropriate, intergovernmental organizations should aim at fulfilling the following objectives:

Establishment of a process to empower indigenous people and their communities through measures that include.

(ii) Recognition that the lands of indigenous people and their communities should be protected from activities that are environmentally unsound or that the indigenous people concerned to be socially and culturally inappropriate;

(iv) Recognition that traditional and direct dependence on renewable resources and ecosystems, including sustainable harvesting, continues to be essential to the cultural, economic and physical well-being of indigenous people and their communities.'

²⁴⁷ Section 3 provides: 'The committee is conscious of the fact that in many regions of the world indigenous people have been, and are still being, discriminated against, deprived of their human rights and fundamental freedoms and in particular that they have lost their land and resources to colonists. Commercial companies and state enterprises. consequently the preservation of their culture and their historical identity has been and still is jeopardized.'

convert their relationship with the environment in such a way that it will still be recognised today.²⁴⁹ This meant that the modernisation of the indigenous people's fishing and bartering practices did not eliminate their identification as constitutionally protected aboriginal rights.²⁵⁰

In *Marshall v the Queen*²⁵¹ the approach followed by the Court excels as one of the best ways of interpreting aboriginal rights, as it goes against the notion that tribal customs and activities have to be primitive in order to be recognised.²⁵² This is due to the fact that the Court held that environmental rights provided for in treaties must be interpreted according to modern tribal practices.²⁵³

The approach followed in the *Sparrow* as well as the *Marshall* decisions illustrate that, just because tribal practices evolve over a period of time, it should not lead to the extinction of a tribe's identity and rights.²⁵⁴

These cases are important as they illustrate that subsistence fishing communities, who have for generations utilised marine resources as a means to ensure their survival,

²⁴⁸ [1990]1 S.C.R. 1075.

²⁴⁹ [1990]1 S.C.R. 1075, 1099.

²⁵⁰ [1990]1 S.C.R. 1075, 1099.

²⁵¹ [1999] 3 S.C.R. 456.

²⁵² Manus P 'Indigenous Peoples' Environmental Rights: Evolving Common Law Perspective in Canada, Australia, and the United States' (2006) 33*B.C. Env'tl. Aff. L. Rev* 78.

²⁵³ [1999] 3 S.C.R. 478.

²⁵⁴ Manus P 'Indigenous Peoples' Environmental Rights: Evolving Common Law Perspective in Canada, Australia, and the United States' (2006) 33*B.C. Env'tl. Aff. L. Rev* 78.

might still retain the right to utilise those resources, as modernisation should not rob them of their entitlement to those resources.

2.9.2 Australia.

The Australian High Court, in 1992, recognised that the aboriginal people had a common law property right to the lands that they have historically occupied.²⁵⁵ This recognition came in the form of *Mabo v Queensland*,²⁵⁶ where the court held that Australia's common law recognizes 'native title' which preserves 'the entitlement of the indigenous inhabitants, in accordance with their laws or customs, to their traditional lands.'²⁵⁷ The court then gave a definition of 'native title', as 'The interests and rights of indigenous inhabitants, in land, whether communal, group or individual, possessed under the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants.'²⁵⁸

These cases illustrate that internationally there is recognition that indigenous people have a right to utilize natural resources that have been available to them for generations.

²⁵⁵ Manus P 'Indigenous Peoples' Environmental Rights: Evolving Common Law Perspective in Canada, Australia, and the United States' (2006) 33*B.C.Envtl.Aff.L.Rev*38.

²⁵⁶ (1992) 175 C.L.R.

²⁵⁷ Manus P 'Indigenous Peoples' Environmental Rights: Evolving Common Law Perspective in Canada, Australia, and the United States' (2006) 33*B.C.Envtl.Aff.L.Rev*39.

²⁵⁸ Manus P 'Indigenous Peoples' Environmental Rights: Evolving Common Law Perspective in Canada, Australia, and the United States' (2006) 33*B.C.Envtl.Aff.L.Rev*39.

Thus, this jurisprudence is important for South Africa as coastal communities who have resided and utilised marine resources for generations would have a common law property right to coastal areas, from which they were removed, as well as to the resources found in those areas on which they historically resided.

2.10. CONCLUSION.

International law thus provides the necessary norms to ensure that natural resources are used in a correct manner. Individual states should take responsibility to make use of these procedures to ensure that they use resources within their territories in a responsible manner. Ultimately, the purpose of these international agreements is defeated when states choose not to become party to these conventions or when they choose not to apply the principles in these international instrument on a national level, irrespective of whether the principles are binding or not.²⁵⁹ When this occurs, marine resources are left vulnerable to over-exploitation.²⁶⁰ Thus, it is important for South Africa to utilise all available international norms to ensure that subsistence fishers use marine resources in a sustainable manner.

²⁵⁹ Wright E 'Applying the third UN Convention on the Law of the Sea to Living Marine Resources: comparing the approaches of the United States and South Africa to Highly Migratory Species' (2004) 32 ICL 917.

²⁶⁰ Wright E 'Applying the third UN Convention on the Law of the Sea to Living Marine Resources: comparing the approaches of the United States and South Africa to Highly Migratory Species' (2004) 32 ICL 917.

CHAPTER 3

CO-MANAGEMENT IN RELATION TO SOUTH AFRICAN FISHERIES

3.1. INTRODUCTION.

For a complete overview of this chapter, reader must refer to the historical perspective in Chapter one.

South Africa's adoption of international norms is illustrated by the formulation of policy and legislation, such as: the Marine Living Resources Act; the White Paper on Environmental Management Policy for South Africa; the National Environmental Management Act; the White Paper on the Conservation and Sustainable Use of South Africa's Biological Diversity; and the White Paper on Marine Fisheries Policy for South Africa. All of these were formulated with the intention to regulate South Africa's marine environment in order to ensure the sustainable use of its marine resources.

Although the mentioned policy and law has been developed to deal with the management of marine resources, Section 24²⁶¹ of the Constitution is considered to be the basic starting point for the protection of the environment.

3.2. POLICY FOUNDATIONS FOR SUSTAINABLE USE AND MANAGEMENT OF SOUTH AFRICA'S NATURAL RESOURCES.

3.2.1. The White Paper on Environmental Management Policy (1997).

The process of creating policy and legislation aimed at ensuring the sustainable use of natural resources began with the need to change the way in which things had been done previously. This is due to the fact that, pre-1994, a number of environmental policies and legislation had been implemented without consideration of the views of the majority of the citizens; only once a democratic dispensation was in place did the development of policy and legislation occur in a democratic and participatory manner.²⁶²

The White Paper on Environmental Management Policy (released to the public for general comment in July 1997) illustrates the new democratic and participatory policy

²⁶¹ Section 24 provides: Everyone has the right.....

(b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that;

(ii) Promote conservation

(iii) secure ecological sustainability development and the use of natural resources while promoting justifiable economic and social development.

²⁶² McDonald DA 'Three steps forward, Two steps Back: Ideology and urban ecology in South Africa' (1998) 25 RAOPE at 77.

process, as it was seen to be the most open and accessible policymaking process undertaken by government.²⁶³

Part 4 of the White Paper provides for strategic goals and objectives, and one of these goals is to ensure sustainable resources use impact management.²⁶⁴ The White Paper was developed with the goal of ensuring that marine resources are exploited in a sustainable manner in order to prevent damage to and degradation of the environment, while also promoting the use of the marine resources by previously disadvantaged communities in order to improve their lives.²⁶⁵

3.2.2. White Paper on the Conservation and Sustainable use of South Africa's Biological Diversity (1997).

Political transition led to South Africa re-instatement into the global community, which meant that South Africa attaining certain global commitments.²⁶⁶

²⁶³ McDonald DA 'Three steps forward, Two steps Back: Ideology and urban ecology in South Africa' (1998) 25 RAOPE at 77.

²⁶⁴ Goal 2 of the white paper requires the promotion of an equitable access to, and sustainable use of, natural and cultural resources, and the promotion of environmentally sustainable lifestyle. It also aspires to the integration of environmental impact management with all economic and development activities to achieve sustainable development with the emphasis on satisfying basic needs and ensuring environmental sustainability.

²⁶⁵ White Paper on Environmental Management Policy of (1997), Goal two: Sustainable resource use and impact management.

²⁶⁶ Cadman N, Petersen C, Driver A, Sekhran N, Maze K & Munzhedzi S 'Biodiversity for development; South Africa's landscape approach to conserving and promoting ecosystem resilience' (2010) 25.

South Africa's ratification of the Convention on Biological Diversity in 1997 meant that it supported the objectives of the Convention,²⁶⁷ this led to the promulgation of policy such as; the White Paper on Sustainable Use of South Africa's Biological Diversity.²⁶⁸

The White Paper was drafted with a vision that seeks to achieve:

'A prosperous, environmentally conscious nation, whose people are in harmonious coexistence with the natural environment, and which derives lasting benefit from the conservation and sustainable use of its rich biological diversity.'²⁶⁹

The White Paper was formulated with the goal of promoting the sustainable use of resources as well as the sharing of benefits with local communities (in order to empower as well as educate local communities), which means that the White Paper discourages the unsustainable exploitation of natural resources.²⁷⁰

The formulation of the White Paper resulted in the creation of a policy which took a different approach to biodiversity protection to what was available in the past, as it identifies six goals, of which the most important for this study are:

²⁶⁷ The Convention on Biological Diversity contains a number of objectives in Article 1, of which the most important relating to the use of marine resources are: the conservation of biological diversity and the sustainable use of its components.

²⁶⁸ Cadman N, Petersen C, Driver A, Sekhran N, Maze K & Munzhedzi S 'Biodiversity for development; South Africa's landscape approach to conserving and promoting ecosystem resilience' (2010) 25.

²⁶⁹ Brownli S & Wynberg R 'The integration of biodiversity into national environmental assessment procedures' (2001) 6.

²⁷⁰ Burns M, Connell A, Makhaye S, Monteiro P, Morant P & Taljaard S, (1999) <http://www.ngo.grida.no/soesa/nsoer/response/general/index.htm>. [last accessed on 27/02/ 2011].

- To use biological resources sustainably and to minimise adverse impacts on biodiversity;
- To create conditions and incentives that support the conservation and sustainable use of biodiversity; and
- To expand the human capacity to conserve biodiversity, as well as manage its use and to address factors threatening it.²⁷¹

The White Paper also called for consideration of biodiversity in all matters concerning planning and decision making.²⁷²

3.2.3 White Paper on Marine Fisheries Policy for South Africa (1997).

The White Paper on Marine Fisheries policy was formulated with the aim of changing the way the fishing industry was regulated.²⁷³ The White Paper contained a number of

²⁷¹ Wynberg R & Swiderska K 'South Africa's experience in developing a policy on Biodiversity and access to genetic Resources' (2001) 17.

²⁷² Swiderska K 'Mainstreaming biodiversity in development policy and planning: a review of country experience' (2002) 24.

²⁷³ Glazewski J *Environmental law in South Africa* (2005) 406.

values that were crucial to marine resources management, of which the most important are found in paragraphs 3.1²⁷⁴ and 3.5.²⁷⁵

The White Paper on Marine Fisheries policy supports calls for the restructuring of the way access rights are provided for, so that those persons who did not have access to natural resources in the past may have access now, but that there must be a balance between increasing access rights and ensuring the sustainability of the marine resources.²⁷⁶

The White Paper warns that ‘open or liberal access to the resource, inevitably leads to overexploitation, depletion or even extinction of stocks’.²⁷⁷ Therefore, the development of mechanisms that would reduce the present levels of overutilisation of resources was encouraged by the White Paper.²⁷⁸

The plight of subsistence fishing communities is also addressed in paragraph 4.9,²⁷⁹ which was not the case in previous legislation. The regulation of this sector in order to

²⁷⁴ Paragraph 3.1 requires the ‘state to promulgate regulations in order to ensure that natural resources are used in such a manner that optimizes long-term social and economic benefits to the nation’.

²⁷⁵ Paragraph 3.5 requires that ‘the management and development of fisheries must comply with the constitution and there must be a promotion of fair and equitable access to marine resources’.

²⁷⁶ Fuggle R & Rabie M *Environmental management in South Africa* (1992) 501.

²⁷⁷ White paper on Marine Fisheries Policy for South Africa (1997), Para 4.1.

²⁷⁸ Fuggle R & Rabie M *Environmental management in South Africa* (1992) 502.

²⁷⁹ Paragraph 4.9 states that ‘in parts of the country, coastal communities have traditionally made use of Intertidal and shallow-water resources as a source of food. For those people, often the poorer section of South African society, such resources can contribute a substantial proportion of their protein needs’.

protect the resources valuable to subsistence fishers' livelihood while also ensuring that those resources are used in a correct manner is emphasised.²⁸⁰

Most of the goals aspired to by the White Paper have not been incorporated in the Marine Living Resources Act (MLRA).²⁸¹ Glazewski holds that the formulation of the MLRA was rushed, lacking public participation, which resulted in the MLRA failing to contain some of the provisions suggested in the White Paper on Marine Fisheries Policy for South Africa.²⁸²

3.3. SUBSTANTIVE LAW APPLICABLE TO SOUTH AFRICA'S MARINE RESOURCES.

3.3.1. National Environmental Management Act (NEMA).

NEMA's provisions comprise recommendations taken from the White Paper on Environmental Management Policy for South Africa.²⁸³ This Act was promulgated in order to give effect to the obligation imposed by section 24²⁸⁴ of the Constitution.²⁸⁵

²⁸⁰ Glazewski J *Environmental law in South Africa 2 ed* (2000) 479.

²⁸¹ Glazewski J *Environmental law in South Africa 2 ed* (2000) 479.

²⁸² Glazewski J *Environmental law in South Africa 2 ed* (2000) 480.

²⁸³ Glazewski J *Environmental law in South Africa 2 ed* (2000) 169.

²⁸⁴ Section 24 states: Everyone has the right

To an environment that is not harmful to their health or well-being; and

To have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that –

(ii) promote conservation; and

(iii) secure ecological sustainable development and use of natural resources while

NEMA turns those rights and principles found in the Constitution into legal provisions, with an important feature being the inclusion of civil society in matters dealing with environmental governance; this can be achieved through the implementation of Environmental Co-operation Agreements.²⁸⁶

NEMA contains a number of principles which apply ‘throughout the Republic to the actions of all organs of state that may significantly affect the environment’.²⁸⁷ Section 2(1) (a) provides the manner in which these principles apply, emphasising the need to meet the needs of those previously disempowered.²⁸⁸

NEMA also contains provisions, which require the sustainable use of natural resources in section 2(4) (a) (v)²⁸⁹ and (vi).²⁹⁰ Provisions encouraging public participation in resource management are provided for in Section 2(4) (f)²⁹¹ as well as in chapter 8

promoting justifiable economic and social development’.

²⁸⁵ Strydom HA & King ND (eds) *Fuggle & Rabie’s Environmental Management in South Africa 2 ed* (2009) 197.

²⁸⁶ Hauck M & Sowman M (eds) *Waves of change* (2003) 48.

²⁸⁷ Section 2(1).

²⁸⁸ Section 2(1)(a) provides that the principles apply alongside all other appropriate and relevant considerations, including the state’s responsibility to respect, protect, promote and fulfill the social and economic rights in chapter 2 of the Constitution and in particular the basic needs of categories of persons disadvantaged by unfair discrimination’.

²⁸⁹ Section 2(4)(a)(v) states: ‘the use and exploitation of non-renewable natural resources is done in a responsible and equitable manner, and takes into account the consequences of the depletion of the resource’;

²⁹⁰ Section 2(4)(a)(vi) provides that ‘the development, use and exploitation of renewable resources and ecosystems of which they are part do not exceed the levels beyond which their integrity is jeopardized’.

²⁹¹ ‘The participation of all interested and affected parties in environmental governance must be promoted, and all people must have the opportunity to develop the understanding. Skills and capacity necessary for achieving equitable and effective participation. And participation by vulnerable and disadvantaged persons must be ensured’.

Section 35(1),²⁹² which deals with environmental co-operation agreements. Therefore, NEMA provide the tools necessary to deal with the issues of ensuring the sustainable use of marine resources while at the same time ensuring that the needs of subsistence fishers are provided for.

If we compare NEMA to the MLRA, the objectives and principles found in section 2 of the MLRA are related to those found in NEMA.²⁹³ Although the principles in the MLRA were formulated specifically to deal with the demands of fisheries management in South Africa, they are similar to principles found in NEMA.²⁹⁴ Principles of sustainable use of resources, and participation of interested and affected parties in decision making and conservation of resources are contained in NEMA as well as MLRA.

3.3.2. The Marine Living Resources Act.

The MLRA was enacted to ensure the conservation of marine eco-systems, as well as to ensure the sustainable use of marine resources, in a fair and equitable manner.²⁹⁵ It was also meant to ensure the participation of the public in decision making when it comes to the utilisation of marine resource.²⁹⁶

²⁹² 'The minister and every MEC and municipality, may enter into environmental management co-operation agreements with any person or community for the purpose of promoting compliance with the principles laid down in this act.'

²⁹³ Glazewski J *Environmental law in South Africa 2ed* (2005) 138.

²⁹⁴ Glazewski J *Environmental law in South Africa 2ed* (2005) 138.

²⁹⁵ MLRA Act 18 of 1998, Section 2.

²⁹⁶ MLRA Act 18 of 1998, Section 2 (h).

Some of the positive aspects of this Act entail the implementation of provisions which require the acquisition of a permit before a person can exercise any rights under the Act.²⁹⁷ The MLRA also provides for the maximum amount of fish that may be caught, as well as the allocation of rights to marine resources, which is determined by the Department Minister.²⁹⁸

The MLRA also incorporates the precautionary approach found in UNCLOS²⁹⁹ into its provisions, which illustrates that South Africa takes its commitment to ensuring the sustainable use of marine resources very seriously.³⁰⁰

Although the MLRA contains positive aspects, a number of issues have been highlighted. If we look at the provisions of the MLRA, they do not fully address the needs of subsistence fishers. According to Witbooi, The MLRA addresses the issue of sustainability but not specifically in terms of the subsistence-fishing sector.³⁰¹

Witbooi³⁰² is of the opinion that, although section 19 emphasizes the advancement of local fishing communities, overall the MRLA does not pay enough attention to these

²⁹⁷ MLRA Act 18 of 1998, Section 13 (1).

²⁹⁸ MLRA Act 18 of 1998, Section 14.

²⁹⁹ United Nations Convention on the Law of the Sea.U.N.Doc. A/CONF.62/122.

³⁰⁰ Wright E 'Applying the third UN Convention on the Law of the Sea to Living Marine Resources: comparing the approaches of the United States and South Africa to Highly Migratory Species' (2004) 32 GAJ 907.

³⁰¹ Witbooi E 'Review and audit of the legal provisions and institutional arrangements that impact on the artisanal fisheries sector in BCLME region' (2004) 53.

³⁰² Witbooi E 'Review and audit of the legal provisions and institutional arrangements that impact on the

communities, as they are not mentioned in either its objectives or the principles reinforcing it. This is contrary to the policy preceding the MRLA, such as, the marine fisheries White Paper,³⁰³ which emphasizes the involvement of local communities in resource management and conservation.

Progress has been made by the Department of Environmental Affairs and Tourism in terms of the MLRA to address these issues, but the implementation of the Act has been slow.³⁰⁴

In order to address some of these problems, the Subsistence Fishers Task Group (SFTG) was appointed to make recommendations on the subsistence fishers sector; the Task Group produced a Report with recommendations in January 2000.³⁰⁵ The SFTG found that the definition of subsistence fishers contained in the MLRA did not properly distinguish between subsistence fishers who utilized the marine resources for survival, from recreational and commercial fishers.³⁰⁶ A new definition was recommended by the

artisanal fisheries sector in BCLME region (2004)' This idea is found in the Executive summary of the article.

³⁰³ Section 4.3 provides for participation and broadening access.

³⁰⁴ Witbooi E 'subsistence fishing in South Africa: implementation of the Marine Living Resources Act' (2002) 17 ILJ 433.

³⁰⁵ Draft Recommendations for Subsistence Management in South Africa, prepared by the Subsistence Fishers Task Group (SFTG) for the Chief Director, Marine and Coastal Management, Department of Environmental Affairs and Tourism, South Africa (28 January 2000). The Draft Report was presented to Marine and Coastal Management in February 2000, and was subsequently accepted by the Minister of DEAT. No amendments were suggested and the document thus became the final report of the SFTG. A Working Group and Management Committee was set up within MCM in August 2000 to 'drive the process forward' and in-house plans to realize the SFTG's recommendations in the form of a draft "Business Plan for Subsistence Fisheries Management' followed.'

³⁰⁶ Witbooi E 'subsistence fishing in South Africa: implementation of the Marine Living Resources Act' (2002) 17 ILJ 434.

SFTG, but the recommendation has not yet been implemented in an amendment to the MLRA.³⁰⁷

The MLRA provides for a state-controlled approach in the management of marine resources, which is not endorsed by the SFTG Report.³⁰⁸ The SFTG recommended user participation in marine resources management and thus endorsed the co-management approach.³⁰⁹ The overall view of the Act, if read within the context of the new constitutional order, favours the introduction of co-management in fisheries.³¹⁰

There are a number of policies and laws regulating and managing the subsistence fishing sector in an adequate manner, but there are still issues that are not properly addressed by the current legal system.

3.3.3 The Biodiversity Act.

The need for the conservation as well as sustainable use of biodiversity was recognized with the adoption of the Convention on Biological Diversity, which South Africa ratified in 1995.³¹¹ To comply with the provisions of the CBD South Africa drafted the White Paper on Environmental Management Policy for South Africa; the White Paper on Marine

³⁰⁷ Witbooi E 'subsistence fishing in South Africa: implementation of the Marine Living Resources Act' (2002) 17 ILJ 434.

³⁰⁸ Witbooi E 'subsistence fishing in South Africa: implementation of the Marine Living Resources Act' (2002) 17 ILJ 435.

³⁰⁹ Witbooi E 'subsistence fishing in South Africa: implementation of the Marine Living Resources Act' (2002) 17 ILJ 435.

³¹⁰ Witbooi 'Law and fisheries reform: legislative and policy developments in South Africa over the decade 1994-2004' (2006) 30 MP 39.

³¹¹ Glazewski J *Environmental law in South Africa* (2000) 299.

Fisheries policy for South Africa; and the Draft White Paper on the Conservation and Sustainable Use of Biological Diversity.³¹² Legislation, such as: the MLRA and the National Environmental Management: Biodiversity Act was also enacted.³¹³ The introduction of the above mentioned policy and legislation has improved the conservation of marine biodiversity, as it has led to a stronger emphasis on environmental protection, balanced with the goal of providing for the needs of the South Africa's local fishing communities.³¹⁴

The loss of biodiversity in South Africa is mainly caused by human activity, one of which is the over-exploitation of natural resources by communities who use the resources as a means of ensuring their subsistence.³¹⁵ In the National Environmental Management: Biodiversity Act, the definition section provides for the sustainable use of biodiversity resources, which means that resources should be used in such a way that they will be available, in the long term, to continue to provide a source of food for future generations.³¹⁶ In terms of section 2, one of its objectives is the management and conservation of biological diversity in South Africa as well as the use of indigenous biological resources in a sustainable manner.³¹⁷

³¹² Government Gazette No. 18163; N1095/1997, dated 28 July 1997.

³¹³ National Environmental Management: Biodiversity Act No 10 of 2004.

³¹⁴ Wynberg R 'International and national policies concerning marine and coastal biodiversity' (2000) 4.

³¹⁵ Strydom HA & King ND (eds) *Fuggle and Rabie's Environmental Management in South Africa 2 ed* (2009) 97.

³¹⁶ National Environmental Management: Biodiversity Act No 10 of 2004 Section 1(1).

³¹⁷ National Environmental Management: Biodiversity Act No 10 of 2004, Section 2(a) (i) (ii).

Blau and Frezzo are of the opinion that, all human generations are in partnership with each other within in the concept of Intergenerational equity, which means that each generation has the right to inherit and enjoy the same biodiversity as the previous generation.³¹⁸

More crucially, there is a need to ensure intergenerational equity when it comes to indigenous people, as they had regular access to natural resources in the past, which has now been interrupted by modern society.

There is a need to re-establish that connection between indigenous people and their environment, which means that governments have to include them in all matters relating to the management of natural resources. If these steps are not taken, then future indigenous generations will not benefit from those resources.

Thus, when we talk about the identity of a specific people or group, that identity is dependent on the group's ability to use natural resources they have had access to for generations.³¹⁹ That identity is partly connected to that group's ability to gain access to those natural resources.

³¹⁸ Blau J & Frezzo M *Sociology and human rights: A bill of rights for the twenty-first century* (2011) 109.

³¹⁹ Blau J & Frezzo M *Sociology and human rights: A bill of rights for the twenty-first century* (2011) 110.

3.4. CO-MANAGEMENT IN OTHER SOUTH AFRICAN LEGISLATION AND POLICY.

Historically, co-management arrangements were initiated between large industry and government, which is illustrated by the establishment of Sea Management Committees and, later, the Industry-Sea Fisheries Forum initiated by the Sea Fishery Act of 1988.³²⁰ A problem existed, as the same structures and process were not available to subsistence fishers.

The democratic government of South Africa has implemented policies and laws relating to equitable access to natural resources, access to information, and involvement of the public in decision-making, which are important principles incorporated in the Constitution. Policies such, as, the Draft Policy for Small-Scale Fisheries Sector in South Africa,³²¹ requires the implementation of co-management agreements. In the draft policy the relevant principles for co-management arrangements are set out in Clause 3 (3.1) (g) (I),³²² while clauses 3.2 (d) (g)³²³ and 4.4 (a)-(e)³²⁴ also emphasize the need for the implementation of co-management agreements.

³²⁰ Hauck M & Sowman M 'Coastal and Fisheries co-management in South Africa: an overview and analysis' (2001) MP 3.

³²¹ No 33530 of 2010.

³²² 'This section sets out the principles for small-scale fisheries that will guide Government and stake holders in achieving the vision and objectives of the policy. The principles listed below are the fundamental premises that will apply to decision-making, management and regulation of marine living resources in the sector. The state must:

- g) adopt an approach of co-management empowerment that builds the capacity of the fishers through education, training and skills development in all aspects of the fishery.
- l) promote effective participation in policy development, management and decision making.'

The White Paper on Sustainable Coastal Development for South Africa³²⁵ provides for community involvement in the management of local coastal resources. An important goal of the White Paper is the promotion of partnerships between the state, the private sector and civil society in order to encourage co-responsibility for coastal resources.

Ultimately, South Africa's environmental policy and legislation requires government to decentralise, delegate power and responsibility to the local level authorities, and embrace the principles and approaches of sustainable development.³²⁶

South Africa's law sufficiently complies with the important international fisheries management principles that are promoted by the international legal order, although there are still issues, which need to be addressed. If South Africa fails to meet these obligations, there is a risk that it will not comply with international law, which might lead

³²³ 'The primary object of this policy is to introduce certain fundamental shifts in government's approach to the small-scale fisheries sector. This entails adopting a developmental approach and an integrated and rights-based allocation system which recognizes the need to ensure the ecological sustainability of the resource; identifies small-scale fishers as a category of fishers for the purpose of the MLRA in law; and provides for community orientation in the management of the marine living resources harvested by these fishers. with this object in mind the following strategic policy objectives are proposed:

d) to co-manage small-scale fisheries sector and applicable marine living resources in an integrated and holistic manner recognizing national management protocols while responding to local contexts;

g) to facilitate the establishment of appropriate institutional arrangement at different spheres of government, in particular co-management arrangements, in order to give effect to this policy.'

³²⁴ 'In the long term, co-management of small-scale fisheries facilitates:

Improved social and environmental responsibility among fishers and other members of the community;

Improved compliance in fisheries;

Individual and collective empowerment in fishing communities;

Strengthened democracy; and

Sustainable utilization of marine resources.'

³²⁵ White Paper on Sustainable Coastal Development in South Africa, (2000).

³²⁶ Fuggle R & Rabie M *Environmental Management in South Africa* (1994) 823.

to the domestic fishing industry not complying with internationally accepted principles of good fisheries management; and if that happens, then the local industry will ultimately be mismanaged.³²⁷

3.5. BENEFITS OF IMPLEMENTING CO-MANAGEMENT AGREEMENTS.

Co-management initiatives, if implemented correctly, can ensure that marine resources are managed in a sustainable manner, while at the same time facilitating community and economic development.³²⁸

When it comes to resource management, the centralised approach to resource management considers state management of natural resources to be the best way to control the use of resources and does not take into account traditional as well as customary knowledge.³²⁹ Co-management takes into account indigenous knowledge and combines it with scientific information in order to find the best way to manage the

³²⁷ Witbooi E 'Law and Fisheries Reform; legislative and policy development in Southern Africa over the decade 1994-2004' (2006) 30 MP 33.

³²⁸ Pomeroy RS 'Devolution and fisheries Co-management' in Meinzen-Dick R, Knox A & Di Gregorio M (eds) *Collective Action Property Rights and Devolution of Natural Resource Management – Exchange of Knowledge and Implications for Policy* (2001) 116.

³²⁹ Pomeroy RS 'Devolution and fisheries Co-management' in Meinzen-Dick R, Knox A & Di Gregorio M (eds) *Collective Action Property Rights and Devolution of Natural Resource Management – Exchange of Knowledge and Implications for Policy* (2001) 111.

resource.³³⁰ This means that local knowledge of the resource is taken into account in order to find the best way to manage it.

Co-management of natural resources is vital as the participation of local communities who use the resources is encouraged.³³¹ Thus, unlike the centralised approach to management, co-management results in a decrease in the cost of managing the resources, as information gathering, co-ordination, monitoring and enforcement become easier as a result of community participation.³³²

A sense of legitimacy amongst the community members is created when communities are encouraged to develop management strategies, which work best for them in meeting their needs.³³³ This means that they are able to create and administer their own regulatory mechanisms that best suit their local conditions; and since they are involved in the formulation and implementation thereof, they are more likely to accept them.³³⁴

³³⁰ Pomeroy RS 'Devolution and fisheries Co-management' in Meinzen-Dick R, Knox A & Di Gregorio M (eds) *Collective Action Property Rights and Devolution of Natural Resource Management – Exchange of Knowledge and Implications for Policy* (2001) 120.

³³¹ Hanna S 'Efficiencies of user participation in Natural Resource Management' (1995) in Hanna S & Munasingh M. (eds.) *Property Rights in a Social and Ecological Context. Case Study and Design Applications* (1995) 60.

³³² Hanna S 'Efficiencies of user participation in Natural Resource Management' (1995) in Hanna S & Munasingh M. (eds.) *Property Rights in a Social and Ecological Context. Case Study and Design Applications* (1995) 60.

³³³ Pomeroy RS 'Devolution and fisheries Co-management' in Meinzen-Dick R, Knox A & Di Gregorio M (eds) *Collective Action Property Rights and Devolution of Natural Resource Management – Exchange of Knowledge and Implications for Policy* (2001) 119.

³³⁴ Pomeroy RS 'Devolution and fisheries Co-management' in Meinzen-Dick R, Knox A & Di Gregorio M (eds) *Collective Action Property Rights and Devolution of Natural Resource Management – Exchange of Knowledge and Implications for Policy* (2001) 119.

Another benefit of implementing co-management initiatives is that co-management makes resolving disputes easier as all stakeholders are encouraged to identify with their environment as well as the resources found in their environment, and to take responsibility for those resources.³³⁵ A sense of ownership of the resources is created among the community members, making them careful not to over-exploit the resources as they realize the long-term benefits of protecting them.³³⁶

3.6. CO-MANAGEMENT PROJECTS IMPLEMENTED IN SOUTH AFRICA.

A number of co-management projects have been established in South Africa to stop the high rate of habitat degradation and species decline. In the following paragraphs, the co-management arrangements implemented in South Africa will be discussed.

While a number of projects have been established, the most effective co-management project implemented before the promulgation of policies and laws aimed at regulating marine resources, and which is currently running, is the Sokhulu mussel harvesting project.

³³⁵ Hagedorn K (ed): *Environmental co-operation and institutional change; Theories and policies for European Agriculture* (2002) 20.

³³⁶ Mitchell B 'participatory partnership: Engaging and empowering to enhance environmental management and quality of life' (2005) 71 SIR 124.

3.6.1. The Sokhulu Mussel-Harvesting Project.

The Sokhulu community is a poor community situated in Kwazulu-Natal that depends on mussels for its subsistence, but over the years the community has greatly exploited the mussels they so desperately depend on for their daily livelihood.³³⁷

The Sokhulu Mussel Harvesting Project was initiated in order to ensure the sustainable use, as well as the conservation, of the mussel population utilised by the Sokhulu community.³³⁸

At the time of its implementation, the Sokhulu Mussel Harvesting Project was seen as the blueprint for co-management initiatives.³³⁹ As a result of its success, other co-management projects were implemented in various communities, while it also helped to shape the development of national policy.³⁴⁰ This Project mainly involved the coastal

³³⁷ Harris JM, Branch GM, Sibiya CC & Bill C 'The Sukhulu Subsistence Mussel-Harvesting project: Co-management in Action' in Hauck and Sowman *Waves of change* (2003) 69.

³³⁸ Harris JM, Branch GM, Clark BM & Sibiya SC 'redressing access inequities and implementing formal management systems for marine and estuarine subsistence fisheries in South Africa' in McClanahan TR & Casilla JC (ed) *fisheries management: progress towards sustainability* (2007) 113.

³³⁹ Harris JM, Branch GM, Clark BM & Sibiya SC 'redressing access inequities and implementing formal management systems for marine and estuarine subsistence fisheries in South Africa' in McClanahan TR & Casilla JC (ed) *fisheries management: progress towards sustainability* (2007) 113.

³⁴⁰ Harris JM, Branch GM, Clark BM & Sibiya SC 'redressing access inequities and implementing formal

ecologists who worked for the provincial nature conservation services in Kwazulu-Natal as well as the women from the Sokhulu community.³⁴¹

When the project was initiated in 1995, it was intended to address a number of problems experienced by the community, such as: the illegal over harvesting of brown mussels; the lack of access to resources by traditional communities; and conflicts between users and the government.³⁴² After years of utilising mussels, there was a realisation that banning of local communities from harvesting the mussels led to illegal over harvesting, putting the mussel resource in danger because of unsuitable methods of harvesting.³⁴³

Most of these problems arose due to the fact that, before the promulgation of the MLRA, the harvesting of mussels was done through a license and bag limit system, which resulted in traditional ways of harvesting being deemed to be illegal under legislation in force at the time.³⁴⁴

management systems for marine and estuarine subsistence fisheries in South Africa' in McClanahan TR & Casilla JC (ed) *fisheries management: progress towards sustainability* (2007) 113.

³⁴¹ Fishing Report South Africa: Mussel Harvesting <http://fishingreportsa.blogspot.com/2009/11/mussel-harvesting.html> [last accessed on 12/03/ 2011].

³⁴² Harris JM, Branch GM, Clark BM & Sibiyi SC 'redressing access inequities and implementing formal management systems for marine and estuarine subsistence fisheries in South Africa' in McClanahan TR & Casilla JC (ed) *fisheries management: progress towards sustainability* (2007) 119.

³⁴³ Fishing Report South Africa: Mussel Harvesting <http://fishingreportsa.blogspot.com/2009/11/mussel-harvesting.html> [last accessed on 12/03/2011].

³⁴⁴ Pomeroy RS & Rivera-Guieb R *Fisheries Co-management; A practical handbook* (2006) 48.

From the beginning, authorities realised that community participation was crucial; therefore, the most important part of the Project was the involvement of the local community in harvesting experiments, aimed at coming up with ways of ensuring that resources were used in a sustainable manner.³⁴⁵ This meant that for the Project to be successful, community members had to give input on all crucial aspects involving the use of the resource.³⁴⁶

The co-management project involved the preservation of inter-tidal brown mussels.³⁴⁷ This resulted in some of the areas where harvesting occurred being closed in order to protect the stock from over-exploitation, which initially caused dissatisfaction among the community members.³⁴⁸

The dissatisfaction among the community members was settled by parties coming together and resolving the problems through discussions and experimental harvesting demonstrations implemented by the authorities.³⁴⁹

³⁴⁵ Harris JM, Branch GM ,Sibiya CC & Bill C 'The Sukhulu Subsistence Mussel-Harvesting project: Co-management in Action' in Hauck M & Sowman M *Waves of change* (2003) 62.

³⁴⁶ Harris JM, Branch GM ,Sibiya CC & Bill C 'The Sukhulu Subsistence Mussel-Harvesting project: Co-management in Action' in Hauck M & Sowman M *Waves of change* (2003) 62.

³⁴⁷ Harris JM, Branch GM ,Sibiya CC & Bill C 'The Sukhulu Subsistence Mussel-Harvesting project: Co-management in Action' in Hauck M & Sowman M *Waves of change* (2003) 62.

³⁴⁸ Harris JM, Branch GM ,Sibiya CC & Bill C 'The Sukhulu Subsistence Mussel-Harvesting project: Co-management in Action' in Hauck M & Sowman M *Waves of change* (2003) 75.

³⁴⁹ Harris JM, Branch GM ,Sibiya CC & Bill C 'The Sukhulu Subsistence Mussel-Harvesting project: Co-management in Action' in Hauck M & Sowman M *Waves of change* (2003) 75.

These experiments were initiated in order to determine the harvesting tools to be used, which could minimize bycatch as well as the levels at which the resources could be harvested without compromising their integrity.³⁵⁰ When the experiments provided good results, it led to the implementation of controlled harvesting of mussels, resulting in the emphasis being placed on sustainable use as well as conservation of the resource.³⁵¹ Once the community members saw the destruction caused to the mussel resource by over-harvesting during the experiment, it led to a decrease in their demands for higher quotas.³⁵²

The participation of community members in conservation and management programs led to a realisation among them that the constant harvesting of mussels resulted in the decline of the resource.³⁵³ Therefore, the hands-on approach led their realisation that mussels had to be used in a sustainable manner.³⁵⁴

Ultimately, the Sokhulu Mussel Harvesting Project is hailed as one of the most successful co-management models in South Africa, because it successfully integrates the community's needs with the goals of the conservation authorities, which can be illustrated by the fact that the model is used in 17 other communities in KwaZulu-

³⁵⁰ Napier VR, Brance GM & Harris JM 'Evaluating conditions for successful co-management of subsistence fisheries in Kwazulu-Natal, South Africa' (2005) 32 EC 174.

³⁵¹ Fishing Report South Africa: Mussel Harvesting <http://fishingreportsa.blogspot.com/2009/11/mussel-harvesting.html> [last accessed 27/05/ 2011].

³⁵² Making mussels work in South Africa http://archive.wri.org/newsroom/wrifeatures_text.cfm?contentid=1893&newsletterid=39 [last accessed 21/05/ 2011].

³⁵³ Harris JM, Branch GM ,Sibiya CC & Bill C 'The Sukhulu Subsistence Mussel-Harvesting project: Co-management in Action' in Hauck M & Sowman M *Waves of change* (2003) 78.

³⁵⁴ Harris JM, Branch GM ,Sibiya CC & Bill C 'The Sukhulu Subsistence Mussel-Harvesting project: Co-management in Action' in Hauck M & Sowman M *Waves of change* (2003) 78.

Natal.³⁵⁵ The Sokhulu Mussel Harvesting project is also the longest running co-management project implemented along South Africa's coast when it comes to the use of marine resources.³⁵⁶

3.6.2. Olifants River Gillnetting Project.

Other co-management projects have been implemented which specifically involve co-operation between the authorities and subsistence fishers, such as, the Olifants River Gillnetting Initiative Project.³⁵⁷ This co-management project was initiated in 1993 and was about to take off in 1997, when roles and responsibilities were outlined, but the project collapsed in 1999 due to the lack of government involvement and support.³⁵⁸

This Project was set up in Ebenaeser, a fishing community that has about 2,500 community members.³⁵⁹ The local community has historically depended on fishing as a main source of food, it was removed from land which it used for subsistence purposes

³⁵⁵ Making mussels work in South Africa http://archive.wri.org/newsroom/wrifeatures_text.cfm?contentid=1893&newsletterid=39 [last accessed 21/05/ 2011].

³⁵⁶ Napier VR, Brance GM & Harris JM 'evaluating conditions for successful co-management of subsistence fisheries in Kwazulu-Natal, South Africa' (2005) 32 EC 174.

³⁵⁷ Gillnets are fishing nets in which all or part of the catch is retained. See Potter ECE & Pawson MG: Gillnetting (1991) 5. This system uses a suspended curtain of netting, which is practically invisible to fish. The main problem with these gillnets is that they tend to accidentally catch and kill animals other than their intended targets. See Monterey Bay Aquarium Seafood Watch: Fishing methods http://www.montereybayaquarium.org/cr/cr_seafoodwatch/sfw_gear.aspx [last accessed on 23/05/ 2011].

³⁵⁸ Sowman M 'Co-management of the Olifants River Harder Fishery' in, Hauck M & Sowman M *Waves of change* (2003) 271.

³⁵⁹ Sverdrup-Jensen S & Raakjaer Nielsen J 'Co-management in small-scale fisheries: a synthesis of South African and West African experiences' (1998) 6.

and resettled on land close to the river which was less fertile.³⁶⁰ This resulted in the local community becoming even more dependent on fishing for its livelihood.³⁶¹

The Olifants River Project was implemented due to concerns raised by the local community.³⁶² Concerns resulted from the decline in marine resources that it was so dependent on for both food and income, and which were caused by a diamond recovery vessel located in the river.³⁶³ The Environmental Evaluation Unit, based at the University of Cape Town, implemented the co-management initiative, with five objectives in mind:

- To determine the extent to which the local community depended on the natural resource;
- To develop other ways in which the local fishing community could provide for its everyday needs;
- To create and assist in the implementation of community based catch monitoring systems;

³⁶⁰ Sowman M, Hauck M, van Sitter L & Sundel J 'Marine protected area management in South Africa: and Policies, Old Paradigms' (2010) 47 EM 577.

³⁶¹ Sowman M, Hauck M, van Sitter L & Sundel J 'Marine protected area management in South Africa: and Policies, Old Paradigms' (2010) 47 EM 577.

³⁶² Sowman M 'Co-management of the Olifants River Harder Fishery' in Hauck M & Sowman M *Waves of change* (2003) 273.

³⁶³ Sowman M 'Co-management of the Olifants River Harder Fishery' in Hauck M & Sowman M *Waves of change* (2003) 273.

- To establish whether or not the marine resources were utilized in a sustainable manner by the local community; and
- To implement co-management arrangements for the Olifants River harder fishery.³⁶⁴

When the Project was initiated, one of its most important aspects was the determination of the relationship between the size of fish, the rate at which they were caught, as well as the size of the gillnet mesh, all of which were to be determined by conducting experiments.³⁶⁵ From the beginning, community members had little decision making power, which led to a realisation that an important aim to be achieved was the establishment of a co-management model in which the community will have an equal say in the running of the co-management initiative.³⁶⁶

There were a number of reasons for the lack of success experienced by the Olifants River Project, and one such reason was the lack of trust that community members had in the committee elected to represent its needs.³⁶⁷ A lack of institutional support from the government meant that there was no provision for capacity building, technical

³⁶⁴ Clark B 'Olifants estuary situation assessment' (2008) 68.

³⁶⁵ Sowman M 'Co-management of the Olifants River Harder Fishery' in Hauck M & Sowman M *Waves of change* (2003) 276.

³⁶⁶ Sowman M 'Co-management of the Olifants River Harder Fishery' in Hauck M & Sowman M *Waves of change* (2003) 280.

³⁶⁷ Martin R 'South African fishing industry experience with local access rights and marine resources management' in Meinzen-Dick R, Knox A & Di Gregorio M (eds) *Proceedings of the International Conference on Collective Action, Property Rights and Devolution of Natural Resource Management: Exchange of Knowledge and Implications of Policy* (1999) 237.

advice or funding on a long-term basis for the Olifants River Project, which ultimately led to its failure.³⁶⁸ Thus, by the end of 1997 funding for the Olifants River project stopped.³⁶⁹

3.6.3. Kosi Bay Gillnetting Project.

The Kosi Bay Gillnetting Project, initiated in 1992 by the Kwazulu Natal Department of Nature Conservation, was implemented in order to ensure that resources were used in a sustainable manner.³⁷⁰ This initiative was not only meant to ensure sustainable resource use, but was also meant to ensure that the local community participated in the management of the resource.³⁷¹ Kosi Bay Reserve staff together with members of the community and community authorities all concluded that the participation of local community members was crucial.³⁷²

The Project involved conducting fishing experiments in order to see whether selective exploitation of certain species was possible.³⁷³ This resulted in a finding that the use of

³⁶⁸ Sowman M 'Co-management of the Olifants River Harder Fishery' in Hauck M & Sowman M *Waves of change* (2003) 294.

³⁶⁹ Sowman M 'Co-management of the Olifants River Harder Fishery' in Hauck M & Sowman M *Waves of change* (2003) 294.

³⁷⁰ Kyle R 'Gillnetting in nature reserves: a case study from the Kosi Lakes, South Africa' (1999) 88 BC 183.

³⁷¹ Kyle R 'Gillnetting in nature reserves: a case study from the Kosi Lakes, South Africa' (1999) 88 BC 184.

³⁷² Boyd C & Inamdar A '*Sustainable Financing of coastal Management Activities in Eastern Africa*' (2001) 27.

³⁷³ Kyle R 'Kosi Bay Gillnetting: A community-Based joint management fishery inside a nature reserve'

certain types of gillnets could be the best way to 'ensure efficient, selective and controllable fishing'.³⁷⁴

The experiment was conducted through the issuing of permits to control the number of people utilising the resource; therefore, in 1992 the KwaDapha community received five fishing permits.³⁷⁵ Later on, when the program was extended to the KwaGeorge as well as the KwaMazambane communities after the success of the KwaDapha experiment, the number of permits issued increased to eight.³⁷⁶ Community authorities as well as traditional leaders allocated fishing permits, with community members being given the responsibility of monitoring, although the Reserve staff cross-checked to ensure that the work was done correctly.³⁷⁷

In order to ensure the participation of the local communities in resource management, gillnetting committees were established, which were given the power to determine who obtained monthly permits, as well as given the task of resolving disputes.³⁷⁸

in Hauck M & Sowman M *Waves of Change* (2003) 126.

³⁷⁴ Kyle R 'Kosi Bay Gillnetting: A community-Based joint management fishery inside a nature reserve' in Hauck M & Sowman M *Waves of Change* (2003) 126.

³⁷⁵ Kyle R 'Gillnetting in nature reserves: a case study from the Kosi Lakes, South Africa' (1999) 88 BC 184.

³⁷⁶ Kyle R 'Gillnetting in nature reserves: a case study from the Kosi Lakes, South Africa' (1999) 88 BC 184.

³⁷⁷ Boyd C & Inamdar A 'Sustainable Financing of coastal Management Activities in Eastern Africa' (2001) 27.

³⁷⁸ Kyle R 'Gillnetting in nature reserves: a case study from the Kosi Lakes, South Africa' (1999) 88 BC 189.

Although most of the goals set for the Kosi Bay Gillnetting project have been achieved, the declining management capacity and budget cuts have meant that there are doubts as to its continued existence.³⁷⁹ Although the Kosi Bay Gillnetting Project has been in operation longer than the Sokhulu initiative and has enjoyed relative success, it has not enjoyed the same success as that achieved by the Sokhulu co-management initiative.³⁸⁰

The implementation of the three co-management projects described above illustrates that co-management initiatives provide the best solution to addressing the poverty that exists in most subsistence fishing communities, as well as sustainable utilisation of marine resources. Although a number of these projects have been implemented,³⁸¹ problems still exist.

3.7. PROBLEMS EXPERIENCED WITH THE IMPLEMENTED PROJECTS.

A number of problems have been identified with the implemented co-management projects, such as, the lack of government support, illustrated by the fact that there is

³⁷⁹ Kyle R 'Kosi Bay Gillnetting: A community-Based joint management fishery inside a nature reserve' in Hauck M & Sowman M *Waves of Change* (2003) 142.

³⁸⁰ Napier VR, Branch GM & HARRIS JM 'Evaluating conditions for successful co-management of subsistence fisheries in Kwazulu-Natal, South Africa' (2005) 32 EC174.

³⁸¹ A number of fisheries Co-management initiatives have been initiated in South Africa such as, the Olifants River Gillnetting, Kosi Bay Gillnetting and Kleinmond inshore fishery. See Hauck M & Sowman M 'Coastal and fisheries co-management in South Africa: an overview and analysis' (2001) 25 MP 177.

very little government involvement in the co-management projects, which can be attributed to the lack of capacity in the different government departments.³⁸² Due to ineffective government support provided to the projects by the different spheres of government, there is continued frustration and mistrust of government officials by community members.³⁸³

One of the most serious problems experienced by the co-management projects initiated in the Olifants River was the failure by the committee selected to represent their interests to involve community members in matters of importance to them.³⁸⁴ This resulted in mistrust and suspicion between the representatives and community members.³⁸⁵ The main issues that community members had with the elected committee concerned: its lack of neutrality; favoritism of committee members towards people they knew; the lack of communication between the committee and the community members; and the withdrawal of licenses from community members without any justification.³⁸⁶

³⁸² Hauck M & Sowman M 'Coastal and fisheries co-management in South Africa: an overview and analysis' (2001) 25 MP 179.

³⁸³ Hauck M & Sowman M 'Coastal and fisheries co-management in South Africa: an overview and analysis' (2001) 25 MP 179.

³⁸⁴ Hauck M & Sowman M 'Coastal and fisheries co-management in South Africa: an overview and analysis' (2001) 25 MP 180.

³⁸⁵ Hauck M & Sowman M 'Coastal and fisheries co-management in South Africa: an overview and analysis' (2001) 25 MP 180.

³⁸⁶ Martin R 'South African fishing industry experience with local access rights and marine resources management' in Meinzen-Dick R, Knox A & Di Gregorio M (eds) *Proceedings of the International Conference on Collective Action, Property Rights and Devolution of Natural Resource Management: Exchange of Knowledge and Implications of Policy* (1999) 237.

The management plans for the Sokhulu co-management project were drafted without the participation of community members.³⁸⁷ Furthermore, in some projects, the fact that communities could sell the fish they caught counted against them, as they were not included in any poverty relief initiatives even though the money they got from selling the fish was not enough to provide for their needs.³⁸⁸

As a result of a lack of clear government support and involvement in the majority of the implemented co-management projects in South Africa, most of the projects collapsed, leaving subsistence fishers with little option but to continue utilising resources in an unsustainable manner.

³⁸⁷ Sunde J & Isaacs M *Marine Conservation and coastal communities: who carries the costs? A study of marine protected areas and their impact on traditional small-scale fishing communities in South Africa* (2008) 28.

³⁸⁸ Sunde J & Isaacs M *Marine Conservation and coastal communities: who carries the costs? A study of marine protected areas and their impact on traditional small-scale fishing communities in South Africa* (2008) 29.

CHAPTER 4

CONCLUSION AND RECOMMENDATIONS

4.1. INTRODUCTION.

In this chapter, I will present my conclusions on the basis of the findings in the previous chapters, and on the basis of my conclusions i will make some recommendations.

4.2. CONCLUSIONS.

4.2.1. CO-MANAGEMENT COULD BE THE SOLUTION TO ADDRESS ENVIRONMENTAL PROTECTION AND SUSTAINABLE RESOURCE USE PROBLEMS.

The unsustainable use of marine resources needs a solution; this solution comes in the form of co-management or co-operation agreements. Implementing co-management agreements would be the most appropriate way to deal with unsustainable resource use, while at the same time meeting the needs of subsistence fishers. This is due to the fact that government has realized that what is needed is ‘an approach which focuses

more on participation and empowerment as well as the promotion of sustainable coastal livelihoods'.³⁸⁹

There is a recognition of the need to preserve marine resources, mainly as a result of the degradation of the world's marine resources in the last decade.³⁹⁰ A solution to this problem is through a paradigm shift, which must see the movement of marine resources from inexhaustibility to sustainable use.³⁹¹

The responsibility to ensure that natural resources are used in a sustainable manner falls on the government, which means that the establishment of policies and legislation aimed at ensuring the sustainable use of natural resources and nature conservation, is crucial to ensure the continued existence of natural resources.³⁹²

The enactment of legislation, such as, the MLRA and NEMA, which specifically provides subsistence fishers with rights to marine resources illustrates the steps taken by government, to ensure that resources are used in such a way that their conservation is taken into account.

³⁸⁹ Cicin-Sain B *Ocean and Coastal Management* (2007) 1.

³⁹⁰ Wright E 'Applying the third UN Convention on the Law of the Sea to Living Marine Resources: Comparing the approaches of the United States and South Africa to Highly Migratory Species' (2004) 32 ICL 916.

³⁹¹ Wright E 'Applying the third UN Convention on the Law of the Sea to Living Marine Resources: Comparing the approaches of the United States and South Africa to Highly Migratory Species' (2004) 32 ICL 916.

³⁹² Geach B 'Overview of international conventions: Implications of spatial planning and natural resources management in South Africa (draft paper for discussion) (2000) 24.

In order to achieve social equity and environmental sustainability, a national strategy for sustainability is required, which can be in the form of co-management initiatives.³⁹³

These co-management initiatives would bring the two components together, to ensure the sustainable use of resources, while at the same time providing for the needs of subsistence fishers, and would ultimately result in South Africa complying with its international obligations.³⁹⁴

Ultimately, co-management is crucial to addressing the problem of nature conservation and social upliftment efforts, as it may be utilised as a mechanism not only to provide subsistence fishers with access but also to ensure that those who utilise the resource are taught the importance of nature conservation. The co-management initiatives implemented in South Africa illustrate that, if they are implemented in a correct manner, with the participation of government, which is currently lacking, marine resource depletion by subsistence fishers will be reduced.

³⁹³ Geach B 'Overview of international conventions: Implications of spatial planning and natural resources management in South Africa' (draft paper for discussion) (2000) 25.

³⁹⁴ Geach B 'Overview of international conventions: Implications of spatial planning and natural resources management in South Africa' (draft paper for discussion) (2000) 25.

4.2.2. THE SHORTCOMINGS OF THE IMPLEMENTED CO-MANAGEMENT INITIATIVES.

A number of problems exist with co-management initiatives implemented in South Africa, as well as the manner in which subsistence fishers are regulated. The two main problems relate to the manner in which the MLRA was drafted and the lack of government support when it comes to the implementation of co-management initiatives.

The manner in which the MLRA was drafted has contributed to ineffective co-management initiatives in South Africa. The MLRA poses problems which have to be addressed, as a number of provisions contained in this Act do not adequately address problems experienced by this sector.³⁹⁵ An amendment to this Act is paramount as, when it comes to the implementation of co-management initiatives, the most important component is the local communities who utilise the resource. Therefore, there is a need for an amendment of certain parts of this Act, as without proper regulation of this sector; resource conservation cannot be adequately achieved.

³⁹⁵ Witbooi E 'A Review and audit of the legal provision and institutional arrangements that impact on the artisanal fisheries sector in the BCLME region' (2004) BCLME Project No. LMR/AFSE/03/01/A, Executive summary; Compliance with international and regional obligations.

With regard to government support: the fact that most co-management initiatives suffer from a lack of capacity, in efficiency within government departments, as well as a lack of adequate funding, illustrate the need for government support.³⁹⁶

The highlighted problems raise questions about government's commitment to, and support, for marine resource conservation.³⁹⁷ The lack of capacity within government departments to implement effective conservation and natural resources management policies, as well as the ineffective management of natural resources to ensure their sustainability, mean that the implementation of co-management initiatives has become crucial.³⁹⁸

The fact that a number of co-management initiatives have been implemented by academic institutions and non-governmental organisations further illustrates the lack of, as well as the need for, government involvement in the implementation of these initiatives.³⁹⁹

³⁹⁶ Witbooi E 'Subsistence fishing in South Africa: Implementation of the Marine Living Resources Act'(2002) 431 ILJ 435.

³⁹⁷ Witbooi E 'Subsistence fishing in South Africa: Implementation of the Marine Living Resources Act' (2002) 431 ILJ 435.

³⁹⁸ Isaacs M & Mohamed N 'Co-managing the commons in the 'New' South Africa: Room for Manoeuvre' in Isaacs M, Mohamed N, Ntshona Z & Turner S (eds) *Constituting the Commons in the New South Africa* (2000) CSAOPS 2.

³⁹⁹ Hauck M & Sowman M 'Coastal and fisheries co-management in South Africa: an overview and analysis' (2001) 25 MP 178.

4.3. RECOMMENDATIONS.

4.3.1. REFORM AND IMPROVEMENT OF THE MARINE RESOURCES CONSERVATION REGULATORY SYSTEM IN SOUTH AFRICA.

There is an urgent need to reform and improve the marine resources regulatory system in South Africa. Although the South African government fulfilled its international objectives when it promulgated legislation, such as, NEMA and the MLRA, these Acts are still not up to standard with what is required for the proper regulation of the subsistence fishing sector.

The SFTG made certain recommendation which would improve the regulation of this sector, and the first and perhaps the most important one was to change the definition of subsistence fishers currently found in the MLRA.⁴⁰⁰ The recommended definitions proposed by the SFTG provides:

‘Subsistence fishers are people who personally harvest marine resources as a source of food or to sell them to meet basic needs of food security; they operate on or near to the shore or in estuaries, live in close proximity to the resource, consume or sell the resource locally, use low-technology gear (often as part of a long-standing community-based or cultural practice), and the kinds of resources

⁴⁰⁰ Section 1(iv) of the Marine Living Resources Act provides: ‘Subsistence fishers’ mean a natural person who regularly catches fish for personal consumption or for the consumption of his or her dependents, 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’.

they harvest are generally only sufficient returns to meet basic needs of food security.⁴⁰¹

Government has endorsed the suggested definition, but has not made the necessary amendments to the MLRA to replace the current definition with the suggested definition.⁴⁰²

Although the MLRA emphasises that all marine and coastal resources must be used in a sustainable manner, it does so in a general manner and does not address the issue of sustainability in relation to the subsistence fishing sector.⁴⁰³ In order to achieve a balance between an improvement in the lives of subsistence fishers and the sustainable utilisation of marine resources, section 19 should be amended to incorporate both objectives.⁴⁰⁴

⁴⁰¹ Draft Recommendations for Subsistence Management in South Africa, Prepared by the Subsistence Fishers Task Group (SFTG) for the Chief Director, Marine and Coastal Management, Department of Environmental Affairs and Tourism, South Africa (28 January 2000) (at Para. 2.3). Key defining features were identified as: poverty; harvesting from or near to the shore or estuaries; use of “low-technology” gear; and “some degree” of trade in harvested resources (at para. 2.3.1.7). It is suggested that as the term “poor” does not sit comfortably in a legal context, “poor people” could be replaced by a phrase

such as “ people living on or below the poverty line” (Witbooi E ‘Subsistence fishing in SA, Implementation of MLRA’ 434)

⁴⁰² Witbooi E ‘Subsistence fishing in South Africa: Implementation of the Marine Living Resources Act’ (2002) 431 ILJ 434.

⁴⁰³ Section 19 of the MLRA, which provides subsistence fishing rights does not address issues of sustainability as regards subsistence fishers.

⁴⁰⁴ Witbooi E ‘A Review and audit of the legal provision and institutional arrangements that impact on the artisanal fisheries sector in the BCLME region’ (2004) BCLME Project No. LMR/AFSE/03/01/A. Executive summary; Balancing sustainable use of resources with transformation of the subsistence sector.

While the SFTG identified a number of subsistence fishing communities along South Africa's coast and requested that the management of the subsistence sector be effected in a decentralised manner, government is yet to declare any of these communities, subsistence communities in terms of section 19⁴⁰⁵ of the MLRA.⁴⁰⁶

The classification of appropriate resources for subsistence use is another issue not completely addressed by government, and this must be resolved as the SFTG compiled a list of resources which would be suitable for subsistence harvesting purposes.⁴⁰⁷ This again can be addressed by amendments to the MLRA.

An amendment to the MLRA to provide for the implementation of co-management initiatives is another reform which should be implemented by government, due to the fact that although the FPDC as well as the SFTG Report Indorsed the implementation of co-management, the MLRA fails to adequately provide for the establishment of such initiatives.⁴⁰⁸ There is a need to transfer responsibility and authority to lower levels to the subsistence communities, and the best way to do this is by implementing co-management initiatives.⁴⁰⁹

⁴⁰⁵ Sections 19(1)(a) and (b) empower the minister to establish subsistence zones and communities, where subsistence fishers may fish.

⁴⁰⁶ Witbooi E 'Subsistence fishing in South Africa: Implementation of the Marine Living Resources Act' (2002) 431 ILJ 434.

⁴⁰⁷ A list was drawn up by the SFTG of species it deemed to be appropriate for the subsistence fishers sector. Table 4.1 and 4.2 of the SFTG report contained a list of the appropriate species such as, crabs, prawns, mussels limpets, milkfish and mullets.

⁴⁰⁸ Witbooi E 'Law and Fisheries reform: legislative and policy developments in South African Fisheries Over the decade 1994-2004' (2006) 30 MP 39.

⁴⁰⁹ Witbooi E 'A Review and audit of the legal provision and institutional arrangements that impact on the

The MLRA deals with a number of these issues in an adequate manner, but there is a need to restructure most of the provisions of the Act. This reform should be done in a manner that enables the MLRA to address the needs of subsistence fishers in such a way that the objectives of resource conservation, as well as the advancement of their social economic position, are both addressed in a satisfactory manner. Thus, what is needed is radical law reform due to the fact that, if the MLRA does not provide adequate provisions to deal with this sector in a satisfactory manner, the problems experienced by subsistence fishers cannot be addressed.

The long term goal should be to efficiently manage the subsistence fishing sector, not just from a social and economic point of view, but also to ensure that from an environmental perspective, subsistence fishers are managed in the best way possible.⁴¹⁰

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⁴¹⁰ Witbooi E 'Subsistence fishing in South Africa: Implementation of the Marine Living Resources Act' (2002) 431 ILJ 439.

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