

**REDRESSING THE PAST: A CRITICAL LEGAL ASSESSMENT OF
'QUOTA' ALLOCATIONS IN POST-APARTHEID SOUTH AFRICA
UNDER THE MARINE LIVING RESOURCES ACT 18 OF 1998 IN
THE HAKE DEEP-SEA TRAWL AND WEST COAST ROCK
LOBSTER NEAR-SHORE SECTORS**

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I hereby declare that I have read and understood the regulations governing the submission of the LLM Environmental Law course dissertations, including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation conforms to those regulations.

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Gregory N Daniels

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ABSTRACT

The South African government faces numerous challenges in redistributing resources and ensuring access to those resources by historically disadvantaged individuals. This is particularly relevant in the fishing industry where people have been dependant on marine living resources, but under Apartheid, were restricted from accessing these resources. The manner and extent to which the South African government seeks to address the injustices of the past in fisheries allocations is an important indication of its commitment to transformation.

Transformation of the fishing industry must be balanced against the South African government's commitment to promote historically disadvantaged individuals on the one hand, and sustainable development, the internal transformation of previously advantaged companies and the government's commitment under international human rights and environmental law instruments on the other.

The South African government's Department of Environmental Affairs and Tourism has published numerous White Papers and laws that recognise the government's role as custodian of natural resources and the need for the redistribution of resources especially to historically disadvantaged individuals. However, the manner in which legislation and policy is implemented and, more importantly, the way transformation is interpreted by the courts is an important indication of what levels of transformation would satisfy the courts that transformation was considered and given effect to. As stated above, this is important not only for the fishing industry sector but for the redistribution and transformation processes in other areas as well.

Transformation requires a marked change. The process under the *Marine Living Resources Act*¹ and the levels of transformation that it has achieved resembles a negotiated settlement, where the process in allocating fishing rights is relatively transparent, rather than change that is so significant that it may be considered as marked.

¹ Act 18 of 1998.

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ABBREVIATIONS AND ACRONYMS

ACHPR	The African Charter on Human and Peoples' Rights
ANC	African National Congress
ARTC	Access Rights Technical Committee
CBD	Convention on Biological Diversity
<i>Constitution</i>	<i>Constitution</i> of the Republic of South Africa Act, 1996
DEAT	Department of Environmental Affairs and Tourism
Diemont Commission	Commission of Inquiry into the Allocation of Quotas for the Exploitation of Living Marine Resources, June 1986
Drommedaris	Drommedaris Visserye Bpk
Du Plessis Commission	Report of the Commission of Inquiry into the Fishing Industry on the Utilisation of Fish and Other Living Marine Resources of South Africa and South West Africa, 3 December 1971
Environmental Management Policy	White Paper on Environmental Management Policy for South Africa
EEZ	Exclusive Economic Zone
Equality Act	Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000
FPDC	Fisheries Policy Development Committee
FTC	Fisheries Transformation Council
General Fishery Policy	Department of Environmental Affairs and Tourism's General Fishery Policy on the Allocation and Management of Long-Term Commercial Fishing Rights: May 2005
HDST General Published Reasons	Hake Deep Sea Trawl Decisions for the Allocation and Quantum: 16 January 2006

ABBREVIATIONS AND ACRONYMS

HDST	Hake Deep-Sea Trawl
HDST Policy	DEATs Policy for the Allocation and Management of Commercial Fishing Rights in the Hake Deep-Sea Trawl Fishery: May 2005
I&J	Irvin and Johnson (Pty) Ltd
ICESCR	International Covenant on Economic, Social and Cultural Rights
Johannesburg Declaration	Johannesburg Declaration on Sustainable Development
MCM	Marine and Coastal Management
Minister	Minister of Environmental Affairs and Tourism
<i>MLRA</i>	Marine Living Resources Act 18 of 1998
<i>NEMA</i>	National Environmental Management Act 107 of 1998
PoI	Plan of Implementation of the World Summit on Sustainable Development
Rio Declaration	Declaration on Environment and Development, 1992
SADC Fisheries Protocol	The Southern African Development Community: Protocol on Fisheries
SADC Treaty	The Treaty of the Southern African Development Community
SAFROC	South African Frozen Rock Lobster Packers (Pty) Ltd
Sea-Harvest	Sea-Harvest Corporation (Pty) Ltd
TAC	Total Allowable Catch
TAE	Total Applied Effort
Treurnicht Commission	Report of the Commission of Inquiry into Certain Aspects of the Conservation and Utilisation of the Living Marine Resources of the Republic of South Africa, 12 June 1980
UNCLOS	United Nations Convention on the Law of the Sea

ABBREVIATIONS AND ACRONYMS

VISKOR	Fisheries Development Corporation of South Africa Ltd
WCRL	West Coast Rock Lobster
WCRL policy	DEAT's Policy for the Allocation and Management of Commercial Fishing Rights in the West Coast Rock Lobster Near-Shore Fishery: 2005
White Paper on Biological Diversity	White Paper on the Conservation and Sustainable Use of South Africa's Biological Diversity
White Paper on Fisheries Policy	White Paper on Marine Fisheries Policy for South Africa (1997)

1. INTRODUCTION

The democratically elected African National Congress ('ANC') government ('the State') faces a formidable task in distributing natural resources to those who were previously discriminated against by the apartheid government of South Africa. Expectations were created that the then *status quo* would be changed, that what was taken away would be restored and that resources would be redistributed to those who were denied access to resources. The State's land restoration process is in many instances easier to implement than the redistribution of marine living resources. This is so because under the land restoration process, the State is restoring what was owned or used by Black persons and was taken away by the Apartheid government. In redistributing access to marine living resources the State, in most instances, will have to take marine living resources that belong(ed) to no-one and redistribute those resources to persons previously discriminated against. The latter process, on the face of it, appears to be a much easier process.

The manner in which the State purports to give effect to the redistribution of marine resources is an important indication of the State's commitment to redress the injustices of the past and to uplift the majority of previously discriminated against South Africans. The State must, and has, taken measures to address the inequitable distribution of marine living resources. Unlike the allocation of mining rights under the *Minerals Act*² allocations for fishing rights ('allocations', also referred to as 'quotas') were, and still are, granted for a limited period only and revert to the State on expiry of the period for which these rights are granted. However, this does not mean that the process is less complex.³

² Act 51 of 1991. This position has now changed under the *Mineral and Petroleum Resources Development Act* 28 of 2002. Depending on the nature of the right mineral rights are awarded for specific time periods. Furthermore, minerals are non-renewable natural resources and therefore mining operations have a limited lifespan. Marine living resources are renewable natural resources and if managed correctly, have an indefinite lifespan.

³ In a Department of Environmental Affairs and Tourism media statement, exemptions were announced in a number of sectors as a result of the number of applications received and the complexities involved in the process (<http://www.deat.gov.za/NewsMedia/MedStat/2005Nov25/25112005.htm> accessed on 28 November 2005).

The long-term allocation of marine living resources by the State may be regarded as a litmus test of the State's commitment to transformation.⁴

The Khoi-Khoi and San have for thousands of years harvested marine living resources from the South African coast.⁵ The Dutch East India Company's occupation of the Cape from 1652, the Roman-Dutch law influence, and later, apartheid policy resulted in access to marine living resources with a high economic value being restricted and granted mostly to White persons. Black ethnic groups were systematically excluded and their participation in the fishing industry was restricted.⁶ As a result of apartheid, it was difficult for Black persons⁷ to obtain access to marine living resources and to obtain capital and equipment to fully exploit these resources. By 1994, 0.75 per cent of the total allowable catch ('TAC') of all species was allocated to Black ethnic groups and only 7 per cent of the 2700 registered commercial fishing boats were Black owned.⁸

Allocations and access rights must be balanced against the State's commitment to the sustainable utilisation of marine living resources and transformation of the fishing industry. This is not new. Fuggle and Rabie recognised that the environment and environmental management are not neutral and must engage social and political issues on a global, regional, national and intra-national basis.⁹

Many principles and rules have evolved at the international level and have frequently been endorsed by countries incorporating these principles in their national legislation.

⁴ Transformation means a marked change in nature. 'Transformation' is defined to mean 'a marked change in nature, form, or appearance.' See *Concise Oxford English Dictionary* (11th Ed) at 1531.

⁵ See *Waves of Change: Coastal and Fisheries Co-management in Southern Africa*, at 39 and the reference to Clark *et al*: 'Identification of subsistence fishers, fishing areas, resource use and activities along the South African coast', *South African Journal of Marine Science* 24:425-437.

⁶ *Waves of Change* at 205.

⁷ In this dissertation reference to 'Black persons' includes 'Coloured persons', 'Indian persons' and indigenous African persons unless the context indicates otherwise.

⁸ Small Business Sector 1996. *Strategies for the integration and promotion of the small-business sector in the fisheries industry*, unpublished paper. Fisheries Policy Development Working Committee, Department of Environmental Affairs and Tourism (DEAT), Cape Town, South Africa.

⁹ RF Fuggle and MA Rabie: *Environmental Management in South Africa*, Juta (1992) at 531. Section 1 of the *National Environmental Management Act* 107 of 1998 defines 'sustainable development' to mean 'the integration of social,

These principles include state sovereignty over natural resources;¹⁰ sustainable development;¹¹ the precautionary principle;¹² and the preventive principle.¹³ The Department of Environmental Affairs and Tourism's ('DEATs') Marine and Coastal Management's ('MCMs') directorate must balance the allocation of fishing rights in terms of these principles. In addition, DEAT needs to manage broader global, regional and domestic threats to fisheries such as over-capitalisation of fishing fleets; over-exploitation of fisheries; inadequate laws for coastal and estuarine habitats; and the impact of recreational fishing.¹⁴

This dissertation is on transformation of the commercial fishing industry in the long-term rights allocation process under the *Marine Living Resources Act*¹⁵ ('MLRA'), focusing specifically on the Hake Deep-Sea Trawl ('HDST') and the West Coast Rock Lobster Near-Shore ('WCRL') sectors. These sectors include high-tech and low-tech fishing methods and equipment. WCRL can be caught by commercial fishers using non-capital intensive equipment, and consequently, less investment is required. HDST on the other hand is capital intensive and requires significant investment. The marine living resources harvested in these sectors yield significant returns and fishing rights allocations have accordingly been subjected to extensive judicial review.¹⁶ These two sectors also differ

economic and environmental factors into planning, implementation and decision-making so as to ensure that development serves present and future generations'.

¹⁰ This principle is part of customary international law - see the ICJ's 1996 Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons (ICJ Reports 226). The UN General Assembly in 1962 adopted the resolution that countries have sovereignty over their natural wealth and resources and to exploit it in the interest of their national development or the well-being of its people. See UNGA Res. 1803 (XVII) (1962). The United Nations Convention on the Law of the Sea (21 *ILM* 1261 (1982)) and the Convention on Biological Diversity (31 *ILM* 822 (1992)) also recognises this principle. (See articles 56(1) of the United Nations Convention on the Law of the Sea and the preamble and articles 3 and 15 of the Convention on Biological Diversity).

¹¹ This principle is reflected in the preamble and articles 61(3) and 62(1) of the United Nations Convention on the Law of the Sea. See sections 1 and 2(4) of the *National Environmental Management Act* 107 of 1998.

¹² Section 2(4)(a)(iv) of the *National Environmental Management Act* 107 of 1988. South Africa's version of the precautionary principle is however not the same as the one recognised in international environmental law as it makes no mention of threats of serious or irreversible damage, or to the traditional trigger of a 'lack of full scientific certainty' (Cullinan C 'The Precautionary Principle in Environmental Law in South Africa: An Assessment' *Draft Discussion Document*).

¹³ See Sands: *Principles of International Environmental Law*, at 231 for a full discussion of these principles.

¹⁴ Sands at 393.

¹⁵ Act 18 of 1998.

¹⁶ Note 203 below.

significantly from each other and provide a good indication of the manner and extent of transformation in the fishing industry for corporations and individuals. Transformation, as used in this dissertation, refers to the allocation of access rights to marine living resources to South African citizens previously discriminated against under Apartheid. In this context, transformation is unique to South Africa as it relates to the redistribution of resources from South African citizens to other South African citizens, where the criteria are race and or gender. In other jurisdictions, transformation refers to the transfer of resources from foreigners to nationals¹⁷ or the transfer of resources to nationals and the reservation of resources (particular species) for a particular sector of fishers.¹⁸

In undertaking the enquiry into whether South Africa's legal and policy framework has provided the requisite tools for effective transformation in these sectors the following shall be discussed: the international conventions and regional instruments that must be considered by the Minister of Environmental Affairs and Tourism ('the Minister') when granting rights to harvest marine living resources; the pre- and post-Constitutional eras and how rights allocation policies and processes have changed; whether redistribution and transformation of the fishing industry has practically taken place; and amendments or changes that may be required in order to promote and ensure future transformation.

2. INTERNATIONAL COVENANTS, REGIONAL INSTRUMENTS AND SOFT LAW INSTRUMENTS

The *Constitution of the Republic of South Africa Act, 1996* ('the *Constitution*') requires that a court or forum must, when interpreting the fundamental human rights contained in the Bill of Rights, consider the values that underlie an open and democratic society as

¹⁷ See for example Namibia where this process is called Namibianisation. Namibia's Marine Resources Policy (Ministry of Fisheries and Marine Resources: 'Towards Responsible Development and Management of the Marine Resources Sector' August 2004) states that 'Namibianisation' means 'greater involvement, participation and benefits for Namibians from the sector' (Preface). Namibianisation is seen as a means to peace, economic reconciliation, equity and increasing employment for Namibians, especially the previously disadvantaged (Preface).

¹⁸ For example Angola where particular species of fish are reserved for artisanal fishers. Transformation of the Angolan fishing sector means ensuring equitable access to inshore fisheries by Angola's artisanal fishers and empowering Angolans by reducing foreign access to fisheries ('Transformation in the Marine Fishing Industries of the BCLME Countries' – BCLME Project LMR/SE/03/03 dated 1 October 2005 at 75-6).

well as international law.¹⁹ Furthermore, any reasonable interpretation of national legislation that is consistent with international law must be preferred.²⁰ The *MLRA* also provides that the State must have regard to international instruments and rules.²¹ Therefore, the State, when allocating commercial fishing rights must be cognisant of its obligations under international law relating not only to the environment, but also to human rights. Access rights granted to exploit marine living resources and, more importantly, the manner in which these rights are granted must be consistent with international law. Furthermore, and where appropriate, the courts may consider international law when considering allocations made under the *MLRA*.

The sections of international covenants and regional instruments relevant to marine living resources; equality; arbitrary deprivation of property; and the participation of local communities in marine living resources are discussed below. These instruments are important as they determine the parameters within which access rights may be granted, and consequently, the importance that the international community places on these factors. The importance that MCM attached to these factors in this long-term rights allocation process, which is reflected as a percentage in the post-allocation documents, shall be discussed further below.²² This weighting serves as an important indication of the value that DEAT, and consequently the State, attach to their international commitments and to transformation.

2.1 International covenants

The State is party to numerous international covenants. Only those covenants that are directly relevant to marine management and conservation in the exclusive economic zone ('EEZ') and human rights instruments that impact on the transformation process of the fishing industry are discussed below. This section is divided into two parts. The first

¹⁹ Section 39(1) of the *Constitution*.

²⁰ Section 233 of the *Constitution*.

²¹ Section 2(i) of the *MLRA*.

²² Sections 4.5.2 and 4.5.3 at 71 and 73, respectively.

considers those instruments of relevance to the environment. The second discusses relevant human rights instruments. Emphasis is placed on the relevant provisions in these instruments which DEAT must consider when making fishing rights allocations.

2.1.1 Environmental instruments

The United Nations Convention on the Law of the Sea ('UNCLOS')²³ and the Convention on Biological Diversity²⁴ ('the CBD') are the two environmental instruments that shall be considered in this section as these are the principal instruments for biodiversity management and the exploitation of resources in the EEZ.

2.1.1.1 UNCLOS

UNCLOS is the principal international legal instrument that sets out the general rights and obligations of States regarding the conservation and sustainable use of marine living resources. The rights of coastal States to the EEZ and the special need to manage and conserve certain species is formalised under UNCLOS. Coastal States have sovereign rights for the purposes of exploring, exploiting, conserving and managing living and non-living resources in their EEZs.²⁵ However, these States must ensure that by using the best scientific evidence available when determining the TAC, marine resources in their EEZ are not endangered by over-exploitation.²⁶ Article 61(3) states that:

Such measures shall also be designed to maintain or restore populations of harvested species at levels which can produce the maximum sustainable yield, as qualified by relevant environmental and economic factors, including the economic needs of coastal fishing communities and the special requirements of developing States, and taking into account fishing patterns, the interdependence of stocks and any generally recommended international minimum standards, whether sub-regional, regional or global. (My emphasis.)

²³ It came into force on 16 November 1994. South Africa acceded to it in December 1997.

²⁴ It came into force on 29 December 1993. South Africa ratified it in November 1995.

²⁵ Article 56(1).

²⁶ Articles 61(1) and (2).

The optimum-utilisation of marine living resources and the capacity to harvest marine living resources must be determined.²⁷ Consequently, the State must ensure that marine living resources are utilised in a sustainable manner while also having regard to the economic needs of coastal communities. This is particularly important for the WCRL sector, as coastal communities have easy access to WCRL. UNCLOS requires that in the territorial sea²⁸ and high seas²⁹ conservation must ensure ‘maximum sustainable yield’ and for the resources in the EEZ ‘optimal utilisation’ is required.³⁰ Where the State does not use the best scientific evidence available when determining the TAC or determines a larger TAC than advised is available in terms of the scientific evidence or ignores that evidence, it would be acting contrary to the obligations imposed on it under UNCLOS.³¹ This constraint, together with section 24 of the *Constitution*,³² the section 2 principles of the *National Environmental Management Act*³³ (‘NEMA’) and the *MLRA*, prohibits the State from increasing the TAC to allow new entrants³⁴ into the numerous fisheries sectors

²⁷ Article 62(1).

²⁸ Every state has the right to establish the breadth of its territorial sea to a limit not exceeding 12 nautical miles, measured from baselines determined in accordance with this Convention (Article 3). South Africa has done so under the *Maritime Zones Act* 15 of 1994.

²⁹ The high seas are the area of ocean beyond the EEZ of countries (Article 86).

³⁰ In the preamble reference is made to the ‘efficient utilisation’ of resources; for the EEZ and high seas UNCLOS refers to the ‘maximum sustainable yield’ (Articles 61(3), 62(1) and 119(1)(a)).

³¹ In the Report of the Commission of Inquiry into the Allocation of Quotas for the Exploitation of Living Marine Resources, June 1986, the Commission refers to two occasions in the WCRL sector where the Minister ignored the recommendations made by the then Sea Fisheries Institute and set a larger TAC (Chapter 5, par 5.49).

³² ‘Everyone has the right-

- (a) to an environment that is not harmful to their health or well-being; and
- (b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that-
 - (i) prevent pollution and ecological degradation;
 - (ii) promote conservation; and
 - (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.’ (My emphasis.)

³³ Act 107 of 1998.

³⁴ In the glossary of terms of the Department of Environmental Affairs and Tourism’s General Fishery Policy on the Allocation and Management of Long-Term Commercial Fishing Rights: May 2005, ‘new entrant’ means ‘an applicant that is not a medium term right holder in the particular sector applied for’ and an ‘existing entrant’ means a medium term right holder, that is ‘a right holder that was granted a medium term commercial fishing right during the period 2001/2002 – 2005 in the specific sector, or became a right holder in the sector by way of an approved transfer of the fishing right.’

where such an increase is not based on the best scientific evidence available or may result in marine resources from being exploited beyond its maximum sustainable yield.³⁵ In accordance with these requirements, MCM reduced the 2006 hake allocation by 10 per cent on the basis of the precautionary principle. This was done as, for the first time since the 1970s, the hake survey did not take place in 2005 due to an unresolved dispute on overtime payment for the vessel crews that were supposed to conduct the survey.³⁶ This reduction, although not made on up to date scientific evidence, is in accordance with the obligations imposed on the State under UNCLOS, as it was based on the best scientific evidence available to the State at the time the State determined the TAC for the hake sector.

The State, in granting new entrants access to marine living resources is restricted by obligations placed on it in the international sphere. In the absence of evidence indicating that the TAC for species may be increased, the manner in which access for new entrants may be achieved is limited. This may include reducing the number of existing entrants, reducing the percentage of the TAC awarded to existing entrants so that the remainder may be distributed to new entrants, or dividing the TAC into smaller portions reducing the resultant fishing rights.

2.1.1.2 *The CBD*

The CBD is potentially applicable to all species, including aquatic species, as biological diversity includes marine ecosystems.³⁷ The CBD's objectives are the conservation and sustainable use of biological resources and the free and equitable sharing of benefits derived from the use of those resources.³⁸ The sovereign rights of states over their

³⁵ Section 2(4) of *NEMA* and section 2(a) - (f) of the *MLRA*.

³⁶ Stefano Ponte and Lance van Sittert "The Chimera of Redistribution: 'Black Economic Empowerment' (BEE) In the South African Fishing Industry" Danish Institute for International Studies *Working Paper No 2006/32* at 23.

³⁷ 'Biological diversity' means 'the variability among living organisms from all sources including, inter alia, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part; this includes diversity within species, between species and of ecosystems'. (My emphasis.) (Article 1.)

³⁸ Article 1.

biological resources, including their right to use and conserve these resources in a sustainable manner, are recognised.³⁹ Sustainable use is defined to mean:

the use of components of biological diversity in a way and at a rate that does not lead to the long-term decline of biological diversity, thereby maintaining its potential to meet the needs and aspirations of present and future generations.⁴⁰ (My emphasis.)

Unlike UNCLOS the CBD does not require the ‘maximum sustainable yield’ but rather that the potential to meet the needs of future generations is maintained. This requirement is less precise than the maximum sustainable yield requirement. States are to develop or adapt existing national strategies or programmes for the conservation and sustainable use of biological diversity and must integrate the conservation and sustainable use of biological diversity into sectoral or cross-sectoral plans, programmes and policies.⁴¹

The CBD, in the context of fisheries management, places an obligation on the State to ensure that the State’s policies meet the requirements of conservation and sustainable use of marine living resources. However, as already indicated above, this is less stringent than the requirement under UNCLOS. In any event, contracting States have to implement the CBD with regard to the marine environment in accordance with the rights and obligations under UNCLOS.⁴² Consequently, the test for the management and conservation of marine living resources under the CBD is also the maximum sustainable yield. Any strategy, programme and sectoral plan implemented for marine living resources that do not meet the maximum sustainable yield requirement would have to be adapted.

DEAT has published numerous policies to guide and inform this long-term commercial fishing rights allocation process. These policies are DEAT’s General Fishery Policy on the Allocation and Management of Long-Term Commercial Fishing Rights: May 2005 (‘General Fishery Policy’), DEATs Policy for the Allocation and Management of

³⁹ Preamble and also Articles 8(c),(d),(f),(i),(j) and (k).

⁴⁰ Article 1.

⁴¹ Article 6.

Commercial Fishing Rights in the Hake Deep-Sea Trawl Fishery: May 2005 ('HDST Policy') and the West Coast Rock Lobster Limited Commercial (Nearshore) Fishery: 2005 ('WCRL policy'). These policies must be consistent with the maximum sustainable yield requirement of UNCLOS and, more importantly, the sustainable development requirement of the *Constitution*,⁴³ *NEMA*⁴⁴ and the *MLRA*.⁴⁵

In 1995 the Conference of the Parties of the CBD adopted the Jakarta Mandate on Marine and Coastal Biological Diversity.⁴⁶ This mandate promotes the conservation and sustainable use of marine and coastal living resources while respecting societal interest and the integrity of the ecosystems. This, in the South African context, would include transformation balanced against sustainability, as transformation must be regarded as being in the interests of South African society.

DEAT must accordingly ensure that marine living resources are optimally exploited in a sustainable manner with due regard for the needs of present and future generations. The economic needs of coastal fishing communities must also be considered. This is important for both the HDST and WCRL sectors. The exploitation of these marine living resources at levels that are not sustainable would negatively impact on these resources and the transformation process. This is so because there may not be sufficient marine living resources to allocate to new entrants. Alternatively, unviable allocations may be made to new and existing entrants. Conservation and the proper management of these resources are therefore important to ensure meaningful transformation of the fishing industry.

⁴² Article 22(2).

⁴³ Section 24(b).

⁴⁴ Section 2(4).

⁴⁵ Section 2(a) – (f).

⁴⁶ Decision 11/10. (Accessed at <http://www.biodiv.org/discussions/default.aspx?lg=0&m=cop.02&d=10> on 19 September 2006.)

2.1.2 Human rights instruments

The International Covenant on Economic, Social and Cultural Rights ('ICESCR'),⁴⁷ the International Covenant on the Elimination of all Forms of Racism⁴⁸ and the Convention on the Elimination of all Forms of Discrimination against Women⁴⁹ are all relevant for this dissertation and should influence the manner in which allocations are made. These instruments are discussed below. The Universal Declaration of Human Rights,⁵⁰ although it is not a treaty or covenant but a recommendatory resolution of the General Assembly of the United Nations, is also considered as an authoritative statement of the international community.⁵¹ The Declaration states that the right to own property is protected and that no one may be arbitrarily deprived of their property.⁵² This is important in the context of fishing rights allocations as property under the *Constitution* does not refer to land only and may include allocation rights.⁵³

2.1.2.1 The ICESCR

The ICESCR provides for socio-economic rights which include the right to work, to social security, and the right to an adequate standard of living.⁵⁴ Member states are required to take progressive measures, within their available resources to achieve the full realisation of these rights.⁵⁵ The ICESCR is important because in the follow-up to the long-term rights allocation process in South Africa, especially in the HDST sector, organised labour sided with established fishing companies and exerted pressure on the State to ensure that the established fishing companies were awarded viable long-term

⁴⁷ It was adopted and opened for signature, ratification and accession by UNGA resolution 2200A (XXI) of 16 December 1966 and entered into force on 3 January 1976. South Africa ratified it on 3 October 1994.

⁴⁸ It was adopted and opened for signature and ratification by UNGA resolution 2106 (XX) of 21 December 1965. It entered into force on 4 January 1969. South Africa ratified it in 1998.

⁴⁹ 19 *ILM* 33 (1980). It entered into force in 1981 and South Africa ratified it in 1995.

⁵⁰ The UNGA approved it on 10 December 1948 (Resolution 217A (III)).

⁵¹ Dugard J *International Law: A South African Perspective* (3rd Ed) 2005 (Juta) at 316.

⁵² Article 17.

⁵³ This is discussed below at section 4.4.1.1 at 54.

⁵⁴ Articles 6 and 11.

rights in an effort to protect the existing work force.⁵⁶ The union representatives argued that the workers had a right to work and to an adequate standard of living. The reduction of allocations to these established companies would, so they argued, result in retrenchments and affect the standard of living of the workers. In granting allocations in the HDST and WCRL sectors DEAT had to be cognisant of the fact that allocations potentially impact on people's socio-economic rights.

2.1.2.2 *International Covenant on the Elimination of all Forms of Racism*

The International Covenant on the Elimination of all Forms of Racism defines racial discrimination as:

any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.⁵⁷ (My emphasis.)

Affirmative action measures may, however, be implemented provided such measures do not lead to the maintenance of separate rights for different racial groups and are not continued after the objectives for which they were originally introduced, are achieved.⁵⁸ States are also required to take affirmative action measures when circumstances warrant it.⁵⁹ The unequal distribution of access rights in the fishing industry is an instance where the circumstances warrant that affirmative action measures be taken. However, these measures must be of limited duration. This raises the issue of whether transformation would be allowed or continued after the expiration of the long-term rights awarded in the allocation process as affirmative action is to be of limited duration, at least in the international context.

⁵⁵ Article 2.

⁵⁶ Nielsen JR and Hara M 'Transformation of South African Industrial Fisheries' *Marine Policy* 30 (2006) 43-50.

⁵⁷ Article 1(1).

⁵⁸ Article 4(4). This is interestingly contrary to the International Covenant on Civil and Political Rights which prohibits discrimination on the grounds of race. (Article 26). It entered into force on 23 March 1976. South Africa ratified it on 10 March 1999.

⁵⁹ Article 2(2).

2.1.2.3 *The Convention on the Elimination of All Forms of Discrimination against Women*

The Convention on the Elimination of All Forms of Discrimination against Women defines discrimination to mean any distinction made on the basis of sex which has the effect or purpose of negatively impacting on the human rights of women when compared with men.⁶⁰ States may adopt temporary special measures aimed at accelerating equality between men and women.⁶¹ Consequently, the Minister when granting access rights may prefer women applicants over men as such a measure would be aimed at introducing more women into an industry historically dominated by men. The extent to which DEAT weighted applications from women will be considered below.⁶²

2.2 **Regional instruments**

Regional instruments allow countries to focus on issues that are relevant in their specific region.⁶³ International conventions may require that countries co-operate with each other through regional instruments, particularly where those countries share common resources.⁶⁴ The inter-dependence of marine living resources and the realisation that the activities of neighbouring countries may negatively impact on marine living resources and ecosystems, despite careful management by another state of its marine living

⁶⁰ Article 1.

⁶¹ Article 4(1).

⁶² See section 4.5.2 at 71 and 4.5.3 at 73.

⁶³ The following conventions were also considered: the 1980 Convention on the Conservation of Antarctic Marine Living Resources (19 *ILM* 841 (1980)) but this convention is concerned with the protection and management of Antarctic marine living resources (Article II(3)); Convention for Co-operation in the Protection and Development of the Marine and Coastal Environment of the West and Central African Region ('Abidjan Convention') (20 *ILM* 746 (1981)) and the Convention for the Protection, Management and Development of the Marine and Coastal Environment of the East African Region ('Nairobi Convention') (*IELMT* 985:46) is primarily concerned with pollution although it provides for the sound environmental management of natural resources (article 4) and for protected areas for marine ecosystems and species (article 11), respectively; and the Convention on the Conservation and Management of Fishery Resources in the South-East Atlantic Ocean ('SEAFO Convention') which applies to waters beyond the area of national jurisdictions. These conventions are not discussed further because they are more concerned with pollution or do not apply to the marine living resources or area where the resources discussed in this dissertation occur.

⁶⁴ See articles 197 of UNCLOS and 14(1)(c) of the CBD.

resources, requires states to co-operate with each other in ensuring the sustainable use of shared marine living resources.

2.2.1 African Charter on Human and Peoples' Rights

The African Charter on Human and Peoples' Rights ('ACHPR'),⁶⁵ states that individuals are equal and are entitled to equal protection of the law.⁶⁶ The right to property is to be guaranteed and may only be encroached upon in the interest of public need or the community's general interest and in accordance with appropriate laws.⁶⁷ People are also entitled to a general satisfactory environment favourable to their development.⁶⁸ The redistribution of access rights, which can be regarded as property, may, in the interest of the public be redistributed under the ACHPR. Furthermore, transformation of the fishing industry may also be regarded as being in the community's general interest.

2.2.2 The Southern African Development Community: Protocol on Fisheries

The Treaty of the Southern African Development Community⁶⁹ ('SADC Treaty') is a regional instrument that requires member states to co-operate on development and economic growth, poverty alleviation and support for the socially disadvantaged through regional integration.⁷⁰ Member states are required to co-ordinate, harmonise and rationalise their policies and strategies to promote sustainable development.⁷¹ Numerous protocols have been developed under the SADC Treaty. Of these protocols, the Southern African Development Community: Protocol on Fisheries ('SADC Fisheries Protocol') is the principal instrument regulating fisheries.⁷² The objectives of the SADC Fisheries

⁶⁵ (1982) 21 *ILM* 58. It came into force on 21 October 1986. South Africa ratified it on 9 June 1996.

⁶⁶ Articles 3, 19 and 28.

⁶⁷ Article 14.

⁶⁸ Article 24.

⁶⁹ (1993) 32 *ILM* 116. It was open for signature since 1992. South Africa is a signatory to this treaty.

⁷⁰ Article 5(1)(a).

⁷¹ Preamble.

⁷² It came into force in August 2003. It was approved by Cabinet but has not been ratified by Parliament. (Witbooi *Law and fisheries reform: Legislative and policy developments in South African fisheries over the decade 1994–2004*)

Protocol are to promote responsible and sustainable use of living aquatic resources and aquatic ecosystems in order to safeguard the livelihood of fishing communities, generate economic opportunities and ensure that future generations benefit from renewable resources.⁷³ The SADC Fisheries Protocol requires member states to take measures to regulate the use of living aquatic resources and to protect those resources against over-exploitation.⁷⁴

A rational and equitable balance between socio-economic objectives in the exploitation of living aquatic resources accessible to artisanal fishers are to be achieved by instituting legal, administrative and enforcement measures necessary for the protection of artisanal fishing rights.⁷⁵ This must be attained by: taking account of the needs of socially and economically disadvantaged fishers; providing physical and social infrastructure and support services for the development of artisanal and small-scale commercial fisheries; agreeing to promote the development of structured programmes relating to optimising the potential economic benefits from artisanal and small-scale commercial fisheries; and by facilitating a broad-based and equitable participatory process to involve artisanal fishers in the control and management of their fishing and related activities.⁷⁶ Policies must be implemented to enhance the capacity of nationals to engage in the responsible use of living aquatic resources on the basis of equity, participation, effectiveness and mutual benefit.⁷⁷ The rationale and criteria pertaining to the determination of the TAC, allocation of quotas, permits, licensing and other rights pertaining to the use of living aquatic resources must be made public.⁷⁸

The SADC Fisheries Protocol does not define the term 'artisanal fishers'. However, the common characteristics of such fishers are that they use traditional fishing methods to

Marine Policy 30 (2006) 30–42 at 32). South Africa signed the Protocol on 14 August 2001 – <http://www.Ecolex.org> accessed on 31 August 2006.

⁷³ Article 3.

⁷⁴ Articles 4(2) and (3).

⁷⁵ Article 12.

⁷⁶ Article 12(1), (2), (3), (4) and (6).

⁷⁷ Articles 15(1) and 15(2).

harvest marine living resources and sell some or all of their catch. In terms of these characteristics, WCRL fishers could be classified as artisanal fishers. Consequently, the State must assist these fishers by protecting their rights; developing infrastructure and support programmes; and involving them in the control and management of marine living resources. In order for the State to fulfil its obligations under the SADC Fisheries Protocol, not only allocations, but also long-term State intervention is required. The mere allocation of fishing rights is insufficient. The State must actively assist these communities in achieving sustainable livelihoods.

2.3 Soft law instruments

Soft law instruments, although difficult to define, are generally carefully negotiated and drafted statements that are intended to have some normative significance despite their non-binding, non-treaty form.⁷⁹ The essential characteristics of soft law instruments are that they contain norms agreed to by states; are recorded; and states have a considerable degree of discretion in interpreting and conforming to this requirements.⁸⁰

In 1992, the Declaration on Environment and Development ('Rio Declaration')⁸¹ and Agenda 21⁸² (an action plan and blueprint for sustainable development) was adopted at the United Nations Conference on Environment and Development which was held in Rio de Janeiro.⁸³ The Rio Declaration contains most of the emerging norms and principles of environmental law which have been incorporated into numerous international environmental instruments. These norms and principles include the following: confirmation of state sovereignty over the rights of states to exploit their natural

⁷⁸ Article 18(4).

⁷⁹ Birnie and Boyle *International Law and the Environment* (2nd Ed) Oxford at 25.

⁸⁰ Ibid at 26.

⁸¹ 31 *ILM* 874 (1992).

⁸² UNCED Report, A/CONF.151/26/Rev.1 (Vol. I) (1993). *Agenda 21: An Agenda for Sustainable Development into the 21st Century*, DEAT, May 1998.

⁸³ A/CONF 151/26 (Vol. 1), June 1992. The CBD was also adopted at this conference.

resources;⁸⁴ co-operation in the eradication of poverty in order to meet the needs of the majority of the people;⁸⁵ achieving sustainable development;⁸⁶ and recognition of the vital role of women⁸⁷ and indigenous communities.⁸⁸ Under Agenda 21, states are to develop research capacities for the assessment and implementation of conservation and management measures for marine living resources and to provide support to local fishing communities.⁸⁹

The follow-up on the United Nations Conference on Environment and Development was the World Summit on Sustainable Development which was held in Johannesburg, South Africa in 2002.⁹⁰ This conference produced three soft law instruments, namely: the Johannesburg Declaration on Sustainable Development⁹¹ ('Johannesburg Declaration'), the Plan of Implementation of the World Summit on Sustainable Development⁹² ('PoI') and the Johannesburg Principles on the Role of Law and Sustainable Development⁹³ ('Johannesburg Principles').⁹⁴ The Johannesburg Declaration confirms the global community's commitment to sustainable development and the building of a caring, equitable and humane society on the basis of dignity for all.⁹⁵ The PoI recognises that the oceans are critical for food security and for sustaining economic prosperity and well-

⁸⁴ Principle 2.

⁸⁵ Principle 5.

⁸⁶ Principle 8.

⁸⁷ Principle 20.

⁸⁸ Principle 22.

⁸⁹ Par 17.94.

⁹⁰ Prior to this summit eight millennium development goals were adopted by 189 nations-and signed by 147 heads of state and governments during the UN Millennium Summit in September 2000. These goals which, which include environmental sustainability, is a blueprint agreed to by countries and leading development institutions to meet the needs of the world's poorest by the target date of 2015. Environmental sustainability includes integrating the principles of sustainable development into country policies and programmes and reversing the loss of environmental resources.

⁹¹ (Accessed at http://www.un.org/esa/sustdev/documents/WSSD_POI_PD/English/POI_PD.htm).

⁹² (Accessed at http://www.un.org/esa/sustdev/documents/WSSD_POI_PD/English/WSSD_PlanImpl.pdf)

⁹³ (Accessed at <http://www.dfa.gov.za/docs/2002/wssd0828a.htm>).

⁹⁴ The Johannesburg Declaration and the PoI was endorsed by the UNGA (UNGA Res 55/199 (20 December 2000)).

⁹⁵ Articles 1 and 2.

being.⁹⁶ The PoI states that in order to achieve sustainable fisheries, fish stocks must be maintained at levels that may produce the maximum sustainable yield.⁹⁷ Signatories to the PoI are to promote the sustainable development of fisheries management by applying the ecosystem approach by 2010.⁹⁸

The UN Food and Agricultural Organisation's: Code of Conduct for Responsible Fisheries⁹⁹ provides principles and standards applicable to the conservation, management and development of all fisheries.¹⁰⁰ The rights of fishers and fish workers, especially those engaging in artisanal or small-scale commercial fisheries, are to be protected and, where appropriate, preferential access to fishing grounds may be allowed.¹⁰¹

The Minister must exercise his mandate with due regard to the State's obligations under these international, regional and soft law instruments. This would include ensuring that marine living resources, based on the best available scientific information, are harvested optimally and sustainably; allocation rights are granted on an equal basis, but where appropriate, with preferential treatment for coastal fishing villages and women; the rights of fishers and fish workers are protected. The extent to which these principles have been incorporated into the *MLRA* and considered in the long-term rights allocation process is discussed further below.¹⁰²

3. **PRE-CONSTITUTIONAL DEVELOPMENT**

Marine living resources management in South Africa is underpinned by Roman and Roman-Dutch legal principles. The ocean is classified as *res extra commercium* and may

⁹⁶ Par 30.

⁹⁷ Par 31(9).

⁹⁸ Par 30(d). The Conference of the Parties to the CBD first endorsed this approach at its Fifth Meeting in Nairobi, in May 2000 (UNEP/CBD/COP/5/23 Decision V/6 Ecosystem Approach).

⁹⁹ It was adopted on 31 October 1995 by the FAO Conference (<http://www.fao.org/fi/agreem/codecend/ficande.asp>).

¹⁰⁰ Article 1.3.

¹⁰¹ Article 6.16.

¹⁰² See section 4.4.2 at 56 and 4.5 at 67.

not be subject to ownership. Wild animals, including fish, are classified as objects. These objects are not owned, but capable of ownership by taking control with the intention of becoming the owner.¹⁰³ In *Van Breda v Jacobs*,¹⁰⁴ the Appellate Division considered whether the customary tradition of trek-net fishers not to cast their nets on the inside of an existing trek-net cast had become part of customary law. The Court held that this tradition had become part of customary law. The Court stated further that no-one could own a fish in the sea before it was caught.¹⁰⁵ This view is one of the major stumbling blocks in fisheries management as the world's oceans and marine living resources are seen as a free for all. This position has been partly improved by the declaration of EEZs of 200 nautical miles ('nm') by most coastal countries, although this unfortunate situation still applies to the high seas.

In this section, a brief historical overview of fishing in South Africa is provided. Thereafter, the numerous laws and policies developed during the pre-Constitutional era which has significantly shaped South Africa's current fisheries management system and rights allocations in the HDST and WCRL sectors are discussed. The following commission of inquiries are also considered: the Report of the Commission of Inquiry into the Fishing Industry on the Utilisation of Fish and Other Living Marine Resources of South Africa and South West Africa,¹⁰⁶ ('the Du Plessis Commission'); Report of the Commission of Inquiry into Certain Aspects of the Conservation and Utilisation of the Living Marine Resources of the Republic of South Africa,¹⁰⁷ ('the Treurnicht Commission'); and the Commission of Inquiry into the Allocation of Quotas for the Exploitation of Living Marine Resources,¹⁰⁸ ('the Diemont Commission').

¹⁰³ Glazewski *Environmental Law in South Africa* (Butterworths) (2nd Ed) par 13.6.1 at 414.

¹⁰⁴ 1921 AD 333.

¹⁰⁵ As per Sir Solomon JA.

¹⁰⁶ 3 December 1971.

¹⁰⁷ 12 June 1980.

¹⁰⁸ Appointed in GN 1280 *Government Gazette* No. 9780 of 7 June 1985.

3.1 History of South Africa's fishing industry in the HDST and WCRL sectors

The period between 1875 and 1900 is regarded as the birth of the trawling industry in the Cape.¹⁰⁹ In 1885, Parliament accepted a report on the development of sea fisheries in the Cape.¹¹⁰ On the basis of this report a trawler, the 'Pieter Faure', was specially built to conduct trawling activities in the waters off the Cape coast.¹¹¹ By 1889, the Cape fishing fleet consisted of 374 boats with 2241 fishermen and an annual catch ranging from 1000 to 2000 tonnes, valued at approximately R 33,000 to R 66,000.¹¹² A small number of Malay fishermen emerged as independent fishermen.¹¹³

Although there was an abundance of rock lobsters in the waters of the Cape, the State, on 1 October 1895, protected rock lobster for the first time by declaring a closed season from the middle of October 1895 to the beginning of February 1896 and by prohibiting the catching and landing of rock lobster with a carapace length of less than 3 inches.¹¹⁴ Price fluctuations, the imposition of import quotas by France and the reduction in rock lobster stocks prompted the State to step in and grant quotas on an 'equitable basis'¹¹⁵ under the *Crawfish Export Control Act*.¹¹⁶ The measures provided under this Act included a system of export permits and the inspection of rock lobsters. However, the poor quality of the rock lobster tails exported to the market in the United States of America and the threat by the New York Food and Drug Administration that rock lobster imports may be banned resulted in the enactment of the *Crawfish Export Control Act*¹¹⁷

¹⁰⁹ Du Plessis Commission, par 49.

¹¹⁰ Cape of Good Hope 'Memorandum on the Development of Sea Fisheries', Report 61 of 1885.

¹¹¹ Du Plessis Commission, par 43-4.

¹¹² Du Plessis Commission, par 39.

¹¹³ Du Plessis Commission, par 29.

¹¹⁴ Diemont Commission, par 5.5. See also Du Plessis Commission, paras 558 and 572, which report states that no direct limitation had been imposed on the size of the rock lobster landed but a prescribed minimum carapace length had been in force since 1940.

¹¹⁵ What this equitable basis was is not clear.

¹¹⁶ Act 50 of 1934.

¹¹⁷ Act 9 of 1940. The title of this Act was changed to the *Rock Lobster Export Control Act* for marketing purposes to the United States of America (See GN1068 in *Government Gazette* No. 3935 of 20 June 1973).

(the '*Rock Lobster Export Control Act*'). Unlike its predecessor, this Act provided for the proper inspection of rock lobsters.

3.2 The Period 1940 to 1972

The Division of Sea Fisheries was initially established within the Department of Mines and Industry.¹¹⁸ In 1940 this Department became the Department of Commerce and Industry.¹¹⁹ The *Sea Fisheries Act*¹²⁰ and *Rock Lobster Export Control Act* were the first laws to regulate fisheries at a national level.¹²¹ These Acts laid the foundation for state control over access to marine resources.¹²² The reforms of the late 1940s were the foundation on which the modern fishing industry was built, resulting in the rise of the White monopolies.¹²³ The Fisheries Development Corporation of South Africa Ltd, commonly referred to by the Afrikaans abbreviation 'VISKOR', and which was established under the *Fishing Industry Development Act*,¹²⁴ and the South African Frozen Rock Lobster Packers (Pty) Ltd¹²⁵ ('SAFROC'), the central marketing agency for rock lobster, played a strategic role in advancing Afrikaner interests in the fishing industry.¹²⁶ The State, as the only shareholder in VISKOR, appointed the Board of Directors.¹²⁷ Public funds were also provided to private companies for post-war modernisation of the inshore fisheries.

¹¹⁸ This division was established in 1929 (Diemont Commission, par 5.6).

¹¹⁹ Isaacs 'Understanding the Social Processes and Politics of Implementing a New Fisheries Policy, The Marine Living Resource Act 18 of 1998, in South Africa' at 63. Doctoral thesis submitted for the degree of Doctor of Philosophy in the Department of Economic and Management Sciences, School of Government, University of the Western Cape (2003).

¹²⁰ Act 10 of 1940.

¹²¹ Prior to these enactments the conservation of fish was a provincial matter. The three provincial authorities were, however, not in a position to provide the requisite infrastructure (Du Plessis Commission, par 68).

¹²² Van Sittert L, "'Those who cannot remember the past are condemned to repeat it": Comparing fisheries reforms in South Africa' *Marine Policy* 26 (2002) at 296.

¹²³ *Ibid.*

¹²⁴ Act 44 of 1944.

¹²⁵ It was established in 1947 by the rock lobster industry.

¹²⁶ Du Plessis Commission.

¹²⁷ *Ibid* par 1004.

The Fisheries Development Advisory Council was established under the *Fishing Industry Development Act*. The Fisheries Development Advisory Council had to advise the Minister of Commerce and Industry on fisheries matters and the general effect of fisheries regulations. The Fisheries Development Advisory Council was criticised because: its views were regarded as *ad hoc* opinions; it had no executive powers; the Minister of Commerce and Industry could accept or reject the recommendations made; the deliberations were confidential and there was no feedback to stakeholders; and the recommendations made by the Division of Sea Fisheries were frequently questioned by the Fisheries Development Advisory Council.¹²⁸

3.2.1 HDST

The *Sea Fisheries Act* provided for the control of sea fisheries and for the better marketing of fish.¹²⁹ Access to fishing was controlled by requiring fishing boats to be licensed.¹³⁰ The Minister of Commerce and Industry could declare areas to be fish marketing improvement areas and could impose a levy on persons catching fish for trade.¹³¹ However, persons who were members of any organisation for the marketing of fish and any corporation, approved by the Minister of Commerce and Industry, could be excluded from paying the levy.¹³²

In 1962, Sea-Harvest Corporation (Pty) Ltd ('Sea-Harvest') was established with Dutch, Spanish and State funding. Irvin and Johnson (Pty) Ltd ('I&J'), which was established in 1912, struggled to compete with this new entity. The State granted allocations to new entrants when reallocation was necessitated after Sharpeville, Soweto and the

¹²⁸ Ibid par 708.

¹²⁹ Long title.

¹³⁰ Section 5(1). 'Fishing boats' were defined to mean 'any vessel used for catching fish for the purposes of trade'. (Section 1.)

¹³¹ Section 6(1)(a) and (b).

¹³² Section 6(1)(b).

establishment of the Tricameral Parliament. These entrants were however quickly reabsorbed by the existing rights holders.¹³³

3.2.2 WCRL

The *Rock Lobster Export Control Act* regulated the export of rock lobster from South Africa. Rock lobsters could only be exported under authority of a permit and by registered persons.¹³⁴ The permit could prescribe the port, quantity and the country to which the rock lobsters had to be exported.¹³⁵ The Minister of Commerce and Industry could refuse to issue a permit if he or she was not satisfied with the price that was agreed to between the parties. This agreed price could not be less than 75 per cent of the price agreed to by 75 per cent of the rock lobster exporters during the preceding 12 months.¹³⁶

From 1946 onward, an annual export quota applied to rock lobster. This quota served as a quantitative catch quota as the export market absorbed most of the rock lobster caught by organised industry.¹³⁷ National sales of rock lobsters were initially proportionately insignificant, but by 1969 more rock lobsters were marketed locally.¹³⁸ The State substituted the production quota (which was practically the equivalent of a catch quota) for the export quota.¹³⁹ From the 1946/47 season to the end of 1978/79 all export, marketing and production quotas were approved in terms of the tail mass of rock lobster.¹⁴⁰

¹³³ Croeser D *et al*, 'The Integration of South African Fisheries into the Global Economy: Past, Present and Future', (2006) 30 *Marine Policy* at 19.

¹³⁴ Section 2(1)(a)(ii) and 2(1)(b).

¹³⁵ Section 2(2).

¹³⁶ Section 5(4)(1).

¹³⁷ Du Plessis Commission, par 558.

¹³⁸ *Ibid*.

¹³⁹ *Ibid*.

¹⁴⁰ The Treurnicht Commission identified the following quotas in the WCRL sector: a catch quota (the quota of the whole mass of rock lobster landed); a marketing quota; a packing quota (granted to some concessionaires for the purpose of supplying their own marketing quota); a packing quota to supply the requirements of other holders of marketing quotas; and a packing quota to supply the requirements of other catchers or marketing quota holders (par 147(1)).

The Cape Coloured Corporation was, for the first time in 1963, awarded an export quota of 100,000 pounds¹⁴¹ from an export quota totalling 6,800,000 pounds.¹⁴² The amount of rock lobsters to be exported to African countries also totalled 100,000 pounds. It is not clear if the rock lobsters caught by the Cape Coloured Corporation were used to fill this market. However, what is clear is that the State controlled the WCRL sector and that the 1.47 per cent of the quota granted to the Cape Coloured Corporation would not threaten the State's continued commitment to Afrikaner nationalism. The Apartheid State, in using the past performance criteria for granting rock lobster quotas and in an effort to increase quotas to Afrikaners, granted quotas to applicants who had performed well as wheat farmers.¹⁴³

3.3 Period from 1973 to 1987

The *Sea Fisheries Act*,¹⁴⁴ repealed its 1940 counterpart¹⁴⁵ and the *Rock Lobster Export Control Act*. The Minister of Commerce and Industry was empowered to appoint a Fisheries Advisory Committee to advise him on matters that he had to consult them on.¹⁴⁶ This Committee consisted of persons from VISKOR and stakeholders engaged in trawling and rock lobster catching.¹⁴⁷ This Minister was further empowered to appoint committees to advise the Director on the issuing of any authority.¹⁴⁸ Control was exercised over the industry by requiring that fishing vessels had to be licensed before they could be used as fishing boats or factories.¹⁴⁹ These licences were issued subject to conditions determined by the Director.¹⁵⁰ The Minister of Commerce and Industry was

¹⁴¹ Treurnicht Commission, table 4 at 18.

¹⁴² Ibid.

¹⁴³ Diemont Commission, par 2.3.

¹⁴⁴ Act 58 of 1973.

¹⁴⁵ See n120.

¹⁴⁶ Section 2(1).

¹⁴⁷ Section 2(2).

¹⁴⁸ Section 3(1).

¹⁴⁹ Section 8(1) and (5).

¹⁵⁰ Section 8(1) and (5).

empowered to prohibit persons from a particular category of persons from receiving a particular species of fish¹⁵¹ or using any fishing boat for the catching of a particular species.¹⁵² This Minister was further empowered to impose levies that differentiated between species or different persons or classes of persons.¹⁵³ The Minister of Commerce and Industry had the power to determine the TAC and quantity of the TAC that any holder of a boat licence could catch. This allocation process, without the right of review, resulted in an unacceptable level of political influence.¹⁵⁴

3.3.1 The Treurnicht Commission

The 1980, the Treurnicht Commission was appointed. Its terms of reference included considering the basis and methods of granting utilisation rights; the principles applied in granting those rights; the manner in which the justifiable claims of others may be considered; and the application of conditions aimed at protecting the interest of the South African consumer. The Treurnicht Commission stressed that marine living resources were a national asset and the common property of all the people of South Africa.¹⁵⁵ The Treurnicht Commission was opposed to the closing of sectors that would result in that sector being permanently controlled by the same limited number of entrants.¹⁵⁶

The Treurnicht Commission recommended that applications for concessions be considered in terms of the following criteria and order of importance: optimal conservation and utilisation of marine living resources; the stability of the industry; the prevention of monopolistic conditions; and the contribution the applicant made towards the socio-economic infrastructure of a particular area or community.¹⁵⁷ Interestingly, the contribution made by applicants to the socio-economic infrastructure of a particular area

¹⁵¹ Section 11(1)(b).

¹⁵² Section 11(e).

¹⁵³ Section 20(1)(a).

¹⁵⁴ Diemont Commission, par 117.

¹⁵⁵ Treurnicht Commission, par 16.

¹⁵⁶ Ibid paras 17 and 148(13).

¹⁵⁷ Ibid par 19.

or community was ranked last and consequently was of less importance than the stability of the industry. No provision was made for criteria to be used for new entrants. However, the Treurnicht Commission recommended the abolition of Fisheries Advisory Committee and the establishment of Statutory Fisheries Council. It recommended that the latter be consulted on issues of exploitation, allocations and the financial implications of the social economic effects of recommendations or decisions regarding marine living resources.¹⁵⁸

3.3.2 HDST

In 1979 the global hake quota of 135,000 metric tonnes in the HDST sector was divided as follows: I&J 64,125 metric tons and Sea-Harvest 49,575 metric tons.¹⁵⁹ The remainder of the quota was divided between four other stakeholders.¹⁶⁰ The limited number of entrants with vested interests in the sector resulted in the creation of the commercial fishery and the formation of the Deep Sea Fishing Industries Association.¹⁶¹ Furthermore, it was not possible to determine the principles on which the division of the global hake quota was made but factors such as past performance, investment in the industry, processing capacity, vessel horse-power and location of the enterprise appear to have been considered.¹⁶² Even then, the HDST industry argued that quota allocations should be increased in order to offset costs and that the one-year licences made long-term financing and investment difficult, and consequently, hampered investment.¹⁶³

¹⁵⁸ Ibid paras 299(1)(e) and (2).

¹⁵⁹ Ibid par 77.

¹⁶⁰ Ibid. Atlantic Trawling (Pty) Ltd 15,000 metric tons; Lusitania Fishing Company (Pty) Ltd 3000 metric tons; and Viking Fishing Company (Pty) Ltd and Chapman's Peak Fisheries (Pty) Ltd, 1650 metric tons respectively.

¹⁶¹ Croeser *et al* at 23. In April 2004 the Deep Sea Fishing Industries Association received certification from the Maritime Stewardship Council ('MSC').

¹⁶² Treurnicht Commission, par 91.

¹⁶³ Ibid par 92.

3.3.3 WCRL

The Drommedaris Visserye Bpk ('the Drommedaris') was founded in 1976 and was incorporated as a wholly owned subsidiary of the Coloured Development Corporation.¹⁶⁴ The Drommedaris was established with the purpose of assisting Coloured rock lobster boat owners. 187 licensed rock lobster boat owners registered as members and shareholders. These members agreed to sell their total catch to the Drommedaris. A TAC for WCRL was introduced at the beginning of the 1979/80 season.¹⁶⁵ The Drommedaris had a marketing quota of 106,980 kg, a packing quota of 52,755 kg and a further packing quota totalling 58,000 kg which was utilised by Lambert's Bay Canning and Chapman's Peak Fisheries, respectively, for the packing of rock lobsters caught by Coloured boat owners. By 1984/5 the Drommedaris' quota totalled 249,673 kg.¹⁶⁶

3.3.4 Fishing Industry Development Act

The *Fishing Industry Development Act*,¹⁶⁷ repealed the *Fishing Industry Development Act*, 1944. VISKOR was retained with the objective of establishing and managing schemes for the promotion and better organisation of the catching and sale of fish.¹⁶⁸ The Fisheries Development Advisory Council had to advise the Minister on all matters where he was required to consult them.¹⁶⁹ Any area could be declared a controlled area and only persons and fishing vessels that were registered could be used to catch fish in such areas.¹⁷⁰ A local advisory committee had to be established in every controlled area.¹⁷¹ The Minister was empowered to direct that no more fishermen be registered in a

¹⁶⁴ Diemont Commission, par 12.3.

¹⁶⁵ Ibid par 5.36.

¹⁶⁶ Ibid par 12.7.

¹⁶⁷ Act 86 of 1978.

¹⁶⁸ Section 3(a).

¹⁶⁹ Section 21(1).

¹⁷⁰ Section 22(2)(a) and (b).

¹⁷¹ Section 23(1).

controlled area.¹⁷² The State was also authorised to prohibit persons registered in a controlled area from disposing of fish or prohibit any person, other than VISKOR, from acquiring any species.¹⁷³ The State was able to fix the price at which fish were bought, exempt any person from this provision, and regulate fish imports.¹⁷⁴

3.3.5 The Diemont Commission

The Diemont Commission, 1985 had to consider and report on the allocation of quotas and make recommendations for procedures whereby the Minister could allocate quotas to existing rights holders based on: past performance; the desirability to manage the fishing industry as a closed industry; the basis on which quotas should be allocated, including the admission of new entrants; the degree to which different population groups should be allowed as entrepreneurs in the fishing industry; and the measures to be used to ensure stability in the industry.¹⁷⁵ For the first time, consideration was given to the manner in which different population groups had to be permitted to the industry.

However, in considering the degree to which different population groups should be allowed as entrepreneurs in the industry,¹⁷⁶ the Diemont Commission stated that there was incontrovertible evidence that the industry was colour blind and that there were no bars against any population group becoming entrepreneurs in the fishing industry.¹⁷⁷ The Diemont Commission failed to highlight or provide this incontrovertible evidence in its report and, instead, focused its attention on the coastal communities.¹⁷⁸ In considering the Gans Bay Co-operative, which was established by VISKOR, the Diemont Commission noted that the shareholding in this co-operative was restricted to Whites but that 40 Coloured fishermen, who were regarded as members and who shared in the

¹⁷² Section 24(5).

¹⁷³ Section 28(1).

¹⁷⁴ Section 28.

¹⁷⁵ The terms of reference were set out in GN 1280 in *Government Gazette* No. 9780 of 7 June 1985.

¹⁷⁶ Diemont Commission, par 2.49.

¹⁷⁷ Par 13.1.

¹⁷⁸ Par 13.4, 13.6, 13.7, 13.24, 13.26 and 13.27.

profits, could become shareholders if a resolution was carried by a two thirds vote.¹⁷⁹ The Diemont Commission concluded that although thousands of fishermen in the coastal areas have been employed in the rock lobster industry, very few of them were granted quotas and that there was an imbalance in the holding of quotas among the different population groups, with Whites holding the majority.¹⁸⁰ Perhaps the Diemont Commission should have considered whether any population group was prohibited or discriminated against in relation to holding quotas. Such an enquiry may have resulted in a different finding on the colour blindness of the industry.

3.4 The Period 1988 to 1997¹⁸¹

The *Sea Fisheries Act*¹⁸² was enacted to provide for the conservation of marine ecosystems and the orderly use of certain marine resources.¹⁸³ A Sea Fisheries Advisory Council was appointed to advise the Minister on any matter which he had to consult the Sea Fishery Advisory Council on.¹⁸⁴ In accordance with the Diemont Commission's recommendations, the Quota Board was established under the Act. The Quota Board was tasked with recommending guidelines to the Minister for: the determination of quotas;¹⁸⁵ and granting of rights of exploitation;¹⁸⁶ to allocate quotas; and to grant rights of exploitation.¹⁸⁷ An applicant could obtain a fishing right in one of two ways.¹⁸⁸ First, the

¹⁷⁹ Diemont Commission, par 13.5.

¹⁸⁰ At par 5.54.

¹⁸¹ Although this period extends into the constitutional period the developments of that period are discussed here as it forms part of the transitional phase after the enactment of the *Constitution* but before the publication of legislation underpinned by the *Constitution*.

¹⁸² Act 12 of 1988.

¹⁸³ Long title of the Act.

¹⁸⁴ Section 7. For example, the Sea Fisheries Council had to be consulted when the Minister determined the total mass of fish available for quotas (section 19).

¹⁸⁵ 'Quota' means 'the maximum mass or quantity of fish of a particular species allocated to a person which he may catch or receive or in any other manner obtain during a specified period and may utilize on the authority of a permit'. (Section 1.)

¹⁸⁶ 'Right of exploitation' means 'a right to utilize living marine resources or aquatic plants for commercial purposes on the authority of a permit'. (Section 1.)

¹⁸⁷ Sections 15 and 18(1)(a), (b) and (c).

Minister could grant a right of exploitation to a person who at the date of commencement of the Act had access to marine living resources.¹⁸⁹ These rights were allocated on the basis of historical performance.¹⁹⁰ Secondly, the Quota Board could grant rights to new entrants for quota controlled species only.¹⁹¹ The first process related to non-quota species and existing rights holders. The second process related to new entrants for species that were quota controlled, such as hake and WCRL.

In 1991, the Quota Board made its first hake allocation with the aim of boosting new entrants to the ratio of 80/20.¹⁹² This meant that only 80 per cent of any increase in the TAC would be allocated to existing stakeholders and the remainder would be allocated to new entrants. In this way, the State sought to secure stability and predictability while also accommodating new entrants.¹⁹³ Thirty eight new entrants, community trusts established with the intention of promoting economic development in fishing communities, were granted quotas. However, it appears that these trusts consisted of farmers, teachers, principals and not necessarily *bona fide* fishermen.¹⁹⁴ The Diemont Commission recommended that the Quota Board be established as it would be free from political influence. However, in May 1992 the then Minister of Environmental Affairs and Tourism instructed the Quota Board to allocate "community quotas" in the deep sea hake fishery to "Coloureds" in a transparent attempt to win the Western Cape Provincial election in 1994.¹⁹⁵

¹⁸⁸ An applicant was referred to as an 'exploiter' under the Act which means 'a person to whom a right of exploitation has been granted in terms of section 25'. (Section 1.)

¹⁸⁹ Section 25(1).

¹⁹⁰ Section 25(1).

¹⁹¹ Section 25(2)(b).

¹⁹² Isaacs, Doctoral thesis at 66.

¹⁹³ *Ibid* at 67.

¹⁹⁴ The Fishing Industry Handbook, 1997 and SADSTIA – The South African Deep-Sea Trawling Industry Association, 1998.

¹⁹⁵ Isaacs M 'Small-Scale Fisheries Reform: Expectations, Hopes and Dreams of a Better Life for All' (2006) 30 *Marine Policy* 51 at 52.

On 10 March 1993, the Minister approved the Quota Board Guidelines.¹⁹⁶ The Quota Board Guidelines provided: basic qualification requirements for quota holders;¹⁹⁷ the factors to be taken into account in determining the quantum of individual allocations;¹⁹⁸ for situations where there was an increase in the TAC;¹⁹⁹ the reallocation of quotas to existing quota holders;²⁰⁰ the allocation of quotas to new entrants;²⁰¹ and for the redistribution of quotas.²⁰² The allocations made by the Quota Board were subject to numerous review applications and were often set aside.²⁰³

Between 1992 and 1996 new allocations to previously disadvantaged persons, predominantly granted through community welfare organisations, co-operatives, and strategically placed individuals within fishing communities, were also increased to 44 per cent and 18 per cent in the WCRL and HDST sectors respectively.²⁰⁴

In 1997 the Quota Board Guidelines were revised.²⁰⁵ The Quota Board was empowered to correct anomalies which arose in the past or accommodate new entrants where the total mass of fish available for allocation increased.²⁰⁶ However, in regard to new applicants, the revised guidelines stated that the Quota Board had to give priority to the existing basis for allocations and to stability in the industry.²⁰⁷ The following factors had to be

¹⁹⁶ This was done under section 18(1)(a).

¹⁹⁷ Clause A.

¹⁹⁸ Clause B.

¹⁹⁹ Clause C.

²⁰⁰ Clause D.

²⁰¹ Clause E.

²⁰² Clause G.

²⁰³ For example *Trawler and Line Fisheries Union v the Minister of Environmental Affairs and 4 Others* (CPD Case No 14344/97); *Marine Products Ltd and Another v The Chairman of the Quota Board and Nine Others* (CPD Case No 8773/97); *Coast Trading Company (Pty) LTD and Seven Others v The Chairman of the Quota Board and 36 Others* (CPD Case No 9671/97); *Tuna Marine (Pty) Ltd v Chairman of the Quota Board and 23 Others* (CPD Case No 6854/97); and *Gillion and 3 Others v The Minister of Environmental Affairs and 23 Others* (CPD Case No. 12875/97). See also *Langklip See Produkte (Pty) Ltd and Others v Minister of Environmental Affairs and Tourism and Others* 1999(4) SA 734 (C), which involves an allocation under the MLRA.

²⁰⁴ See n195 above.

²⁰⁵ The Minister had approved it on 14 August 1997.

²⁰⁶ Section 3(a) and (c).

²⁰⁷ Section 4.

considered in determining the quantum of allocations: historic performance or the extent to which the quotas were utilised; product enhancement and the manner in which local consumers were provided for; the treatment of personnel (training and benefits); and the advancement of the community where the quota holder operated.²⁰⁸ However, the treatment of personnel and advancement of the community could only apply after the industry had an opportunity to make proposals regarding the norms that could be used.²⁰⁹

Consequently, although the Quota Board set the path for transformation, the Quota Board had limited scope for manoeuvre. The Quota Board also received a vague mandate from the new ANC government. In addition, the Quota Board faced huge expectations from previously disadvantaged persons to be allocated fishing rights in the hake and other sectors, this despite the Access Rights Technical Committee ('ARTC') concluding that the hake fishery was capital intensive and already fully exploited.²¹⁰ The State's lack of political will left the direction that allocations took under the Quota Board unaltered.²¹¹ New entrants were allocated economically unviable quotas as there was no focus on processing and marketing activities and no institutional structures were put in place to assist fishers.²¹² This resulted in new entrants entering into arrangements with the established industry. These arrangements varied from joint ventures, catching agreements or the hiring and purchasing of vessels.²¹³

In 1994, 93 per cent of the rights to exploit marine resources were in the hands of only eight companies and their subsidiaries.²¹⁴ Only 0,75 per cent of the TAC was awarded to Black companies.²¹⁵ Of the 2700 registered commercial fishing boats in South Africa, 7

²⁰⁸ Section 5(a), (b), (f) and (g).

²⁰⁹ Second part of section 5.

²¹⁰ Nielsen and Hara 'Transformation of South African Industrial Fisheries' *Marine Policy* 30 (2006) 43-50 at 47.

²¹¹ Nielsen and Hara at 48.

²¹² *Ibid.*

²¹³ *Ibid.*

²¹⁴ DEAT Fishing Industry Handbook 2004 (22nd Ed).

²¹⁵ *Ibid.*

per cent were owned by Blacks.²¹⁶ Only 6 per cent of 4000 commercial fishing licences issued were awarded to Blacks.²¹⁷ Only 2 per cent of hake and 2 per cent of WCRL were awarded to small and medium enterprises.²¹⁸ The monopoly enjoyed by existing entrants resulted in the development of vertically integrated industries where harvesting, processing and marketing were combined. These structures made, and still make, it difficult for new entrants to compete successfully and forces them into joint ventures with the established players.²¹⁹

The provisions of the numerous Acts to control and regulate marine living resources and the prevailing political influences at that time, resulted in marine living resources allocations being granted to Whites, although insignificant portions of the TAC were allocated to Coloureds. Consequently, the fishing industry had to be transformed. The manner and mechanism used by the State to achieve this is discussed below.²²⁰

4. **POST-CONSTITUTIONAL DEVELOPMENT**

The post-constitutional developments that have influenced the manner in which DEAT ought to, and has, allocated rights for marine living resources shall be considered in this section. The relevant fundamental human rights enshrined in the *Constitution*; the numerous White Papers published by the State; *NEMA*; the *MLRA*; and the sectoral fisheries policies published under the *MLRA* shall also be discussed.

²¹⁶ Ibid.

²¹⁷ Ibid.

²¹⁸ Ibid.

²¹⁹ See n210 at 44.

²²⁰ See section 4.4.4.1 at 59.

4.1 The Constitutional imperative

The Bill of Rights in the *Constitution* includes an environmental right,²²¹ the right to equality,²²² dignity,²²³ access to food and water,²²⁴ and the right to choose a trade, occupation or profession freely.²²⁵ The State has an overarching responsibility to respect, protect, promote and fulfil the rights in the Bill of Rights.²²⁶ The *Constitution* also recognises that measures must be taken to redress historical imbalances.²²⁷ Provision is made for the preferential treatment of previously disadvantaged groups of persons that were discriminated against on the basis of race, gender, disability or sex.²²⁸ In accordance with this preferential treatment, the courts have also stated that the commitment to transform our society lies at the heart of our constitutional order.²²⁹

The Roman-Dutch law emphasis on ownership contributed to the privatisation of natural resources. The numerous White Papers promulgated by the State sought to address this by affirming the State as custodian of the nation's natural resources. This notion of custodianship or trusteeship was reaffirmed by subsequent legislation relating to natural resources.²³⁰

However, the *Constitution* also provides that no one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.²³¹ Under the *Constitution* property is not limited to land.²³² This is particularly

²²¹ Section 24.

²²² Section 9.

²²³ Section 8.

²²⁴ Section 27.

²²⁵ Section 22.

²²⁶ Section 7(2).

²²⁷ Sections 9 (equality clause) and 25(4) of the *Constitution*.

²²⁸ Section 9 of the *Constitution*.

²²⁹ Chaskalson P in *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC) at par 8.

²³⁰ See for example section 2(4)(o) of *NEMA*, section 2(b) of the *Mineral and Petroleum Resources Development Act* 28 of 2002, sections 3 of the *National Water Act* 36 of 1998 and the *National Environmental Management: Biodiversity Act* 10 of 2004.

²³¹ Section 25(1).

relevant when the State allocates fishing rights or attempts to reallocate rights that were granted to right holders that failed to perform, either in fully exploiting their allocation rights or by failing to transform, prior to expiry of the period for which those rights were granted.²³³ The reallocation of fishing rights under these circumstances may be regarded as an expropriation, and consequently, may require compensation even though this reallocation may be in the public or nation's interest.²³⁴

There is a link between socio-economic rights and the foundational constitutional commitment to dignity, equality and freedom.²³⁵ The success of our constitutional democracy depends on the extent to which meaningful effect can be given to socio-economic rights for the whole population. The environmental right shall be discussed first, then the fundamental human rights of dignity and equality, and then the other socio-economic rights.

4.1.1 Environmental right

The environmental right in the *Constitution* is a fundamental justiciable human right.²³⁶ In *BP Southern Africa v (Pty) Ltd v MEC for Agriculture, Conservation and Land Affairs*²³⁷ ('*BP Southern Africa*') the Court held that the environmental right in the *Constitution* was on par with other socio-economic rights.²³⁸ Section 24 of the *Constitution* provides as follows:

'Everyone has the right-

(a) to an environment that is not harmful to their health or well-being; and

²³² Section 25(4)(b).

²³³ HDST Policy at 16, includes performance monitoring criteria but it is not clear if rights would be reallocated where applicants do not perform well.

²³⁴ Section 25(2).

²³⁵ See *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 (11) BCLR 1169 (CC) at par 24.

²³⁶ See *The Director: Mineral Development, Gauteng Region and Sasol Mining (Pty) Ltd v Save the Vaal Environment and Others* 1999 (2) SA 709 (SCA) at 719 and also *BP Southern Africa (Pty) Ltd v MEC for Agriculture, Conservation, Environment and Land Affairs* 2004 (5) SA 124 (W) at 144.

²³⁷ 2004 (5) SA 124 WLD.

²³⁸ At 143C-D.

- (b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that-
- (i) prevent pollution and ecological degradation;
 - (ii) promote conservation; and
 - (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development. (My emphasis.)

Legislative measures must be implemented to ensure ecologically sustainable development and use of natural resources.²³⁹ In *BP Southern Africa* the applicant sought to have the MECs decision to refuse its application for environmental authorisation in terms of section 22(1) of the *Environment Conservation Act*²⁴⁰ ('the *ECA*') to develop a filling station on one of its properties, reviewed and set aside. The basis for the review application was that the MEC, in considering the socio-economic impacts of the filling station, under the *ECA*, had considered irrelevant factors. The Court held that the determination of the precise measures to be undertaken to fulfill the obligation to take reasonable legislative and other measures fell within the ambit of the State's power.²⁴¹ Furthermore, the Court stated that pure economic principles were no longer the only yardstick to be used, but that cognisance must be taken of intergenerational equity and the sustainable use of resources.²⁴² The Court stated that such an approach would lead to the environment being protected by the adoption of integrated measures where socio-economic concerns are also addressed.²⁴³ The Supreme Court of Appeal in *Director: Mineral Development, Gauteng Region and Sasol Mining (Pty) Ltd v Save the Vaal*

²³⁹ Section 24(b)(iii). Section 29 of the *Constitution of the Republic of South Africa Act* 200 of 1993, that contained the environmental right, did not refer to sustainable development. See also Field's 'Sustainable Development v Environmentalism: Competing paradigms for the South African EIA regime' *SALJ* (2006) Vol 123 at 406.

²⁴⁰ Act 73 of 1989.

²⁴¹ At 142I to 143B.

²⁴² At 143D.

²⁴³ *Bp Southern Africa* at 145. See *contra All the Best Trading CC T/A Parkville Motors, and Others v S N Nayagar Property Development and Construction CC and Others* 2005 (3) SA 396 (T) at 401, where in another filling station review of an environmental authorisation issued under the *ECA*, the Court distinguished this case from *BP Southern Africa* and refused to review and set aside the authorisation as the applicants were seeking to protect only their commercial interests under the *ECA*. The Court held that the *ECA* may not be used to protect commercial interests. See *contra NEMA* that defines 'sustainable development' to mean 'the integration of social, economic and environmental factors into planning, implementation and decision-making so as to ensure that development serves present and future generations'. (Section 1.) (My emphasis.) See also section 2(4)(i) of *NEMA* which states that the 'social, economic and environmental impacts of activities, including disadvantages and benefits, must be considered,

*Environment and Others*²⁴⁴ stated that environmental considerations must be accorded appropriate respect in the administration of South Africa.²⁴⁵ In awarding allocations for exploiting marine living resources the State must consider the impact of its decision on the marine environment.

NEMA defines the environment to mean the surroundings within which humans exist which are made up of the land, water and atmosphere of the earth micro-organisms, plant and animal life and combinations of this and the interrelationship between them as well as the physical, chemical, aesthetic and cultural properties and conditions of these that influence human health and well-being.²⁴⁶ The above-mentioned judgments, with the section 2 principles of *NEMA* which apply to decisions by organs of State that may significantly affect the environment, should ensure that environmental considerations and the environmental right inform decisions regarding activities that may significantly affect the environment. The Minister, in allocating fishing rights, must consider the impact that his decision will have on the environment and on socio-economic considerations.

Although the unsustainable use of fishery resources may no longer be permissible, it is equally important that socio-economic considerations form part of the decision-making process when the Minister allocates rights for marine living resources. The Minister must strike a balance between sustainability and socio-economic considerations.

4.1.2 Fundamental Human Rights

The environmental right must be balanced against the other fundamental human rights contained in the Bill of Rights of the *Constitution*. DEAT, when drafting its policies for the numerous fisheries sectors had to consider the fundamental human rights in the *Constitution*. For the purposes of this dissertation, the rights to equality; dignity; access

assessed and evaluated, and decisions must be appropriate in the light of such consideration and assessment.’ (My emphasis.)

²⁴⁴ 1999 (2) SA 709.

²⁴⁵ At 719.

²⁴⁶ Section 1.

to food; and freedom of occupation; and the importance of these rights in the context of the allocation process are considered.

4.1.2.1 Equality

Section 9 of the *Constitution* states that:

- (1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
- (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken. (My emphasis.)

As already mentioned above, the *Constitution* and international law makes provision for previously disadvantaged persons to receive preferential treatment.²⁴⁷ However, even within those previously disadvantaged categories of persons identified, the levels of discrimination may have been significantly different and therefore redress measures may need to differentiate between different degrees of previous discrimination. This issue has been considered in two judgments.

In *Government of the Republic of South Africa and Others v Grootboom and Others*,²⁴⁸ ('*Grootboom* case') the Court noted the preferential treatment that Coloured persons received in relation to Black persons with regard to the housing policy in the Western Cape Province.²⁴⁹ In *Motala v University of Natal*²⁵⁰ the University accepted a limited number of Indian students so that it may accept more African students into its medical school. The rationale for this different treatment was that African students, when compared with Indian students, were subjected to poorer standards of education. The Court endorsed the approach adopted by the University and held that the program was not unfair.²⁵¹ De Waal is of the view that the Court failed to consider whether the program

²⁴⁷ See sections 2.1.2.2; 2.1.2.3 and 2.3 discussed at 12-3 and 16.

²⁴⁸ 2001 (1) SA 46 (CC).

²⁴⁹ At 77 par 30.

²⁵⁰ 1995 (3) BCLR 374 (D).

²⁵¹ At 383.

was rational and designed to achieve equality.²⁵² Although De Waal states that it is perfectly legitimate to apply affirmative action measures in proportion to the degree of disadvantaged suffered such a program would have to focus on the second requirement of the affirmative action clause in section 9(2) of the *Constitution* and ensure that the program is rational and carefully construed to achieve equality.²⁵³

This is important in relation to the allocation of marine living resources, as Black people when compared with Coloured people, were to a large extent denied access to marine living resources. This is partly because a large proportion of the fishing industry sector is located in the Western Cape Province, a province that, in the past, had preferential labour policies for Coloured people. Black women applicants should then also have received more preferential treatment as they experienced more discrimination than their male counterparts. On the basis of the decision in *Motala*, DEAT could theoretically discriminate between Black and Coloured applicants for fishing right allocations. Such a program would have to be rational and be designed to achieve equality.

This approach was not, however, adopted by DEAT. DEAT has rather adopted a ‘one size fits all’ approach, whereby any previously disadvantaged person can apply and is awarded the same points for being Black. No distinction was made between the different degree of disadvantage to which applicants had previously been subjected on the basis of race or gender. The approach adopted by DEAT is in line with the *Broad-Based Black Economic Empowerment Act*²⁵⁴ where ‘Black people’ means ‘Africans, Coloureds and Indians’.²⁵⁵ Adding a further requirement, that previously disadvantaged applicants are to be scored significantly differently on the basis of race and or gender, would have further complicated an already controversial process. The approach adopted by DEAT was the least controversial approach, but arguably, a more nuanced approach could have been adopted on the basis of *Motala*.

²⁵² De Waal *et al*, *Bill of Rights Handbook* (2005) at 267.

²⁵³ *Ibid*.

²⁵⁴ Act 53 of 2003.

²⁵⁵ Section 1.

4.1.2.2 Dignity

The *Constitution* states that ‘everyone has inherent dignity and the right to have their dignity respected and protected.’²⁵⁶ Dignity demands that each person develops his or her talents optimally.²⁵⁷ The Supreme Court of Appeal and the Constitutional Court were disinclined to use dignity in a manner that diminished the deleterious consequences of criminal sanctions imposed on those who had no choice but to engage in morally reprehensible behaviour in order to survive.²⁵⁸ In *Khosa v Minister of Social Development; Mohlondé v Minister of Social Development*²⁵⁹ Mokgoro J, in dealing with the exclusion of permanent residents from entitlement to social grants, stated that ‘the exclusion of permanent residents in need of social security programs forces them into relationships of dependency ... likely to have a serious impact on the dignity of the permanent residents concerned who are cast in the role of supplicants.’ In the *Grootboom* case, adults and children were evicted from private land onto which they had moved to escape the appalling conditions in an informal settlement.²⁶⁰ After they were evicted, they occupied a sports field but were not able to erect any shelters as their building material had been destroyed. They applied to the Cape High Court for an order that the State must provide them with temporary shelter. The Constitutional Court, contrary to the Cape High Court, held that the State’s housing policy did not comply with section 26(2) of the *Constitution*. Section 26(2) provides that ‘the State must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.’ The housing policy was held to be unreasonable as it did not provide short-term relief to those in desperate need.²⁶¹ The Court held that

²⁵⁶ Section 10. In *S v Makwanyane* 1995 (3) SA 391 (CC) at par 76, O’Regan J stated that ‘...a right to dignity is an acknowledgement of the intrinsic worth of human beings: human beings are entitled to be treated worthy of respect and concern.’

²⁵⁷ Woolman *et al*, *Constitutional Law of South Africa*, (Juta) 2nd Ed Vol 2 at 36-50.

²⁵⁸ *Ibid* at 36-47.

²⁵⁹ 2004 (6) SA 505 (CC), 538 at par 76.

²⁶⁰ Note 248 at 53 par 3.

²⁶¹ *Ibid* at 80 par 69.

‘society must seek to ensure that the basic necessities of life are provided to all if it is to be a society based on dignity, equality and freedom.’²⁶²

The right to dignity may be infringed as a result of environmental degradation or where environmental protection receives pre-eminence at the cost of human dignity.²⁶³ In the former instance this may occur where effluent is discharged into the drinking water of a nearby village negatively impacting on the health of the community. In the latter instance this may occur where access rights to fishing grounds are restricted in order to protect the marine resource, to the detriment of the community.

This latter infringement of the right to dignity is relevant for allocation of rights in the WCRL and HDST sectors. Those fishers who are not allocated rights or prevented from continuing with their livelihoods on the basis of environmental protection of the resource may argue that by not being able to access the resource, they are being denied the basic necessities of life. Furthermore, this forces them into the role of supplicants which negatively impacts on their dignity. These fishers may then have no choice, but are forced to break the law in order to survive and secure the basic necessities of life.

DEAT, in allocating rights must ensure that fishers who are dependant on marine resources are treated as worthy of respect and concern. The impact that the non-allocation of fishing rights may have on these fishers must be considered as it may amount to an infringement of their right to dignity.

4.1.3 Socio-economic rights

As already mentioned, the *Constitution* makes provision for upholding socio-economic rights. The right to access to sufficient food²⁶⁴ and the right to choose an occupation are considered below.²⁶⁵ Socio-economic rights must be interpreted in their textual, social

²⁶² Ibid at 69 par 44.

²⁶³ Woolman *et al*, *Constitutional Law of South Africa*, (Juta) 2nd Ed Vol 2 at 50-34.

²⁶⁴ Section 27(1)(b).

²⁶⁵ Section 22.

and historical context.²⁶⁶ The courts may prevent the State from taking measures that infringe upon socio-economic rights, especially where those measures are retrogressive.²⁶⁷ The State has an obligation to balance the various potentially competing fundamental human rights when considering allocations. The State first has to manage and protect the natural environment, and secondly, provide adequate conditions for access to food.

4.1.3.1 Food

The right to food is entrenched in numerous international treaties and agreements.²⁶⁸ Food security depends on two things, the existence of sufficient supply of food and on the ability of people to acquire that food.²⁶⁹ The *SADC Regional Food Security Strategy Framework* defines food security to mean ‘ensuring that all members of a household, nation and region have access to an adequate diet to lead an active and normal life.’²⁷⁰

Section 27 of the *Constitution* states that:

- (1) Everyone has the right to have access to -
 - (a) ...
 - (b) sufficient food and water; ...
- (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights. (My emphasis.)

The State has a duty to take steps to the maximum of its available resources progressively to achieve the full realisation of this right.²⁷¹ A court may evaluate the reasonableness of the measures adopted at the legislative and implementation program level.²⁷² The legislation and policies or programs undertaken under that legislation must therefore be

²⁶⁶ In *Minister of Health and Others v Treatment Action Campaign* 2002 (5) SA 721 (CC), 736 par 24 and the *Grootboom* case at 61 par 22.

²⁶⁷ See sections 24(b) and 27(2) of the *Constitution* cited at 4.1.1 at 35 and 4.1.3.1 at 42.

²⁶⁸ For example see article 11 of the ICESCR.

²⁶⁹ See *Woolman et al* at 56C-3.

²⁷⁰ Alternative Information and Development Centre at <http://www.aidc.org.za>. (Accessed on March 2006).

²⁷¹ Article 2 of the ICESCR.

²⁷² In *Grootboom* at 85 par 91.

reasonable. Furthermore, reasonableness must be determined on a case-by-case basis²⁷³ and is a higher standard than that called for in a rationality review under section 9(1) of the *Constitution*.²⁷⁴ In *Grootboom*, reasonableness was held to mean that those most in need of protection must not be excluded from being provided with housing.²⁷⁵ In *Minister of Health and Others v Treatment Action Campaign*²⁷⁶ the provision of nevirapine at a few test centres to pregnant mothers to reduce the transmission of HIV from mother to child, was held to be inadequate as a significant segment of society was excluded from treatment.²⁷⁷

The failure of the State to implement the *MLRA*, and the consequent interference with rights of artisanal fishers to access to the sea and the right to obtain food from the sea, is on the face of it, a violation of the duty to respect these fishers' right to access to sufficient food.²⁷⁸ This is particularly important for the WCRL fishers who may be dependant on WCRL for food. However, in the absence of available marine resources, the State's failure to fulfil the right to access to food would not be a violation of this right.²⁷⁹ In any event, the right of access to food may also be limited by law of general application where it is reasonable and justifiable to do so in a society based on human dignity, equality and freedom.²⁸⁰

Theoretically, the policies adopted by DEAT which guide fishing rights allocations, should satisfy this threshold. Here particular regard must be had to the effect of such policies on those most in need, namely the artisanal fishers.

²⁷³ Ibid at 85 par 92.

²⁷⁴ *Bel Porto School Governing Body and Others v Premier, Western Cape and Another* 2002 (3) SCA 265 CC at 282 par 46.

²⁷⁵ See n261 above.

²⁷⁶ See n266 above.

²⁷⁷ At par 68.

²⁷⁸ Although this view, expressed by Brand in *Woolman et al Constitutional Law of South Africa*, (Juta) 2nd Ed Vol 2 at 56C-13, referred to subsistence fishers, in my view, it also applies to artisanal fishers.

²⁷⁹ De Waal at 583.

²⁸⁰ Section 36 of the *Constitution*.

4.1.3.2 Freedom of occupation

South African citizens have the right to choose their occupation freely.²⁸¹ Section 22 states that

[e]very citizen has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law. (My emphasis.)

The use of ‘citizen’ indicates that this right applies to individuals and not to juristic persons.²⁸² The courts have also stated that section 22 was designed to prevent the perpetuation of the state of affairs under Apartheid.²⁸³

In *Van Rensburg v South African Post Office Ltd*²⁸⁴ Jones J stated that this right must be interpreted within the framework of any lawful regulation which controls its practice,²⁸⁵ the test being that such restrictions must be reasonable.²⁸⁶ Restrictions may also be justified in terms of section 36 of the *Constitution* which provides for the limitation of rights in circumstances where it is reasonable and justifiable in an open and democratic society based on human dignity and equality to do so.

Consequently, the right to choose an occupation freely is not an unqualified freedom.²⁸⁷ De Waal is of the view that occupational freedom is aimed at helping individuals to live profitable, dignified and fulfilling lives.²⁸⁸ The rights of WCRL fishers and trawler fishers engaged in the HDST sector may respectively be infringed if DEAT does not grant allocations to natural and juristic persons. For the HDST sector, not only may the rights of the trawler fishers be infringed, but also the rights of those persons engaged in the processing of fish.

²⁸¹ Section 22.

²⁸² Woolman *et al.*

²⁸³ See *JR 1013 Investments CC and Others v Minister of Safety and Security and Others* 1997 (7) BCLR 950 at 980E.

²⁸⁴ 1998 (10) BCLR 1307 (E).

²⁸⁵ At 1322D.

²⁸⁶ At 1322E.

²⁸⁷ See *Law Society of the Transvaal v Machaka and Others* 1998 (4) SA 413 at 416 (T) where the court struck attorneys from the roll and rejected the argument that by doing so it was infringing on their rights to choose a profession.

²⁸⁸ De Waal at 491.

The High Court sitting as the Equality Court under the *Promotion of Equality and Prevention of Unfair Discrimination Act*²⁸⁹ ('Equality Act') and as High Court in the matter of *Kenneth George and Others v the Minister of Environmental Affairs and Tourism*²⁹⁰ is considering such a matter. The applicants' complaint is that the Minister had failed to make adequate provision for artisanal fishers in the fishing rights policies published under the *MLRA*. This, the applicant's contend, resulted in them being deprived of access to marine living resources, and consequently, their livelihood and traditional way of life. The purpose of the application is to compel the Minister to make proper and adequate provision for traditional artisanal fishers and other members of traditional artisanal fishing communities who similarly do not have access to marine living resources. The applicants contend that the Minister's failure to make adequate provision for artisanal fishers violates the prohibition of unfair discrimination in s 6 of the *Equality Act* which states that '[n]either the State nor any person may unfairly discriminate against any person.'

As mentioned, the matter is being heard in the High Court sitting as the Equality Court. This is so, because although the facts are the same, the applicants' claims are based on a range of different causes of action under the *Equality Act*, the *Constitution*, the *MLRA*, *NEMA* and the *Promotion of Administrative Justice Act*.²⁹¹ This matter has not been decided yet.²⁹²

DEAT, in drafting and implementing its policies for the allocation of fishing rights, must consider the impact that its decisions would have on the environment, people's dignity and socio-economic rights. Where these rights are conflicting, they must be weighed against each other and the decisions made would have to be appropriate under the

²⁸⁹ Act 4 of 2000.

²⁹⁰ Equality Court Case No: EC1/2005f. See also paragraph 4 of the DEATs newsletter, *Fish Rights about South Africa's Commercial Fishing Rights Allocations: 2005*, Vol 13 October 2005.

²⁹¹ Act 3 of 2000.

²⁹² The applicants asked the Equality Court to hold an inquiry into their causes of action under the *Equality Act* before their High Court matter was to be considered. In *Minister of Environmental Affairs and Tourism v George* [2006] SCA 57, the Minister sought to block this application. The Minister had asked the Equality Court to refer the entire matter to

circumstances. Allocations are always difficult. Including transformation in the process adds a further layer of complexity.

4.2 White Papers

White papers are official policy documents of the State, and as such, must be implemented by State officials.²⁹³ The relevant provisions of the *White Paper on Environmental Management Policy for South Africa*²⁹⁴ ('the Environmental Management Policy'), the *White Paper on the Conservation and Sustainable Use of South Africa's Biological Diversity*²⁹⁵ ('White Paper on Biological Diversity') and the *White Paper for Sustainable Coastal Development in South Africa, 2000* ('White Paper on Coastal Development') are discussed first as they deal with the environment in general. Thereafter, the *White Paper on Marine Fisheries* shall be discussed.

4.2.1 Environmental White papers

The above-mentioned White Papers establish the policy framework for the new direction that the State was, and is, intending to take. The Environmental Management Policy sets out the vision, principles, objectives and regulatory approach that the State will use for environmental management.²⁹⁶ It emphasises solutions that promote economic and environmental gains, particularly for previously disadvantaged communities.²⁹⁷ The Environmental Management Policy states that natural resources are public assets that belong to the nation's people and that the State must ensure that its policies do not result

the High Court. The Equality Court refused. The Minister appealed against this decision to the Supreme Court of Appeal but the Minister's appeal was dismissed.

²⁹³ Section 85 of the *Constitution* vests executive authority in the President who must exercise executive authority with other Members of the Cabinet by developing and implementing national policy and preparing of initiating legislation. See also Currie, Iain and De Waal *The New Constitutional and Administrative Law, Volume I: Constitutional Law*, Juta Law, 2001, at 248.

²⁹⁴ GenN 749 in *Government Gazette* No. 18894 of 15 May 1998.

²⁹⁵ GenN 1095 in *Government Gazette* No. 18163 of 28 July 1997.

²⁹⁶ At 9.

²⁹⁷ At 16.

in access to those resources being denied to its people.²⁹⁸ This is re-iterated in the White Paper on Biological Diversity which has as its guiding principles the free and equitable distribution of benefits, with the up-liftment of previously disadvantaged communities as an important criterion.²⁹⁹ The White Paper on Biological Diversity states that where people's historical rights of access to natural resources were constrained, this should be reviewed.³⁰⁰ Furthermore, the State is regarded as the custodian of natural resources and must ensure equitable access to those resources in a manner that meets the basic needs and ensures the well-being of its people.³⁰¹ The White Paper on Coastal Development recognises that the sea and the coast is a national asset and that the State is the custodian of the sea and the coast.³⁰² Furthermore, the right of the public (especially coastal communities) to equitable access to the opportunities and benefits of the coast, on a managed basis is also provided for.³⁰³ The Environmental Management Policy also recognises that the exploitation of fisheries resources must make provision for the benefit of previously disadvantaged communities.³⁰⁴

The above provisions in these White Papers recognise the State's role as custodian of the natural resources, which include marine living resources, and that these resources are for the benefit of all citizens and should be used in an equitable manner. Measures to promote or up-lift previously disadvantaged communities or persons, especially where these communities or persons were denied access to natural resources, must be taken. In the absence of legislation that specifically provides for transformation, the Minister and his officials, when drafting the policy and allocating rights, are bound by the goals and objectives of these White Papers.

²⁹⁸ At 20.

²⁹⁹ Par 2.4.4.

³⁰⁰ Ibid.

³⁰¹ At 21 and 22.

³⁰² Goals B1 and B4.

³⁰³ Goals B1 and C1.

³⁰⁴ Goal 2 at 32.

4.2.2 The White Paper on Marine Fisheries

In 1995, the Fisheries Policy Development Committee ('FPDC') was established to develop and draft a new policy for transforming the fishing industry. The mandate of the FPDC in developing this policy was to ensure that all sectors in the fishing industry, including disadvantaged fishing communities, participated and that the process was transparent and democratic.³⁰⁵ Unfortunately, the process was dominated by established industry that, together with organised labour, was in favour of long-term rights in the form of individual transferable quotas and resisted interference in the allocation of rights.³⁰⁶

The objectives of the *White Paper on Marine Fisheries* include improving the overall contribution from the fishing industry to the long-term vision for a democratic South Africa and the redistribution of income and opportunities in favour of the poor.³⁰⁷ These objectives are based on the fact that marine living resources are national assets and the heritage of all South Africans. The *White Paper on Marine Fisheries* states that: marine living resources regulations must ensure that the utilisation of these resources is undertaken on a long-term sustainable basis resulting in optimal social and economic benefits for people;³⁰⁸ the management and development of fisheries should comply with the *Constitution*;³⁰⁹ access to marine living resources is fair and equitable;³¹⁰ and that historical imbalances are addressed.³¹¹ The mechanisms proposed to address these issues include a fairer system of allocation, greater access for those who were previously denied access rights, and reducing pressure on marine living resources.³¹² The *White Paper on*

³⁰⁵ Nielsen and Hara at 46.

³⁰⁶ Ibid.

³⁰⁷ *White Paper on Marine Fisheries* at 3.

³⁰⁸ Ibid at 13.

³⁰⁹ Ibid at 15.

³¹⁰ Ibid.

³¹¹ Ibid at 16.

³¹² Ibid at 14.

Marine Fisheries states that the (then) existing system of access rights had to be fundamentally restructured.³¹³

Numerous methods of empowerment are considered in the *White Paper on Marine Fisheries*. These include expanding equity ownership in companies and encouraging small-scale fishing operations. The *White Paper* recommends that implementation of the restructuring process take place in two phases: the establishment of a commercial public company to which allocations would be made; and the establishment of an implementation committee of finite life.³¹⁴ Provision is made for transformation by allowing new entrants to enter the fishing industry and also by allowing previously advantaged companies from undertaking internal transformation.³¹⁵ Transformation, in this context, includes transferring significant equity to previously disadvantaged persons and communities.³¹⁶ The FPDC could, however, not agree on access rights and the ARTC was appointed.³¹⁷

The ARTC primarily focused on technical and scientific issues but it also made recommendations on socio-economic issues.³¹⁸ Instead of a people-centred approach, the ARTC adopted a top-down resource-related approach.³¹⁹ This approach committed the Minister to maintain a balance between allowing new right holders into the industry and the stability of the industry, particularly in the industrial sector.³²⁰ According to Nielsen and Hara, this resulted in the reallocation of fishing rights primarily being achieved through the inflated surplus that was generated by currency devaluation.³²¹

³¹³ Ibid.

³¹⁴ Ibid at 19.

³¹⁵ Ibid.

³¹⁶ Ibid at 20.

³¹⁷ Ibid.

³¹⁸ Nielsen and Hara at 46.

³¹⁹ Ibid.

³²⁰ Ibid.

³²¹ Ibid.

The White Papers sought to redress the imbalances that were created in the past, which imbalances were perpetuated and enforced under the legislative regime enforced during this period. Placing the transformation process of the fishing industry in the hands of scientists and administrative incumbents at MCM who supported the apartheid state, contributed to the chaos and crises facing the MCM administration during the first three years of implementing the *White Paper on Marine Fisheries*.³²² It appears that MCM was not suited for the formidable task of restructuring the industry and seemingly fell short in nearly all respects.³²³

The *MLRA* incorporated some of the measures mentioned in the *White Paper on Marine Fisheries* to redress the past. However, some measures were never implemented or only partially implemented. This is discussed further below.³²⁴

4.3 *NEMA*

NEMA was enacted to give effect to the Environmental Management Policy. *NEMA* is framework legislation that provides for co-operative environmental governance by establishing principles for decision-making on matters that may significantly affect the environment.³²⁵ The principles, which are set out in section 2 of *NEMA*, apply throughout the State and to the actions of all organs of state that may significantly affect that environment.³²⁶ These principles guide the interpretation, administration and implementation of any other law concerned with the protection or management of the environment and applies alongside all other appropriate and relevant considerations.³²⁷ The *MLRA* is concerned with the protection and management of the marine environment. Consequently, decisions made in terms of the *MLRA* must be consistent with the *NEMA*

³²² Isaacs doctoral thesis at 135.

³²³ Ibid.

³²⁴ See section 4.4. at 52 below.

³²⁵ Long title.

³²⁶ See *Minister of Public Works and Others v Kyalami Ridge Environmental Association and Another* 2001 (3) SA 1151 (CC) at 1179 par 74.

³²⁷ Section 2(1)(a) and (e).

principles as these principles apply alongside other relevant considerations. These other relevant considerations would, for example, include the section 2 principles and transformation requirement of the *MLRA*. Furthermore, 'actions' are widely defined in *NEMA*, and include policies, programmes, plans and projects.³²⁸ The Minister's decisions must not only be in line with the *NEMA* principles, but the policies published by DEAT must also be consistent with these principles.

The State is also required to respect, protect, promote and fulfil the social, economic and environmental rights of everyone and must strive to meet the basic needs of previously disadvantaged communities.³²⁹ Equitable access to environmental resources and special measures to ensure access for persons disadvantaged by unfair discrimination may also be taken.³³⁰ Furthermore, decisions must take into account the interests, needs and values of all interested and affected parties; community well-being and empowerment must be promoted; and the social, economic and environmental impacts of activities, including disadvantages and benefits, must be considered, assessed and evaluated.³³¹ Lastly, the vital role of women in environmental management and development must be recognised and their full participation must be promoted.³³²

NEMA recognises that measures in order to promote previously disadvantaged persons or communities may be taken and that community well-being and empowerment must be promoted. This is particularly important for the WCRL sector where fishing communities on the West Coast were historically involved in the harvesting of WCRL, but were granted insignificant proportions of the WCRL TAC. DEAT's policies and the allocation of fishing rights must be made with regard not only to the principles in the *MLRA*, but also to the *NEMA* principles.

³²⁸ Section 1.

³²⁹ Preamble.

³³⁰ Section 2(4)(d).

³³¹ Sections 2(4)(g), (h) and (i).

³³² Section 2(4)(q).

4.4 *MLRA*

The *MLRA* was enacted to give effect to the recommendations made in the *White Paper on Marine Fisheries*. The aim of the *MLRA* is to provide for the exercise of control over marine living resources in a fair and equitable manner and for the benefit of all the citizens of South Africa.³³³ The *MLRA* applies to 'fish' which is broadly defined as marine living resources of the sea and seashore.³³⁴ In respect of persons, the *MLRA* applies to South African waters³³⁵ which include the seashore³³⁶ and internal waters³³⁷ up to the EEZ and continental shelf,³³⁸ and beyond that to South African fishing vessels.³³⁹

4.4.1 Granting of rights

The *MLRA* provides for four categories of fishing. These categories are commercial fishing; subsistence fishing;³⁴⁰ recreational fishing;³⁴¹ and foreign fishing.³⁴² In this dissertation, only commercial fishing will be discussed. Commercial fishing means fishing for any of the species which have been determined by the Minister in terms of section 14 of the *MLRA* to be subject to the allowable commercial catch or total applied

³³³ Long title.

³³⁴ Section 1. 'Fish' means 'the marine living resources of the sea and the seashore, including any aquatic plant or animal whether piscine or not, and any mollusc, crustacean, coral, sponge, holothurian or other echinoderm, reptile and marine mammal, and includes their eggs, larvae and all juvenile stages, but does not include sea birds and seals'.

³³⁵ 'South African waters' means 'the seashore, internal waters, territorial waters, the exclusive economic zone, ... and such waters include tidal lagoons and tidal rivers in which a rise and fall of the water level takes place as a result of the tides'. (Section 1).

³³⁶ The *MLRA* refers to the meaning in section 1 of the *Sea-shore Act*, 1935 (Act 21 of 1935) which states that 'seashore' means 'the water and the land between the low-water mark and the high-water mark'. (Section 1.)

³³⁷ For internal waters, the *MLRA* refers to the meaning in section 3 of the *Maritime Zones Act*, 1994 (Act 15 of 1994) which states that the 'internal waters of the Republic shall comprise (a) all waters landward of the baselines; and (b) all harbours.' (Section 3(1).)

³³⁸ Section 3(1)(a) read with section 1.

³³⁹ Section 3(1)(b).

³⁴⁰ DEAT published a draft policy for the allocation and management of Medium-Term Subsistence Fishing Rights (GenN 1679 in *Government Gazette* No. 29391 of 17 November 2006).

³⁴¹ 'Recreational fishing' means, 'any fishing done for leisure or sport and not for sale, barter, earnings or gain'. (Section 1.)

³⁴² See section 14(2).

effort ('TAE'),³⁴³ or parts of both.³⁴⁴ Hake and WCRL are subject to the allowable commercial catch. The Minister determines the annual TAC or the TAE, of a species or group of species, or a combination of the two,³⁴⁵ and the portions to be allocated to the above four categories of fishers.³⁴⁶ The Minister may also determine that the TAC is nil.³⁴⁷

Commercial fishing may only be undertaken once the Minister has granted an applicant a right to undertake commercial fishing.³⁴⁸ Section 18 states that:

- (1) No person shall undertake commercial fishing or subsistence fishing, engage in mariculture or operate a fish processing establishment unless a right to undertake ... such an activity ... 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 need to permit new entrants, particularly those from historically disadvantaged sectors of society.³⁴⁹
- (6) All rights granted in terms of this section shall be valid for the period determined by the Minister, which period shall not exceed 15 years, whereafter it shall automatically terminate and revert back to the State to be reallocated in terms of the provisions of this Act relating to the allocation of such rights. (My emphasis.)

³⁴³ 'TAE' means 'means the maximum number of fishing vessels, the type, size and engine power thereof or the fishing method applied thereby for which fishing vessel licences or permits to fish may be issued for individual species or groups of species, or the maximum number of persons on board a fishing vessel for which fishing licences or permits may be issued to fish individual species or groups of species'. (Section 1.)

³⁴⁴ Section 1.

³⁴⁵ Section 14(1).

³⁴⁶ Section 14(1) and (2).

³⁴⁷ Section 14(5). In *Minister of Environmental Affairs and Tourism and Others v Atlantic Fishing Enterprises (Pty) Ltd and Others* 2004 (3) SA 176 (SCA), Streicher JA however remarked that a right to undertake commercial fishing without an allocation under section 14 is not a right to fish at all (183 at par 19).

³⁴⁸ Section 18(1).

³⁴⁹ Amendments have been proposed to section 18(5). The amended section would read as follows:

'In granting any right referred to in subsection (1), the Minister shall have particular regard to the objective and principle referred to in section 2(j).' (See section 4 of the Marine Living Resources Amendment Bill [B16-2005].)

There are two steps that are to be completed in order to acquire and exercise rights under the *MLRA*. First, the applicant must be awarded a section 18(1) right, and secondly, a section 13 permit to exercise that right must also be obtained.³⁵⁰ Permits may be issued subject to conditions and for a period not exceeding one year.³⁵¹ Permit conditions may therefore be used to promote and ensure that transformation continues. Failing to comply with permit conditions could result in refusal of a permit and consequently a denial of access rights. In *Hout Bay Fishing Industries (Pty) Ltd and Others v Minister for Environmental Affairs and Tourism and Others*³⁵² the Court had to consider whether the Minister acted capriciously and arbitrarily in cancelling fishing licences issued to applicants in the South Coast Rock Lobster sector. The Court stated that the Minister has 'very wide powers in terms of section 13(2) to impose conditions when issuing permits.'³⁵³ Conditions to promote and ensure continuous transformation in the fisheries industry may be imposed as part of the permit conditions. It is not clear to what extent DEAT has used this mechanism, if at all, to promote continued transformation. The proposed amendment to section 18(7) of the *MLRA* seems to support the view that this mechanism has not been used by DEAT.³⁵⁴

4.4.1.1 Nature of section 18 rights

In terms of the General Fishery Policy, section 18 rights are described as statutory permissions to harvest marine resources and not as property rights.³⁵⁵ Therefore, cancellation or revocation of section 18 rights would not amount to expropriation under section 25 of the *Constitution* or the *Expropriation Act*.³⁵⁶ This conclusion seems to be supported by section 18(6) of the *MLRA* which states that the rights are valid for a specific period only and on expiry of this period, the rights automatically terminate and

³⁵⁰ Section 13(1).

³⁵¹ Section 13(2).

³⁵² [2001] JOL 8449 (C).

³⁵³ At 10.

³⁵⁴ See section 4.4.1.1 below.

³⁵⁵ At 14 par 6.

³⁵⁶ Act 63 of 1975.

revert to the State. This is contrary to the view expressed by Glazewski³⁵⁷ who regards fishing allocation rights as property which consequently fall under the protection of section 25 of the *Constitution*.³⁵⁸ In *Minister of Environmental Affairs and Tourism and Others v Atlantic Fishing Enterprises (Pty) Ltd and Others*,³⁵⁹ when describing the nature of section 18 rights, the Court stated that before any commercial fishing rights are granted, applicants have a contingent right to the TAC in the wide sense, which was in fact held not a right at all.³⁶⁰ However, on appeal, and in instances where the applicants are to share in the TAC remainder after the finalisation of appeals, successful applicants have a right, albeit a contingent (conditional) right, to the portion of the TAC reserved for allocations on appeal.³⁶¹

The distinction between statutory permissions and property rights is important, as it may affect the manner in which the State might attempt to impose transformation measures after the Minister has granted long-term rights to applicants. If the long-term rights so granted are property rights, then any revocation of those rights prior to the termination of the period for which the rights are granted under section 18 would amount to expropriation. The State would have to compensate those right holders where those rights are prematurely terminated. However, if these long-term rights are statutory permissions, then no compensation would be required where those rights are prematurely terminated.

In order to address this the Minister has proposed that certain amendments be made to section 18(7).³⁶² The amended section 18(7) would read as follows:

³⁵⁷ Glazewski *Environmental Law in South Africa* Butterworths (2nd Ed) par 13.5.1.2 at 412.

³⁵⁸ In regard to minerals section 5(1) of the *Minerals and Petroleum Resources Development Act* 28 of 2002 states that a new order right granted in terms of that Act is a limited real right in respect of the mineral or petroleum and the land to which such right relates.

³⁵⁹ 2004 (3) SA 176 (SCA).

³⁶⁰ At 183 par 16.

³⁶¹ *Ibid.*

³⁶² Section 4(c) of the *Marine Living Resources Amendment Bill* [B16-2005].

The Minister may [determine] grant rights subject to conditions that he or she determines, including conditions in respect of sustainable conservation and management measures, [including] the use of a particular type of vessel or gear, or the area of fishing[, to which a right may be subject].³⁶³ (My emphasis.)

This amendment would allow the Minister to grant rights subject to conditions which, as stated in the Memorandum of the Bill, would be useful to grant rights subject to internal transformation criteria.³⁶⁴ However, section 28 states where the holder of any right or permit contravenes or fails to comply with a condition imposed in the right or permit,³⁶⁵ the right or permit may be revoked, cancelled or the conditions may be altered.³⁶⁶ The Minister may therefore already include conditions in the right or permit that would promote transformation. Non-compliance with these conditions may result in the cancellation of the rights.

4.4.2 Objectives and principles

The Minister in granting rights and permits under the *MLRA* must have regard to the principles and objectives in section 2 of the *MLRA*. The Minister must consider:

- (a) the need to achieve optimum utilisation and ecologically sustainable development of marine living resources;
- (b) the need to conserve marine living resources for both present and future generations;
- (c) the need to apply precautionary approaches in respect of the management and development of marine living resources;
- (d) the need to utilise marine living resources to achieve economic growth, human resource development, capacity building within fisheries and mariculture branches, employment creation and a sound ecological balance consistent with the development objectives of the national government;
- (e) the need to protect the ecosystem as a whole, including species which are not targeted for exploitation;
- (f) the need to preserve marine biodiversity;

³⁶³ The words in brackets would be deleted and the words underlined would be inserted into the *MLRA*.

³⁶⁴ Section 2.1 of the Memorandum.

³⁶⁵ Section 28(1)(b).

³⁶⁶ Section 28(3)(a), (c) or (d).

- (g) the need to minimise marine pollution;
- (h) the need to achieve to the extent practicable a broad and accountable participation in the decision-making processes provided for in this Act;
- (i) any relevant obligation of the national government or the Republic in terms of any international agreement or applicable rule of international law; and
- (j) the need to restructure the fishing industry to address historical imbalances and to achieve equity within all branches of the fishing industry. (My emphasis.)

There is no hierarchy in terms of which these principles and objectives are to be applied. However, in *Phambili Fishing (Pty) Ltd and Bato Star v the Minister of Environmental Affairs and Tourism*,³⁶⁷ Ngcobo J stated that in applying the section 2 principles the decision-maker had firstly to determine the TAC at which stage sections 2(a)-(i) would be of particular importance.³⁶⁸ The second stage was to make the allocations. It was at this latter stage that the objective to transform the industry assumed prominence.³⁶⁹

4.4.3 The 1999 allocation of fishing rights

In the 1999 allocation of fishing rights, the State attempted to consolidate the HDST by giving existing new entrants larger quotas and by removing paper quota holders.³⁷⁰ This move proved unpopular among first-time entrants and paper quota holders. Bowing under intensive lobbying from influential and powerful stakeholders and politicians, this approach was abandoned.³⁷¹ Labour unions and established industry joined forces in order to protect employment opportunities in the established industry amid concerns that small and medium enterprises would not be able to generate the same amount of employment opportunities.³⁷²

³⁶⁷ 2004 (4) SA 490 (CC).

³⁶⁸ At 531 par 101.

³⁶⁹ Ibid at par 102.

³⁷⁰ See n34 for the meaning of the term 'new entrant'. 'Paper quota holder', although not defined, refers to those quota holders who do not participate in catching their quota but out sources it to third party. In other words, the quota holder does not catch his quota but uses someone else to do so.

³⁷¹ Nielsen and Hara at 48.

³⁷² Ibid.

In 2001, medium-term right allocations were introduced for 2002-2005.³⁷³ The transferable nature of the fishing rights enabled established companies to buy up quotas issued to new entrants.³⁷⁴ In many instances Black investors acted as fronts for established companies.³⁷⁵ In the HDST sector the medium-term rights allocation records show that 74 per cent of participants were Black-owned and managed with 42 per cent of right holders being small and medium-sized enterprises.³⁷⁶ Nielsen and Hara are of the view that although it appeared that transformation was taking place within the hake industry, the industry was still being controlled by a small number of companies.³⁷⁷ There were 49 unsuccessful applications for the review and setting aside of allocations made under the medium-term rights allocations process.³⁷⁸

4.4.4 Transformation

The *MLRA* does not define what transformation means.³⁷⁹ However, transformation was held to be the foundational principle of the *MLRA*.³⁸⁰ Nielsen and Hara are of the view that by keeping the definition of transformation vague, DEAT may have been provided with the necessary flexibility to carry out the complex task of restructuring the fisheries industry and of avoiding lawsuits that affected reform efforts in the 1990s.³⁸¹

³⁷³ Ibid.

³⁷⁴ Ibid.

³⁷⁵ Ibid.

³⁷⁶ HDST Policy at 5.

³⁷⁷ Nielsen and Hara at 49.

³⁷⁸ Fishing Industry News Southern Africa, April 2004 at 23.

³⁷⁹ Interestingly DEATs Abalone Policy of October 2003 defines 'transformation' to mean 'the equitable representation of historically disadvantaged persons in both the ownership and management spheres of an entity.' (At 22.)

³⁸⁰ In *Langklip See Produkte (Pty) Ltd and Others v Minister of Environmental Affairs and Tourism and Others* 1999 (4) SA 754 (C) at 743H -744B and in *Phambili Fishing (Pty) Ltd and Bato Star v the Minister of Environmental Affairs and Tourism* 2004 (4) SA CC at 523 par 78.

³⁸¹ Nielsen and Hara at 48. See also O'Regan's J remarks in *Phambili Fishing (Pty) Ltd and Bato Star v the Minister of Environmental Affairs and Tourism*, that the manner in which transformation is to be achieved is left to the discretion of the decision-maker (2004 (4) SA CC at 509 par 35).

4.4.4.1 Mechanism for transformation

In order to achieve transformation, the *MLRA* compels organs of state when exercising any power under the *MLRA*, to have regard to the need to restructure the fishing industry, to address historical imbalances and to achieve equity within all branches of the fishing industry.³⁸² The Minister, in granting any right, has to have particular regard to the need to permit new entrants, particularly those from historically disadvantaged sectors of society.³⁸³ In addition, the Minister may establish zones or areas where subsistence fishers may fish in order to achieve the objectives of section 9(2) of the *Constitution*.³⁸⁴ Finally, the *MLRA* provides for establishment of the Fisheries Transformation Council ('FTC') which has as its main object, the achievement of fair and equitable access to section 18 rights.³⁸⁵ These mechanisms, with the exception of the provisions regulating subsistence fisheries (as this sector falls outside the scope of this dissertation), are discussed in detail below.

Fisheries Transformation Council

The FTC was established by the Minister shortly after the *MLRA* was promulgated. The FTC is one of the mechanisms proposed by the *White Paper on Marine Fisheries* that was to be used in order to promote transformation in the fishing industry.³⁸⁶ The White Paper on Marine fisheries proposed that this mechanism should be used for a finite period. The Minister was to allocate rights to the FTC which would then lease the rights to persons from historically disadvantaged sectors of society.³⁸⁷ The FTC had to be broadly representative and its members were not to have a direct interest in commercial fishing activities or operations.³⁸⁸ However, allegations of corruption, specifically that

³⁸² Section 2(j).

³⁸³ Section 18(5).

³⁸⁴ Section 19(1).

³⁸⁵ Sections 29 and 30.

³⁸⁶ See section 4.2.2 at 48 above.

³⁸⁷ Section 31.

³⁸⁸ Section 34(2) and (4).

allocations were being made to relatives and friends of members of the FTC, were rife.³⁸⁹ Its first attempt to allocate rights to fishers was declared invalid. The FTC failed to allocate any rights or to record any of its decisions and was accordingly abolished in 2002.³⁹⁰ The provisions in the *MLRA* enabling its formation are scheduled to be repealed.³⁹¹ The problems experienced by the FTC in transforming the fishing industry were clear indications that transformation would not be easy.

The failure of the FTC to allocate and record rights may have been due to the lack of administrative support. It also raises the critical issue of the independence of the decision-maker when allocating rights. Put differently, because the Minister makes the decision it does not mean that the decision is free from influence. This was recognised by the Diemont Commission when it called for the establishment of an independent quota board to allocate rights. Failure of the State to ensure that the FTC functioned properly may have negatively impacted on transformation of the fishing industry, ensuring that the State manages and controls the process. This may have suited the established stakeholders.

Section 2(j) and 18(5) of the MLRA

In *Phambili Fishing (Pty) Ltd and Bato Star v the Minister of Environmental Affairs and Tourism* the issue of transformation was fully dealt with by the High Court of the Cape of Good Hope Provincial Division,³⁹² the Supreme Court of Appeal³⁹³ and the Constitutional Court.³⁹⁴ These courts had to consider whether the State had fulfilled its obligations under sections 2(j) and 18(5) of the *MLRA*, in transforming the HDST fishing industry sector in the medium-term rights allocation process.

³⁸⁹ BCLME Project n18 at 19.

³⁹⁰ GN 971 in *Government Gazette* No. 21587 of 20 September 2002.

³⁹¹ Section 2.3 of the *Marine Living Resources Amendment Bill* [B16-2005].

³⁹² Unreported judgment of Cape of Good Hope Provincial Division (Case No 32/2003 and Case No 40/2003 delivered on 16 May 2003).

³⁹³ 2003 (6) SA 407 SCA.

³⁹⁴ 2004 (4) SA 490 (CC).

On 27 July 2001 MCM published an invitation calling for persons to submit applications for a broad range of fishing rights, including in the HDST sector.³⁹⁵ In terms of the policy guidelines applications for commercial fishing rights would be evaluated in accordance with section 2 of the *MLRA*. These policy guidelines recognised that transformation involved more than simply a change in ownership. In this regard, it recognised that equity would be an acceptable alternative to ownership. The distribution of wealth created from access to those particular marine resources and the extent to which an applicant employed people from historically disadvantaged sectors of the community would also be considered. For the HDST sector, the guidelines noted that a higher level of internal transformation of existing right holders, rather than the introduction of new entrants, would be encouraged. Furthermore, it was also the intention to allocate a notable proportion of the TAC to deserving applicants in order to encourage transformation. The hake long-line, hand-line and WCRL sectors were considered suitable for Black fishers and small and medium sized Black owned enterprises. The HDST sector was however not considered suitable for these fishers.

Phambili Fisheries (Pty) Ltd ('Phambili') and Bato Star ('Bato'), both of whom are Black empowerment companies, lodged applications for the review and setting aside of the medium-term rights allocations made in the HDST sector. Phambili first received a quota in 1997 and Bato in 1999. In order to avoid protracted litigation with existing participants, the Minister entered into an agreement with these existing participants wherein they agreed to contribute up to 10 000 tons of their existing quotas for reallocation.³⁹⁶

110 applications were received in response to the invitation of 27 July 2001. Of these, 54 were existing right holders and 56 new applicants. In December 2001, the Chief-Director, acting on authority delegated to him, marginally increased Phambili's allocation to 1083 metric tons and Bato's to 856 metric tons out of a TAC of 136 205 metric tons.

³⁹⁵ GN 1771 in *Government Gazette* No 22517 of 27 July 2001.

³⁹⁶ Note 392 at 31 par 64.

Despite the increase in tonnage awarded to Phambili and Bato, they sought an order for the review and setting aside of the Chief-Director's decision.

The High Court recognised that the *MLRA* sought to address the historical imbalances and that the intention of the legislature was to herald a new era into the fishing industry. The Court held that the provisions of section 2 are mandatory and had to be complied with and that it was not open to State officials to ignore the clear language of the *MLRA* and apply extraneous criteria such as capital intensive industry and stability. The Court considered what was provided in the Summary of Recommendations Report and the supporting evidence, and held that section 2 of the *MLRA* was not taken into account and that the applications were only considered against the criteria set out in the policy guidelines.³⁹⁷ It however rejected the applicants' arguments that the Chief-Director, by failing to allocate a notable proportion of the TAC to the applicants in order to encourage transformation, violated their right to equality as the applicants had failed to establish that they were discriminated against and that this discrimination was unfair.³⁹⁸ The Court also rejected the argument that the *White Paper on Fisheries Policy* and other draft discussion documents created the legitimate expectation that increased tonnage would be awarded to historically disadvantaged persons.³⁹⁹ The Court set aside the decisions made by the Chief-Director on December 2001. De Ville argues that the High Court could, under its inherent jurisdiction, make any order it deemed fit, including making the allocation.⁴⁰⁰

Supreme Court of Appeal

The Minister appealed to the Supreme Court of Appeal. The Supreme Court of Appeal noted that in the HDST sector transformation was not only achieved by increasing quotas for small holders but it might also be achieved by internal transformation within the big companies. The Court considered the make-up of Sea Harvest, one of the two largest

³⁹⁷ Ibid at 78 par 169.

³⁹⁸ Ibid at 68 par 147.

³⁹⁹ Ibid at 70 par 151.

⁴⁰⁰ De Ville 'Deference as Respect and Deference as Sacrifice: A Reading of *Bato Star v Minister of Environmental Affairs*' (2004) 20 *SAJHR* 577.

players in the HDST industry and concluded that the majority of its employees, 38 per cent of its management, and three of its nine board members came from the historically disadvantaged sectors of society. The Court held that section 2(j) of the *MLRA* does not trump the other subsections nor does it trump the rest of the *MLRA*. Decision-makers were only to have regard to or have particular regard to section 2(j). In other words, subsection 2(j) was merely a guide.⁴⁰¹ Furthermore, the Court noted that neither Phambili nor Bato were new entrants under section 18(5) of the *MLRA*⁴⁰² as they had previously received quotas.

The Court rejected the High Court's interpretation and finding that the Chief-Director did not have regard to those sections. The Court held that on the law and on the facts the argument that section 2(j) of the *MLRA* was ignored, must fail. Furthermore, the Court held that stability in the industry was a factor that had to be considered, especially in light of section 2(d) of the *MLRA*. The Court held that the High Court erred in regarding stability and the need for investment as extraneous matters.⁴⁰³

Constitutional Court

Bato appealed against the judgement of the Supreme Court of Appeal to the *Constitutional Court*.⁴⁰⁴ Bato's grounds of appeal included that the Supreme Court of Appeal misconstrued the nature of the objectives in section 2 and that DEAT, in adopting 5 per cent as the amount to be taken from the equity pool of existing rights holders for re-allocation, had given insufficient weight to the transformation criteria.⁴⁰⁵ Bato argued that the effect of section 18(5) was that it elevated section 2(j) in relation to the other section 2 principles and objectives in the *MLRA*.⁴⁰⁶ The Court stated that the *MLRA* and the *Constitution* required that the Chief-Director give special attention to the importance

⁴⁰¹ At 425 par 30.

⁴⁰² *Ibid* at 427.

⁴⁰³ *Ibid* at 433 par 57.

⁴⁰⁴ Note 394 above.

⁴⁰⁵ *Ibid* at 504 par 20.

⁴⁰⁶ *Ibid* at 509 par 33.

of addressing imbalances in the industry with the goal of achieving transformation in the industry.⁴⁰⁷ The Court held that in allocating fishing rights, decision-makers must give effect to the objectives of the *MLRA* and ensure that transformation takes place. The Court held that at the very least, practical steps, if possible, must be taken to fulfil these needs each time allocations were made.⁴⁰⁸ According to the Court 'new entrants' as used in section 18(5) does not mean that all new entrants must be catered for at every allocation, nor that new entrants must be admitted at every allocation in every sector of the fishing industry.⁴⁰⁹

The Court held that MCM had, on the papers before the Court, achieved the practical fulfilment of sections 2(j) and 18(5). The Court was satisfied with the internal transformation requirement in the HDST sector and upheld the decision of the Chief-Director.⁴¹⁰ The Court held that the Chief-Director's decision struck a reasonable equilibrium between the principles and objectives as set out in sections 2 and 18(5) in the context of the specific facts of the HDST sector, and therefore, the equilibrium achieved cannot be said to be unreasonable. However, Ngcobo J, in a separate, concurring judgment in the same matter stressed the importance of transformation in the HDST sector.

Ngcobo noted that the obligation to give effect to section 2(j) depended on the place of transformation in the constitutional democracy, and secondly, on how the phrases 'have regard to' or 'have particular regard to' were to be understood in the context of the *Constitution* and the *MLRA*. The Court held that the transformation objectives of the *MLRA* are in line with the *Constitution*, especially section 9(2). Furthermore, the Court stated that section 2(j) was remedial and prophylactic, in that it eradicated the effects of

⁴⁰⁷ Ibid at 509 par 34.

⁴⁰⁸ Ibid at 510 par 40.

⁴⁰⁹ Ibid at 511 par 39.

⁴¹⁰ Ibid at 509 par 41.

past discrimination and prevented reinforcing and perpetuating the exclusionary effects of past discrimination.⁴¹¹

The Supreme Court of Appeal's conclusion that section 2 was merely a guide to the exercise of administrative discretion was rejected. The Court held that this view fails to give due weight to the importance attached to transformation in the *MLRA* when read as a whole.⁴¹² Furthermore, the Court held that section 18(5) reinforced section 2(j), making it clear that its provisions were to be given pre-eminence when granting rights under the *MLRA*. The Court held that such a construction was consistent with the constitutional goal to achieving equality and with the main foundational policy of the *MLRA*, the transformation of the fishing industry.⁴¹³

The Court held that what was essential as far as fishing rights were concerned was that the policy should meet the requirement of section 2(j).⁴¹⁴ In other words, the policy must in a meaningful way address the need to restructure the fishing industry, address historical imbalances and achieve equity within all branches of the fishing industry.⁴¹⁵ Lastly, the Court held that what is important is not what percentage was set aside but that a percentage was actually set aside for transformation. Accordingly, the argument based on the failure to reserve a larger percentage of the TAC for transformation was also dismissed.⁴¹⁶

With the exception of the High Court judgment, these judgments demonstrate that the courts are reluctant to interfere in circumstances where decision-makers have to strike an equilibrium between competing interests and where the decision-maker has the requisite expertise to make such a decision. Where decision-makers take account of all factors, strike a reasonable equilibrium between those factors and select reasonable means to

⁴¹¹ Ibid at 526 par 84.

⁴¹² Ibid at 529 par 92.

⁴¹³ Ibid at 530 par 97.

⁴¹⁴ Ibid at 532 par 104.

⁴¹⁵ Ibid.

⁴¹⁶ Ibid at 533 par 110.

pursue the identified legislative goals in the light of the facts before them, then it would be difficult to have such a decision reviewed and set aside. In *Foodcorp (Pty) Ltd v Deputy Director-General: The Department of Environmental Affairs and Tourism*⁴¹⁷ the Court confirmed the view that Courts would rather review the procedure established by decision-making departments, than question the results of a decision. However, in the follow-up to the Supreme Court of Appeal *Foodcorp* case, *Foodcorp (Pty) Ltd v The Minister of Environmental Affairs and Tourism*,⁴¹⁸ the applicants had previously successfully approached the Supreme Court of Appeal to set aside allocations made by DEAT in the pelagic fishing industry on the basis that those allocations produced some glaring and unexplained anomalies. A new formula was used which resulted only in marginal differences which appeared to be no less irrational, inexplicable and unreasonable than the results considered by the Supreme Court of Appeal.⁴¹⁹ The High Court stated that to the extent that the implementation of policies is irrational, inexplicable and unreasonable a court must hold the executive accountable to proper compliance with the values of the *Constitution*.⁴²⁰ The High Court therefore moved away from the *Constitutional Court's* position of deference towards the executive in *Bato Star* and held that the interference required by the applicant does not breach the principle of separation of powers. The High Court also set aside the allocations made under this formula.⁴²¹

Policies drafted by DEAT must therefore be rational, explicable and reasonable. The policies that are used in the long-term rights allocation process are discussed below.

⁴¹⁷ (5) SA 91 SCA 2004.

⁴¹⁸ Unreported Cape of Good Hope Provincial Division High Court judgment, Case No. 2615/05.

⁴¹⁹ *Ibid* at 21.

⁴²⁰ *Ibid* at 20.

⁴²¹ *Ibid* at 21.

4.5 Fisheries policies

Numerous problems were experienced with the medium-term rights process especially by small-scale commercial fishers as they were less familiar with the intricacies of the process.⁴²² These problems included the mechanism used for notifying people to apply for fishing rights (usually the *Government Gazette*), the technical nature of the application forms and the non-refundable fee.⁴²³

The State introduced numerous fisheries policies in an effort to clarify and guide the long terms rights allocation process.⁴²⁴ These policies include the General Fishery Policy, the WCRL policy and the HDST Policy. The General Fishery Policy is discussed first, then the WCRL policy and thereafter the HDST policy.

4.5.1 The General Fishery Policy

The General Fishery Policy divided the fishing industry into 19 fishing sectors which were grouped into four clusters.⁴²⁵ Rights in clusters A (which include the HDST sector) and B would only be awarded to entities incorporated under the *Close Corporations Act*⁴²⁶ or *Companies Act*.⁴²⁷ Commercial fishing rights in clusters C (which included WCRL) and D were to be awarded, save in some exceptional cases, to individuals.⁴²⁸

The General Fishery Policy sets out the allocation methodology, process and

⁴²² Cardoso, Fielding and Sowman 'Overview and analysis of social, economic and fisheries information to promote artisanal fisheries management in the BCLME Region' – South Africa - Final Report and Recommendations (South Africa), February 2005 at 54.

⁴²³ In *Minister of Environmental Affairs and Tourism and Others v Pepper Bay Fishing (Pty) Ltd; Minister Of Environmental Affairs and Tourism and Others v Smith* 2004 (1) SA 308 (SCA) the Court had to consider whether the Minister's refusal to accept and consider defective applications for fishing rights, was justified. Pepper Bay Fishing's application was lodged with a post-dated cheque and Mr Smith's, who had been a subsistence fisher for more than 20 years, was only lodged with one copy of the application instead of two as required. The Court held that where a statute provided for the acquisition of a right or privilege, as opposed to the infringement of an existing right, compliance with the prescribed formalities are imperative.⁴²³ Accordingly, the Court held that the Chief Director and the Minister did not have a discretion to condone the defects in either of the two applications.

⁴²⁴ General Fishery Policy at 6.

⁴²⁵ *Ibid* at 15.

⁴²⁶ Act 69 of 1984.

⁴²⁷ Act 61 of 1973.

⁴²⁸ General Fishery Policy at 28.

considerations for the allocation of rights, and quantum or effort. The core allocation and management considerations are transformation, ecological and biological considerations and socio-economic considerations.⁴²⁹ South African citizens historically classified as “*African*”, “*Coloured*” and “*Indian*” would be considered historically disadvantaged on account of race.⁴³⁰ In the WCRL sector a fixed number of points were to be allocated to Black applicants and in the HDST sector points were to be allocated for Black ownership and management.⁴³¹ According to DEAT, only quality transformation (that is transformation which results in real benefits to historically disadvantaged individuals) would be recognised.⁴³²

The following criteria were used to assess applicants: exclusionary criteria, weighted balancing criteria and, for some sectors, tie-breaking factors.⁴³³ The exclusionary criteria were used to assess whether applications were properly lodged, materially sound and met the minimum essential requirements.⁴³⁴ Applications that were not excluded in terms of the exclusionary criteria would be considered in terms of the balancing criteria.⁴³⁵ In circumstances where there were too many applicants with the same score, tie breaking criteria could be used in order to choose between those applicants.⁴³⁶ Transformation is one of the cross-cutting policy considerations for the allocation of rights.⁴³⁷ The General Fishery Policy specifically refers to transformation and the need to achieve equality within the numerous sectors.⁴³⁸

The General Fishery Policy states that the issue of ‘new entrants’ is a fishery specific one and is dealt with in the fishery specific policies. It states further that a distinction is

⁴²⁹ Ibid at 13.

⁴³⁰ Ibid at 30.

⁴³¹ Ibid.

⁴³² Ibid.

⁴³³ Ibid at 25.

⁴³⁴ Ibid at 26.

⁴³⁵ Ibid.

⁴³⁶ Ibid at 27.

⁴³⁷ Ibid at 29.

drawn, in the fishery specific policies, between ‘additional’ and ‘new entrants’, and notes that there is very little room to accommodate additional entrants because most of the fisheries are already over-subscribed.⁴³⁹ This distinction is mentioned in the WCRL sector but not in the HDST sector. In the WCRL Policy it states that rights may be awarded to new entrants but not to additional participants.⁴⁴⁰ The precise nature and effect of this distinction is not clear. However, it would appear that DEAT was attempting to make a distinction between entrants that at some stage were involved in the fishing industry (i.e. new entrants) and entrants that were not involved in the fishing industry before (i.e. additional participants). Furthermore, the manner in which the Constitutional Court interpreted the ‘new entrant’ provision in section 18(5) of the *MLRA* may make it possible for DEAT to limit the number of new entrants in any sector. This may result in the various fisheries sectors effectively being closed to additional participants or new entrants. This may have the effect that no further transformation may take place in the next round of allocations as existing entrants may perceive the fishing industry as closed, and consequently, with their fishing rights secured there is no incentive for further transformation. This would result in the fishing industry being closed to the benefit of the existing entrants. The Treurnicht Commission was opposed to the closing of sectors in the fishing industry.⁴⁴¹

DEAT used the policies, the database and information submitted by applicants for the development of detailed criteria and weighting for each sector.⁴⁴² Even though DEAT consulted with interested and affected persons and allowed for comment on the draft policies, applicants were not aware of the weight that would be attached to each criterion. Applicants only became aware of the weighting attached to a particular sector after their applications were considered and they were awarded or refused allocation rights. It

⁴³⁸ Ibid at 13.

⁴³⁹ Ibid at 33.

⁴⁴⁰ WCRL Policy at 8.

⁴⁴¹ At 25 par 3.3.1.

⁴⁴² General Fishery Policy at 19.

would appear that preliminary results were presented to decision-makers, and if the decision-makers were not satisfied with the results, the weighting would be changed.⁴⁴³

This approach seems to have been endorsed by the courts in *Minister of Environmental Affairs and Tourism and Another v Scenematic Fourteen (Pty) Ltd.*⁴⁴⁴ In this matter the respondent's instituted motion proceedings in the High Court in which it sought orders reviewing and setting aside all of the allocations of the Deputy Director-General and the Minister's decisions on appeal in the hake long-line sector for the 2002-2005 season.⁴⁴⁵ The respondent's argued that applicants for fishing rights ought to have been told in advance of the procedure to be adopted, involving as it did the use of a scoring system applied to predetermined criteria.⁴⁴⁶ The Court stated that applicants (which include the respondent's) would have been fully aware of the information that was required and the basis on which allocations were to be made. The Court held that in these circumstances, the decision-maker would not be required to explain in advance exactly how the applications would be processed.⁴⁴⁷ Accordingly, the manner in which the decision-makers, DEAT, changed the weighting determination may be lawful. However, in my view, the facts in *Scenematic Fourteen* are distinguishable from the present matter. Unlike in the medium-term rights process the weighting criteria had not been finalised for the long-term allocation process as decision-makers could adjust the weighting and in so doing manipulate the process. Furthermore, this approach may be contrary to the need to achieve 'to the extent practicable a broad and accountable participation in the decision-making processes provided for in this Act'⁴⁴⁸ [the *MLRA*] and the participatory and transparency provisions of the SADC Fisheries Protocol.⁴⁴⁹ However, such a process may be justified in terms of DEAT's obligation in national and international law to ensure

⁴⁴³ Stefano Ponte and Lance van Sittert "The Chimera of Redistribution: 'Black Economic Empowerment' (BEE) in the South African Fishing Industry" Danish Institute for International Studies *Working Paper No 2006/32* at 22.

⁴⁴⁴ 2005 (6) SA 182 (SCA).

⁴⁴⁵ *Ibid* at 190.

⁴⁴⁶ *Ibid* at 199.

⁴⁴⁷ *Ibid*.

⁴⁴⁸ Section 2(j).

⁴⁴⁹ Articles 12 and 18(4).

sustainable development and it is not possible to consult with stakeholders on every aspect of the process.

The General Fishery Policy states that it is necessary to address historical imbalances and to achieve equity, especially for women, but then states that the race and gender of applicants and for juristic persons, the race and gender of its shareholders, management and workforce, may be taken into account.⁴⁵⁰ The fishing industry has always been dominated by males. This division is partly cultural and partly because fishing is seen as dangerous. In order to promote transformation the percentages allocated to women applicants, particularly Black women applicants, should have been significantly higher.

The courts have held that transformation is the foundational principle of the *MLRA*.⁴⁵¹ Accordingly, transformation must be a mandatory and not a discretionary requirement, as provided in the General Fishery Policy.⁴⁵² The General Fishery Policy is therefore inconsistent with the *MLRA* in that it does not regard transformation as the foundational principle.

The General Fishery Policy does contain an ‘escape clause’ which states that the General Fishery Policy and the fishery specific policies do not lay down hard and fast rules or cover every aspect and consideration that will be taken into account in determining and applying criteria for balancing, tie-breaking and determining quantum or effort.⁴⁵³ However, this escape clause does not detract from the fact that the General Fishery Policy is inconsistent with the foundational principle of the *MLRA*.

4.5.2 WCRL Policy

The WCRL Policy’s overarching sectoral objectives are to maintain the transformation profile of the industry and to ensure that fishers, historically associated with WCRL are

⁴⁵⁰ General Fishery Policy at 31.

⁴⁵¹ See n380 above.

⁴⁵² General Fishery Policy at 30.

⁴⁵³ *Ibid* at 27.

allocated a fair proportion of rights.⁴⁵⁴ Here, transformation forms part of the comparative balancing criteria, with Black applicants⁴⁵⁵ scoring positively and gender being used as a tie-breaking factor only.⁴⁵⁶ Comparative balancing criteria are used to balance or weigh up applicants against each other. New entrants and existing applicants may also be awarded for historical involvement in the industry.

In the WCRL Policy the coastline was divided into 7 different alphabetically numbered zones. 4070 applications were received for long-term fishing rights in the WCRL sector. Those applicants who were awarded medium term WCRL fishing rights in the previous round of allocations were regarded as medium-term right-holders and new entrants were applicants that were not in possession of medium-term rights. The Courts have approved of the streaming of applicants into these categories and the different weighting that may be attached to transformation for each category.⁴⁵⁷

The comparative balancing criteria for medium term rights holders were 40 per cent for involvement as a crew member and 10 per cent for transformation. This 10 per cent was divided into 4 per cent for being a Black person, 3 per cent for being female and 1 per cent respectively for corporate social investment, employment of Blacks and training of staff.⁴⁵⁸

For new entrants, 60 per cent of rights were awarded for historical involvement as a crew member and for being more than 50 per cent reliant on WCRL for a livelihood. 20 per cent was awarded for transformation. This 20 per cent was divided into 12 per cent for being Black and 8 per cent for being female.⁴⁵⁹ The scores were calculated in the same manner for the different WCRL zones. Out of 1090 traditional fishers that applied for

⁴⁵⁴ WCRL Policy at 7 par 5.

⁴⁵⁵ Blacks as used in the policy documents include “Coloured” and “Indian” persons. See General Fishery Policy at 30.

⁴⁵⁶ WCRL Policy at 11 par 9.2(a).

⁴⁵⁷ Note 444 at 197 par 15.

⁴⁵⁸ DEAT: General Published Reasons: WCRL: Zone D, at 11 par 10.2.

⁴⁵⁹ Ibid at 14 par 10.3.

WCRL initially only 110 rights were allocated.⁴⁶⁰ Although, the 10 and 20 per cent awarded respectively for transformation are not significant it seemed to have had the desired effect in the WCRL sector in promoting access to WCRL fishing rights for historically disadvantaged individuals. However, many *bona fide* fishers were not granted allocations. Following a public outcry, the Minister doubled the allocations for the WCRL sector on appeal from 418 to 812, with significant allocations being made to Blacks and women applicants.⁴⁶¹ It is not clear how the Minister succeeded in doubling the allocations awarded without compromising the States duty to fulfil its international and national obligations in promoting sustainable development. Furthermore, as DEAT was manipulating the weighting applied to limit or expand the number of applicants, it is not clear why this was not applied prior to the initial decisions being made to allocate WCRL. The Minister's decision to double the WCRL allocations appears to be based on political pressure that may have been applied following the public outcry after the initial round of long-term rights allocations made by the Chief Director. Consequently, it would appear that decisions to grant or refuse allocation rights in the WCRL sector is again subject to political influence albeit this time for the benefit of previously disadvantaged South Africans.

4.5.3 HDST policy

The purpose of the HDST Policy is to set out the considerations that will apply to the allocation of long-term commercial fishing rights in the hake fishery sector.⁴⁶² This sector is made up of deep-water and shallow-water hake. A global TAC is set for deep- and shallow-water hake⁴⁶³ which is then divided between the deep-sea trawl, in-shore

⁴⁶⁰ 'West Coast drifts to poverty: Kreef fishers feel pinch coming after 90% lose out', *Cape Times* March 2006.

⁴⁶¹ Published on the internet by the *Cape Times* on 5 June 2006. (Accessed on 3 January 2006 http://www.capetimes.co.za/general/print_article.php?fArticleId=3277241)

⁴⁶² At 3 par 1.

⁴⁶³ At 4 par 2.

trawl, hake longline and handline sectors without regard to the hake species split in the respective fishery sectors.⁴⁶⁴

Under the 2000 medium-term rights allocation process 74 per cent of applicants were Black-owned, 42 per cent were small and medium sized enterprises, with 25 per cent of the TAC being held by Black owned companies.⁴⁶⁵ In 1992 this was 0%. Only 53 right holders were granted rights as medium-term right holders.

The overarching objectives for allocating fishing rights in the HDST sector include improving the transformation profile of the HDST sector by increasing Black ownership of the TAC and by redistributing allocations to medium term right-holders with smaller allocations that have transformed and performed well. Other objectives are to create an environment that stimulate jobs and attract investments and support the economic viability and environmental sustainability of the fishery.⁴⁶⁶ Although new entrants would be allowed the total number of participants in this sector would not be increased.

For the HDST sector the exclusionary criteria included compliance with the formal requirements for applications and whether applicants were paper quota holders and had access to suitable vessels.⁴⁶⁷ Transformation forms part of the balancing criteria and applicants were to be scored on the following:

The percentage black and women ownership and black and women representation at top salary, board of directors and senior official and management levels;

Whether employees (other than top salary earners) benefit from an employee share scheme;

Affirmative procurement;

Compliance with the *Employment Equity Act* 55 of 1998 and the representivity of blacks and women at the various levels of employment. The delegated authority may also have regard to the wage differentials between the highest and lowest paid employees;

Compliance with legislation on skills development and the amounts spent on the training of blacks and participation in learnership programmes; and

⁴⁶⁴ At 4 par 2.

⁴⁶⁵ At 5 par 3.

⁴⁶⁶ At 6 par 4.

⁴⁶⁷ At 7 and 8 par 7.1.

Corporate social investment.⁴⁶⁸

80 applications were received for long-term rights in the HDST sector. 50 were from medium-term right holders and 30 from new entrants.⁴⁶⁹ 10 applications for exemptions were received; four were allowed bringing the total number of applicants to 84. 45 of the medium-term rights holders claimed that they fully achieved the transformation goals set in the transformation plans which they submitted to DEAT in 2001.⁴⁷⁰ The mean Black ownership of medium-term right holders increased from 59 per cent to 61 per cent.⁴⁷¹ 75 per cent of the skippers and 48 per cent of employees in levels between R 16,001 to more than R 60,000 were Black.⁴⁷² For new entrants, the mean Black ownership was 78 per cent.⁴⁷³ 23 per cent of employees between R 16,001 and more than R 60,000 are Black and 58 per cent of the skippers employed are Black.⁴⁷⁴

For medium-term right holders, transformation, as a single category, made up 50 per cent of the score. 0.5 was awarded for Black directors; 4 per cent for top salary earners being Black and female; 6.5 per cent for income levels and occupational categories; and 35 per cent was awarded for Black ownership.⁴⁷⁵ For new entrants transformation also made up 50 per cent. 9 per cent was awarded for Black directors; 3 per cent if applicants top salary earners were Black; 1.5 per cent for transformation of occupational categories. 32 per cent was awarded for Black ownership.⁴⁷⁶

Out of the 53 medium-term right holders only 46 received allocations. Interestingly, I&J scored 68.15 per cent and were awarded 40,003 tonnes (this is a reduction of 1213

⁴⁶⁸ At 10.

⁴⁶⁹ DEAT: HDST Decisions for the Allocation and Quantum: 16 January 2006 ('HDST General Published Reasons') at 4 par 4.

⁴⁷⁰ HDST General Published Reasons section 9.2(d).

⁴⁷¹ Ibid par 9.2(d).

⁴⁷² Ibid par 9.2(d), table 6.

⁴⁷³ Ibid par 10 (d).

⁴⁷⁴ Ibid at 14 par 10(d), table 10.

⁴⁷⁵ Ibid par 10.2.

⁴⁷⁶ Ibid par 10.3.

tonnes); Sea Harvest scored 48.2 and was awarded 27,338 tonnes (this is a reduction of 4593) and; Bato scored 61.3 and was awarded 2527 tonnes (a gain of 1789 tonnes).⁴⁷⁷

In terms of the General Reasons for the Decisions on Appeals in the Hake Deep Sea Trawl⁴⁷⁸ ('Hake Deep Sea Trawl Appeals GPR') 58 appeals were submitted and made available for comment in terms of section 80(3) of the *MLRA* which provides that:

The Minister shall consider any matter submitted to him or her on appeal, after giving every person with an interest in the matter an opportunity to state his or her case. (My emphasis.)

This is in line with the decision in *Minister of Environmental Affairs and Tourism and Others v Atlantic Fishing Enterprises (Pty) Ltd and Others*⁴⁷⁹ where the Court held that where the remainder of the TAC after appeals had been concluded, would be distributed to right holders in the sector, those right holders had an interest in the appeals being considered and should have been granted an opportunity to comment on those appeals. However, it does not appear that similar provision was made for applicants in the WCRL sector. It is not clear on what basis this was not done but is indicative of applicants being treated differently because they are less likely to challenge the decisions made in court.

7 medium-term right holders were not granted allocations in the long-term allocation process. No new entrants were successful. The new entrants argued that they should have been awarded rights as a result of section 18(5) of the *MLRA* which requires the Minister to have particular regard to the need to permit new entrants.⁴⁸⁰ The Minister upheld the Chief-Director's decision not to permit any new entrants because of the need for consolidation in the industry and the reduction and the probable further reduction of the TAC.⁴⁸¹

⁴⁷⁷ Ibid at 29.

⁴⁷⁸ 18 August 2006.

⁴⁷⁹ 2004 (3) SA 176 (SCA).

⁴⁸⁰ Exclusion of new entrants, at 10.

⁴⁸¹ At 12 par 4.32.

As decision-makers would be required to compare applicants with each other, rather than against an external benchmark, the Minister did not adopt the weighting and benchmarks set in the draft code regarding ownership and management published under the *Broad Based Black Economic Empowerment Act*.

5. CONCLUSION

The State has made several attempts to ensure that transformation in the fishing industry is effective and benefits previously disadvantaged persons while simultaneously ensuring that marine living resources are used in a sustainable manner. These attempts include the creation of the Quota Board, the promulgation of numerous White Papers that require the addressing of historical imbalances and the enactment of *NEMA* and the *MLRA*.

Transformation had to take place within the ambit of international environmental and human rights law developments which include sustainable development, inter-generational equity, recognition of artisanal fishers and preferential treatment of women. These international instruments shaped the manner in which DEAT first created, and then implemented, its White Papers, including the numerous fisheries policies. Guided by *NEMA* and the *MLRA*, DEAT engaged in extensive public consultation in developing the numerous fisheries policies and ensuring that transformation is given effect to in the fishing industry.

Transformation has taken place in the WCRL sector. However, the percentage points awarded to the transformation criteria as explained in DEAT's General Published Reasons for WCRL was low. Transformation of the fishing industry is a foundational principle of the *MLRA*, therefore the 10 and 20 per cent allocated to the transformation criteria for medium-term rights holders and new entrants respectively in the WCRL sector is insignificant and at odds with the General Fishery Policy. Furthermore, with regard to women, 3 per cent out of the 10 per cent and 8 per cent out of the 20 per cent was allocated to them for medium-term rights holders and new entrants respectively. These percentages are not significant. The participation of women in this sector should have been promoted by increasing the points awarded to women applicants. This is so because the WCRL sector predominantly employed male fishers to the exclusion of female

persons. The preferential treatment of women applicants would have been in line with DEATs commitment to promote transformation under the *MLRA*, *NEMA*, the *Constitution* and the Convention on the Elimination of Discrimination against Women. This would also have been in accordance with the decision in the *Motala* matter. However, in spite of this, it appears that transformation, in relation to the increased participation of Black persons and women has taken place in the WCRL sector.

However, the State's duty in transforming the WCRL sector does not end at granting allocation rights to these fishers. The State should support and promote sustainable development and livelihood strategies for these fishers by providing them with assistance and institutional support. In providing this level of assistance the State would also comply with its obligations under the SADC Fisheries Protocol.

Transformation has also taken place in the HDST sector. However, here transformation has been focused on the internal transformation or restructuring of corporate entities. This form of transformation was endorsed by the *White Paper on Marine Fisheries* for the HDST sector as the sector was regarded as capital intensive and already oversubscribed. 50 percentage points was awarded for transformation for medium-term rights holders and new entrants. However, the difficulty in determining who owns whom and the dynamic nature of business transaction and empowerment deals also means that it is difficult adequately to assess the levels of transformation in this industry. More importantly, it is not clear how DEAT is going to ensure that transformation continues in those corporate entities now that they have been awarded long-term rights allocations. The Namibian *Marine Resources Act*⁴⁸² specifically provides for the variation by the Minister of the period for which rights are awarded where the applicant has met the prescribed criteria which would entitle the applicant to a longer term right or where the applicant no longer complies with the criteria, resulting in the period being adjusted downward.⁴⁸³ Unless ongoing transformation is included as a condition in the section 13

⁴⁸² Act 27 of 2000.

⁴⁸³ Section 33(6).

permit issued under the *MLRA*, DEAT may not be in a position to insist on ongoing transformation.

Nielsen and Hara, in considering transformation of the fisheries industry prior to the long-term rights allocation process, conclude that the transformation process was controlled by interest in the established industry and organised labour, and that the process lacked political direction.⁴⁸⁴ They draw a distinction between transformation and enrichment, noting that transformation was supposed to lead to a more equal distribution of wealth within the broader society and not just among a few individuals.⁴⁸⁵ If this yardstick, a more equal distribution of wealth in the broader society, is to be used to measure transformation in the HDST sector, then transformation has not taken place in the sector. In using this yardstick, the points allocated under transformation in the HDST sector would also have to be reprioritised.

The test in order to satisfy the courts is that the General Fishery Policy, the WCRL policy and the HDST policy, and the implementation of these policies, are rational, explicable and reasonable. The fact that a different route or that scores should be calculated differently is irrelevant. The Constitutional Court's confirmation in *Bato Star* of DEATs transformation process in the medium-term rights allocation process makes it difficult for new entrants to be granted access rights in the long term rights allocation process in the HDST sector. The *Bato Star* decision also confirms that all that is required is that provision must be made for transformation irrespective of the actual level or percentage awarded for transformation.

The Diemont Commission, in calling for the establishment of an independent body in the *Sea Fisheries Act*, 1988 to award quota allocations stressed the importance of that body being free from political influence. However, it would appear that under the *MLRA*, because allocations are made by the Minister, allocations are again subject to political influence. This is reflected in the arbitrary manner in which decision-makers could adjust

⁴⁸⁴ Nielsen and Hara at 49.

⁴⁸⁵ *Ibid.*

the weighting in order to achieve the desired outcome. An independent body would ensure that the allocation process is free from political influence.⁴⁸⁶ However, it would be difficult to ensure that such a body remains independent and even if that body is independent it may still be perceived to be influenced by the State or stakeholders in the fishing industry. Now that DEAT has weighted the respective categories (i.e. transformation, historical involvement and investment in vessels) in the WCRL and HDST sectors, they may not be able to deviate from this weighting in the next round of allocations in 2016. This would ensure that political influence in the allocation of fishing rights is minimised. Unfortunately, DEAT is not bound by that weighting criteria and by 2016 the 2006 allocation process and its requirements would have been long forgotten.

Lastly, as pointed out, DEAT's General Fishery Policy and the WCRL and HDST policies are not consistent with the *MLRA* in that those policies do not regard transformation of the fishing industry as a foundational principle. It is undeniable that increased access or preference to fishing rights was granted to previously disadvantaged persons. However, if transformation had been the foundational principle of these policies and if that was adequately reflected in the weighting attached to transformation, then the fishing industry would have been markedly changed. The results obtained in DEAT's transformation process is not so marked and seem rather to reflect a negotiated settlement. Hersoug, in referring to the preparatory policy document of the committee that worked on the development of the *White Paper on Marine Fisheries*, stated that this document does 'not present a new fisheries policy for South Africa. The document is very cautious when it deals with redistribution and is rather conservative regarding institutional structures. As in the political arena, this is, at most, a "negotiated revolution." The most important difference is that, if implemented, the strategy will ensure greater transparency towards the general public.'⁴⁸⁷ This holds true for the transformation process under the *MLRA* in

⁴⁸⁶ Martin and Nielsen 'Creation of a new fisheries policy in South Africa: The development process and achievements' at 70 advocate the creation of an Independent Access Rights Board (IARB), similar to the Quota Board, operating independently from the (then) Department of Sea Fisheries and the Ministry of Environmental Affairs and Tourism.

⁴⁸⁷ Hersoug B 'Same procedure as last year? Same procedure as every year! - some reflections on South Africa's new fisheries policy.' Paper presented at the international seminar on national marine fisheries policy for South Africa, 4. June, Cape Town, South Africa as cited by Martin and Nielsen above at 168.

the long term rights allocation process as well. It is a negotiated revolution that has resulted in greater transparency being achieved in the allocation process.



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