

# HOW WELL IS IUU FISHING ENFORCED BY THE SOUTH AFRICAN AUTHORITIES?

An analysis of SA practices in relation to foreign fishing vessels visiting Cape Town and Durban ports from years 2005-2009.

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## **DEDICATION**

It is sad to mention but necessary, first I dedicate this work to three persons with different stories of disappearing in my life. My Father Mr P.W. Wellem I came to Norway not knowing where you are and I manage to complete my studies in your absence. I hope when I'm getting back home you can welcome me, I pray God to fulfil my wishes.

Mthetheleli Jabavu you were a brother/friend to me, but I left South Africa in late August 2008 then early September I received sad new that you no longer in this life. Brother rest in peace even if I don't believe because I was not there to goodbye you forever but with the mighty God all over the earth I believe I'll have another chance to meet you.

Last but not least to my very special daughter who was born without her dad and she waited up until this day. Zockey dad is coming home and we going to be together for the rest of our lives, I love you so much that I cannot express myself fully here. This thesis I dedicate to you three with all my heart with you. I thank you.

## **DECLARATION**

I, Wellem Xolela, hereby declare that this Thesis submitted for the partial fulfilment of Masters Degree of International Fisheries Management at the University of Tromsø, Norway; is my own original work and has not previously been submitted to any other institution of higher education. I further declare that all sources cited or quoted are indicated and acknowledged by means of footnotes and bibliography at the end.



## List of Acronyms

CCAMLR	Commission for the Conservation of Antarctic Marine Living Resources
CCSBT	Commission for the Conservation of Southern Bluefin Tunas
DEAT	Department of Environmental Affairs and Tourism
EEZ	Exclusive Economic Zone
EKZN	Ezemvelo KwaZulu Natal wildlife compliance
FAO	Food and Agriculture Organisation
FCO	Fishery Control Officer (Fishery Inspector)
FFV	Foreign Fishing Vessel(s)
GRT	Gross Registered Tonnage of vessels
ICCAT	International Commission for the Conservation of Atlantic Tuna
IPOA-IUU	International Plan of Action to combat Illegal, Unreported and Unregulated fishing.
IOTC	Indian Ocean Tuna Convention
IUU	Illegal, Unreported and Unregulated fishing
MCM	Marine and Coastal Management
MCS	Monitoring Control and Surveillance
MLRA of 1998	Marine Living Resources Act. of 1998
RFMO	Regional Fisheries Management Organisation(s)
SA	South Africa
SADC	Southern African Developing Community
SEAFO	South East Atlantic Fisheries Organisation
TNPA	Transnet National Port Authority
UNCLOS	United Nations Convention on the Law of the Sea, 1982
VMS	Vessel Monitoring System(s)



# Chapter One

## INTRODUCTION

### 1.1 Problem statement

Regarding to foreign fishing vessel, when applying for permit to enter South African waters there are a number of issues, procedures and persons involved in the process until the vessel is finally docked in the port. An Exclusive Economic Zone (EEZ) permit application process involves four persons and it has to undergo pre-screening<sup>1</sup> and vessels identity before issued. And all the former is performed in the Department of Environmental Affairs and Tourism, branch Marine and Coastal Management (DEAT- MCM) Cape Town. The fishery control officers (FCOs) under MCM are responsible personnel for fishing vessel monitoring and inspection in South African ports. Fishing industry as whole is a contributing factor to the country's Gross Domestic Product (GDP); but foreign fishing vessels require attention they bring foreign currency for various services rendered by all stakeholders<sup>2</sup> involved; hence create a valuable economic contribution. Also as a signatory to international agreements and conventions South Africa has to meet her legal obligations.

*According to T. Lobach (2000)<sup>3</sup> In South Africa a foreign flagged fishing vessel must request a permit to enter South African waters. Before the vessel calls into a South African port, it must furnish the authorities with proof that it has complied with the reporting requirements of the flag State. When it has done this and has reported its current position, the authorities will consent to the vessel entering South African waters and will furnish it with a permit. In terms of this permit, the vessel is not normally permitted to discharge its catch?*

International Plan of Action on Illegal, Unreported and Unregulated (IPOA-IUU) argues that states should publicize ports to which foreign flagged fishing vessels may be permitted admission and should ensure that these ports have the capacity to conduct inspections. A vessel should be provided port access, in accordance with international law, for reasons of *force majeure* or distress or for rendering assistance to persons, ships or aircraft in danger or

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<sup>1</sup> IUU check if the vessel is in RFMOs website, cargo manifest, reason to call for port; and a blacklisted vessel should not be granted a permit to come to port.

<sup>2</sup> Three stakeholders to be analysed are the National Port Authorities, Shipping /Vessel agents and Fishery Control Officer (Inspectors) under Marine and Coastal Management.

<sup>3</sup> FAO; US: IUU/2000/15. Measures to be adopted by the port state in combating IUU fishing, Legal adviser Director of fisheries in Norway.

distress<sup>4</sup>. The Food and Agriculture Organisation (FAO) Model Scheme under the IUU-understanding (2005) an international instrument/measure not legally binding to combat illegal fishing. The instrument includes an extensive list of result indicators that should guide the inspections in port (a check list), such as vessel identification, fishing authorization (licenses/permits), trip information, results of inspection on discharge and possible quantities retained on board.

As a signatory to legal international agreements including United Nation Convention on the Law of the Sea (UNCLOS) 1982, voluntary instruments such as FAO International Plan of Action and Model Scheme to combat IUU fishing; and treaties and conventions related to conservation and management of fisheries; thus, the control system in South Africa is deprived regards to foreign fishing vessels the duty lies with the port Authorities. Hence cooperation and integration among different stakeholders involved is necessary.

### ***Research questions***

This study seeks to answer these questions:

1. *To what extent do all the stakeholders involved organised efficiently according to the country's laws<sup>5</sup>, IPOA-IUU, FAO Model scheme under IUU fishing understanding and the United Nations Convention on Law of the Sea (UNCLOS) 1982 obligations and*
2. *Also how well do Fisheries control officers (inspectors), National Port authorities and Shipping agents understand each other's business as they all working on behalf of South African government to facilitate foreign fishing vessels into ports?*

This study focuses only on exploring, understanding and interpretation the involved stakeholder/organisations according to the country's law and international obligations and requirements as to how they do business in terms of communication and cooperation. In so doing possibilities of improving present state of affairs might reveal as it is South Africa's international responsibility and legal obligation. However, limited time and data also holds a reason for limited explorations, understanding and interpretation even though problems prevail beyond.

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<sup>4</sup> See paragraph 54 of FAO IPOA-IUU (2001), Port State Measures. In accordance with article 19 (2) UNCLOS 1982

<sup>5</sup> Laws including Marine Living Resource Act no.18 of 1998, National Ports Act, no 12 of 2005 and the Constitution of the Republic of South Africa

## 1.2 Summary of findings

### *Legislative and legal background*

At once in South Africa exclusive economic zone under fisheries law “no person shall undertake commercial or subsistence fishing or engage in mariculture or operate a fish processing establishment unless a right (of access to fish) to undertake or engage in such activity or to operate such an establishment has granted to such a person by the Minister”<sup>6</sup>. Moreover no person shall exercise any right of access unless a *permit*<sup>7</sup> has been issued by the Minister for such person. And section 39 of Marine Living Resource Act of 1998 further state, “no foreign fishing vessel shall be used for fishing or related activities in South Africa waters unless a foreign fishing vessel licence has been issued to such vessel”. However, a political decision taken in 2003 the bilateral agreements with Japan and Taiwan where the latter conditions had applied were terminated.

UNCLOS entitles all coastal States to claim various maritime zones; viz include a 12 nautical miles territorial sea, within coastal states enjoy complete sovereign<sup>8</sup>, and a 200 nautical miles EEZ in which they may exercise sovereign rights over the marine resources therein<sup>9</sup>. “The coastal state’s jurisdiction to regulate vessels depends on its sovereignty or sovereignty rights over marine zones contiguous to its coast”<sup>10</sup>. Thus, South Africa had claimed its maritime zones<sup>11</sup> since 1977. Birnie and Boyle (2002) also mentioned that internal waters<sup>12</sup>, such as ports, the coastal state is free to apply national laws and determine conditions of entry for foreign vessels. Therefore, South Africa has adopted a permit condition system that a foreign fishing vessel should comply with if it deems to come to South African ports; this entrance permit is only applicable for foreign fishing vessels. With the exception to ships in distress or force majeure as UNCLOS 1982 article 18 suggests.

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<sup>6</sup> See section 18 (1) of Marine Living Resource Act no 18 of 1998

<sup>7</sup> First is a right to the resource/activity and licensed to undertake then a Permit issued for a specific period not exceeding a year

<sup>8</sup> See Art. 17 UNCLOS: all states enjoy the right of innocent passage

<sup>9</sup> See Witbooi, E. Law and fisheries reform: Legislative and policy development in South African fisheries over the decade 1994-2004. *Marine Policy* 30 (2006) 30-42.

<sup>10</sup> See Birnie, P and Boyle, A. (2002) *International Law and the Environment: The law of the sea and the protection of the marine environment*. 2<sup>nd</sup> edition pg 370-376

<sup>11</sup> Claims to marine zone: 12 nm Territorial sea (1977) and 200 nm EEZ and 24 nm Contiguous Zone (1994).

<sup>12</sup> See Churchill, R.R. and Lowe, A.V. (1999). *The law of the sea* 3<sup>rd</sup> edition defines as internal, or national or interior waters lie landward of the baseline from which the territorial and other maritime zones are measured: these waters of maritime character mostly comprise bays, estuaries and ports, and waters enclosed by the straight baseline.

### *Permit conditions subject to foreign fishing vessels*

There are two permit conditions that a foreign fishing vessel has to adhere to, first the permit condition to enter South Africa's Exclusive Economic Zone (EEZ)<sup>13</sup> not to fish (all fishing gear on board the fishing vessel shall be properly stowed)<sup>14</sup> but to come to ports for other any reasons<sup>15</sup>. And a second permit is for transshipping in South Africa's EEZ. Japan one of the dominant distant fishing nations in global tuna and the largest consumer base for tuna<sup>16</sup> together with other nations visit South Africa for discharge, transshipment, refuel, resupply and etc<sup>17</sup>. Paragraph 8 of the permit condition clarifies that "transshipment may only be carried out in the Ports of Cape Town and Durban". Therefore in this study unless the context indicates otherwise the EEZ permit refers to only the permit of foreign flagged fishing vessels coming to South African ports not to any other permit stated elsewhere. And will be discussed through out the paper how easy/hard to discharge and how well South Africa controls its ports.

### *Limitations of the study*

This paper is not by any means trying to discuss the domestic illegal activities by South African flagged vessels in the EEZ or high seas. The rationale is due to the country's status in relation to large pelagics fishery, it is pretty new the first exploratory fishing permits were issued only in 1995<sup>18</sup>, and the country is still developing the fishery<sup>19</sup>. As a result under the country's law<sup>20</sup> there is no section ideally emphasis on foreign fishing vessels discharging catches in South Africa, the only emphasis is based on bilateral agreements which entitled foreign vessels (Japanese and Taiwanese) to licensing and undertake fishing under South Africa<sup>21</sup>; and the act is currently under review. In addition South Africa is in control of its

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<sup>13</sup> See appendix permit conditions for foreign vessels to enter South Africa's EEZ 2007

<sup>14</sup> See Paragraph 4 supra note 11

<sup>15</sup> Reasons include (85% ) of fish discharge, transshipment, refuelling, resupply, crew exchange and food and water by foreign fishing vessels in port, questionnaire from all the shipping agents

<sup>16</sup> See Song, Yann-huei (2009).The efforts of ICCAT to Combat IUU fishing: the Role of Japan and Taiwan in Conservation and Managing Tuna Resource. The international Journal of Marine and Coastal Law, vol. 24 pg 101-139

<sup>17</sup> Questionnaires from the shipping agents, question related to ranking the reason to come to port.

<sup>18</sup> See Kroese, M. (1999). South African Tuna Fisheries: WPDCS99-12 IOTC proceeding no.2 pg 105-110

<sup>19</sup> See Public notice by the Minister of Environmental Affairs and Tourism: INVITATION TO APPLY FOR RIGHTS TO UNDERTAKE COMMERCIAL FISHING OF LARGE PELAGIC (TUNA AND SWORDFISH LONGLINE) 2009

<sup>20</sup> Marine Living Resource Act no. 18 of 1998 (MLRA No 18 of 1998)

<sup>21</sup> See sections 38-42 of the Marine Living Resource Act no. 18 of 1998

vessel, as such all the vessels discharging are monitored, all joint venture<sup>22</sup> vessels and domestic vessels have 100% and 20% observer coverage respectively<sup>23</sup>. Overall the study only analysis the country's practice base on international UNCLOS, IPOA-IUU, FAO Model Scheme, a bit of RFMOs and domestic laws of Ports and Fisheries. *Things I will not discuss*

#### *Summary problems related to IUU foreign fishing vessels encountered in South Africa*

However, there are problems encountered in South Africa, illegal activities by foreign fishing vessels (FFVs) still prevail despite the improvements in compliance. In early 2009 four foreign fishing vessels<sup>24</sup> were convicted of contravening the permit conditions of entering South African waters. The Republic is a signatory to a number of international agreements/instruments related to conservation and management of fisheries; consequently South Africa has to meet her legal obligations accordingly. However, some authorities who are involved in facilitating the visits of FFVs are not familiar primarily what is their obligations and with each others business as port/coastal state officers.

#### ***Thesis statement***

The practical execution of the law on Illegal Unreported and Unregulated fishing by persons entitled to inspect the vessel is deprived in South Africa. The authorities (fishery inspectors) are not familiar about their duties. Consequence the law enforcement on IUU vessels is inefficient. There are very few fishery inspectors who understand their bestowed duties such of monitoring the discharge of fish. And the lack of internal communication in Marine and Coastal Management and with the parties involved, interest and awareness is a major reason for such discrepancies. The port authorities are not familiar with MCM business related to foreign fishing vessels. The ship agents on the other side do understand the international instruments to combat illegal unregulated and unreported fishing. Communication, cooperation and coordination is reduced among involved stakeholders. Having said that, port Authorities on the other hand are very keen for cooperative governance for the common good for South Africa's economy.

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<sup>22</sup> After the termination of bilateral agreement in 2003, South Africa entered into a joint venture vessel scheme. With the objectives of having a truly South African fishery (more than 50% shareholder by South African) and skills transfer by the join-venture vessels.

<sup>23</sup> See Marine and Coastal Management minutes of ships agents meeting May 2008: An argument by the fishery managers on shark ratio fins of 8% S.A. local vessels as compared to 5% for foreign vessels. Also see the permit conditions for foreign fishing vessels to enter and tranship in South Africa.

<sup>24</sup> Taiwanese, Spanish and Two Koreans vessels, see more on background below.

### 1.3 Background

South Africa is a signatory to a number of international instruments<sup>25</sup> and Regional Fishery Management Organisations (RFMOs), only those which are in concerned to the study will be reflected upon. South Africa (SA) is been a party to UNCLOS since 1997 and has incorporated these provisions into its domestic legal regime via the Maritime Zone Act of 1994 and the Marine Living Resource Act of 1998<sup>26</sup>. These agreements include Food and Agriculture Organisation (FAO) Compliance Agreement. The agreement is an integral component of the FAO Code of Conduct for Responsible Fisheries as well as FAO arrangement on Illegal Unreported and Unregulated fishing.

Further instruments the country is oblige to includes UN Fisheries Agreement on Straddling Fish Stocks and Highly Migratory Fish Stocks; Agreement for the Implementation of Provisions of UNCLOS with objectives of ensuring long-term conservation and sustainability of the stock, to improve co-operation between the states and to ensure more effective enforcement by flag states, port states and coastal states .

From a regional and international perspective, South Africa is an important partner in enhancing compliance; as it straddles three Oceans the Indian, Atlantic, and Southern in addition to its EEZ and around Prince Edward Islands (Southern Ocean). Birnie and Boyle define EEZ “*as zone which extends to 200 nautical miles from the territorial sea baseline and confers on coastal States sovereign rights over living and mineral resources, and jurisdiction with regards to the protection and preservation of the marine environment*”<sup>27</sup>. And a large number of international commercial and fishing vessels transverse these Oceans under its control<sup>28</sup>. In the territorial sea and internal waters a coastal state has jurisdiction to regulate vessels depends on its sovereignty or sovereignty rights over maritime zones contiguous to its coast. In internal waters, such as ports the coastal state is free to apply national laws and determine conditions of entry to foreign vessels<sup>29</sup>.

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<sup>25</sup> See more of in chapter 3

<sup>26</sup> Witbooi, E. (2006). Law and fisheries: *Legislative and policy developments in South Africa over the decade 1994-2004*. Marine Policy volume 30

<sup>27</sup> Birnie, P and Boyle, A. (2002) International Law and the Environment: *The law of the sea and the protection of the marine environment*. 2<sup>nd</sup> edition. And also see Article 56 of UNCLOS 1982.

<sup>28</sup> See Hauck, M and Kroese, M./ Marine Policy 30 (2006) 78-79

<sup>29</sup> See supra note 8 1<sup>st</sup> part



South Africa is therefore a coastal State like none other in Africa located in the southern tip; boast a coastline of approximately 3000 km. Due to the geographic area the country is laying on one of the world's busiest ship transport routes. It has eight major commercial ports from east to west coasts; and only two Cape Town and Durban ports that are officially designated for foreign fishing vessels to land catches and port of Port Elizabeth still under review. Between the two authorized ports Cape Town port has lions share of about 65% regarding visits (*personal comm.*). These fishing vessels require use of port facilities and services to be rendered; eventually this has economy implication directly/indirectly in the country.

### ***1.3.1 South African approach to compliance***

Marine Living Resource Act (MLRA) of 1998 Parts 6 and 7 are addressing the issues of Foreign Fishing and High Seas Fishing under the domestic law of the Republic respectively<sup>30</sup>. Under the Act attention is basically to the foreign vessels registered in South Africa, this may be due to bilateral agreements the country had with foreign vessels<sup>31</sup>. From the Act there is no section specific dealing with the control of foreign fishing vessel discharging catches in the country's commercial ports; the duty lies with the port authorities. The current amendment to the Act would probably consider this matter into greater depth as it the responsibility of the Republic to fulfil its legal obligations. Hence, a clear move to strengthen law enforcement capacity is a primary objective to achieve compliance. Following the institutional restructuring of the compliance function, five key strategies were adopted to enhance law enforcement effectiveness viz, *Specialised investigation unit, Joint investigation, Environmental court, Regional and International co-operation and Anti-corruption techniques*<sup>32</sup>.

South Africa has improved its capability to protect marine resources; the government has purchased four fisheries and environmental protection vessels. All four vessels<sup>33</sup> have been named after heroines of South Africa's struggle against apartheid. ***Sarah Baartman*** is an 83 metres length vessel the largest of the four and is assigned for offshore duties. Its capabilities include top speed of 20 knots, accommodation of 7 fishery inspectors, 18 crew members, and

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<sup>30</sup> See MLRA of 1998 Chapter 3 sections 37- 42 addressing the issue of Foreign fishing

<sup>31</sup> See supra note 20

<sup>32</sup> See Hauck, M and Kroese, M. Fisheries Compliance in South Africa: A decade of challenges and reform 1994-2004. *Marine Policy* 30 (2006) 77-79.

<sup>33</sup> The vessels are Sarah Baartman, Lilian Ngoyi, Ruth First and Victoria Mxenge respectively.

4 cadets, 45 days at sea, search and rescue works etc.<sup>34</sup> The vessel is classified for unrestricted service and is also deployed for duties off Marion and Prince Edward Islands in the southeast Indian Ocean.

#### *International co-operation*

In co-operation with Australia, South Africa engaged in a 14 days hot pursuit in waters south of South Africa of the Togo-registered fishing vessel, “the *South Tomi*” in 2001 and the chase was successfully undertaken. In 2003 another remarkably arrest of a Uruguayan-registered vessel *Viarsa 1* which lasted for 21 days longest pursuit in history, South Africa and a United Kingdom vessel assisted Australia. For both arrests in the Southern Ocean, Australia admired that “the arrests was effective only after assistance was rendered by South Africa”<sup>35</sup>. The icebreaker SA *Agulhas* crucially equipped with a helicopter was a South African vessel assisting the Aussies.

As a coastal state and fishing nation, South Africa is a member and co-operating non party to various RFMOs, and indeed supports their initiatives to eliminate and eradicate illegal fishing. The commitment in this regard is reflected in the decision to deny access to Exclusive Economic Zone and ports by illegal, unregulated and unreported-listed (IUU) foreign fishing vessels. Furthermore, in case of distress or force majeure access may be granted, but discharge of fish, refuelling and resupplying of the vessel may be denied.

#### *Regional co-operations*

In a media statement for immediate release DEAT announced the seizer of Taiwanese-Flagged vessel and confiscated tons of sharks and dried shark fins by the fishery control inspectors on 14<sup>th</sup> of March 2009. The Taiwanese vessel, *Chien Jui No. 102* declared 0.1 tons of shark fins and 2.2 tons of shark trunks in the EEZ permit application, however more than 1.6 tons of dried shark fins and 5.1 tons of trunks were discovered by the inspectors and were confiscated. The amount of dried shark fins suggested that at least 30 tons of sharks were caught, “the biggest alleged illegal fishing consignment during recent year”, the department acknowledged. The captain of the vessel was fined R1.5 million (a highest fine ever imposed for such a transgression) for contravening permit conditions of foreign fishing vessels to enter

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<sup>34</sup> See DEAT Media Alert 25 March 2009: Sarah Baartman returns after SADC joint patrol.

<sup>35</sup> See Gullet, W. and Schofield, C. (2007): Pushing the limits of the Law Sea Convention: Australia and French Cooperation Surveillance and Enforcement in the Southern Ocean. *The international journal of marine and coastal Law*, Vol. 22, No 4

South African EEZ and the confiscated shark products were forfeited to the State. *Chien Jui No. 102* was black-listed on the IUU fishing list of vessels involved in illegal fishing practices the department had concluded<sup>36</sup>.

Following the above scandal on 26<sup>th</sup> of March 2009 *Sarah Baartman* returned to South Africa after a successful transboundary fisheries patrol. The first ever multilateral joint patrol involving four SADC countries<sup>37</sup> arrested six vessels and managed to inspect more than 40 vessels. In Tanzania Sarah Baartman pursued a fleeing flagless vessel with radar turned off and arrested its crew on board; and all the fish was confiscated by the Tanzanian authorities<sup>38</sup>. More than 290 tons of Southern bluefin tuna (*Thunnus maccoyii*) a **Critically Endangered** species red listed status by World Conservation Union's (IUCN) 2006<sup>39</sup>; was found on board the vessel without any legitimate fishing permit or license. The incident drew widespread national recognition from Tanzania resulting to special honour bestowed to the team by the Minister of Livestock and Fishing development and the President of Tanzania himself for work done in fighting illegal fishing in Tanzanian waters<sup>40</sup>.

On her (*Sarah Baartman*) way back to South Africa, off the coast from Durban (East), a Spanish fishing vessel was arrested and fined R300 000 for being without a valid permit in South African waters. And the department stated that the vessel will be detained and will be released upon payment of the fine<sup>41</sup>. This illustrates the utmost importance of which increased enforcement should take place.

### *Domestic operations*

Two case studies that have exposed the effectiveness of improved compliance enforcement: **Hout bay fishing**, a high profile illegal harvesting scandal of rock lobster, South Africa and US had a joint investigation which led to the seizure of a shipping container, vessels, fish and equipment and the removal of the Hout Bay Fishing company from the fishery in year 2000.

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<sup>36</sup> See DEAT Media Alert 14 March 2009: Department seizes Taiwanese-flagged vessel and confiscates tons of sharks and dried shark fin.

<sup>37</sup> Underpinned by the SADC protocol of fisheries co-operation between fisheries surveillance organizations Tanzania, Kenya, Mozambique and South Africa were countries involved.

<sup>38</sup> See DEAT Media Alert 26 March 2009: *Sarah Baartman off-shore EPV returns to South Africa after successful transboundary fisheries patrol.*

<sup>39</sup> See statement from Humane Society International: A step in right direction for Southern Bluefin Tuna, Sydney Australia September 2004 World-Wire; also available online <http://www.iucnredlist.org/details/21858>

<sup>40</sup> See supra note 24

<sup>41</sup> See supra note 24

The other case is from the *Abalone fishery* which is currently closed due stock status an attempt for stock recovery; the fishery has been identified as one of the most difficult fisheries to manage. Violent confrontations between police, coastal communities, poachers and legal commercial abalone divers had been prominent<sup>42</sup>. It is widely believed that Chinese Triads, as well as other international syndicates are integrally involved in the illegal transnational abalone trade<sup>43</sup>. However, despite a number of new initiatives of enhancing law enforcement, the illegal abalone trade still prevails and the fishery seems to collapse due to resource depletion.

On March 2002 a foreign vessel owner was convicted of illegal fishing in South African waters without a foreign fishing vessel licence. A Panama-based company, Harleston Valley Properties SA operating from Cape Town, and the owner of the vessel *Golden Eagle* was fined R500 000 by the Cape Town Magistrate Court. The court further ruled that the proceeding of the sale of the fish caught by the vessel be forfeited to the State; the sale amounted to R158 000 including fish species of tuna, swordfish and shark<sup>44</sup>. The Minister<sup>45</sup> on his statement further admired the conviction as “it vindicated government’s approach to take a firm approach when it comes to the sustainable use of marine resources and also demonstrated strong commitment to clamp down on illegal fishing”.

#### **1.4 RFMOs<sup>46</sup> relevant to South Africa**

In a regional context, South Africa is geographically placed at the epicentre of eight relevant Regional Fisheries Management Organisations (RFMOs). And South Africa has adopted RFMO’s management measures to eliminate Illegal Unreported and Unregulated (IUU) fishing activities to its domestic fleet and extends to foreign fishing vessels discharging catches in her waters. Paragraph 3 of EEZ permit condition for foreign fishing vessels states that; all foreign vessels are subject to the country’s law upon entering the South African EEZ, the permit<sup>47</sup> is issued subject to South African Marine Living Resource Act no.18 of 1998.

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<sup>42</sup> See Weekend Argus December 1994, Battle of the pearl lemon, Poachers battle cops and Perlemoen divers clash with the police.

<sup>43</sup> The illegal abalone industry, a confidential report prepared for national government department, 2004

<sup>44</sup> See Statement issued by the Minister of Environmental Affairs and Tourism 2002. *Moosa applauds conviction of foreign vessel owner for illegal fishing.*  
<http://www.info.gov.za/speeches/2002/02120410461007.htm>.

<sup>45</sup> Minister of Environmental Affairs and Tourism at the time, Mr Valli Moosa

<sup>46</sup> Regional Fisheries Management Organisations that are geographically relevant to South Africa includes ICCAT, SEAFO, IOTC, CCAMLR and CCSBT.

<sup>47</sup> See Permit Condition for Foreign Fishing Vessels entering South African EEZ 2008

These laws include a permit condition of 2008 for tuna/sword fish domestic longline vessel which requires a nominated fishing vessel to be fitted with a functional vessel monitoring system (VMS) approved by the Chief Director and foreign fishing vessels are subject to these rules including a valid single entry permit in South African waters, reason to come to port, details of the applicant, owner and the vessel and as well as fishing trip details<sup>48</sup>.

The ICCAT and IOTC recommendations of shark fin to trunk ratio of not exceeding 5%, and a 15% estimated weight of fish on board by skippers is an acceptable tolerance limit in South Africa<sup>49</sup>; adoption of authorised vessel lists by relevant RFMOs and only rendering service to those vessels by MCM. CCAMLR requirements of monitoring of all toothfish discharges which should be accompanied by the toothfish catch statistics document<sup>50</sup>. Also trade documents from the flag state are required for bigeye tuna, bluefin tuna and swordfish when imported or re-exported<sup>51</sup>. The observer program is also adopted in South Africa where 20% and 100% coverage are maintained for domestic and joint venture fishing vessels respectively<sup>52</sup>.

South Africa had a catch bilateral agreement with Taiwan and Japan which enabled the foreign vessels to fish for tuna and swordfish in the country's EEZ and high seas, with the catch performance accrued to South Africa. In 2003 a political decision was taken to terminate the bilateral agreements and South Africans were encouraged to develop a truly South African fishery. However, no South African capacity existed at the time to target tuna by means of longlining method<sup>53</sup>; joint venture was the solution for the purpose of skills transfer.

A voluntary regional agreement "Southern African Developing Community (SADC) protocol on fisheries" encourages signatory States to co-operate in enhancing the effectiveness of law enforcement and reducing the cost of surveillance in the region<sup>54</sup>. With the objectives of promoting responsible and sustainable use of the living aquatic resources and ecosystems of interest to State Parties; the protocol clearly further defines more objectives of: "*Promote and enhance food security and human health; Safeguard the livelihood of fishing communities;*

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<sup>48</sup> See application form for foreign fishing vessels to enter South Africa's EEZ

<sup>49</sup> See paragraph 10 of supra note 47

<sup>50</sup> See CCAMLR Conservation Measures (10-05) season 2008/09

<sup>51</sup> Meeting held by MCM and ships agents on November 2007

<sup>52</sup> See supra note 51 measures (41-07)

<sup>53</sup> See Regional Fisheries Management Organisations that are geographically relevant to South Africa, DEAT article: Deputy Director –General: MCM

<sup>54</sup> See Section 10 of the SADC protocol on Fisheries

*Generate economic opportunities for nationals in the region; Ensure that future generations benefit from these renewable resources and; Alleviate poverty with the ultimate objective of its eradication”*<sup>55</sup>. As a signatory to the protocol South Africa participated in a joint operation with Mozambique in 2004.

In the Atlantic Ocean; the International Commission for the Conservation of Atlantic Tunas (ICCAT) South Africa as one of the founding member together with Japan and USA in 1967. As a member the Republic has adopted the newly recommended revised ICCAT port inspection scheme<sup>56</sup>. ICCAT’s mandate is to conserve tuna and tuna-like species in the Atlantic Ocean. Science underpins the management decisions made by ICCAT; scientific information is gathered by the members through the tuna and swordfish fisheries.

South East Atlantic Fisheries Organisation (SEAFO), South Africa is currently in the process of ratifying the agreement. The SEAFO Convention Area includes waters beyond national jurisdiction of coastal States in the South East Atlantic Ocean. The convention shares common objectives with UNCLOS Implementation Agreement to ensure long-term and sustainable use of fishery resources in the area. As coastal state, South Africa was compelled to become a Contracting Party to ensure potential further economic opportunities in the high seas fisheries adjacent to her EEZ<sup>57</sup>.

In the Southern Ocean the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR) and South Africa is a founding member of the convention. The commission is a binding convention; all members are required to implement the conservation measures as part of their national legislation; the CCAMLR Conservation measures no 10-03<sup>58</sup>, compulsory port inspection and cooperation with the flag state is adopted in South Africa<sup>59</sup>. These measures *inter alia* include vessel requirement, Vessel Monitoring System (VMS), inspections, scientific observers, exploratory fishery catch limits, IUU vessel lists, as well as toothfish (*Dissostichus*) Catch Document (DCD)<sup>60</sup>. Toothfish resources were exposed to high levels of IUU fishing and DCD became a valuable tool to deter illegal fishing, as the

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<sup>55</sup> See [http://www.mcm-deat.gov.za/international/sadc\\_protocol\\_on\\_fisheries.html](http://www.mcm-deat.gov.za/international/sadc_protocol_on_fisheries.html)

<sup>56</sup> See GEN (97-10) of Compendium Management Recommendations and Resolutions adopted by ICCAT for the Conservation of Atlantic tunas and tuna like species 2008

<sup>57</sup> See supra note 53

<sup>58</sup> See annexure to permit conditions CCAMLR conservation measures 2007-8 relevant to prince Edward Islands EEZ (South Africa)

<sup>59</sup> See Section 42 (3) of the MLRA no 18 of 1998 the measures taken by the Republic when there is a reason to suspect a foreign fishing vessel has engage in IUU activity. Also see the EEZ permit condition of foreign vessels particular paragraph 7

<sup>60</sup> See CCAMLR Conservation Measures No. 10-05 (Compliance) 2008

commission require all toothfish shipments to be accompanied by the DCD. Members of the commission are required to apply to the Commission for the access to Antarctic Resources.

And Commission for the Conservation of Southern Bluefin Tuna (CCSBT) in the southern ocean, SA as a cooperating non-member to the commission. Its primary mandate is the conservation of the highly migratory Southern Bluefin Tuna (SBT) *the species is red listed as threatened species-Geneva Convention on endanger species 1979* and is found throughout the southern hemisphere, but rarely in the east. SBT primary market is Japan due to traditional and cultural aspects; Japanese are the world largest consumers<sup>61</sup> of tuna as *sashimi* and *sushi*<sup>62</sup> and is where premium price is obtained. Even though South Africa is not a fully member to the commission it does receive a country quota of about 45 tonnes during fishing season, and the RFMOs allocate country quotas based to the performance of the countries.

In the Indian Ocean South Africa is a Co-operating Non-contracting party State to these RFMOs (IOTC, SWIOFP and SIOFA)<sup>63</sup>. Indian Ocean Tuna Commission's (IOTC) objective is to broadly promote cooperation among its members, with a view to ensuring through appropriate management, conservation and optimum utilization of stocks covered by the commission. This would be achieved through reviewing scientific research, reviewing socio-economic aspects of the fishery as well as administrative, financial and management rules of procedure<sup>64</sup>. In IOTC a compliance meeting held January 2009 South Africa applied for the renewal of its status (co-operating non-contracting) for the season 2009/10. Currently the country has a developing longline fishery in the region and is in process of ratifying the agreement<sup>65</sup>.

The former organisations require more human/financial resource capacity, and South Africa in recent years has recruited a number of environmental officer/fishery officers to meet those obligations of conservation, managing and sustainability of fish stocks. These duties should

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<sup>61</sup> See supra note 16 pg. 122-123

<sup>62</sup> From experience a lunch in one of the Japanese vessel visited S.A. in 2007 with MCM Fisher managers: *sashimi* is a fresh tuna sliced into pieces, dipped in soy sauce and consumed raw; *sushi* another popular Japanese method, eating tuna or other fish raw put on top of cooked rice or rolled together with other ingredients in seaweed paper.

<sup>63</sup> Indian Ocean Tuna Commission (IOTC), South West Indian Ocean Fisheries Programme (SWIOFP) and South Indian Ocean Fisheries Agreement (SIOFA).

<sup>64</sup> See article 5 (objectives, functions and responsibilities of the commission) of the Agreement for the establishment of Indian Ocean Tuna Commission, available online <http://www.iotc.org/files/proceedings/misc/ComReportsTexts/IOTC%20Agreement.pdf>

<sup>65</sup> See South African application for cooperating non contracting party status in IOTC Compliance committee, available in [http://www.iotc.org/English/meetings/comm/history/doc\\_meeting\\_S13.php](http://www.iotc.org/English/meetings/comm/history/doc_meeting_S13.php) accessed (23/04/09)

be met through co-operation with relevant parties and improve fisheries inspection. However, competency and execution of the law by the officers is an enquiry, this might be due to lack of capacity, training, experience or communication by relevant authorities.

## **1.5 Administrative system**

Under the constitution of the Republic of South Africa, 1996 chapter 10 Public Administration; **Section 195**: Basic values and principles governing the public administration states that: *Public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles: subsection 1:*

- a. A high standard of professional ethics must be promoted and maintained.*
- b. Efficient, economic and effective use of resources must be promoted.*
- c. Public administration must be development-oriented.*
- d. Services must be provided impartially, fairly, equitably and without bias.*
- e. People's needs must be responded to, and the public must be encouraged to participate in policy-making.*
- f. Public administration must be accountable.....*

**Subsection 2** declares that all of the above principles apply to administration in every sphere of government; organs of state; and public enterprises. The constitution also acknowledges national unity, coherent government and indivisibility of the republic as a whole.

### **1.5.1 Involved organisations/stakeholders**

Three stakeholders involved in the process of facilitating foreign fishing vessels into ports of South Africa. Transnet National Port Authorities (TNPA), Marine and Coastal Management (MCM) and the Shipping agents organisation are stakeholders involved. These entities will be assessed according to the constitution of South Africa related to administration of foreign fishing vessels; and communication and cooperation among them.

UNCLOS articles 2 and 21 entitle all coastal states sovereignty and legal competence in their territorial sea respectively. Therefore South Africa enjoys full territorial sovereignty over its



internal waters to prescribe rules and policy regarding the use of ports and other areas of internal waters. The one case where there is a clear customary law right of entry to ports concerns ships in distress or force majeure where human life is at risk, that the foreign vessel should be given immunity from coastal State jurisdiction<sup>66</sup>. However, “Ships of all States, whether coastal or landlocked enjoy the right of innocent passage through the territorial sea”<sup>67</sup>. Transnet National Ports Authority (TNPA) under the Department of transport is a responsible entity for the safety, efficient and effective economic functioning of the national ports system which it manage, control and administer on behalf of the South African Government<sup>68</sup>. TNPA require a ship master to give details of his ship and cargo, produce all papers and documents relative to the ship and to allow authorized person to board and inspect the ship’s equipment and cargo.

Marine and Coastal Management (MCM) in Cape Town is a public institution<sup>69</sup> under national umbrella body the Department of Environmental Affairs and Tourism (DEAT) accountable for all coastal and marine activities. An authority responsibly to manage and regulate fishing by South African flagged vessels inside and beyond Exclusive Economic Zone (EEZ) of South Africa. Given these responsibilities the department extends its duties to foreign fishing vessels (FFV) to provide prior notice for the intention to use a South African port and enforce the country’s law on those vessels. This notice is an EEZ permit application which requires information related to the identity of the vessel, including its authorisation to fish and activities undertaken and the Estimated Time of Arrival (ETA) at least 24 hours notice<sup>70</sup>.

Shipping agents are none governmental organization (NGOs) that facilitate communication of foreign fishing vessels with South African authorities while at sea until the vessel has finally docked and rendered all the relevant services required. Vessel/ship agents are subject to registration certificates in ports and they shall provide the Authority with an agency appointment letter, indicating that they represent the vessel<sup>71</sup>. Paragraphs 4 and 5 of

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<sup>66</sup> See supra note 12

<sup>67</sup> See Part 2 Section 3 Articles 17 and 18 of the UN Convention on the Law of the Sea, 1982

<sup>68</sup> See Transnet National Port Authority of SA, available in [http://www.transnet.co.za/AR\\_2007/or\\_npa.htm](http://www.transnet.co.za/AR_2007/or_npa.htm)

<sup>69</sup> As defined by Jon Elster as a rule-enforcing mechanism. The rules govern the behaviour of a well defined group of persons by means of external and formal sanctions. These sanctions backed by the law enforcement system include fines and imprisonment, enforcement include laws, judicial decisions, administrative decrees and executive orders.

<sup>70</sup> See appendix 1 EEZ permit condition for Foreign Fishing Vessels 2007.

<sup>71</sup> See Annexure K of Guidelines for Agreements, Licences and Permits in terms of the National Ports Act

conditions of vessel agents registration declare that a vessel agent acknowledges and agrees that the Authority may disclose the information provided by the agent to law enforcement, government and regulatory agencies; and an agent should comply with all relevant management systems, policies and procedures and directives of the Authority respectively. Paragraph 10 further state that; “The vessel agent is responsible for payment of all port dues, fee, fines and any other monies due to the Authority by the vessel’s owner”<sup>72</sup>. In addition to with MCM the agents has to apply for an EEZ permit on behalf of the foreign fishing vessel, and only on approval of such a permit will the vessel enter the SA EE?

A port State has the right and duty to take measures in port as well as at sea, in accordance with international law. These measures includes inter alia, the inspection of documents, fishing gear, and catch, and when it has been established that a catch was taken in a manner which undermines the effectiveness of sub regional, regional or global conservation and management measures on high seas, beyond or inside EEZ of any coastal state; to prohibit landing and transshipment<sup>73</sup>.

## **1.6 Goals and significance of the study**

The present study is an attempt to assess South African ports de facto practice of national jurisdiction on foreign fishing vessels landing catches as measured against legal competencies according to international agreements and the country’s law, and to consider possible improvements to the present state of affairs. As it is the country’s legal obligation under international agreements and conventions to conserve and manage marine living resources, as a signatory, thus South Africa has a duty to improve its port measures by monitoring, control and surveillance (MCS) as well as enforcement on foreign fishing vessels coming to its port.

FAO Model scheme acknowledges that it is absolutely necessary that agencies, international organisation and States establish ways for co-operation, as this is the only way of achieving the goal of preventing, deterring and finally eliminate IUU fishing. The study is the first of its kind in South Africa; however fisheries management is still in the developing stage in the country, therefore it will serve as the basis of some effective management measures. Measures related to address the issue of IUU fishing which is the global concerned, and South Africa is

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No. 12 of 2005, Paragraph 1 and 2

<sup>72</sup> See supra note 71 paragraph 10

<sup>73</sup> See Article 27 (1-3) of Convention of the Conservation and Management of Highly Migratory fish stocks, 2005.

geographically located in one of the perfect spot for potential IUU activities by foreign fishing vessels. Thus the significance of this study is indeed necessary to recognised.

- Port State control measures and international agreements and conventions the country is obligatory to will be considered as one of the objectives. Also improvements potential according to legal requirement will be assessed.
- Understanding of the country's law on foreign fishing vessels by the involved stakeholders will be determined.
- Analysis of foreign fishing vessels trends visiting South African ports and more emphasis will be on Cape Town and Durban ports from year 2003 until to date.

Foreign fishing vessels are landing catches in South African ports, however, there are number of issues, procedures and persons involved in the process to facilitate those vessels into port. So this study concerns understanding and law implications as diversified from the actual practicing of the law. The legal analysis boils down to textual analysis to see whether national achievements are more or less well bestowed within the limits of the international-as well as national law in communication, co-operation and coordination of what is the laws efforts to control overfishing, black listed and other illegal, unreported and unregistered fishing.

### ***Hypothesis***

The stated organisations (MCM, TNPA and Shipping agents) are independent to each other the only reason to get together is when doing business i.e. vessel facilitating. However, communication, co-operation and coordination among them is deprived probably due to lack of interest or just simply ignorance as to what is their duty. Consequence, they are not well familiar with each other's business processes.

## **STRUCTURE OF THE THESIS**

### **Chapter 1 Introduction**

The introduction of this study is trying to cover the broad spectrum of South African practices on compliance to foreign fishing vessels. First the recognition of existing problems in the country regarding the issue and the research questions underpinning its existence; and the summary of findings. The background follows as it is incorporated within the introduction to explain what has been done so far. The relevant RFMOs are considered as the country's commitment, and the administrative system of involved organisation according to the

constitution of the Republic. Lastly the goals and significance of the study are acknowledged with the hypothesis defined in the end.

## **Chapter 2 Methodology**

In this chapter methodological considerations are applied, starting with the background of empirical data foundation; and contextualisation of the field sites. Research approaches are defined as the study includes qualitative and quantitative data respectively. Experiences and limitations during the research are also acknowledged.

## **Chapter 3 Theory and Practice**

The chapter kickoff with explaining the concept of institution as the study includes different organisation/institutions working towards a common interest. It further explains the different institutions of public and private institutions, due to nature of the study which includes both entities. Collection action problem is a notion added as the problem statement suggests “there are a number of persons involved in the processing of foreign fishing vessel”. Last but not least international measures, responsibilities and practices on foreign fishing vessels.

## **Chapter 4 Empirical Data Analysis**

The chapter is analysing the findings of the research and discussion is going hand in hand with the findings. Combining the two is some how to reveal the real practice, execution and understanding of the law by persons involved.

## **Chapter 5 Conclusion and Recommendations**

In this final chapter the research questions are answered and the hypothesis tested. At the very last recommendations/suggestions are given as it is the task of the study not only to explore but rather improve the existing state of affairs.

## Chapter Two

### METHODOLOGICAL CONSIDERATIONS

#### 2.1 Background

The empirical part of this thesis consists of the practice and understanding of the government of South Africa regulating foreign fishing vessels, based on literature reviews (policies, decrees, acts, statements, regulation etc.) meetings with different groups of actors related to these vessels, interviews (questionnaires) for different groups and minutes of meetings held with some actors. And the legal basis of the study is the country's law on foreign fishing vessels and the legal international obligations of South Africa on fisheries related issues. The written statistical data material dates back from 2003 and 2005 from port authority's statistics and Exclusive Economic Zone permit applications data from Marine and Coastal Management respectively. The field work includes meetings with fishing vessel's agents, Transnet National Port Authorities (TNPA) and Ezemvelo KwaZulu Natal (EKZN) Wildlife compliance representatives. After all the meetings questionnaires were given to the representatives. In Cape Town meetings with stakeholders were held including a joint operation inspection of three foreign fishing vessels in port by port authorities, MCM, Customs, Immigration officers and Border police.

I have been involved with Marine Coastal Management since December 2005 as research assistant (internship) for one month duration during my junior Degree in the *University of Fort Hare*, South Africa. It is then I was introduced to fishery sciences working with scientists at the time. The work was about swordfish (*Xiphias gladius*) diet composition and age (gonad maturity and fins) where I was dealing with unpleasant smell of stomachs, gonads and fins of swordfish; and also measuring small pelagics (e.g. anchovies, sardines and herrings) eggs. The experience raised my interest in other large pelagics such as tunas. And then later (2007) I once again joined MCM as a Master Student based in Norway. Before going to Norway I was working in MCM for resource management; pelagics and high seas section for 4 months in Cape Town.

#### 2.2 Contextualising the field sites

South Africa is a coastal state which borders Indian Ocean in the east (Durban) and South Atlantic Ocean in the west (Cape Town) (Figure1 below). The country has eight official ports

and only two Durban and Cape Town ports which are officially designated for foreign fishing vessels to land catches. Port Elizabeth in the southwest Indian Ocean is still under review for foreign fishing vessel. The magnitude of visiting vessels differs between the two main ports with Cape Town 65% and Durban 35% (*personal comm.*).

As illustrated in the Map below my home town (East London) is in between of both my study areas, and I was basically residing in Cape Town due to availability of resources to work in MCM department. Also for the convenience for the respondents as most of ships agents and compliance officers were base in Cape Town. Communication was by fax, email and phone or even in person as it was the case for the compliance officers. Approximate distances from Cape Town - Durban (1,273 km) and Cape Town - East London (884 km) by flight were experienced among the field sites (fig.1).

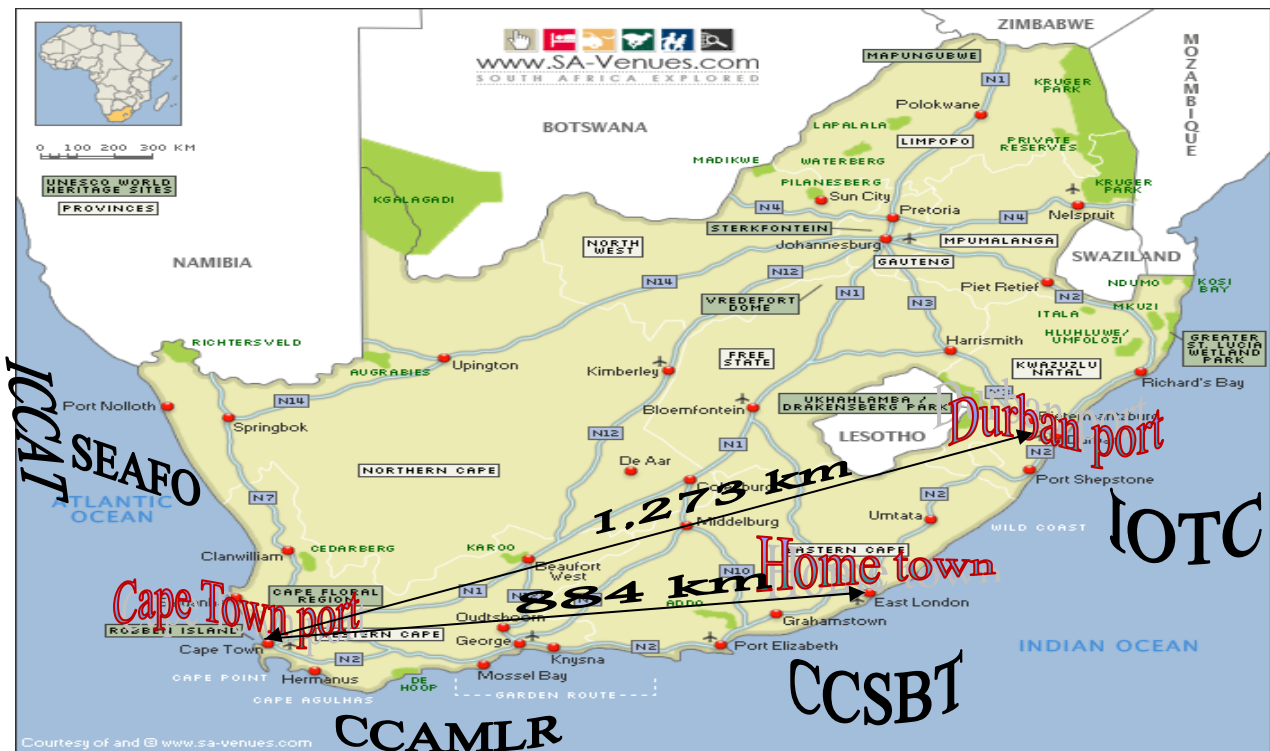


Figure1. Map (modified) of South Africa demonstrating ports, distances, home town and relevant RFMOs<sup>74</sup>.

### 2.3 Qualitative and quantitative approaches

Both legal, qualitative soft and hard data (sociology) and quantitative approaches were employed in this research. Qualitative social approach was the most employed discipline as

<sup>74</sup> Available online: [www.sa-venues.com](http://www.sa-venues.com).

opposed to quantitative, since the latter will only serve as support for the trend to determine the magnitude of visiting foreign fishing vessels in South Africa. The rationale is due to the nature of the study, it involves three stakeholders (MCM, TNPA and ship agents). These entities are all assisting during the visit of foreign fishing vessels. Thus, they are assigned as units of analysis and the idea is to assess their business processes and understand how well they know their own and as well as each others business operations and communication.

Bryman (2001) cited<sup>75</sup> argued that qualitative research tends to view social life in terms of processes, where the concern is to show how events and patterns unfold overtime. As said elsewhere in the introduction that there are number of issues, procedures and persons involved in the process of facilitating FFVs to ports, it is necessary to understand the practice and procedures unfold, as to how South African authorities perform their duties as it is stated by law. Pettigrew (1997) defines process as '*a sequence of individual and collective events, actions and activities unfolding over time in context*'. An interaction among the stakeholders was a rationale for assigning them as focus groups; as it is the objective of the study to obtain facts, explore and discover in depth the context of foreign fishing vessels coming to land fish in South African ports; and referring the finding facts to the legal situation as interpreted, the phase of applying the law, not only interpreting it. Meeting and interview (questionnaires) with these organisations were held separately to each other for information gathering and sharing.

### **2.3.1 Qualitative approach**

The qualitative research paradigm in its broadest sense refers to research that elicits participant accounts of meaning, experience or perception<sup>76</sup>. A characteristic of social science qualitative research is the exploration for an understanding on how those in focus of the study understand their own situation. The qualitative researcher is therefore concerned with the understanding rather than explanation; naturalistic observation rather than controlled measurements; and the subjective exploration of reality from the perspective of an insider. This can be achieved through unstructured interviews and meetings, assuming that during the process detailed and rich information would be generated. The distinction of the qualitative approach, data is presented in the form of words, pictures and quotes. And that tend to give

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<sup>75</sup> See Dissertation for the dr.polit. Degree by Normann, A.K. (2006) *Troubled waters, troubled times. Fisheries policy reforms in the transition to democracy in South Africa and Mozambique.*

<sup>76</sup> McRoy, R.G. (1995). Qualitative research: In Edwards, R.L. and Hopps, J.G. (Eds) 1995, *Encyclopaedia of social work*, 19<sup>th</sup> ed. Washing DC: *National Association of Social Workers*

subtle description and multiple perspectives to help the reader gain a feel for the subjective world of the respondents, hence transporting the reader directly into the world of the study.<sup>77</sup>

### *Sampling*

Sampling carried out practically, according to Thagaard (2002) cited by<sup>78</sup>, in qualitative studies informants with the characteristics relevant to the research questions are selected through strategic sampling. Also he stated that random sampling is a strategic method in the sense that the characteristics of the informants are relevant to the research questions. The sampling procedure is based on the accessibility to the researcher, or as stated<sup>79</sup> “it is the result of restriction placed on the researcher”. Due to these characters, thus *convenience sampling* was employed. Time was the major concern since only two and half months were available in South Africa to gather information, and also all the informants where always on duty, so meetings where scheduled according to their availability.

### *Meetings and interviews (questionnaires)*

In **Durban** the first meeting was held on 10 July 2008 at 10 am by MCM staff (Me, Deputy Director, Assistant Director and Senior Administration officer) and nine foreign fishing vessel agents and lasted for 2 and half hours. The second meeting with four EKZN wildlife compliance officers (inspectors) and one Border police (figure2 below) had taken place at 14 hrs in the afternoon and lasted for 2 hrs the same day.

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<sup>77</sup> de Vos A.S., Strydom, H., Fouche, C.B. and Delpont, C.S.L. (2005) 3<sup>rd</sup> Edition Research at grass roots: *For the social sciences and human service professions*.

<sup>78</sup> See supra note 41

<sup>79</sup> Bryman, Alan. 2001. *Social research methods*. Oxford: Oxford University Press.





**Figure 2 Photo1. Meeting by MCM staff, EKZN wildlife compliance representatives (green uniform) and Border police commander in Durban, July 2008 (Photo: Wellem, X).**

Then the third and last meeting in Durban was held on 11 July 2008 at 9 am supposed to be at 8 am with Transnet National Port Authorities, the harbour Chief, the Master and two other officers but was delayed because we got lost as to which building exactly was the venue. The meeting was scheduled for 1 hour as the port authorities were emphasising their busy scheduled work, but they were devoted enough it lasted more than that. During all meetings notes were taken and after each meeting interview questionnaires were distributed to the representatives and had to be completed and returned by fax or mail within a space of a week. Meetings were basically information sharing and understanding as to how MCM and these stakeholders conduct their business processes and was the first time ever initiative by MCM in Durban.

In *Cape Town* a meeting with two TNPA (Harbour master and Marketing manager), MCM staff and one MCM compliance representative on 01 August 2008 was held and lasted for 2 hours; and questionnaires were distributed for TNPA and fisheries control officers (MCM compliance). For the ship agents, two meetings were held on November 2007 and early May 2008; due to absence, to gather minutes for both meetings was a the only possible option

adopted. During the course of those meetings the Director<sup>80</sup> introduced my project to the representatives, when I contacted them over phones and emails they knew about me already and that made it possible to give out interview questionnaires to them as well.

The same principle was adopted in *Port Elizabeth*, southwest Indian Ocean (see figure 1) for fisheries inspectors since they are the persons involved with FFVs in the port, and there are no foreign fishing vessels agents based that side (*personal comm.*). Communication was basically telephonically with the chief inspector, first week August 2008 I called and explain my project to him. He was eager to help, thus interview questionnaires were sent to him by fax and manage to get three respondents returned by fax.

During the course of all the meetings held both in Durban and Cape Town I took notes and Marine and Coastal Management staff also did; I then later combined the notes especially from the lady namely senior administration officer.

### ***2.3.2 Quantitative approach***

A quantitative study is defined as an inquiry into a social or human problem, based on testing a theory composed of variables, measures with numbers and analysed with statistical procedures in orders to determine whether the predictive generalisations of the theory hold true<sup>81</sup>. The sources of data were Marine and Coastal Marine Exclusive Economic Zone (MCM EEZ) entrance permit applications from resource management section and port authority's statistics of foreign fishing vessels visiting South Africa for the years (2005 – 2008) and (2003 – 2008) respectively as they are recorded every year. Data analysis will help to determine the magnitude of foreign fishing vessel calling for ports. And also will indicate the trend and amount of these vessels between the two designated ports, as the 2007 permit application requires a vessel to specify which port is it intended to dock. This data will support the qualitative data which was collected in meetings and questionnaires, so as to understand the significance of bringing these vessels to South African ports.

### ***2.3.3 Experiences and limitations***

Due to time constraint there were few possible options to obtain a large number of respondents within a brief period of time. So other means to get more information and

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<sup>80</sup> The Chairperson and Director of Offshore and High Seas Fisheries Management at the time, Ms Theresa Frantz

<sup>81</sup> See supra note 76

understanding were employed, including participating in MCM inspection operations on foreign fishing vessels and available minutes of meetings held during my absence were considered. In those meetings, minutes and operations held; understanding and experiences were obtained.

In both Cape Town and Durban meetings held, shipping agents were the busiest of all stakeholders. During the meeting in Durban some of agents were getting calls from their clients, they had to break out during the course of a meeting to attend to those calls. This also explains the response rate, at the beginning where only two agents responded to the questionnaires within a week. For other agents telephone calls and emails were made as reminders, but problems still existed. Because for some of the agent's company cards had only telephone numbers not cell phone numbers, so calls were made to the company and the agents were not available and for emails they claimed that they did not receive any and sometimes they even had changed the emails and so forth. As a result four agents (44%) responded in Durban as opposed to Cape Town nine agents (64%) responses; however, all agents did emphasise that their companies are operating in both ports so that might probably be the reason for their responses.

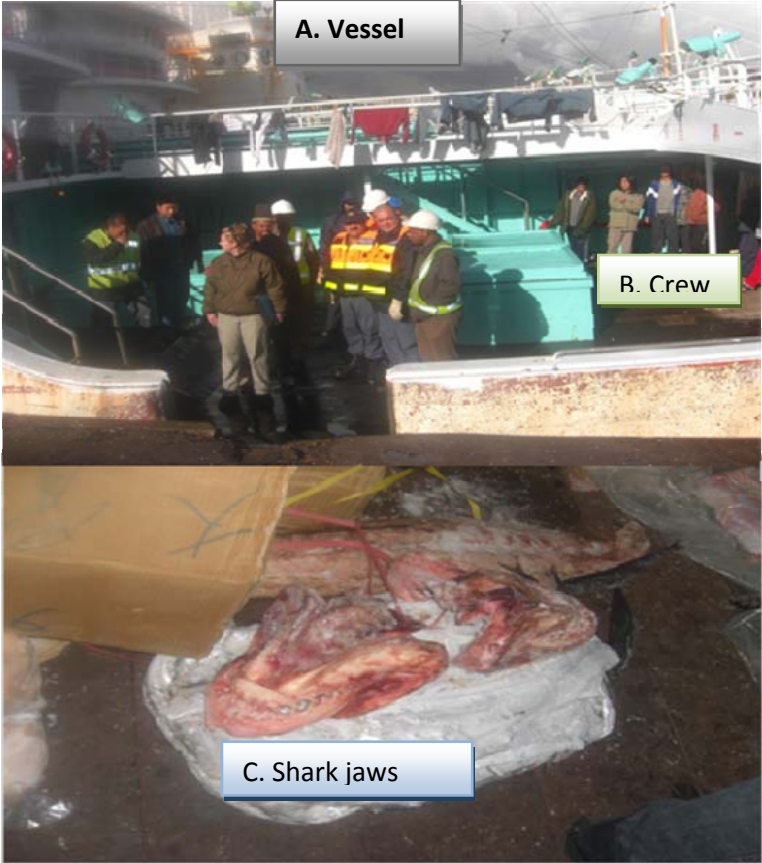
Still in Durban, the meeting with the port authorities was scheduled for 1 hour at 8 am in the morning, but we got lost with the inspectors and we made 9 am. The authorities were so keen to us that they gave us some time (1:45) even though they had highlighted on their busy schedule. Surprising enough that inspectors did not know the building of the authorities for the port they do inspection and monitoring for discharging fishing vessels. And unexpectedly quick (within a week) response from Durban harbour master on the questionnaires, especially from the rumour heard before that he was not a very welcoming person.

Back to Cape Town the inspector's response rate was very poor, even though questionnaires were handed to them in person claiming that they could not understand some of the questions. In addition they are within the same building 7<sup>th</sup> with resource management 3<sup>rd</sup> floor where I was based, but 2-3 weeks had to pass without getting responses from them having excuses of being busy. Nevertheless, Port Elizabeth approximately 770 km away from Cape Town I managed to get three respondents within a space of a week with just few phones calls and emails I made.

A joint operation in Cape Town (fig.3 below) was held late June 2008 where three foreign fishing vessels<sup>82</sup> were inspected and I participated. The operation is random, authorities just communicate when there is suspicion of illegal vessel activity no specific dates in place. The inspection was initiated by MCM, it included Custom officers, Immigration officers, Border police and the port authority was excused due to other commitment he had. All the former entities were inspecting according to their respective fields and for MCM we (me and the fishery inspectors) were checking kitchens, the freezers and other place where hiding of illegal fish was possible. But even though inspection was conducted there was a getaway, because we had to wait for almost 30 minutes for the vessel agents. He was called from his company and we had to wait we could not board the vessel unless he arrives. So that was an enough chance for the crew to hide what ever was illegal.

**Join operation on FFV**

**Join operation by MCM, Border police, Immigration officers and Custom officers in Cape Town.**



**Figure3 Photos 2 and 3: During joint operation from left back in the vessel are vessel agents, police and custom officers (right) and the inspector (she) in a brown jacket and me behind her upfront, June 2008 (Photos Wellem X.).**

<sup>82</sup> There two Taiwanese vessels and one Philippine vessel.

However, in one of the Taiwanese vessels we did manage to discover some illegal shark jaws (figure 3c) in the freezer (*that was a very cold place*) as the vessel was suppose to have nothing onboard except bait because discharge had already taken place. The inspector (she) said further proceedings will be taken on the matter and later the warning was given to the vessel (*personal communication with the inspector*).

During all meetings and questionnaires costs were relatively low; because large numbers of respondents were obtained as oppose to conduct each an every individual to gather information and also time was a factor to be considered because only 2 and half months available to collect data. The advantage was that the same motivation was offered to all respondents and the possibility of contamination was eliminated.

Potential limitations are often even in most carefully planned research<sup>83</sup>. First was the limited time and budget, and also I did not have enough time to dig deep in the topic so that I carefully plan my research data collection. The course work was too much to accommodate some time before going out for data collection. Initial the response rate from the respondents was very low than expected to return questionnaires, since the agents had demonstrated interest to work with me as the project's objectives to improve the existing state of affairs for their benefit. Especially with the some ship agents claiming that they had forgotten about the questionnaires while they were the very persons raising concern on delays of permits (*why a permit has to take 7 day?*)<sup>84</sup> Due to the pressure they get from their customers (FFVs). The follow up was performed by calls and emails reminders eventually the response rate improved; since contacts details from shipping agents list in MCM were available for all the respondents it was possible to contact them.

The data from Marine Coastal Management was collected for departmental purposes not my research, hence not all the years has the required information for my study. However the crucial information is available, such data like number of vessels visited each year from 2005 because it will support the primary data. And also the consideration of visit of foreign fishing vessels statistics from port Authority was to overcome those disadvantages. However, validity and reliability of the data is considered it will serve the objectives of this study due to efforts made to mitigate those potential limitations. The study aims to explore a problem or describe a setting, a process; pattern of interaction will be it validity. An in-depth description showing

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<sup>83</sup> See supra note76

<sup>84</sup> During the meeting with the shipping agents in Durban, one agent raise a question of permit delays

the complexities of variables and interaction will be embedded with data derived from the settings that it cannot help but valid<sup>85</sup>.

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<sup>85</sup> See supra note 75

## Chapter Three

### THEORIES AND PRACTICE

#### 3.1 Introduction

This chapter focuses on what institutions are in theory and how they can really perform in practice. Institution concept is adopted here due to the nature of the study that involves different actors towards a same entity. The concept is broad in nature and its application in this study is somehow reduced to stakeholders/organisations due to the fact that there is no distinction in practice although exist in theory. As different actor towards a common entity prevails, collective action is required so the notion of the latter is also employed.

The inclusion of impact analysis and compliance of FFVs is also considered. The rationale is the fact that South Africa is a signatory to several international agreements, treaties and conventions, so it has to fulfil her legal obligations. Therefore by fulfilling such obligations means the country should improve its regulations concerning foreign fishing vessels and doing so as a developing country some impacts such as cost and benefits will be incurred. However, international measures to regulate foreign fishing vessels by port/flag states are also considered in this regard.

#### 3.2 Institutions in general

As Jentof argues, families, firms, communities, social networks, private organisation (NGO), research institutes, government agencies and legislative bodies are all entities termed institutions. And they are also generally perceived to include shared symbolic system, such as languages, religion, law and science. Institutions are indispensable when organising, communicating, representing, negotiating, leading, and governing. They are part of the constitution, something we share as a joint experience, and provide us with common social identities and frames of reference<sup>86</sup>. According to Elster, social institutions keep society from falling apart, provided that there is something that keeps them from falling apart. Institutions can be private and public; “they shelter us from the destructive consequences of passion and self-interest, but also they themselves run the risk of being undermined by self-interest “the rust of societies” Tocqueville called it”<sup>87</sup>.

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<sup>86</sup> See Svein Jentof, Chapter 6 in **Fisheries Development: The institutional change** (2004) by Bjørn Hersoug,

<sup>87</sup> See Jon Elster, **Nuts and Bolts: For the Social Sciences** (1990), Chapter: Social institutions

By definition the concept institution has a wide range of theories which at best partially overlap and they emphasise different attributes and qualities. Some theories define institutions in broader terms than others.

For example some approaches define institutions as an aspect of culture, a set of habits, rules or values. Mead defines it as “*nothing but an organisation of attitudes, which we carry with us, the organised attitudes of others that control and determine conduct*”<sup>88</sup>. Pearson perceives institution as “*a structure in which powerful people are committed to some common value or interest*”.

By contrast Elster defines institution “*as not rules per se but the instrument that guarantee they are abided by: as a rule-enforcing mechanism*”. The rules govern the behaviour of a well defined group of persons by means of external and formal sanctions. March and Olsen are talking of “*collection of interrelated rules and routines that defines appropriate actions in terms of relations between roles and situation*”<sup>89</sup>. Hence, the definitions varies based to different disciplines of social science literature, the latter definitions are the bases of reasoning in this study. Marine and Coastal Management and National Port Authority are the public institutions in South Africa therefore the rationale for this theoretical insight is due to their analysis as to how well are these entities are organised.

### **3.2.1 Private and Public institutions**

Institution can be public or private depending on the nature of sanctions. Private institutions include firms, trade unions, religious organisations and universities. The main sanction at their disposal is expulsion from the group. They offer benefits ranging from a wage or a degree to the absolution of sins for people to join<sup>90</sup>. The shipping agents are falling under this definition, so law enforcement will be hard to impose if they do not comply with regulations as the case could if they were public institutes. However, in the meeting held in November 2007 with the shipping agents the Director<sup>91</sup> mentioned that MCM expects agents to be aware of the IUU vessel list so that they do not render services to those vessels. She further declared that “legal actions could be taken against any South African that supports IUU vessels as well as any South African onboard an IUU vessel, with effect from July 2008”.

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<sup>88</sup> See Mead, G.H. Mind, self and society (1934)

<sup>89</sup> See March, J.G. and Olsen, J.P. (1989) Rediscovering institutions: The organisation basis of politics

<sup>90</sup> See supra note 87

<sup>91</sup> See supra note 80



The public institutions include Congress, securities, exchange commission, the Supreme Court, government agencies and etc. Their sanction by contrast to private is that they are backed by the law enforcement systems; include subsidies, taxes, fines and imprisonment. The rules enforced include laws, judicial decisions, administrative decrees and executive orders<sup>92</sup>. Port Authority and MCM are public institutions they are subject to law as the former suggest; they can enforce law to non complying individuals. Also they themselves are not immune to law enforcement if they are breaking/corrupting the system. As public institution is concerned “force” means any action intended to make undesirable practise more costly for those who might be tempted to engage in it. And institutions themselves rely heavily on this means of enforcing their rules. The intension to make undesirable behaviour more costly induces less costly for the desirable behaviour. “Without enforceable contracts, long term interaction and planning would rest on the fragile of honesty and credible threats” Elster argued.

Elster went on by saying institution can affect behaviour by altering the bargaining context for individuals. He argue that institutions action can produce kinds of effects: *efficiency* (they make everybody better off), *redistributive* (transfer income without any waste), *redistribution* (at the cost of some waste), others still achieve *efficiency at the expense of the redistribution* and finally *destructive* (by making everybody worse off). Institutions can also make everybody better of by solving collection action problems.

### **3.2.2 Collection action problem**

The collective action problem is employed based to the fact that different stakeholders are working towards a common interest. Nevertheless level of interest is not even, some of the stakeholders are not familiar with the operation and their responsibilities, and thus collective action problem prevails. The concept is characterised by constant benefits and decrease cost of cooperation, shows how varying degrees of force could make people to co-operate. For instance imposing a large fine to non co-operators, co-operators will always do better than non co-operators<sup>93</sup>. But if a small fine is imposed to both then universal co-operators and non co-operators are in equilibrium. Cooperation will be achieved only if people are well informed, so that they can count of each others cooperation. If it is reached based to these

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<sup>92</sup> See supra note 87

<sup>93</sup> See supra note 87, Chapter: Collective Action

grounds stability would reveal against defectors though it might be hard to achieve Elster concluded.

Elster defines collection action problem “*as suppose that each member of a group has a choice of engaging in a certain activity and not engaging in it. The group has a collective action if it is better for all if some do it than if nobody does, but better for each not to do it. It may or may not be better for all to do it than if nobody does and it may or may not be best if all do it*”. He states that people who do what is best for all if all do it are called co-operators, and the others are non co-operators. Cooperation is to act against one’s self interest in a way that benefits all if some, possible all act in that way.

Collective action problems arise because it is hard to get people to co-operate for their mutual benefits, especially in a large group with many people who do not know each other very well cooperation is hard to find. Co-operation occurs when and because different motivations strengthen each others self interest. Two terms are adopted to clarify the behaviour of different groups of people, *Kantians*: they want to do what would be best if all did it; *Utilitarians*: they want to promote the common good. The Kantians could act as a trigger or catalyst for Utilitarians behaviour, and Utilitarians as a multiplier for the Kantians; the Utilitarians might themselves act as catalyst for people who are motivated by the norm of fairness<sup>94</sup>.

### **3.3 Impact analysis**

“Impact” is a very general word, meaning the influence of one set of events has on the others; generally impact analysis seeks to measure the impact of public action, such as regulation on a designated sector of the society/economy<sup>95</sup>. The idea is widely employed in natural resource economics, but its relevance to the study is that *impact* of foreign fishing vessel in South Africa is one of the objectives to be assessed. The concepts will be determined to the limited extend just to expose the implication due to limited time and insufficient data available.

Understanding of compliance is of necessity, therefore compliance theory is considered. But also will be determined not into great depth just to understand what is compliance. Tyler 2006 defines compliance as the behaviour of people to conform to rules that have been developed to influence actions. “These rules may exist as formal laws or as informal law

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<sup>95</sup> See Field, B.C. (2001) Natural Resource Economics: an introduction

norms, thus being monitored and enforced through either formal or informal mechanism or some times both”<sup>96</sup>. The scholar explores two thoughts of compliance, the rational models of deterrence and law enforcement that assume that rational actors calculate cost and benefits of their actions; while normative models investigate norms, morality, legitimacy and social and cultural influences of individual’s decision to comply with rules and laws. The rationalist model theory is the concept dominated the fisheries compliance theory; a fisher will choose to comply or not based on economic gains and severity of sanctions<sup>97</sup>. Hence South Africa shares no common norms, morals; social/cultural etc with foreign fishers, rational compliance model is a solution for them to comply.

### **3.4 International measures, obligations and practices on FFVs**

The United Nations Convention on the Law of the sea (UNCLOS) 1982 is a key to international agreement that exerts significance influence over domestic fisheries policy<sup>98</sup>; it establishes the legal regime for the governance of oceans and all marine resource therein. International instruments which deal with port State control on fishing vessels includes UN Fish Stock Agreement, FAO Code of Conduct for Responsible Fisheries, FAO Compliance Agreement were all developed in the 1990s and IPOA on IUU fishing in 2001. The FAO Model Scheme on Port State measures to combat IUU is a relatively new instrument adopted in 2005<sup>99</sup>.

Article 58 of UNCLOS acknowledges that all states enjoy the right of navigation and over flight and laying pipelines and cables within EEZ. Within their respective Exclusive Economic Zones coastal states incur various conservation and sustainable use requirements with regard to marine resources. Article 117 of UNCLOS on the High Seas spell out that, “States have a duty to take or co-operate in taking conservation measures”; establishing regional fisheries organization<sup>100</sup> and flag states shall effectively exercise their jurisdiction and control over ships flying their flags<sup>101</sup>. States enjoy freedom on high seas, they have a

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<sup>96</sup> see Hauck M. (2008) Marine policy 32 pg 635-642

<sup>97</sup> see Raakjær, J. (2003) Marine policy 27 pg 425-432

<sup>98</sup> See UNCLOS, 1982, UN Doc A/CONF 62/122

<sup>99</sup> See Ichiro Nomura’s opening statement on FAO regional workshop on Port State Measures to combat IUU fishing, Cape Town, South Africa January 2008

<sup>100</sup> See Article 118 of UNCLOS 1982

<sup>101</sup> See Article 94 of UNCLOS 1982

right to fish and conduct scientific research; also they may engage in fishing subject to treaty obligation<sup>102</sup>.

### ***3.4.1 Port State control fisheries-related***

A coastal state has full jurisdiction within its internal waters, with minor exceptions. These waters include ports and are regarded as part of the land over which the State has sovereignty<sup>103</sup>. Port State control is the control of foreign flagged vessels in national ports; its competency is highly operational on merchant fleet and fishery is newly adopted as it was seen as extremely relevant for the fishery conservation and management.

International instruments related to fisheries include UN Fish Stock Agreement article 23<sup>104</sup> “measures taken by the port state”. Part VII of the agreement articles 24 and 25 recognise the special requirements for developing States in relation to conserve and manage these stocks; and form of cooperation among states either directly or through sub-regional, regional or global respectively. The FAO Code of Conduct for the Responsible Fisheries is a voluntary instrument rather than a legally binding international agreement. It provides a broad and comprehensive framework of principles and standards for efforts to promote responsible fishing worldwide through effective conservation, management and development of marine resources<sup>105</sup>.

Compliance Agreement<sup>106</sup> is an integral component for the FAO Code of Conduct for responsible fisheries and is a legal binding international instrument. Its purpose is to “provide an instrument for countries to take effective action, consistent with international law, to deter reflagging of vessels by their nationals as a means of avoiding compliance with applicable conservation and management rules for fishing activities on the high seas”<sup>107</sup>.

International Plan of Action to combat illegal, unreported and unregulated (IPOA-IUU) fishing is a voluntary instrument that applies to all States and entities and to all fishers. Objective and principles of this instrument are to prevent, deter and eliminate IUU fishing by providing all States with comprehensive, effective and transparent measures by which to act,

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<sup>102</sup> Articles 87 and 116 UNCLOS 1982

<sup>103</sup> See Lobach, T. Port State control of fishing vessels: FAO fisheries circular. No.987. 2003

<sup>104</sup> Agreement for the Implementation of the Provision of UNCLOS 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks adopted 1995.

<sup>105</sup> See [http://www.mcm-deat.gov.za/international/code\\_of\\_conduct\\_responsible\\_fisheries.html](http://www.mcm-deat.gov.za/international/code_of_conduct_responsible_fisheries.html)

<sup>106</sup> Agreement to Promote Compliance with International Conservation and Management measures by fishing vessels on the high seas adopted in 1993.

<sup>107</sup> See [http://www.mcm-deat.gov.za/international/compliance\\_agreement.html](http://www.mcm-deat.gov.za/international/compliance_agreement.html)

include through appropriate RFMOs establishment in accordance with international law<sup>108</sup>. States responsibilities; being flag, coastal or port State are well defined in the instrument. Paragraphs 51 – 64 of the IPOA on IUU fishing defines all measures that a coastal and port state should consider. “When confronted with IUU fishing, nations and RFMOs can fail to achieve management goals. This situation leads to loss of both short and long-term social and economic opportunities and has a negative effect on food security and environmental protection. And can lead to collapse of a fishery or seriously impair efforts to rebuild stocks that have already been depleted”<sup>109</sup>.

The Model Scheme was developed as a result of consultations convened by FAO between 2002 and 2004, and the FAO fisheries committee urged members to give priority to its operationalisation<sup>110</sup>. *“Its purpose is to facilitate the implementation of effective action by port States to prevent, deter and eliminate illegal, unreported and unregulated (IUU) fishing. Following the Preamble, the Scheme addresses general considerations, issues relating to the inspection of vessels while they are in port, actions to be taken when an inspector finds there is reasonable evidence for believing that a foreign fishing vessel has engaged in, or supported, IUU fishing activities, and information that the port State should provide to the flag State. The final section of the Scheme focuses on other matters including the provision that it should be implemented in a fair, transparent and non-discriminatory manner”*<sup>111</sup>.

### **3.4.2 Practices by other port States on IUU by FFVs**

Port state should require all foreign vessels having engaged in fishing activities or transporting fish or fishery product to provide prior notice of the intention to use a port, its landing or transshipping facilities<sup>112</sup>. Paragraphs 55 and 57 of IPOA-IUU fishing set out minimum requirement prior to allowing a foreign fishing vessel port access; and States should publicise ports to which foreign fishing vessels may be permitted admission and should ensure that these ports have the capacity to conduct inspection respectively. Article 23 of 1995 UN Fish Stocks Agreement suggests that port States should not discriminate, they should treat their vessels and foreign vessels on equal terms.

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<sup>108</sup> See paragraph 8- 9.6 of the IPOA on IUU fishing

<sup>109</sup> IPOA to prevent, deter and eliminate IUU Fishing: FAO of the UN. Rome, 2001

<sup>110</sup> See FAO Fisheries Report No. 859: Regional workshop on Port State measures to combat IUU 2008

<sup>111</sup> See FAO Model Scheme on port State measures to combat illegal, unreported and unregulated fishing Rome, FAO. 2007. 46p.

<sup>112</sup> See Lobach, T. Port State of foreign fishing vessels: FAO Fisheries Circular. No.987. Rome 2003

Australia and France had signed treaties on cooperative surveillance and enforcement in their remote EEZs in the Southern Ocean in 2003 and 2007 respectively<sup>113</sup>. And this serves as further evidence of the development of State practice in response to IUU fishing<sup>114</sup>. In Australia amendments to domestic fisheries law has been made; the current maximum penalty available for foreign fishing offences committed in the Australian Fishing Zone (AFZ) with respect to vessels over 24 metres is A\$ 825,000<sup>115</sup>. The other two amendments made *where automatic forfeiture regime* and *pursuit cost*. Section 106 A of Australia's Fisheries Management Act 1991 provides the automatic forfeiture of a vessel and its equipment. Under Australian law, if a foreign flag vessel on high seas upon suspicions of committing a relevant fisheries offence in its waters, such a vessel would become an Australian and thus Australia would simply seize its own vessels.

In 2004, Australia took a further step on hot pursuit; all expenses incurred in hot pursuit should be recouped from the owner of the arrested vessel. Such expenses are on behalf of Commonwealth in respect of pursuit of activities conducted in respect of the boat; it further include costs incurred by governments of foreign countries that assisted in the pursuit of apprehension of the vessel<sup>116</sup>. The amended section of hot pursuit in Australian law remains to be seen whether the provision is consistent with LOSC Gullet and Schofield further commented. In 2007 South Africa and Australia announce their intentions to conclude a bilateral treaty similar to Australia-France treaties. "This development may turn out to be the essential momentum needed for States to consider seriously initiating one of the available procedures to amend LOSC or opting to advance a more flexible interpretation of the Law of the Convention" Gullet and Schofield concluded.

According to Lobach, as he requested a number of States about information regarding their port practices on IUU fishing by foreign vessel, but unfortunately only few (Canada, US, Iceland and South Africa)<sup>117</sup> submitted relevant information:

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<sup>113</sup> See Treaty between the Government of Australia and the Government of the French Republic on cooperation in the maritime Areas adjacent to the French Southern and Antarctic Territories (TAAF), Heard islands and the Macdonald islands, Canberra, 2003 and further developed an Agreement on Cooperative Enforcement in 2007.

<sup>114</sup> See supra note 25

<sup>115</sup> See Australia's Fisheries Management Act 1991 (Cth), section 100A (2) (a): Also available online [http://www.austlii.edu.au/au/legis/cth/consol\\_act/fma1991193/](http://www.austlii.edu.au/au/legis/cth/consol_act/fma1991193/)

<sup>116</sup> See section 106L of Australia's Fisheries Management Act 1991

<sup>117</sup> See Lobach, T. Measures to be adopted by the port State in combating IUU fishing: *Current Practices by some port States*. AUS:IUU/2000/15

## *Canada*

“Canadian fisheries legislation includes the controlling of activities and access to Canadian ports of foreign vessels<sup>118</sup>. The regulations list nations whose vessels may be granted a licence to enter Canadian ports for a number of purposes, including effecting of repairs and obtaining supplies. Subject to obligations arising from bilateral fisheries agreements, other laws, treaties and provisions, e.g. force majeure, access to Canadian ports will not be granted to fishing vessels which undermine conservation measures by fishing contrary to conservation regimes established by international fisheries organizations to which Canada is party. Licences for access to Canadian waters for specific purposes, such as purchase of fuel and supplies, ship repair, crew exchanges and transshipment of fish catches<sup>119</sup>, are only granted to fishing vessels from a country with which Canada has favourable fishery relations”.

Canada's Coastal Fisheries Protection Act already prohibited foreign fishing vessels from operating without permission in Canadian waters see section 3 of the Act. Section 5 of the Act specify conditions of license to fish in Canada, however for South Africa that is not the case, only section 5(iii) that can be applicable in South Africa because no foreign fishing vessel (FFVs) is allow to fish in S.A. waters unless is a joint venture vessel. The registration of the persons authorised to represent the foreign flagged vessel<sup>120</sup> and for South Africa the representatives are shipping agents and are subject to registration only in port authority but not the fishery authorities. The Act also incorporated RFMOs recommendations such as NAFO and ICCAT sections 26 and 40 respectively. In South Africa all the conditions for FFVs are specified in the EEZ permit but not the country's law (MLRA no 18 of 1998). However, if the SA fisheries Act's amendments can address the issue of foreign fishing vessels implementing some of Canadian provisions such as RFMOs recommendations and agents registration by the fisheries Authority compliance by the FFVs might improve.

## *United States*

“According to US legislation fishing vessels taking part in large-scale drift-net fishing on the high seas may be denied port privileges in a US port<sup>121</sup>. Further, foreign vessels under US law<sup>122</sup> are generally prohibited from landing in a US port fish caught on the high seas, and as a result foreign vessels do not call on US ports”. Section 251 (c) states how forfeiture and penalties should be “Any fish landed in the Virgin Islands of the United States which are retained, sold, or transferred other than as authorized in subsection ((b) sale or transfer for immediate consumption) shall be liable to forfeiture and any person or persons retaining, selling, transferring, purchasing, or receiving such fish shall severally be liable to a penalty of \$1,000 for each offense, in addition to any other penalty provided in law. Therefore if South Africa could also impose such penalties under the Marine Living Resource Act i.e. about R8500 in South African rand.

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<sup>118</sup> See Coastal Fisheries Protection Act (R.S.C. 1970, c.C.21) Sections 3 and 4, and Coastal Fisheries Protection Regulations (C.R.C., 1978, c. 413), Section 5.

<sup>119</sup> See Section 5(iii) of Coastal Fisheries Protection Regulation of Canada

<sup>120</sup> See particular section 7(f) of Coastal Fisheries Protection Act 2009

<sup>121</sup> See SEC.206a of Magnuson-Stevens Fishery Conservation and Management Act (As Amended Through October 11, 1996).

<sup>122</sup> See 46 U.S.C. Sec. 251.

### ***The Norwegian approach***

Norway has been working seriously in dealing with unregulated fisheries on high seas for quite some time<sup>123</sup>. Thus, several measures to discourage this undesirable behaviour include denial of fishing license and the right to fly the Norwegian flag; denial of the use of port facilities; Vessels without nationality; Co-operation with other port States and *inter alia*.

If a vessel or the vessel owner has taken part in an unregulated fishery on the high seas on a fish stock subject to regulations in water under Norwegian fisheries jurisdiction, an application for fishing license for such vessel/owner in Norwegian waters may be denied. Foreign fishing vessels that have taken part in an unregulated fishery on high seas have been denied port access by the Norwegian port authorities<sup>124</sup>. However, in South Africa foreign fishing vessels are subject to permit application prior entrance in ports; the conditions of the permit require a vessel to specify reasons to come to port, port of call, type of vessel, details of vessel, owner, and the agent etc<sup>125</sup>. And paragraph 2 of the permit condition acknowledges that all foreign vessels upon entering SA EEZ are subject to the country's fisheries law, the Marine Living Resource Act no 18 of 1998. If the vessels could not declare what it has onboard or not all information required provided, port access is denied; and also contravening of permit condition by deliberately misreporting is subject to fines, forfeiture of the excess catch and reported to international community.

There is a reference under 1982 UNCLOS<sup>126</sup> that if reasonable grounds for suspecting a vessel being without a nationality such vessel maybe treated by the boarding State as its own vessel. Inspired by the US law, Norway has amended its national legislation accordingly<sup>127</sup> in order to exercise those measures.

Regarding co-operation Norway has entered into agreements with States<sup>128</sup> for monitoring, surveillance and control. Norwegians acknowledge the significance benefits in sharing relevant information and intelligence and enhancing co-operation in areas of mutual interest. Especially when exchange of information on inspection at sea and on port control; exchange of personnel between relevant control services and to co-operate on training of personnel are initiatives considered. The country further signed an agreement with Canadian government on conservation and enforcement basis<sup>129</sup>.

Under International Law, States are not entitled to institute legal proceedings against foreign vessel for fishing violations that have taken place exclusively in areas outside the national jurisdiction of that State<sup>130</sup>. Hence, there are exceptions to this rule; exception concerns Stateless vessels in the high seas or vessels undermining the

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<sup>123</sup> Lobach T, Legal adviser Director of Fisheries, Norway in Sydney, Australia May 2000

<sup>124</sup> See Lobach, T. Measures to be adopted by the port State in combating IUU fishing: *Norwegian approach to curb IUU fishing*. AUS:IUU/2000/15

<sup>125</sup> See DEAT application form for permit to enter SA EEZ by foreign fishing vessels

<sup>126</sup> See particular Article 110 (1)(d) of LOS Convention which concerns ships without nationality

<sup>127</sup> A vessel without a valid flag is going to be treated like a Norwegian vessel and thereby all legislation relevant to Norwegian vessels will apply to Stateless vessels and they may be prosecuted accordingly.

<sup>128</sup> Such agreements are concluded with Denmark, Faroe Islands, France, Iceland, Ireland, Netherlands, Sweden, Russia and United Kingdom

<sup>129</sup> See Agreement between the Government of the Kingdom of Norway and the Government of Canada on Fisheries conservation and enforcement (signed 30 June 1995).

<sup>130</sup> See section 2 article 116-119 of the UNCLOS 1982



conservation measures of relevant RFMOs. The domestic laws of Canada, Norway and the US respectively authorise each of those State to take enforcement action against such vessels under certain circumstances.<sup>131</sup>

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<sup>131</sup> See Lobach, T. Port State of foreign fishing vessels: FAO Fisheries Circular. No.987. Rome 2003

## Chapter Four

### AN ANALYSIS OF SOUTH AFRICAN PRACTICES ON FOREIGN FISHING VESSELS

#### 4.1 Introduction

Hauck 2003 acknowledged that to better understand the factors influencing (non)-complaint behaviour and thus effectively respond to them, it is necessary to gain a broad understanding about the inter-relationships that exist, and the complexities that are evident in a system where people co-exist. Therefore, in South Africa a foreign fishing vessel has to apply for an Exclusive Economic Zone (EEZ) permit to enter South African waters into ports through shipping agents. The agents themselves have to apply to Marine and Coastal Management (MCM) customer service centre on behalf of the owner of such a foreign vessel<sup>132</sup>. Paragraph 1 of Permit condition for foreign fishing vessel to enter South Africa (SA) state that, a permit holder (agent) should at least 24 hours notice of the vessel's Estimated Time of Arrival (ETA) and also to indicate port of call to MCM's Fishery Control Officers<sup>133</sup>. An EEZ permit application process within MCM has to via four personnel namely customer service; and Administrator, Assistant/Deputy director, and the Director of large pelagics and high seas sector respectively for pre-screening of the vessel and signature granting validity of the permit before taken back to customer service for collection by shipping agent. The former personnel reside under resource management, large pelagics and high seas sector in MCM Cape Town.

Fishery Control Officers are personnel under Monitoring Control and Surveillance (MCS) a sector within MCM; they are responsible for the monitoring and inspection of local/foreign fishing vessels (FFVs) landing catches in South Africa. National Port Authorities (NPA) is an entity under the national department of Transport which own, manage, control and administers, ports of South Africa to ensure their efficient and economic functioning<sup>134</sup>. All the former entities are involved in facilitating the visit of FFVs into ports and communication, co-operation and coordination among them is an enquiry. *There is a loophole (lack of communication, co-operation and coordination) among them and if so why?*

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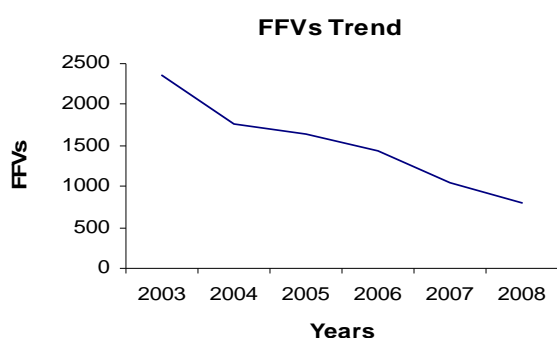
<sup>132</sup> See appendix EEZ permit application form

<sup>133</sup> Permit condition for foreign vessels entering South African EEZ 2008

<sup>134</sup> See Chapter 3 section 11 of National Port Act. No 12, 2005

#### ***4.1.1 The present state of foreign fishing vessels visiting SA for discharge, transshipping, refuelling, repairs etc.***

From the MCM EEZ permit application data Japan (30%), Taiwan (24%), Spain (7%), China (6%) Korea (5%) and others<sup>135</sup> are the main flagstates that dominated visits in South African ports in 2005-2008 period. The type of vessels that came were dominated by the Tuna Longliners (80%), Squid Jiggers (12%) and Bottom Trawls (2.5%) and few Crustacean Longliners and Toothsifh Longliners respectively; and tuna and tuna like species<sup>136</sup> were the most popular fish resources discharged.



**Figure 4: General trend of foreign fishing vessels in South Africa years (2003-2008)<sup>137</sup> from port authority's statistics.**

The figure above illustrate the general trend of foreign fishing vessels in South Africa, a dramatic decline of vessels from about 2500 to less than a thousand in just 6 years. Nevertheless, statistics related to each harbour is found in figure 5 below. This situation definitely brings attention to FAO Model Scheme recognitions of economic implications. A decline of this scale might have negative impact in the country's economy and especially to the directly and indirectly involved parties. As South Africa has a non legal binding obligation to improve its enforcement on FFVs to combat Illegal Unregulated and Unreported fishing this might explain trade-offs a country has to make in order to show commitment to

<sup>135</sup> The countries includes Portugal (4%), Philippines (3.8%), Indonesia (2.8%), Namibia (2%) Mozambique (1.2%) and etc. less that 2%

<sup>136</sup> Bigeye tuna, Yellowfin tuna, Southern Bluefin tuna, Albacore, Skipjack tuna, Swordfish, Marlins, Sailfish, Bonita, sharks etc.

<sup>137</sup> Constructed figure from port authority statistics of foreign fishing vessels visiting South Africa, statistics available on line [http://www.transnetnationalportsauthority.net/NPA\\_Port\\_statistics.html](http://www.transnetnationalportsauthority.net/NPA_Port_statistics.html)

international instruments. The impact can be measured in employment numbers total and trade balance with other countries<sup>138</sup>.

Recalling from the background of this study “the South African approach to compliance”, the country has improved its enforcement. In early 2009 four foreign fishing vessels were convicted and fined with the highest fine (R1.5 million) ever impose to a Taiwanese vessel for such transgression in South Africa<sup>139</sup>. This explains the improvement of the country’s law enforcement, thus the illegal operator are aware of the situation is South Africa so they just probably discharge some where else. Two statements from the fishery manager and the port marketing manager supporting this thought during the meeting in Cape Town. “That Namibia has bilateral agreement with Spain. And Spain is helping Namibia in port infrasture upgrading. And Spanish vessels are no longer coming to South African port due to sharkfin ratio which is 5% as opposed to their home ratio of 12% *about 40 vessels a month now she further stated*”.

Figure 4 demonstrate the general trend from the port authorities statistics; however, compared with MCM the figures are different they are not showing common decline from the last four years<sup>140</sup> periods. Whilst the ports report show a decrease especially the last two years periods (2007/08) of less than 1000 vessels showing up. The accuracy of these statistics is uncertain though the port authorit reports are reliable since they record everything that comes to their port but “*still sceptical about especial Mossel Bay port*”<sup>141</sup>. For MCM the available data was only for vessels that have applied for EEZ permit entrance; however, recalling from Durban inspector’s report of “*some vessels come to port without an EEZ permit 3 times within a period of six months by the same vessel*” this might explain the cause of such distinction. Foreign fishing vessels prefer to pay fine of not having an EEZ permit since its just R2500 (approximtely to US\$ 300), knowing that they will get away with fish that was not declared in the permit probably illegal and the accrued returns from such catches will make millions and the fine in just about 300 US dollar.

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<sup>138</sup> See Weisbrod, G. and Weisbrod, B. (1997). A Primer on Economic Impact Analysis: How should economic impacts be measured?

<sup>139</sup> In March 2009 a Taiwanese vessel was fined R1.5 million for deliberately misreporting its catch in the EEZ permit application and a Spanish vessels fined R300 000 for being in SA waters without a valid licence; and on 29<sup>th</sup> April two Korean vessels were a also fined R500 000 each for contravening South African law.

<sup>140</sup> See DEAT-MCM Permit/Exemption report 31 January 2009. Periods 2005/06 and 2007/08 number of foreign fishing vessels is **1659** and **1746** for both periods respectively.

<sup>141</sup> A comment from the Director of off-shore and high seas resource management MCM

Regardless of the operation to all ports the overall foreign fishing vessels trend in South Africa is declining (Fig.5 below). Recalling from Song 2009 he mentioned the decline of Japanese tuna fishing industry since middle 1980s and increasingly in the 1990s<sup>142</sup>. Reasons were rising competition from Taiwan, Korea and other distant-water fishing fleets, soaring labor and fuel costs, declining catches, and shortage of labor supply<sup>143</sup>. Taiwan on the other hand with high number of IUU fishing vessel, accusations from Japan; in 1999 was urged by ICCAT to scrap vessels engage in IUU fishing. In response Taiwan promised to strengthen management and deduct 1600 tons annually from 2005-2009 to compensate for 8000 tons previously caught in excess of its quota<sup>144</sup>. Thus, considering these facts they may hold some reasons for such decline not only because of the improving enforcement, these factors could also be the case. Also Japan 30% and Taiwan 24% are the dominant flagstates that visit South Africa, their increase or decline has significance effect in the country.

Cape Town, Durban and Mossel Bay are in a constant decline respectively. Looking in recent past two years (2007 & 2008) where enforcement suppose to be effective R.B. and P.E. seem to be emerging although in a very slight number; Saldana on the other hand appear to be constant. Average decline for all the years Cape Town (801) is the highest with Durban (142) this might explain something. In Durban during site seeing in the harbour with MCM staff and Inspectors, Ezemvelo KwaZulu Natal (EKZN) wildlife compliance officers with one of the shipping agents we met a Spanish vessel master. During the conversation he acknowledged the strict regulations there are in Cape Town, that even the slightest offence committed they get heavy fines. So to avoiding those heavy fines they prefer Durban than Cape Town port. Therefore improved compliance measures of South Africa on foreign fishing vessels induce the decline of those vessels as a result shipping agents, port authority businesses are negatively impacted. In Durban meeting with the agents one of the agent raised a concern of decline of vessels.

The transshipment at sea is prohibited by the transshipment permit condition of foreign fishing vessels in South Africa. Paragraphs 8 and 9 of the permit condition for foreign fishing vessels to transship in South Africa's exclusive economic zone; state that transshipment may only be carried out in Durban and Cape Town ports and the operation must be monitored by

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<sup>142</sup> See Song, Y (2009) The efforts of ICCAT to combat IUU fishing: The Roles of Japan and Taiwan in Conserving and managing tuna fisheries. *The international journal of marine and Coastal Law* 24 pg 101-139

<sup>143</sup> Also see Miyake, P.M. (2003) Extracts from brief review of world tuna fisheries: FAO Technical paper

<sup>144</sup> See supra note 16

the Fishery Control Officers (FCO). Paragraph 2 of the permit further require all carrier vessels to be in position of an EEZ permit in order to receive transshipment<sup>145</sup>.

#### **4.2 Is it lack of interest to combat IUU fishing by authorities?**

National port authority owns, manages and administers all national ports<sup>146</sup>. And in doing so the Authority must regulate and control the entry of vessels into ports, and their stay, movements or operations in and departures from ports<sup>147</sup>. The act further state section 11 (1) (t) that the “Authority should discharge or facilitate the discharge of legal international obligations relevant to ports”. All ports are under the jurisdiction of the authority the main functions vested upon by the government of South Africa include the control and regulation of access into ports by foreign/local vessels. And under international law the ports of every State must be open to foreign vessel and can only be closed when the vital interest of the State so requires. Therefore the authority is legally subject to the former provisions. The objectives of the authority include *promote the development of an effective and productive ports industry that is capable of contributing to the economic growth and development of South Africa; and establish appropriate institutional arrangements to support the governance of ports*<sup>148</sup>. Section 83 of the national port Act recognises that “a port must be freely accessible to any person who conducts lawful business in it.”<sup>149</sup>

Marine and Coastal Management (MCM) viewpoint, a foreign fishing vessel (FFV) is not allowed access in South African ports until it is in position of a valid Exclusive Economic Zone (EEZ) permit<sup>150</sup>. The permit holder (agents) is responsible personnel to facilitate the communication between the vessel and the authorities; he/she enjoys the right of doing business in ports. The permit condition clarifies regulations that a permit holder (shipping agent) should comply to. Paragraphs 1 and 3 declares that a notice should be provided at least 24 hours of the vessel’s estimated time of arrival and port of call to MCM’s fishery control officers; and upon entering South African EEZ all foreign fishing vessels are subject to the Marine living Resource Act No. 18 of 1998.

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<sup>145</sup> See Permit condition for foreign vessels to tranship in South Africa’s exclusive economic zone (EEZ) 2008

<sup>146</sup> See Section 10 (1) of National Port Act. No 12, 2005: Ports under the jurisdiction of authority and functions of authority, Chapter 3.

<sup>147</sup> See particularly section 11(ii) supra note 146

<sup>148</sup> See section 2 of National Port Act. No 12, 2005

<sup>149</sup> See section 83: Port access of National Ports Act. No 12, 2005

<sup>150</sup> See paragraph 5 of EEZ permit condition 2008

During the meeting in Durban with National Ports Authorities they emphasised on their perspective that any vessel has a right to pass/come to port in South African waters.

*“Cannot deny vessels based on EEZ permits- not in our job description”<sup>151</sup>*

This perspective is indeed inconformity with the country’s law that a port must be freely accessible to any person who conducts lawful business in it; however, contrary to MCM perspective of EEZ permit prior entering SA ports. The port authorities highlighted more referencing to the international law that all vessels are allowed to come to port<sup>152</sup>, and also avoiding of being sued for not giving right of passage. According to authorities the shipping agents are the responsible persons to represent FFVs and all requirements are agencies’ concerned, and *“we have no understanding of any EEZ permit issued by MCM prior a foreign fishing vessel comes to port”* the Durban harbour master enlightened.

The representation of foreign fishing vessels by agents is in business basis when an agent has to pay bills for services (Port dues, Berth dues, Pilotage dues, etc.) for such foreign fishing vessel. Paragraph 10 of conditions of vessel agent registration confirms this point that *“the vessel agent is responsible for the payment of all port dues, fees, fines and other monies due to the Authority by the vessel’s owner.”<sup>153</sup>* However, the registration conditions paragraph 5 recognises that the agent shall comply with all relevant management systems, policies and procedures and directives of the Authority. Therefore the registered shipping agents are subject to these conditions.

When entering ports under South African law Pilotage is not compulsory for any vessel that have been exempted for Pilotage by the authority in writing on entering, leaving or moving in port<sup>154</sup>. The Cape Town authorities in accordance to this rule notified that for local fishing vessel if they are competent enough exemption for Pilotage is granted; nevertheless foreign fishing vessels are an exception to this rule, Pilotage is compulsory. Certain barriers such as language and experience in South African ports by foreign fishing vessel pilots are the rationale for the compulsory Pilotage service, the authorities informed. Upon arrival of the vessel when all the services by port authority have been rendered and completed and the vessel has finally docked, then fishery inspectors, Ezemvelo KwaZulu Natal (EKZN) wildlife compliance are personnel in charge once the vessel is in port (*personal comm.*). Their duty is

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<sup>151</sup> Meeting, Durban port authorities, Harbour chief 10/07/2008

<sup>152</sup> See Articles 17 & 18 of UNCLOS 1982: Right of innocent passage and definition of passage respectively.

<sup>153</sup> See paragraph 10 of conditions of vessel agent registration: Guidelines for Agreements, Licences and Permits in terms of the National Ports Act No. 12 of 2005.

<sup>154</sup> See Pilotage Section 75(1-3) of National Port Act No.12, 2005

to inspect and monitor the discharge of cargo referring to the faxed valid EEZ permit for such a vessel issued by MCM, Cape Town, which gives details of the vessel and what has to be offloaded, transhipped or any reason to come to port. The latter is the requirement before granted entrance permit in SA waters by MCM to specify reason(s) in the EEZ permit application<sup>155</sup>.

In Cape Town the harbour master noted that for requirements of foreign fishing vessels:

*“Notification to port control at least 72 hours prior arrival if under 500GT”*<sup>156</sup>.

During the meeting he also mentioned that foreign fishing vessels are less than 500 Gross Registered Tonnage (GRT), therefore they are not much of security concern by the South African security authority. The master further added “for local vessels if less than 70 m are exempted for piloting if they can show competence, but for FFVs it is compulsory to port *piloting even if less 70 m due to certain barriers e.g. language, experience etc*”<sup>157</sup>; and also confirmed that agents are in control once the vessel is in port.

In Cape Town, harbour master understanding of EEZ permit issued by MCM as “*federal application for vessels fishing in exclusive economic zone*”<sup>158</sup>. Although there is some lack of common understanding on FFVs requirement among port authorities, consistency in all the ports is what Cape Town harbour master had emphasis on, as he will go along with what Durban harbour chief has said. For him and the Marketing Manager (She) of the port during the meeting they sounded well aware of MCM business and operations. She added concerns of Spanish vessels that are no longer coming to port “*only about 40 vessels a month now*”. On her concerns she made reference on regulations e.g. a sharkfin ratio of 5% to trunk weights. However, the marketing manager has also acknowledged internal co-operation on her statement:

*“There is a recognition that we need to work as Corporate South Africa. Changes to the maritime landscape mean that internal industry co-operation is necessary and non negotiable. International competition is healthy but internal co-operation is essential”*<sup>159</sup>

Substantiating her statement the country’s law on ports section 13 states how principles of co-operative governance and governmental relations should be; referring to the Constitution of

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<sup>155</sup> See appendix EEZ permit application form 2008

<sup>156</sup> Questionnaire, Cape Town Port authority, harbour master

<sup>157</sup> Statement from a Cape Town harbour master during the meeting, on 01/08/2009

<sup>158</sup> Supra note 156

<sup>159</sup> See Port of Cape Town handbook and directory 2008/2009: Marketing pages 18-19



the Republic<sup>160</sup> Chapter 3, “*all organs of state as defined in section 239 thereof must co-operate with one another*”. Thus, this means that the implementation of the law should become equally strict in all harbours. She added that they are not just marketing Transnet National Ports Authority; the organisation is a catalyst for regional and national economic activity through joint co-operations and partnership to support the various industries<sup>161</sup>. Elster 1989 in his theory of Collective Action defines co-operation as “to act against one’s self interest in a way that benefits all if some, or possibly all act in that way; and also collective action problem is defined in part by the clause that it is not selfishly rational to cooperate.” Thus the co-operation by port Authorities is to promote the common good among national authorities and any entity undertaking business in South African ports. Section 84 of the National Port Act states that the Authority must co-operate with other authorities, such as immigration, customs, law enforcement and any other authority required to perform any function within a port.

Cape Town and Durban harbour masters concerning their communication and co-operation with MCM, where Cape Town seems to be in good conditions. Durban master on his answer regarding communication channels with MCM he noted as “*NO*”; that is they do not exist, however, for co-operation the master said “*still in progress*”<sup>162</sup>. This is may perhaps be due to distance; Cape Town harbour (West coast) is just a walking distance from MCM building, whereas Durban is in the East coast of South Africa is 1,753 km in driving and 1,273 km in flight away from Cape Town<sup>163</sup>. And also the meeting with the authorities in Durban, it was the first initiative by Marine and Coastal Management as compared to Cape Town, which has good communication and co-operation channels. In Cape Town, MCM and the port authority even have random joint-operations for inspecting foreign fishing vessels.

The question of lack of interest by authorities on IUU fishing by foreign vessels is ruled out, the authorities are both (Durban and Cape Town) eager to work with MCM, the deprive communication and coordination by MCM is the problem. Durban harbour master for instance have no idea of MCM business. However, the country’s law of national ports suggests co-operative governance as a necessity. Marine and Coastal Management should be the entity encouraging this co-operation and provide channels of better communications with

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<sup>160</sup> See Constitution of the Republic of South Africa 3<sup>rd</sup> Amendment Act. 1996 Section 41

<sup>161</sup> See supra note 157

<sup>162</sup> Questionnaire, Durban Port authority, harbour master

<sup>163</sup> See figure 1, edited map of South Africa

especially Durban and strengthen the universal co-operation because foreign fishing vessels control is of their interest. As Elster point the substantial gain from universal co-operation “each individual must be quite confident that the other individuals are rational and fully informed about the situation”. Marine and Coastal Management must and should improve channels of cooperation and communication, since they themselves managing all fishery related issues and the requirement which the country has to meet such as combating illegal unregulated and unreported are of their interest and concerned.

#### **4.3 Is it lack of knowledge (education) by involved stakeholders?**

The Constitution of the Republic of South Africa under public administration recognises the promotion and maintenance of high standard of professionalism in the public service<sup>164</sup>. Section 195(h) of the Constitution further state that good human-resource management and career-development practices and to maximise human potential must be cultivated. As for the education levels for the port authorities Matric and Tertiary level<sup>165</sup> is a minimum standard for both ports, and with experiences of working in ports, ages 40 and 50 years old. And grade 12 at the time is considered first-class as compared to current education system in the country.

The shipping agents (60%) have reach Tertiary level and almost 80% ages from 36 up to 60 years and experience of 10-20 years. This situation suggests that the majority of shipping agents are well educated and have experience to their job. Therefore, regulations/requirements of the country and responsibilities as defined in the country’s laws, agreements, policies, permit, etc. concerning foreign fishing vessels the agents should be aware. For the fishery inspectors a 50% shared educational levels in all ports combined was observed. Inspectors from Port Elizabeth<sup>166</sup> are also included in this instant due to occasional visits of foreign fishing vessels to the port as to have an idea and understanding of how is their control, communication with MCM and the compliance of those vessels in port. Port Elizabeth is still under review of being designated for FFVs the Director of large pelagic high seas mentioned that during the meeting with Cape Town authorities.

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<sup>164</sup> See Section 195 Public Administration of the Constitution of the Republic of South Africa 1996: *One law for One nation*

<sup>165</sup> Grade 12 and College/University in South Africa respectively

<sup>166</sup> See edited SA map supra note 163

With reference to international instruments<sup>167</sup> that South Africa is obligatory to, almost all the personnel view them (instruments) as important even though some do not have an idea of those instruments.

**Table1: A comparison of Fishery inspectors and Shipping agents on FAO IPOA-IUU understanding.**

Inspectors * FAO IPOA IUU					Shipping agents * FAO IPOA IUU						
		FAO IPOA IUU?			Total			FAO IPOA IUU?			Total
		Yes	No	N/A				Yes	No	N/A	
Port	C.T.	1	2	1	4	Port	Cape Town	6	3		9
	Durban		3		3		Durban	1	1	2	4
	P.E.	2		1	3	Total		7	4	2	13
Total		3	5	2	10						

Table1 (a)

Table1 (b)

From the tables above shipping agents (53%) seems to understand the Food and Agriculture Organisation International Plan of Action to combat Illegal, Unregulated and Unreported (FAO IPOA-IUU) fishing better than the fisheries inspectors (30%) who are responsible personnel for the enforcement of the law in ports “*strange!!*”. Even though awareness is improved for the agents but still overall is not convincing as South Africa has a mandate to meet the obligation. Therefore this lack of awareness explains a bit of incompetency. Again the FAO Model Scheme a newly adopted agreement 2005 on port measure to prevent, deter and eliminate IUU fishing, there is lack of understanding among involved persons in South Africa (Table 2) below.

**Table2. Fishery inspectors and Shipping agents on FAO Model Scheme understanding**

Inspectors* FAO Model Scheme					Shipping agents* FAO Model Scheme						
		FAO Model Scheme			Total			FAO Model Scheme			Total
		Yes	No	N/A				Yes	No	N/A	
Port	C.T.		3	1	4	Port	Cape Town	5	3	1	9
	Durban		3		3		Durban	1	1	2	4
	P.E.	1	1	1	3	Total		6	4	3	13
Total		1	7	2	10						

Table2 (a)

Table2 (b)

<sup>167</sup> FAO International Plan of Action to combat –Illegal Unregulated and Unreported (IPOA-IUU) fishing and FAO Model Scheme of port state measures to combat IUU fishing

This time only 1 (Table 2(a)) Port Elizabeth fisheries inspector who is familiar with the Food and Agriculture Organisation (FAO) model scheme, he also emphasise on the importance of these instruments by saying:

*“They ensure management control; deter IUU fishing activities if implemented correctly. Serve as database to identify suspects, treats and modus operandi of IUU companies, boats and operators”*<sup>168</sup>.

In table 2(a) and 2(b) above is the level of understanding on relevant international instruments to combat Illegal, Unreported and Unregulated fishing South Africa is obligatory to, by the shipping agents and fishery inspector. The shipping agents (46%) are having a better understanding as opposed to inspectors (10%) on recognition of FAO Model Scheme (Table 3b). Strange!! The instruments are better understood by the agents but not the inspectors, the very same persons who suppose to execute them as they are bestowed powers by the marine Living Resource Act of 1998<sup>169</sup>. *Is this has something to do with education/age or communication?* To all the inspectors 50% had just finished grade 12 and in Cape Town the inspectors are less than 30 years of age (4 inspectors). In addition an inspector who is familiar with both instruments is a 43 year old BA degree (Political Science) male from Port Elizabeth. Suggesting that education and experience have some effect but it is not the main factor to dwell on.

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<sup>168</sup> Questionnaire, Inspector from Port Elizabeth

<sup>169</sup> See Chapter 6 (Law Enforcement) sections 51-52 of MLRA no. 18 of 1998.

**Table3. Correlation matrix of shipping agents (P < 5%):**

	Experience	co-business	SADC-port	Prefer	IPOA-IUU	FAO scheme	Communication	Suggestions
Age	0,582							
Port		0,617	0,720		0,573			
SADC-port				0,732				
IPOA-IUU						0,893		
Model scheme								0,624
Co-operation							0,757	

The following is defined as SADC (Southern African Developing Community), IPOA-IUU (International Plan of Action to combat Illegal, Unregulated and Unreported fishing) and FAO (Food and Agriculture Organisation) Model Scheme

*When there are several variable to study it is useful to calculate the correlation between variable. By doing so a quick picture of relationships between variables can be revealed, a correlation matrix is one way of doing this; where variables with high correlation and which are not can be determined. Correlation indicates the relationship between variables and measure the strength of that relationship. Pearson probabilities measure the extent of the linear relationship between variables. All Pearson Correlation coefficient (r) values with P < 5% means the correlation between the two parameters/variables is significant<sup>170</sup>.*

The correlations (Table3) explain the significance on the variables by shipping agents. FAO IPOA-IUU and Model Scheme have a very strong correlation (89%) and co-operation and communication (76%). However these significances demonstrate the high level of understanding of international instruments and communication and co-operation with MCM by shipping agents respectively. And they suggested for better communication on FAO model scheme (62%) because they are not familiar as IPOA-IUU fishing. And this also confirms their (agents) responses (Table 2b) of 46% compared to 53% of FAO model scheme and IPOA-IUU fishing understanding respectively.

<sup>170</sup> See Berk, K.N. and Carey, P. (2004). Data Analysis with Microsoft Excel: *Master of Statistical Analysis with the power of Microsoft Excel and Stat Plus.*

On the other hand as the fishery inspectors are concerned; there is no significant correlation between any variables. Recalling the responses from the inspectors in Cape Town about the international instruments regarding IUU fishing 75% of them were not familiar and the one who understands refer to FAO IPOA-IUU fishing as “*yes to IUU*”. However, as the FAO Model Scheme is concerned 90% of all the inspectors are not familiar with the instrument. Baring in mind the inspectors in Cape Town are within the same building with resource management sector which deals with foreign fishing vessels. And the EEZ permit condition for foreign fishing vessels paragraphs 1 and 6 clarify that Fishery Control Officer (inspectors) should be notified by the agent about the vessel and the agent must adhere to orders and requirements of a fishery Control Officer respectively<sup>171</sup>. Requirements that he/she must be in position of a valid EEZ permit before the vessel comes to port. “Applying for a permit does not mean the shipping agent has been granted yet because MCM has to pre-screen the vessel in question they have to wait until validated”, the fishery manager notified during the meeting with the shipping agents in Durban.

Marine Living Resource Act no. 18 of 1998 bestows powers to fishery control officers as they are the law enforcers. In exercising the powers the inspectors may with or without a warrant order any foreign fishing vessel in South African waters or beyond such waters to stop, and enter and search any vessel if he/she has reasonable grounds to believe that an offence has been or is being committed or illegal fishing<sup>172</sup>. The inspectors are bestowed a prominent authority; to order any foreign/local fishing vessel in South African waters to stop, and may with or without warrant enter and search any vessel if he/she has reasonable grounds to believes that an offence ha been or is being committed. Having bestowed such powers, however the communication, co-operation and understanding of their obligation is deprived. Recalling statements from Cape Town senior inspector concerning international instruments; “*Yes, but this information should be communicated to the people on the ground that does the actual enforcement of our country’s Law. Resource management is always willing to answer any questions I have and even offered a workshop for inspectors but it was turned down by the Compliance management*”<sup>173</sup>.

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<sup>171</sup> See permit conditions for foreign fishing vessel entering South African Exclusive Economic Zone 2008

<sup>172</sup> See particular Section 51 ((2a) and (3a)) supra note 29

<sup>173</sup> Questionnaire, Cape Town fishery inspector

Monitoring, Control and Surveillance (MCS) is a sector within Marine and Coastal Management (MCM) where the fishery inspectors are managed and controlled. The sector has its own Directorates so as the Resource management sector which administers in terms of an exclusive economic zone entrance permit for foreign fishing vessel. According to Kooiman (2003), governance is partly an issue of how institutions work internally, interactions that take place within, and how they can be made to operate efficiently and effectively. Therefore as the Cape Town inspector stated “*a workshop for inspectors but it was turned down by the Compliance management*” the basis of governance as Kooiman suggested<sup>174</sup> is an enquiry. A State is basically driven by reasons, in reality government institutions are often ridden with internal conflicts, vested interests, and in some instances by corruption<sup>175</sup>. MCS seem to have their own objectives or interest, inspectors are lacking knowledge on illegal fishing regulations however the Compliance management is turning down workshops provided by resource management to improve inspector’s ability and knowledge.

Turning now to port authorities on international instruments; Cape Town harbour master also view the instruments as important, nevertheless Durban harbour master have no idea of these instruments whatsoever he just do not know their significance. And this also confirms the communication and co-operation Cape Town harbour master has with MCM as compared to Durban master. Probably this again is due to distance, which Cape Town harbour master is always having a better understanding than Durban master on issues related to foreign fishing vessels or is it communication channels and co-operation that are deprived. Nevertheless this era is internet-age; modern technology could to the work. Therefore the will by MCM to communicate with the relevant authority concerning IUU fishing by foreign vessel should be the factor to blame.

The commitment and interest on foreign fishing vessels illegal fishing practices are not of the common level of concern among these entities. The inspectors on the other side are complaining that the information should be communicated to people who do the actual work; therefore the enquiry is to convey available knowledge to law enforcement personnel. According to Svein 2004 as he discusses pillars of institutions, as *cognitive pillar* is concerned he argued that “if a problem is that those who fish are not aware of the rules or do

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<sup>174</sup> See Kooiman, J. (2003). *Governing as Governance*: London Sage publications

<sup>175</sup> See Offe, C. (2000). *Civil Society and Social Order: Demarcating and Community State, Market and Community*. volume 41, pp 78-89

not understand them, the problem is basically a matter of communication: managers are not getting their message through. Neither penalties nor moral condemnation will do the job; rather more effective communication is the answer.” Therefore considering this latter condition on inspectors who suppose to execute the law could improve the situation. However for inspector communication channels are available and education is not the main factor as well, thus co-operation as defined by Elster on collective action as “to act against one’s self interest” and interest are the reasons. Also recalling during the data collection from the inspectors in Cape Town it took more that three weeks to get only 4 respondents from the questionnaires; where reminders were even in person because they are just in the same building with resource management where the researcher was based but just different floors.

Therefore in conclusion deprive knowledge about the duties vested to fishery control officers are basically not due to poor communication between Resource management and compliance management or education; but lack of interest and awareness.

#### **4.4 Does South Africa have enough capacity to control FFVs?**

Paragraph 57 of the International Plan of Action to combat Illegal Unregulated and Unreported (IPOA-IUU) fishing recommend that States should publicise ports to which foreign flagged fishing vessel may be permitted admission. The instrument is voluntary and it also further states that States should ensure publicised /designated ports have capacity to conduct inspections. FAO Model Scheme also suggests designating of ports for foreign fishing vessels (FFVs) by States and acknowledges some trade related implications. Nevertheless it recognised the importance within especially to States with extensive coastline, several possible spot or limited inspection capacities<sup>176</sup>.

South Africa a unique coastal State in the southern edge of Africa straddles three world Oceans. International fishing vessels traverse the region from and to their fishing grounds, and this makes South Africa a perfect spot for their discharging, resupplying and other port services. From the east (Indian Ocean) around south, Southern Ocean and to the west (Atlantic Ocean) there are eight including the newly build Port of Ngqura (Southwest Indian Ocean) national ports of South Africa. At this situation the Republic is facing what FAO Model Scheme recognised, “possible limited inspection capability”.

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<sup>176</sup> See FAO regional workshop to promote the full and effective implementation of port state measures to combat IUU fishing 2006. Chapter 3 (Elements of the FAO Model Scheme)



*“However, Cape Town (West) and Durban (East) are the only two ports designated for foreign flagged fishing vessels and Port Elizabeth is still under review”<sup>177</sup> (see Figure 5).*

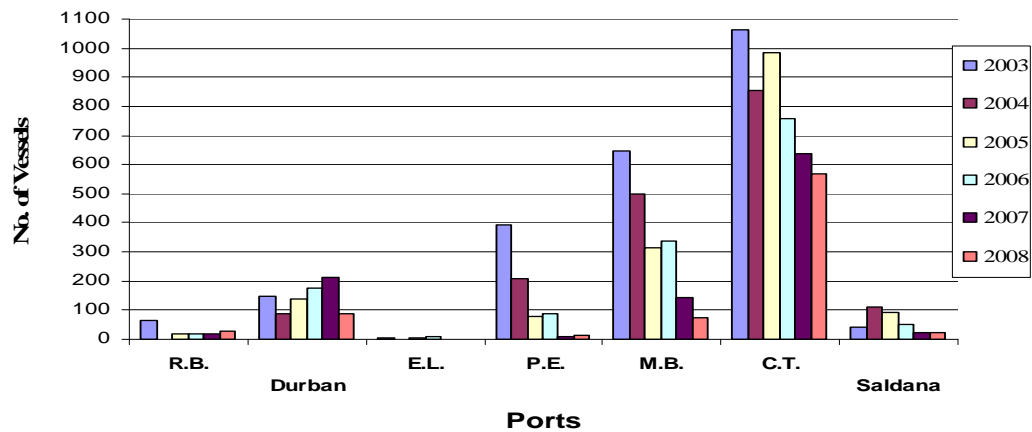
During the meeting in Cape Town the harbour master notified that there were some foreign fishing vessels operating in Mossel Bay (South coast) which is designated for local fishing vessels harbour. However, the master did assure of communicating with Mossel Bay harbour master regarding the matter. And also the resource manager<sup>178</sup> from Marine and Coastal Management proposed National Port Authority’s co-operation with regard to Foreign Fishing Vessels. Recalling her statement the Director at the time from resource management MCM, “Durban and Cape Town ports are the only two designated ports for foreign fishing vessels and P.E. is still under review”; figure 5 below demonstrate the operation of Foreign Fishing Vessels (FFVs) into all ports. This also pose an enquiry from the personal communication with shipping agents in Durban where they estimated (65% to 35%) visits of FFVs between Cape Town and Durban respectively. Here (Fig.5) foreign fishing vessels seem to be operating in all national ports atleast for the past few years, despite the designation of only two. Cape Town port has the pronounced number of vessels compared to any other port, and Mossel Bay, Durban, Saldana, Port Elizabeth and Richards Bay trail behind respectively. East London port appear to have very limited vessels.

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<sup>177</sup> Statement from the Director of Resource Management, offshore and high seas sector (MCM) at the time (Meeting with C.T. harbour master. 01/08/2008)

<sup>178</sup> Deputy Director during the meeting in Cape Town.

**Trend of FFVs in SA ports (2003-2008)**



**Figure 5<sup>179</sup>: Trend of foreign fishing vessels in different ports of South Africa from year 2003 – 2008. Where Richard Bay (R.B.) and Durban (east coast), East London (E.L.), Port Elizabeth (P.E.) (southeast coast) , Mossel Bay (M.B.) (south coast) and Cape Town (C.T.) and Saldana (west coast) respectively.**

Paragraph 61 of IPOA on IUU fishing acknowledges procedures for the port State control of vessels involved in fishing and related activities, including training, technical support, qualification requirements and general operation guideline for the port officers. The instrument further recommends States should consider capacity-building needs in the development and implementation of this strategy<sup>180</sup>. In the FAO workshop held in South Africa 2008 it was recognized that constraints are prominent to implement the Model Scheme, such constraints includes; human capacity, financial resources, equipment, etc. and also lack of national coordination among agencies<sup>181</sup> working group 3 identified this as one of the problems. In national level potential problems are lack of information and gaps in legislations, working group 2 recognition. They suggested some solutions to counter those constraints like required campaigns, co-operation and exchange of information-inter-and intra-governmental information and sensitisation of fishing vessel agents on IUU fishing matters<sup>182</sup>.

<sup>179</sup> Constructed figure from Port authority statistics

<sup>180</sup> See FAO International Plan Of Action on IUU fishing, Rome 2001

<sup>181</sup> See FAO Regional workshop on Port State measures to combat IUU fishing. Cape Town, South Africa, 28-31 January 2008. FAO Fisheries report No.859

<sup>182</sup> See supra note 181

**Table4: Suggested improvements by fishery inspectors**

		Port			Total
		C.T.	Durban	P.E.	
Suggested Improvements in SA	Train FCOs	2	1		3
	Co-operation	1	1	1	3
	Communication			2	2
	Power to Provinces		1		1
	N/A	1			1
Total		4	3	3	10

The table above illustrate inspectors’ suggestions for improvements that can be made in South Africa for implementation of international instruments, Cape Town, Durban and Port Elizabeth respectively. The inspectors have no suggestions on any staff shortage, the emphasis is on training fisheries control officers and co-operation (30% both) among stakeholders. Communication (20%) also seems to be significant for upgrading, inspectors suggested:

*“Distributing international agreements to all persons involved, improve compliance by improving communication between compliance departments of affected countries. Have proper communication channels between relevant parties. Training of all compliance officers in understanding these agreements and compliance practices”*<sup>183</sup>

*“Proper training of inspectors in terms of the Model Scheme at what is expected of us as Port State, providing proper equipment, training inspectors in a foreign language, revising the MLRA to better deal with foreign fishing vessels (there are too many loopholes, that hinder us to take serious action against a vessel).”*<sup>184</sup>

Powers to be delegated to Provinces was suggested in Durban, a reference was made for example a process of issuing of exclusive economic zone permit should be given to Ezemvelo KwaZulu Natal (EKZN) Wildlife compliance<sup>185</sup>. The negative effect of such delegation is that it will complicate things especially that communication, cooperation and coordination already prevails things might get worse. This suggestion is probably due to the condition that it used to be provincial responsibility to conduct such operations. However, now EKZN wildlife is a sub-contract to Marine and Coastal Management, since the department is responsible for all

<sup>183</sup> Questionnaire, inspector from Port Elizabeth

<sup>184</sup> Questionnaire, Senior Marine Conservation inspector Cape Town

<sup>185</sup> Questionnaire, inspector from Durban

fisheries related issues in the country. The rationale is MCM is trying to harmonise things and manage collectively rather than individually so that IUU fishing is dealt within a universal manner across the board.

Also in Durban during the meeting an inspector reported a complicated situation they are facing: “Vessels come to port without EEZ permit simply because they will pay fine of R2500 of not being in position of valid license and a same vessel can come three times within a period of six months without EEZ permit”. As result they get away with IUU fish which will generate millions compared to the light fine if they are in position of illegal fishing, as it is believed to be always the case. Since the EEZ permit application only cost only about R500 and the vessels will be subject to normal port dues that are compulsory anyway with or without the EEZ permit. Therefore, it is not because they are avoiding paying permit but there must be something else. The manager<sup>186</sup> responding to the statement suggesting that a receipt for a fine of a vessel can be good enough to report to the international community that he/she admitted that he/she is guilty of an offence. In addition fined vessels were suggested to be sent to MCM immediately so that further grounds may be taken e.g. reporting to Regional Fisheries Management Organisations and international community.

However, in Durban considering the shipping agents complaints; they raise a point of permit delays. That why a permit has to take seven days before they can be in position of one; and before agents used to show receipt of payment for application. Agents told that they have problems with their clients, and so desperate willing even to pay extra fees for permit processing. This might also explain the reasons of foreign fishing vessels that still found in SA waters without an EEZ permit, because they avoid such delays. However, the agents did compliment the current MCM management for better services. The EEZ permit is valid for only 30 days, thus agents needed some extensions to be made (3 months maximum); and the fishery manager responded as there should be an attached motivation letter for the extension when applying for permit.

In the responses from shipping agents questionnaires, they made some suggestion on improvement of qualified staff (inspectors), and a bit of additional inspectors. This idea is in conformity with IPOA-IUU paragraph 61. Training of inspectors, communication and co-

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<sup>186</sup> The Deputy Director of Offshore and High Seas in MCM at the time, who was a chairman to all the meetings

operation amongst involved stakeholders emerge as prominent improvements suggested. Human capacity, financial resources and equipment seems to be a problem too as working group suggested but enhancement should be more on already existing arrangements by improving communication, cooperation and coordination.

Once again communication, cooperation and coordination among involved stakeholders prevail as a factor limiting the proper execution of the law by law enforcers. Improvement of the former aspects is urgent for South Africa to fulfil its obligations as a signatory to international instrument regarding illegal fishing. Human capacity seems to be not the problem *per se*; from the inspectors perspective rather proper training is a significant feature they had emphasised on. Inspector from Port Elisabeth responded to opinion on how South Africa can improve its implementation of international instruments by “have proper communication channels between the relevant parties, train all compliance officer in understanding these agreement and compliance practices”. Shipping agents on their suggestions also confirmed the issue of qualified staff; therefore first matter should be the improvements of existing system. As the Marine Living Resource Act give powers to the inspectors to enforce the law, if these improvements and awareness could be met South Africa could be in much better place as to hinder illegal fishing.

#### **4.5 Economic incentive induces loophole on IUU?**

Section 72-73 of National ports Act; provide Transnet National Port Authority powers to determine tariffs for services and facilities offered in port. The authority may charge fees in accordance with a tariff determined in terms of section 72<sup>187</sup>. Foreign fishing vessels (FFVs) when coming to South African ports are subject to the terms and conditions above. The permit to enter South Africa’s Exclusive Economic Zone (EEZ) cost R500<sup>188</sup> paid to Marine and Coastal Management in Cape Town for FFVs during EEZ permit application process; before port dues and services. And then when approaching port the vessels are subject to compulsory Pilotage services basic fee Durban (R8000) and Cape Town (R3000)<sup>189</sup>. The overall port bill for foreign fishing vessels can range from a minimum of (R200.000 - R3.5 million).<sup>190</sup> After discharging 50% of the vessels goes for repairs i.e. dry-docking and that alone can cost up to

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<sup>187</sup> See Sections 72 and 73 (commercial aspects) of National Ports act. No 12. 2005

<sup>188</sup> South Africa’s currency about 1 Rand - 0,1 US Dollar, 06/05/2009

<sup>189</sup> See <http://www.transnetnationalportsauthority.net/documents/pdf/portStats/Tariff%20Increase>

<sup>190</sup> Questionnaires, shipping agents (Cape Town & Durban) on the port cost structure questions

a million rand<sup>191</sup> and refuelling of a vessel can also cost up to 3 million rand. The agents also mentioned food and water, crew exchange and medical bills as other costs that are prominent. During the meeting in Durban with the agents' one agent emphasise the cost of medical bills when required, that it can cost a million rand to take a crew member from sea to hospital by helicopter.

Foreign fishing vessels are bringing money in South African ports as the agents determined port bills. Since the trend of foreign fishing vessels demonstrate dramatically decline (Fig. 3); looking only from the last two years (2007/08) were vessels have reduced to about a thousand from about 2500 in 2003. One thousand vessels generate a minimum of about 200 million – 3.5 billion rands a year<sup>192</sup>. This may probably explain why there is a lack of enforcement. That these vessels should come to ports for the financial benefits they bring or they are just neglected? The average cargo tonnage of FFVs is about 20-200 tons with very few reaching maximum of 500 tons and of a basic vessel of 500 Gross Registered Tonnage (GRT) with length of about 40 m<sup>193</sup>. Tariffs and fees are determined by the mass (GRT) and length of vessel, as well as services charged based on time and tonnage discharged. Several other port services required includes cranes, berthing, stevedores, etc. From the port authority's perspective fishing vessels are regarded as small vessels they are just about 40 m of 500GRT as opposed to the Merchants ships<sup>194</sup>. Merchant ships are enormous; they can attain (51 – 30 million GT) in Durban and Cape Town respectively for container vessels a year.<sup>195</sup> As the tariffs and fees are determined due to size and mass of the vessel, definitely these giants are the most generators of financial benefits.

The tariff fee from Transnet National Port Authority booklet defines how the ports fees are determined. Services like tugs/vessel assistance and /or attendance of vessels less than 700 tons is about R1700 and up to 2800 tons a fee of about R18000 in Cape Town. In Durban the minimum is R2700 up to R25000 for the same mass of latter services<sup>196</sup>. And the merchants ships can go up to 53 000 tons and above by mass, eventually have enormous contribution in

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<sup>191</sup> Questionnaire of a shipping agent from DEL Shipping Company operating both in Cape Town and Durban

<sup>192</sup> Calculated from shipping agent questionnaires as they determined port dues

<sup>193</sup> See supra note 187

<sup>194</sup> In South Africa these ships includes General Cargo vessels, Bulk dry/liquid, Tankers (oil and chemical) vehicle carries vessels, passenger vessels and etc.

<sup>195</sup> <http://www.transnetnationalportsauthority.net/documents/pdf/portStats/Calender%20Year%202008.pdf>

<sup>196</sup> See supra note 36

the ports of South Africa. The adjustment of tariffs are due effect from the 1 April 2009 port authorities has published the increment of tariffs to meet their economic growth demand.

As the harbour master in Cape Town highlighted foreign fishing vessels are less than the minimum fee due to their size of about 500GRT they are not much of a concern to the authorities. Economic incentives are not the driving force for the loophole of illegal, unregulated and unreported fishing, its just negligence. And also in reference to Durban authorities they have no idea of Marine and Coastal Management business or about any EEZ permit to enter South African waters by foreign fishing vessels. Therefore fishery managers have to get their message through as Svein in the *cognitive pillar* suggested; however the meeting was the first initiative ever by MCM with the Durban port Authority. Such initiatives and the dedicated staff that is currently improving in MCM is highly appreciated will eventually enhance the development for better management.

## Chapter 5

### CONCLUSION AND RECOMMENDATIONS

Foreign fishing vessels are coming to South African ports to discharge catches, and an enquiry is how well the authorities involve enforce law to combat illegal, unreported and unregulated (IUU) fishing. The study seeks to answer questions of; to what extent all stakeholders involved are organised according to South African laws and level of understanding and the international instruments related to IUU fishing are how they (shipping agents, port authority and MCM/ inspectors) understand each other's business. Another critical aspect in the research outcome has illustrated a wide range of variations on understanding, communications and co-operation among the stakeholders. Marine and Coastal Management and National Port Clearly "institutions shelter us from destructive consequence of passion and self-interest, but also themselves run a risk of being undermined by self-interest" Svein Jentoft argued.

According to the country's laws authorities are bestowed powers to enforce law; and the powers are in writing under all the acts<sup>197</sup> (law) of South Africa, nevertheless practical execution of such laws by persons entitled to, is deprive they do not . They are not familiar about their duties, consequence the law enforcement on IUU vessels is just not effective as it suppose to be. With regards to fishery inspectors, very few, who understand their bestowed duties; and the lack of internal communication, interest and awareness is a major reason for such discrepancies. Having said that, port Authorities on the other hand are very keen for cooperative governance for the common good for South Africa's economy. The national port act and the port authorities confirm this cooperation through willingness of concluding agreements and memorandums.

The shipping agents are subject to the country's national port rules for the commercial ports of South Africa, adopted in terms of the National Ports Act No. 12 of 2005. The rules detail conditions where a registered shipping agent is subject to, thus enforcement or surveillance cooperation with them is highly possible especially that it is a core business for some. Therefore complying with the regulation is likely to result for port requirement. With regards to Marine and Coastal Management there is no such registration with conditions binding the

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<sup>197</sup> Marine Living Resource Act no 18 of 1998 and National Port Act no 12 of 1995



agent, where he/she is granted a right (right holder). Marine and Coastal Management should adopt the same compulsory registration procedure with the agent that as the port authority. Agents can have a binding agreement that will require their attention not to render services to potentially IUU vessel. Thus a goal of combating IUU might be achieved

When looking on understanding of each others business, port authority and agents are very well adjusted to each other; the agents know exactly what to do. MCM and port authority should harmonise the EEZ permit misunderstanding for foreign fishing vessels. Both are public institutions, therefore common understanding is highly required as the Constitution of the Republic suggests high standard of professionalism. The fishery managers should get their message through from one authority to another, they should not internalise the threat of IUU fishing but across the board as the effect will be felt by all stakeholders when world fisheries productions decline. However, with MCM the agents are aware of what is required from them, but it is just a matter of effective coordination, cooperation and communication by resource management and the dedicated staff that is currently in place in MCM was appreciated by the agents, that it will eventually enhance the development for better fisheries management.

In general world commercial fisheries are declining; however in South Africa cases of illegal fishing by foreign vessels are given high priority. Even though EEZ permit has been in place but still foreign fishers are bringing in illegal caught fish. Resources such as Tunas and sharks are fish species discovered during those raids. Southern blue fin tuna and Bigeye tuna have critically endangered and vulnerable conservation status respectively and shark fins are the most inducing illegal fishing due to their high market demand. Payne et al 2004 recognised the incentives that underline the rise of illegal fishing; they further examine the factors through the simple profit and loss equation for IUU fishing:

Therefore to reduce the incentive for IUU fishing arising from the benefits available, equally obviously, is to restrict access to market for IUU-caught fish<sup>198</sup>. Fishing is costly, these includes the cost of the vessel (capital cost plus depreciation), running costs (for vessel and crew) and coast associated with steaming to and from the fishing grounds and transshipment points. To IUU fishing vessels these costs include the direct cost potentially resulting from being apprehended and fined for illegal fishing and the indirect costs of needing to find a

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<sup>198</sup> See Payne et al 2004

State willing to have the IUU fishing vessels on its register. Thus, bringing the compliance rationalist theory that fisher will choose to comply based on economic gains and severity of sanctions. As public institution is concerned its sanctions are intended to make undesirable practise more costly for those who might be tempted to engage in it. Therefore considering these theories South Africa has to make it more costly if a foreign fishing vessel is being caught engaged in IUU fishing.

### ***How can the situation improve?***

Recalling Hauck's point that, it is necessary to gain broad understanding about the inter-relationships that exist between authorities and shipping agents and the complexities that are evident in a regulation system. Therefore bringing the inspectors voice to the surface is vital as they are the very persons doing the job, than a voice of an outsider. They know better about their limitations and difficulties as they do actual practice of the law, hence the recognition of their suggestions is essential if then researcher shall have a say.

Bringing the inspector's voices:

*“proper training of inspectors in terms of the Model Scheme as what is expected of us as port State, providing proper equipment, and training inspectors on foreign language revising MLRA to better deal with foreign fishing vessel”*<sup>199</sup>

*“To have proper communication channels between relevant parties; drafting of standard operating procedures, participate in global regional fisheries management structures liaison with parties e.g. ship agents”*<sup>200</sup>

*“By using the model technical information; Conference, workshops and meeting should be held everywhere”*<sup>201</sup>

As a point of departure communication, co-operation and co-ordination is crucial among involved parties, this is a common view for all. But the problem is how, thus Marine and Coastal Management has all what it take to answer that. The internal communication has to be a very first consideration before going out and promote cooperation with other stakeholders. The Chief Directorate for Monitoring Control and Surveillance (MCS) and Resource

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<sup>199</sup> Questionnaires, inspectors Cape Town

<sup>200</sup> Questionnaires, inspectors from Port Elizabeth

<sup>201</sup> Questionnaire, inspectors from Durban

management should improve by better communicate on the deprived cooperation especially that they are within the same building, awareness and interest should be on equal terms.

Thus, Marine and Coastal Management may liaise with port authority with the understanding of EEZ permit importance by the foreign fishing vessels. So that they both can have an agreement on specifically to foreign fishing vessel through legal bases incorporated within the port act. By having such provisions shipping agents will be automatically be bound to it as the registrations conditions suggest that the have to obey the authorities.

The recommendation of Port Elizabeth (P.E.) could be an option for those vessels to shift from Mossel Bay (Southern Ocean) to Port Elizabeth (Southwest Indian Ocean) see figure 1 and 5. And also considering the responses of P.E. inspectors during the study they sounded well aware and interest of the duties bestowed to them and has an experience as compared to any other inspectors. This approach might at least not discourage the foreign fisher to discharge in South Africa.

In Durban as the inspectors suggested also improve communications or MCM have a link between their computer systems as to share the duties, or have an office that will process permits and send through modern technology to MCM for signatures for better enhance the 7 day delay of permit the agent's voice. Amendments of MLRA should address clearly the issue of foreign fishing vessel discharging catches in South Africa. Also liaising with port authority's act MCM should incorporate a section which specifically deals with fishing foreign vessels under national port act. MCM, resource management sector should resolve the issue of EEZ permit misunderstanding with the port authorities; the sector should also play a key role in coordinating and improving communication channels.

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## Appendix 1

### Summary of questions

#### Interview Protocol

- Name
- Gender
- Age
- Highest level of education
- Nationality

#### 1. Common questions to all

1.1 How aware are the inspectors, port authorities and shipping agents on international instruments requirement standards that South Africa has to meet?

- Are you familiar with the FAO IPOA (2001) to prevent, deter, and eliminate IUU fishing?
- Are you familiar with the FAO Model Scheme on port state measures to prevent, deter, and eliminate IUU fishing 2005?
- Do you view these international instruments as important and substantiate your answer?
- How does your port inspection co-operate with Resource Management to implement the IPOA and Model Scheme?
- Are there any sufficient communication channels available for you to clarify your understanding of the international instruments?
- In your opinion how can the implementation of the international instruments be improved in S.A?

#### 2. Fisheries inspectors

These questions have revealed, how well these inspectors understand inspection, as they are aware of their duties. In this case it was necessary to find out how much they know about it. The researcher was also interested on their awareness embarked upon South Africa in order to meet international standards.

2.1 How do they go about inspection and how well do they understand it?

- What is the step by step process for conducting inspection and monitoring in port?

- Do you have any standard form for port inspection of these vessels?
- Is an Exclusive Economic Zone (EEZ) permit important?  
If yes, then why?
- What actions you take when a foreign fishing vessel is suspected of being involve in illegal fishing?  
How do you regard foreign fishing vessels visiting S.A ports in terms of compliance?
- How does your port inspection co-operate with Resource Management to implement the IPOA and Model Scheme?
- Are there any sufficient communication channels available for you to clarify your understanding of the international instruments?

### 3. Port Authorities

The purpose of these questions was constructed in order to find out what business are involved in foreign fishing vessels and how these port authorities administer arrival of these vessels. Also, there was a need to find out on how aware they are about the international instruments South Africa has to meet.

#### 3.1 Cost structure and what businesses do to foreign fishing vessels in ports?

- What is the fee structure of the following port services? E.g. port fees = Rand × per hour per m length of vessels.
- What other businesses do foreign fishing vessels have in port? E.g. companies for required services

#### 3.2 How do port authorities administer foreign vessels?

- What are the requirements for foreign fishing vessel to access S.A. ports?
- What is your understanding with EEZ permit issued by DEAT?

### 4. Shipping Agents

These questions not only revealed the profile or activities they do, but the importance of ports to these agents. It further identified questions that can point out on the average discharge and efforts used. Lastly finding out whether these shipping agents are aware of the international instruments.

#### 4.1 The Shipping agents profile

- Name of your company?
- Which port is your company based?



- How long have you been working as a ships agent?
- Does the agency service vessels from specific countries
- If yes, which countries and why?
- Is the serving of foreign fishing vessels your agency's core business?
- If not, what other business matter does your agency conduct?
- How many people are directly and indirectly employed in your company?

4.2 What is the importance of South African ports to the agents?

- Do your vessels use other port in the SADC region (yes/no?)
- If yes, which ports?
- Is there a preference for foreign vessels to use SA ports (yes/no?)
- If yes, what are the main contributing factors?

4.3 What are the cost structure and average discharge and effort introduced?

4.4 How aware are shipping agents on international instruments requirement standards South Africa has to meet?

- On what bases does your company take on a foreign fishing vessel as a client?
- How does your agency co-operate with Marine and Coastal Management (MCM) to implement the IPOA and Model Scheme?

## Appendix 2

### Permit conditions for Foreign Fishing Vessel entering in South Africa EEZ 2007

Permit Conditions Foreign Vessels EEZ 2007

February – December 2007

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#### PERMIT CONDITIONS FOR FOREIGN VESSELS ENTERING SOUTH AFRICAN EXCLUSIVE ECONOMIC ZONE (EEZ)

##### SECTION B

1. The Permit Holder shall provide at least 24 hours notice of the vessel's Estimated Time of Arrival (ETA) and port of call to Marine and Coastal Management's Fishery Control Officers, (Attention: Operations Centre, telephone number 021 402 3076/3077, fax 021 425 6497).
2. The permit is valid for a single entry.
3. Upon entering the South African Exclusive Economic Zone (EEZ) all foreign fishing vessels are subject to the Marine Living Resources Act, 1998 (Act No. 18 of 1998) and all regulations promulgated there under while within South African waters. As such, foreign vessels may be boarded and inspected at any time while in South Africa's EEZ.
4. When entering the Exclusive Economic Zone, all fishing gear on board the fishing vessel shall be properly stowed as prescribed by the Marine Living Resources Act section 49 and Regulation 81.
5. The Permit Holder shall ensure that the vessel only enters the Exclusive Economic Zone once the notification in terms of paragraph 1 above has been acknowledged by the Fishery Control Officer.
6. Permit Holders must adhere to all lawful orders and requirements of a Fishery Control Officer.
7. Permit Holders must accommodate the boarding and inspection of their vessel by a Fishery Control Officer(s) at any time while in South African waters in accordance with the powers granted to such officers in terms of section 51 of the Marine Living Resources Act 1998 (Act No 18 of 1998).
8. Failure to meet any of these conditions shall be considered as a material breach of permit conditions and may lead to the cancellation or withdrawal of the permit, but may also lead to criminal prosecution.
9. This permit may at any time be withdrawn or its permit conditions amended by the Chief Director: Resource Management (Marine).