

Fisheries and the right to food

Implementing the right to food
in national fisheries legislation



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Anniken Skonhoft
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in collaboration with
Dubravka Bojic Bultrini



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RIGHT TO FOOD STUDIES

Right to Food Studies is a series of articles and reports on right to food related issues of contemporary interest in the areas of policy, legislation, agriculture, rural development, biodiversity, environment and natural resource management.

This study was conducted in the context of the project “Creating capacity and instruments to implement the right to adequate food” financed by the Government of Germany.

Right to Food Studies are available at www.fao.org/righttofood/. For those without web access, mail or paper copies may be requested from the Right to Food Unit, FAO, Viale delle Terme di Caracalla 00153, Rome, Italy, righttofood@fao.org. Readers are encouraged to send any comments or reactions they may have regarding a Right to Food Study.

The positions and opinions presented do not necessarily represent the views of the Food and Agriculture Organization of the United Nations.

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BOBP-IGO	Bay of Bengal Programme Inter-Governmental Organisation
CCRF	[FAO] Code of Conduct for Responsible Fisheries
CESCR	UN Committee on Economic, Social and Cultural Rights
COFI	[FAO] Committee on Fisheries
EAF	Ecosystem approach to fisheries
EEZ	Exclusive Economic Zone
FAO	Food and Agriculture Organization of the United Nations
FARMC	Fisheries and Aquatic Resources Management Council
FCA	Fishery cooperative association
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic Social and Cultural Rights
IUU	Illegal, unreported and unregulated [catch]
ITQ	Individual Transferable Quota
LGU	Local government unit
LOSC	United Nations Convention on the Law of the Sea
MCS	Monitoring, Control and Surveillance
MPA	Marine Protected Area
MSY	Maximum Sustainable Yield
PANTHER	Participation, Accountability, Non-Discrimination, Transparency, Human Dignity, Empowerment and Rule of Law
Right to Food Guidelines	Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of National Food Security
TAC	Total Allowable Catch
UNFSA	UN Agreement on Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks

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Introduction

The fisheries sector is a source of employment and income for more than 43 million fishers and fish farmers in the world, and the great majority of these live in developing countries, principally in Asia. When jobs produced through secondary activities and the number of dependents each jobholder provides for are counted, estimations indicate that this sector assure the livelihoods of a total of about 520 million people worldwide. (FAO, 2009c: 23 and 26). In terms of nutrition, per capita fish consumption has been increasing steadily in the past four decades, from an average of 9.9 kg in the 1960s to 16.4 kg in 2005. Although the per capita fish consumption in low-income food-deficit countries is only half that of industrialized countries, the contribution of fish to total animal protein intake in these countries is significant at about 20 percent. Fish is highly nutritious, and provides not only high-value protein, but is also an important source of essential micronutrients, minerals and fatty acids (FAO, 2009c: 59-61).

Most fishing communities in the developing world are characterized by social and economic vulnerability, particularly subsistence and small-scale fishers. As noted by the FAO Committee on Fisheries (COFI), small-scale fishers often face precarious and vulnerable living and working conditions due to insecure rights to land and fisheries resources, inadequate health and educational services and social safety nets, and exclusion from wider development processes because of weak organizational structures and inadequate participation in decision making (FAO, 2007a). Competition with industrial fishers for access to declining resources, and the degradation of the resources due to over-fishing and pollution, are other challenges for small-scale and subsistence fishers. Besides fishers and fishworkers, other groups are also affected by the availability of fish to meet their food needs, including better-off fish consumers. These considerations highlight perhaps the most salient link between the fisheries sector and the realization of the right to food: the sustainability of the fisheries resources and the availability and access to these resources for fishing communities and consumers in general. Conservation and sustainable use of the fisheries resources is therefore one of the key elements for achieving respect for and protection of the right to food for fishing communities and consumers, and failing to achieve this means that the ability of future generations to access this food resource will be significantly jeopardized.

Aquaculture is recognized as the fastest growing animal food-producing sector in the world, and accounts for nearly half of the world's fish supply (FAO 2009c: 17). This sub-sector has expanded in recent years to meet a growing demand and high levels of fish consumption and plays an increasing role in the realization of the right to food.

In addition to providing food, aquaculture development can contribute to poverty alleviation, employment, community development, reduction in overexploitation of fisheries resources, as well as food security.

The role of fishery trade is important for many economies, particularly for developing countries. Trade in fish represents a significant source of foreign currency earnings, in addition to the sector's important role in employment, income generation and food security (FAO, 2006a: 44). As much as 37 percent of the global fish production is traded internationally, and for developing countries net fishery exports exceed that of coffee, rubber, meat and sugar (FAO, 2009c: 45, 49). Fishery products can be an important source of revenue for coastal communities in developing countries, but may also be diverted from the local population to overseas markets to generate higher revenues. Improved market access is essential in order to enable small-scale fishers to generate higher revenues, but the increased application of complex safety and quality requirements may constrain this access.

The importance of human rights for achieving poverty eradication and responsible fisheries has been recognized by FAO's Committee on Fisheries (COFI).

In 2007, the body

“stressed that the recognition and adoption of human rights principles can help achieve poverty eradication and facilitate the adoption of responsible fisheries practices.”

It moreover

“stressed the need to adopt a right-based approach to managing small-scale fisheries that respects the interests of present and future generations and ensures resource sustainability, reduces vulnerability and optimizes the flow of benefits to fishing communities and the wider economy.” (FAO, 2007a, paras 58–59)

In this context, COFI also addressed the role that human right principles play in defining and allocating fishing rights. The need to recognize traditional forms of fishing rights and the need to protect the poor from the adverse impacts of transition to right-based fisheries management was also considered imperative by COFI (FAO, 2007a, para. 60).

The human right to food is realized when people, alone or in community with others, have access to adequate food or means for its procurement. The possibility for people to feed themselves from natural resources is an important element of this right (See Chapter 1). The fisheries sector and the right to food therefore have a direct interface where communities depend on aquatic resources to meet their food and nutritional needs.

Set against this backdrop, the study seeks to precipitate further discussions regarding the interface and linkages between the right to food and human rights principles and the fisheries sector. It does this by indicating how far human rights principles such as participation, accountability and non-discrimination are reflected in fisheries legislation that might not have used a human rights based approach during the drafting process, and by identifying how this approach can be introduced or strengthened in the legislation. Although the right to food may not be among the expressed objectives of fisheries laws, for some countries the closely linked concept of food security is expressed. Other goals,

such as sustainable use of fisheries resources, are a more commonly stated objective of fisheries legislation and are equally important for the realization of the right to food.

In addition to this introductory chapter, this study provides a short introduction to the right to food and human rights principles in international law (Chapter 1) and an overview exploring the relationship between international fisheries instruments and the right to food (Chapter 2). Drawing on examples from selected national fisheries laws, Chapter 3 seeks to identify components that are considered important for the implementation of the right to food in fisheries legislation. Finally, some concluding remarks are offered, summarizing the key findings of the study.

The study uses the normative content of the right to food as enshrined in international human rights instruments, in particular the International Covenant on Economic Social and Cultural Rights (ICESCR). It is guided by the Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of National Food Security (hereinafter the Right to Food Guidelines) as a platform from which international fisheries instruments and national fisheries laws are approached and discussed.



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Photo by M. T. Palazzolo

1. The right to food and human rights principles in international law

1.1 THE RIGHT TO FOOD: NORMATIVE CONTENTS AND OBLIGATIONS

Several international instruments recognize the right to adequate food in various formulations.¹ The most comprehensive formulation of the right to food is found in ICESCR. Article 11 of ICESCR formulates the right to adequate food as part of an adequate standard of living, and recognizes the fundamental right to be free from hunger:

11.1. The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.

2. The States Parties to the present Covenant, recognizing the fundamental right of everyone to be free from hunger, shall take, individually and through international co-operation, the measures, including specific programmes, which are needed:

(a) To improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources;

(b) Taking into account the problems of both food-importing and food-exporting countries, to ensure an equitable distribution of world food supplies in relation to need.

¹ Article 25 of the Universal Declaration of Human Rights protects the right to an adequate standard of living, including food. The Convention on the Rights of the Child (Art. 27(1)) and the Convention on the Elimination of Discrimination Against Women (Art. 12(2)) oblige states to combat child malnutrition and to ensure adequate nutrition for women during pregnancy and lactation, respectively. The International Convention on Civil and Political Rights (ICCPR) also outlaws deprivation of food and of means of subsistence in Article 1(2).

The Committee on Economic Social and Cultural Rights (CESCR)² has fleshed out the normative contents of ICESCR Article 11 on the right to adequate food and state obligations under this right, as follows:

The right to adequate food is realized when every man, woman and child, alone or in community with others, has physical and economic access at all times to adequate food or means for its procurement. (CESCR, 1999)

The concepts of availability of and access to food are important elements in what CESCR considers to be the main content of the right to adequate food:

“The availability of food in a quantity and quality sufficient to satisfy the dietary needs of individuals, free from adverse substances, and acceptable within a given culture. The accessibility of such food in ways that are sustainable and that do not interfere with the enjoyment of other human rights (CESCR, 1999, para. 8).

The concepts of adequacy and sustainability underpin the concepts of food availability and access. All four concepts are expounded by the CESCR as follows (CESCR, 1999, paras 7, 12 and 13):

- **Availability** refers to the possibilities either for feeding oneself directly from natural resources, or for well-functioning distribution, processing and market systems that can move food from the site of production to where it is needed in accordance with demand;
- **Accessibility** encompasses both economic (cost of acquiring food for an adequate diet without compromising other needs) and physical accessibility (particularly physically vulnerable individuals such as victims of natural disasters and illness, elderly etc);
- **Adequacy** serves to underline a number of factors which must be taken into account in determining whether particular foods or diets that are accessible can be considered the most appropriate under given circumstances; it is determined to a large extent by prevailing social, economic, cultural, climatic, ecological and other conditions; and
- **Sustainability** incorporates the notion of long-term availability and accessibility, i.e. that food is accessible for both present and future generations.

The right to food does not mean that individuals and groups (the “right holders”) have a right to be provided food. It is primarily interpreted as the right to feed oneself in dignity, through economic and other activities. In other words, individuals and groups are responsible for undertaking activities that enable them to have access to food.

Nonetheless, the State has an important role to play in supporting these efforts. Under the ICESCR, states must “take steps [...] to the maximum of [their] available

² The UN Committee on Economic, Social and Cultural Rights (CESCR) is a body of independent experts responsible for monitoring the implementation of the ICESCR by its State parties. CESCR has clarified the meaning of provisions of the treaty in a series of authoritative interpretations (General Comments).

resources, with a view to achieving progressively the full realization of the [right to food] by all appropriate means” (Article 2(1)). In other words, the key obligation of states is to “take steps” towards the progressive realization of the right to food. The nature of the steps that states must take is defined by an analytical framework developed by CESCR. According to this framework, states must take three types of steps, namely (i) respect, (ii) protect and (iii) fulfil (Cotula, Djiré and Tenga, 2008).

The obligation to respect requires states to refrain from taking measures that affect access to food negatively. It reflects the fact that the right to food is primarily to be realized by the right holders themselves, and that states have a duty not to unduly hinder the exercise of economic and other activities for this purpose. The obligation to protect requires states to adopt specific legislative or other measures regulating third parties’ activities so as to ensure that they do not negatively affect people’s enjoyment of the right to food. The obligation to fulfil requires states to take positive measures to facilitate the efforts of individuals and groups to gain access to food. Article 11(2) of ICESCR exemplifies the duty to fulfil by requiring states to take measures that are needed

“[...] to improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources [...].”

This duty moreover requires states to provide food for individuals or groups who are unable to enjoy the right to food by their own means, which may entail the establishment of social safety nets (Cotula, Djiré and Tenga, 2008: 16).

Facilitating the realization of the right to food will require more far-reaching measures on the part of the government in that it has to actively seek to identify vulnerable populations and implement policies and programmes to improve these people’s access to food and their capacity to feed themselves. The obligation to fulfil also includes the obligation to ensure, as a minimum, that no one in a country suffers from hunger. The CESCR has considered that the obligation to fulfil also incorporates an obligation to promote human rights among its own agencies and private players (CESCR, 2000, 2002).

1.2 THE RIGHT TO FOOD GUIDELINES

The Right to Food Guidelines, adopted in November 2004 by the 127th Session of FAO Council, is a voluntary instrument, but build on international law and provide guidance on implementation of already existing legal obligations. These include several provisions that highlight the important role of natural resources, including fisheries, in the realization of the right to food. Important in this regard is Right to Food Guideline 8.1, which stresses the duty of states to both facilitate access and utilization of resources, and to respect and protect individual’s rights with respect to natural resource, including fisheries.

8.1 States should facilitate sustainable, non-discriminatory and secure access and utilization of resources consistent with their national law and with international law and protect the assets that are important for people’s livelihoods. States should respect

and protect the rights of individuals with respect to resources such as land, water, forests, fisheries and livestock without any discrimination. Where necessary and appropriate, States should carry out land reforms and other policy reforms consistent with their human rights obligations and in accordance with the rule of law in order to secure efficient and equitable access to land and to strengthen pro-poor growth. Special attention may be given to groups such as pastoralists and indigenous people and their relation to natural resources.

As will be seen in Chapter 2, sustainable use and management of the fisheries resources is one of the guiding principles in international fisheries instruments. The Right to Food Guidelines acknowledges the importance of management to ensure the sustainability of the fisheries resources for the realization of the right to food in Guideline 8.13:

8.13 States should consider specific national policies, legal instruments and supporting mechanisms to protect ecological sustainability and the carrying capacity of ecosystems to ensure the possibility for increased, sustainable food production for present and future generations, prevent water pollution, protect the fertility of the soil, and promote the sustainable management of fisheries and forestry.

1.3 HUMAN RIGHTS PRINCIPLES AND LINKS TO THE FISHERIES SECTOR

Human rights are universal, indivisible, interdependent and interrelated (UNGA, 1993). The right to food should therefore not be seen or approached in isolation from other human rights. Rights with especially clear correlations to the right to food are the rights to life; health; education; work; freedom of opinion, expression and information; and freedom of assembly and association (Vidar, 2005). In the discourse on human rights based approaches, several fundamental principles were developed by the UN system and are increasingly recognized as being integral to the fulfilment of human rights (UN, 2003). These principles are expressed by FAO under the mnemonic acronym of PANTHER, which stands for participation, accountability, non-discrimination, transparency, human dignity, empowerment and recourse or rule of law (FAO, 2009b). These principles relate to the process that should be followed, in the case of a given action (legislation, policies, programmes) or activity (design, implementation, monitoring and evaluation) in addressing the right to food of the population group concerned. What each of these human rights principles entails in the specific context of national fisheries legislation is briefly examined in the sections below.

PARTICIPATION

The principle of participation entails that people should enjoy non-discriminatory, full, free, meaningful and empowering participation in decision-making processes that affect their lives and well-being. Providing mechanisms for stakeholders' active participation in decision-making goes a long way to prevent and remedy breaches of their rights. Participation is a crucial component of successful policies and legal frameworks, which also contributes to peoples' empowerment and human dignity. Recent legal trends have seen the expansion of stakeholder involvement in both decision-making and implementation, for example through devolution of management powers to local councils and interested groups. In addition, ensuring that perspectives of interested communities are taken into account when policies and legislation are being formulated often results in

greater compliance. Formal representation of different stakeholders in various types of decision-making or advisory bodies can increasingly be seen in fisheries management laws (FAO, 2002). A key consideration when formulating legal mechanisms to accommodate stakeholder participation is that active, free and meaningful participation is available to all. In this regard it is important to consider culturally sensitive issues related to participation, particularly related to gender, that may exist in a society.

ACCOUNTABILITY

The principle of accountability requires that politicians and government officials be held accountable for their actions, including through judicial procedures. It requires the institutional framework and the mandates of each government institution to be clearly defined within the legal framework. In addition to creating clarity about roles and responsibilities, this may prevent overlapping mandates and ensure coordination among institutions. Provisions for periodic review, monitoring and evaluation by a separate government entity or independent body to ensure that mandated functions are being carried out efficiently would also be necessary. This will make it easier for users to hold government and other involved bodies accountable for what they have or have not done. While human rights discourse focuses on the accountability of public institutions, the actions of private companies and individuals can hinder the enjoyment of the use of and access to fisheries resources. The protective role of the state under the right to food requires it to adequately regulate activities of private actors and ensure that such activities do not hinder the capacity of persons to exercise their right to food.

NON-DISCRIMINATION

The principle of non-discrimination prohibits arbitrary differential treatment in decision-making. The key grounds of discrimination that are prohibited under international human rights law are race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status (e.g. disability, gender, age, HIV/AIDS status, migration or displacement status). Non-discrimination does not imply treating everyone in the same way; unequal starting points result in unequal outcomes even where equal measures have been applied. A human rights approach requires governments to adopt special measures for certain categories of persons or groups allowing compensation for disadvantages due to discrimination. The identification of all relevant stakeholders within a sector will facilitate an inclusive and non-discriminatory approach. Such identification and application of the principle of non-discrimination can, for example, contribute to accommodating customary fishing practices and knowledge, which otherwise could be overlooked or negated by the operation of formal laws. Through measures that promote non-discrimination, the right to food of these communities can be safeguarded.

TRANSPARENCY

Respect for transparency contributes to better accountability. Transparency is assured through processes that are open and accessible to all—where outcomes are predictable and consistent with predetermined requirements laid down by the law. The provision of information is crucial to this principle, including through detailed legal provisions on procedures, functions and relevant requirements, and by mandating institutions to disseminate or make available the relevant information. Through being aware of all the

avenues available to them, individuals can make informed choices and decisions. In this way, transparency is interlinked with empowerment.

In the context of fisheries, the legal framework should allow for processes to be open and accessible to the public, like those related to distribution of quotas among vessel groups and establishment of MPAs, as such decisions can influence the possibilities of access for people that are dependent on fisheries resources for their livelihoods.

HUMAN DIGNITY

The principle of human dignity requires government to treat all persons with dignity and respect. The importance of this principle is particularly pronounced in the context of the right to food: hunger is a violation of human dignity. Respect for and recognition of human dignity takes various forms and is not limited to the extreme condition of hunger. Respect for traditional practices and methods of acquiring and consuming food forms a part of this principle.

In the fisheries sector, the principle of human dignity can encompass the use by the state of certain methods of facilitating access to information related to fishing rights by a community. For example, disseminating relevant information through written means in a fishing community that is largely illiterate would amount to an affront to their dignity. Ensuring appropriate working conditions for those in processing plants, fishing vessels and other fishery related occupations also forms an element of human dignity. The employment conditions by which people meet their basic needs should not be conditions that deny dignity to employees by threatening their health or physical safety. This includes factors such as establishing a limit on the number of hours to be worked daily or weekly, setting a minimum wage, as well as safety issues in processing plants and aboard vessels. Hazardous job situations should be identified and measures put in place to mitigate these.

EMPOWERMENT

The principle of empowerment requires that people are in a position to exert control over decisions affecting their lives. It is thus closely correlated to the fulfilment of all the other human rights principles. Essential components of empowerment are access to information and education, aiming not only at the creation of awareness of what rights individuals have, but also of how they can effectively harness institutional mechanisms to realize those rights. Elements of empowerment, moreover, include the ability to make decisions, express interests, negotiate interests, and influence public decisions, customs and practices (NORAD, 2001).

In the context of fisheries, empowerment through education also means having exposure to technologies that increase the competitiveness of small-scale fishers and other vulnerable groups.

RULE OF LAW

The principle of the rule of law entails that every member of society, including decision-makers, must comply with the law. The principle is intended as a safeguard against arbitrary use of state authority and lawless acts of both organizations and individuals. It is a crucial factor for the implementation of rights, as it also includes access to justice

and the corresponding right to an “effective remedy” for anyone whose rights are violated, as well as the guarantee of due process in all legal proceedings.³

In the fisheries sector, many laws lack clear provisions concerning appeal of decisions by fishery decision-making bodies, particularly as regards the issue of licences and permits. This possibility may, however, exist under other administrative laws. In this regard, the human rights based approach requires that the available mechanisms allowing individuals to complain against negative administrative decisions be easily accessible and affordable.

³ According to the CESCR, in case of an established violation of an individual’s right to food by a court, he or she should be entitled to an effective remedy in form of restitution, compensation, satisfaction or guarantees of non-repetition (see General Comment 12, para. 32, CESCR, 1999).



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2. The right to food and international fisheries instruments

Although developed without integrating a human rights based approach, several international fisheries instruments allude to elements of human rights principles relevant for the realization of the right to food. These elements include, in particular, responsible fisheries management, conservation and sustainable use of fisheries resources, consideration of the special needs of developing countries and the special needs of subsistence and small-scale fishers.

International fisheries instruments are important to consider because the legal obligations they confer upon state parties need to be implemented through national legislation. These instruments also provide momentum for the implementation at the country level of principles and concepts that are not legally binding, but which are applicable to fisheries management.

In this regard, it should be kept in mind that human rights treaties differ substantially from international fisheries treaties. While human rights instruments are framed in terms of obligations of the state vis-à-vis the individual, the principal fisheries treaties entail rights and obligations among state parties, and then indirectly also an obligation towards the nationals of their respective states as custodians of their natural resources.

2.1 INTERNATIONAL INSTRUMENTS

THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA

The United Nations Convention on the Law of the Sea (1982) (LOSC) is the primary binding treaty essentially regulating “peaceful uses of the seas and oceans, the equitable and efficient utilization of their resources, [and] the conservation of their living resources...” (LOSC Preamble) and promotes an international cooperation agenda, both regionally and globally, to this end.

LOSC alludes to several elements that are conducive to the implementation of the right to food, in particular its sustainability dimension. LOSC grants coastal states sovereign rights to manage fish stocks in their Exclusive Economic Zone (EEZ) (Art. 56), but obliges them to determine an allowable catch of the living resources and to take conservation and management measures to prevent overexploitation of these resources in the EEZ. Coastal states are moreover obliged to manage these resources in a way that maintains or restores these stocks at levels that can produce the maximum sustainable yield (MSY), taking into account, inter alia, the economic needs of coastal

fishing communities and the special requirements of developing states (Art. 61). At the same time, states shall meet the objective of optimum utilization (Art. 62), which implies that coastal states have a duty to give other states access to the surplus of the allowable catch in their EEZ when they themselves do not have the capacity to harvest the entire allowable catch. Among the factors for consideration in providing such access are the requirements of developing states; the need to minimize economic dislocation in states whose nationals have habitually fished in the zone; the needs of landlocked and geographically disadvantaged states; and the nutritional needs of the populations of those states (Arts. 69–70). With respect to straddling and highly migratory stocks, states are obliged to cooperate in establishing measures for the conservation of these stocks (Arts. 63–64).

The obligation of states under LOSC to take conservation and management measures to prevent over-fishing in the EEZ is echoed in Right to Food Guideline 8.13, which calls on states to take measures that promote sustainable fisheries. Through its provisions on international cooperation, LOSC goes in the same direction as ICESCR Art. 11(1), which requires parties to cooperate at the international level for the realization of the right to food.

THE UNITED NATIONS AGREEMENT ON CONSERVATION AND MANAGEMENT OF STRADDLING FISH STOCKS AND HIGHLY MIGRATORY FISH STOCKS

The Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (1995) (UNFSA), like LOSC, accords special recognition to the needs of poorer countries and the need for protection of vulnerable groups. In giving effect to the duty to cooperate in the establishment of conservation and management measures for straddling and highly migratory fish stocks, states shall take into account

“the vulnerability of developing States which are dependent on the exploitation of living marine resources, including for meeting the nutritional requirements of their populations [...]; the need to avoid adverse impacts on, and ensure access to fisheries by, subsistence, small-scale and artisanal fishers and women fishworkers, as well as indigenous people in developing States [...]” (Art. 24(2)).

Although the latter provision deals with the management of fish stocks on the high seas and thus has limited applicability, the identification of these target groups for special attention is a method of promoting equality and non-discrimination and is consistent with a sound right to food strategy.

UNFSA also recognizes the limited capacities of developing countries to participate in high sea fisheries and to cooperate in the management of straddling and highly migratory stocks, and provides for various forms of cooperation to assist these countries (Art. 25). The type of cooperation envisaged in this provision predates the directions laid down in the more recent Right to Food Guidelines, which promote international cooperation, particularly through technical cooperation in all its forms, including the transfer of technology (FAO, 2005b, Section III).

THE FAO CODE OF CONDUCT FOR RESPONSIBLE FISHERIES

The FAO Code of Conduct for Responsible Fisheries (1995) (CCRF) was adopted by the FAO Conference in 1995. Although not legally binding, CCRF enjoys recognition as one of the most important and authoritative fisheries instruments through its accommodation of principles and criteria for responsible fisheries and aquaculture management and development. The concept of responsible fisheries is expressed in Article 6.1 of the CCRF, which states that “the right to fish carries with it the obligation to do so in a responsible manner so as to ensure effective conservation and management of the living aquatic resources.” CCRF acknowledges the key role responsible fisheries management plays in poverty alleviation and food security, and thereby in the realization of the right to food, by stating that fisheries management

“should promote the maintenance of the quality, diversity and availability of fisheries resources in sufficient quantities for present and future generations in the context of food security, poverty alleviation and sustainable development” (Art. 6.2).

CCRF stresses the adoption of appropriate management measures as a key element in responsible fisheries management. When establishing such management measures, states are urged to take a participative approach, by taking into account “the interests of fishers, including those engaged in subsistence, small-scale and artisanal fisheries” (Arts. 7.2.1 and 7.2.2(c)). The interests of vulnerable groups should also be taken into account when deciding on the use, conservation and management of fisheries resources, by giving due recognition to “the traditional practices, needs and interests of indigenous people and local fishing communities which are highly dependent on fisheries resources for their livelihood” (Art. 7.6.6).

CCRF embraces a rights based approach in Article 6.18, which calls upon states to

“appropriately protect the rights of fishers and fishworkers, particularly those engaged in subsistence, small-scale and artisanal fisheries, to a secure and just livelihood, as well as preferential access, where appropriate, to traditional fishing grounds and resources in the waters under their national jurisdiction.”

This provision can contribute to the realization of the right to food for small-scale fishers and other vulnerable groups under its availability and accessibility dimension.

CCRF moreover calls on states to have due regard to the rights of coastal communities and their customary practices when developing institutional and legal frameworks that govern the use of and access to coastal resources (Art. 10.1.3).

The working conditions of fishers and fishworkers is also addressed in CCRF, which calls upon states to “ensure that fishing facilities and equipment as well as all fisheries activities allow for safe, healthy and fair working and living conditions” (Art. 6.17). The CCRF does, however, not address the situation of women, who play an important role in ensuring food security, particularly in post-harvest operations.

With regard to the adequacy component of the right to food, CCRF addresses this in the context of both harvest and post-harvest by establishing that

“the harvesting, handling, processing and distribution of fish and fishery products should be carried out in a manner which will maintain the nutritional value, quality and safety of the products, reduce waste and minimize negative impacts on the environment.” (Art. 6.7)

CCRF’s provisions on aquaculture and post-harvest practices can contribute to implementing Right to Food Guideline 10.1 related to strengthening of dietary diversity and healthy eating habits. Aquaculture is put forward as a means to diversify income and diet (Art. 6.19), and, given its nutritional value, the use of fish for human consumption is encouraged whenever appropriate (Art. 11.1.9). CCRF cautions, however, against possible negative effects of aquaculture industry on “the livelihood of local communities and their access to fishing grounds” (Art. 9.1.4) and advocates responsible aquaculture practices in support of rural communities and fish farmers. It furthermore urges the active participation of these communities in the development of such practices (Art. 9.4.1 and Art. 9.4.2).

CCRF’s provisions relating to international trade in fish and fishery products also have a bearing on the implementation of the right to food. Through these provisions, the CCRF creates a direct link between the right to food, food security and trade by cautioning that practices and policies related to the promotion of international fish trade and export production should not adversely affect the “nutritional rights and needs of people for whom fish is critical to their health and well-being and for whom other comparable sources of food are not readily available or affordable” (Art. 11.2.15). CCRF draws attention to the need for transparency regarding the laws, regulations and administrative procedures adopted that affect fish trade (Art. 11.3.1).

CCRF also promotes the implementation of Right to Food Guideline 5.4 (full and transparent participation by civil society in decision-making processes) by stating that while ensuring transparency in decision-making processes, states should facilitate consultation and effective participation of industry, fishers and fishworkers in the development of laws and policies related to fisheries management, as well as in their implementation (Arts. 6.13 and 6.16.).

2.2 REGIONAL INSTRUMENTS AND BODIES

As is the case with international instruments, regional fisheries instruments and bodies play an important role in initiating trends in national legislation or in establishing specific conservation and management measures that will need implementation through national legislation (FAO, 2002).

There is a plethora of regional bodies dealing with fisheries and coastal area management. In this section two of the bodies that are specifically mandated to advocate for the rights of small-scale fishers will be discussed.

The Bay of Bengal Programme Inter-Governmental Organisation (BOBP-IGO Agreement) covers Bangladesh, India, Maldives and Sri Lanka.⁴ The BOBP-IGO

Agreement mandates the organization to support member states to increase “the livelihood opportunities and improving the quality of life of the small-scale fishers in the region” with a view to furthering sustainable coastal fisheries development and management in the Bay of Bengal (Arts. 3 and 4(c)). The quality of life standard echoes the requirement for an adequate standard of living found in Article 11(1) of the ICESCR, which includes the right to food.

The Southern African Development Community (SADC) Protocol on Fisheries is another instrument that advocates the rights of vulnerable groups in fisheries management. It strives, to, among other things, promote “the responsible and sustainable use of the living aquatic resources ... [to] (a) promote and enhance food security and human health; and [to] (b) safeguard the livelihood of fishing communities [...]” (Art. 3). There is also a human rights approach in Article 4, which enumerates principles that are applicable to the whole Protocol, including, stakeholder participation and non-discrimination (specifically gender equality).

While the right to food of artisanal and subsistence fishers is not explicitly laid down, the Protocol can contribute to the implementation of the accessibility dimension of this right by mandating states to protect artisanal and subsistence fishing rights through legal, administrative and enforcement measures (Art. 12(1)(a)). Additionally, the Protocol draws attention to the need to accommodate the requirements of disadvantaged groups.



Fisheries and the Right to Food

Implementing the right to food in national fisheries legislation

ABBREVIATIONS AND ACRONYMS USED IN THE TEXT

INTRODUCTION

1. THE RIGHT TO FOOD AND HUMAN RIGHTS PRINCIPLES IN INTERNATIONAL LAW

2. THE RIGHT TO FOOD AND INTERNATIONAL FISHERIES INSTRUMENTS

3. IMPLEMENTING THE RIGHT TO FOOD IN NATIONAL LEGISLATION

CONCLUSIONS

REFERENCES

3. Implementing the right to food in national legislation

As previously noted, one of the primary challenges for the realization of the right to food in the fisheries sector is the general decline in fish stocks and the resultant increase in competition for them, worsened by disjointed policy and management.

The importance of fisheries and aquaculture in ensuring food security for coastal people and communities around the world requires the integration of the right to food standards and human rights principles into national fisheries legislation. Many countries are currently reviewing their policies and legislation with a view to managing their fisheries resources in a responsible way and ensuring compliance with international fisheries instruments, which is an opportunity to allow for these standards and principles to be implemented in their fisheries legislation.

This chapter identifies components that are considered important in order to effectively implement the right to food in fisheries legislation. It also expands the analysis of the Right to Food Guidelines and their applicability in the fisheries legislation context. Throughout the chapter, examples are given on how the right to food approach has been incorporated and addressed in selected national fisheries laws.

3.1 THE OBJECTIVE OF SUSTAINABLE FISHERIES

Ensuring ecological sustainability and the carrying capacity of ecosystems and fisheries resource to ensure food supply is an important element in achieving the right to food, and adopting an adequate fisheries legal framework is fundamental for achieving this goal (Right Food Guideline 8.13). Lack of fisheries legislation, inadequate legislation and the inability of states to properly enforce their legislation can contribute to the depletion of fish stocks, economic losses, hardship for fishers, and disruption of traditional ways of life (FAO, 2005c). Loss of livelihoods in fishing communities can result in the inability of persons to feed themselves in dignity, by their own means.

As pointed to earlier, the FAO Code of Conduct requires national authorities to manage fisheries in a “responsible” manner. The principle of responsible fisheries management and Right to Food Guideline 8.13 equally highlight the importance of adopting national policies and legal frameworks that are supportive of sustainable fisheries, thus preserving and improving availability and accessibility of fisheries resources.

It should be noted that Right to Food Guideline 8.13 goes further than encouraging sustainable use of the target species only: it is only through responsible management

of the ecosystem as a whole that sustainability truly can be achieved. When regulating fisheries and aquaculture, consideration should therefore be given to the relationship between these sectors and the ecosystem. The ecosystem approach to fisheries (EAF) requires that consideration be given to issues like by-catch of non-target species, food-chain effects and physical damage to habitats (FAO, 2003). This in turn requires the adoption of a whole array of management measures aimed at protecting species and habitats. Emphasis should, however, also be put on the human dimension of fisheries management by looking at the fisheries sector within a larger context of households, communities and the socio-economic environment (FAO, 2008).

Traditionally, fisheries laws have provided for the management of commercial fish stocks only. A number of recent laws demonstrate a shift in focus by providing for conservation of both the living marine resources and the ecosystem of which they are part, as well as the sustainable use of these resources. This aims at achieving responsible fisheries management, and the well-being of human beings plays an important role in this management approach. These are elements of fisheries legislation that are conducive to the implementation of the right to food.

An example of this can be found in the Marine Living Resources Act (1998) of South Africa, which has the following long title:

“To provide for the conservation of the marine ecosystem, the long term sustainable utilisation of living marine resources and the orderly access to exploitation, utilisation and protection of certain living marine resources; and for these purposes to provide for the exercise of control over living marine resources in a fair and equitable manner to the benefit of all the citizens of South Africa [...].”

In a similar vein, the Norwegian Act relating to the Management and Conservation of Living Marine Resources (2008) aims in article 1

“to secure a sustainable and socioeconomic profitable management of wild marine resources and the genetic material pertaining to these, and to contribute to securing employment and settlement in coastal communities.”

The purpose of the New Zealand Fisheries Act (1996) enshrines the concepts of utilization and sustainability, and defines them in a manner that is consistent with a human rights approach: one aspect of ensuring sustainability is “maintaining the potential of fisheries resources to meet the reasonably foreseeable needs of future generations”; while utilization entails “conserving, using, enhancing, and developing fisheries resources to enable people to provide for their social, economic, and cultural well-being” (Section 8).

The Philippine legal framework takes a different approach by including food security as one of its main objectives. The Philippine Fisheries Code (1998) identifies the achievement of “food security as the overriding consideration in the utilization, management, development, conservation and protection of fishery resources in order to provide the food needs of the population [...].” (Section 2(a)). The Philippine Agriculture and Fisheries Modernization Act (1997) also lays down food security – “the availability, adequacy, [sic] accessibility of food supplies to all at all times” – in its declaration of policy and its statement of objectives (Sections 2 and 3).

Achieving sustainable fisheries in practice entails the adoption of a series of management and conservation measures that can contribute to maintaining fish stocks at sustainable levels and to conserving the ecosystem to which they belong. A variety of such measures will be considered in the below sections. Proper enforcement of management measures is, however, essential for the protection of the availability and accessibility of fisheries resources and therefore the right to food.

3.2 SPATIAL AND TEMPORAL CONTROLS – FISHING GEAR AND METHODS

The conservation and sustainable use of living marine resources contributes to the realization of the right to food either through the conservation of the food source itself, or by facilitating and ensuring peoples' livelihoods. Restricting fishing activities to certain times, seasons or areas as a means to rehabilitate stocks play an important role in responsible fisheries management. Closures can be in relation to the taking of certain stocks, or a geographical area, such as a Marine Protected Area (MPA), the latter being also considered a tool for more holistic biodiversity conservation. MPAs located in areas that overlap the fishing grounds of vulnerable fishing communities may potentially conflict with the needs of such communities. The right to food approach would therefore require that the establishment of an MPA does not encroach on the right of access to fishing areas for these groups, in particular indigenous and subsistence fishing communities. Through involving local communities in initiating and managing MPAs, they can be seen as a tool by the communities to protect their resource use rights against detrimental impacts caused by e.g. unsustainable fishing practices. In contrast, if MPAs are established through a top-down process without community consultation and participation, they may be less beneficial for the local fishing communities and rather a tool for other sectors (FAO, 2009a).

The Namibian Inland Fisheries Resources Act (2003) includes an example of such bottom-up establishment of closed areas; the Act provides that the local or traditional authority in an area may request the Minister to declare an area of inland waters as a fisheries reserve for various reasons, including for the preservation or rehabilitation of the aquatic environment and ecosystem, and for regenerating fish stocks (Section 22). The Minister can also do this on their own initiative. The Act is, however, mute on the role of the local and traditional authorities in the management of these areas.

The Philippine Fisheries Code (1998) provides for the possibility for establishing fish refuge and sanctuary zones where commercial fishing is prohibited (Section 81). The Code also includes provisions on limited entry into overfished areas (Section 23) and closed season provisions (Sections 9 and 23). With respect to closed seasons, public notice must be given for two days in a public newspaper at least five days before a closed season declaration becomes effective. In municipal waters, closed seasons can be established by the local government unit (LGU) in consultation with the Fisheries and Aquatic Resources Management Councils (FARMCs), which are local fisher cooperatives. Important human rights elements of participation, information and transparency are thereby injected into this process. Another important issue to consider in the context of sustainable fisheries is the

adoption of measures regulating fishing gear and methods. In this context, the main concern from a right to food perspective would be to minimize the harmful impacts of fishing on the marine environment and resources—impacts that could lead to a decline in the availability of these resources. This would require, inter alia, the adoption of regulations that prescribe the use of fishing gear and methods that are designed to selectively harvest the target species so that incidental captures, and hence discards, of juveniles and unwanted by-catch is kept to a minimum.

An example of provisions on fishing gear and methods is found in the Philippine Fisheries Code (1998). The Code elaborates the kinds of activities that are prohibited when fishing, for example the use of explosives, noxious or poisonous substances and the use of fine mesh nets (which harvest fish in juvenile stages) (Sections 88–89).

The Namibian Inland Fisheries Resources Act (2003) takes another approach by exempting subsistence fishers using traditional fishing gear (“gear manufactured by the local population in an artisanal manner making use of natural materials available from the local environment”) from the licensing and gear requirements provided for in Part IV of the Act. By way of regulation, harmful traditional fishing gear may, however, be prohibited (Sections 29(b), 31(2), and definition in section 1).

3.3 MONITORING, CONTROL AND SURVEILLANCE

Illegal, unreported and unregulated (IUU) fishing is seriously undermining national and regional efforts to manage fisheries in a sustainable manner, with rapid depletion of fish stocks as a consequence. Monitoring, control and surveillance (MCS) is considered a key factor in addressing IUU fishing, and the lack of appropriate MCS measures in legislation can strongly affect the realization of the right to food, as it is instrumental in protecting fisheries resources. MCS measures supportive of sustainable fisheries would include procedures for collecting and recording catch and effort information, and the establishment of observer schemes. In addition, procedures for ensuring compliance need to be adopted, including enforcement powers for authorized officers, and the establishment of judicial processes for penalizing violators (Flewwelling et al., 2002). Enforcement of laws is also crucial in order to ensure that fishing rights allocated to vulnerable fishing communities are respected. (See Section 3.4)

The application of the principles of accountability and rule of law are key consideration when adopting MCS legislation. In the light of this, and to enable an MCS system to be effective, it needs to be provided for in the legal framework in a manner that clearly sets out the rights and duties of all concerned parties, and which provides for the legal procedures for implementing and enforcing these rules.

The Philippine Fisheries Code (1998) includes several measures aimed at implementing an MCS system. First, it mandates the reporting of daily catch and spoilage landing points, quantity and value of fish caught, etc., on a prescribed logsheet form, with a duty to report monthly to Department representatives (Section 38). Under the Implementing Rules and Regulation of the Philippine Fisheries Code of 1998, Rule 14.1, the monitoring component implies collection and storage of catch data and related information by the

Agricultural Department; the control component relates to the rules and regulations governing licences, catch ceiling limitations, etc; while the surveillance component consists of law enforcement activities. In line with the human rights principle of participation, the Code provides for a participatory monitoring and surveillance system, stating that this system shall be established in coordination with LGUs, FARMCs, the private sector and other agencies. The Code identifies assistance in the enforcement of fisheries legislation in municipal waters as one of the functions of FARMCs (Sections 14 and 74(c)). (See Section 3.5 below)

3.4 ACCESS TO AND ALLOCATION OF FISHERIES RESOURCES

The availability of food, which is a fundamental element of the right to food, pertains in part to the possibility of feeding oneself directly from productive natural resources (CESCR, 1999, para. 12). One of the most salient points of intersection between the right to food and fisheries legislation is that they both govern the ability of individuals to access resources. As demonstrated earlier, Right to Food Guideline 8.1 urges states to “facilitate sustainable, non-discriminatory and secure access and utilization of resources [...] and protect the assets that are important for people’s livelihoods.” It is therefore important to see how access to fisheries resources is provided for in fisheries legislation, ranging from provisions on open access, to licensing systems and allocation of quotas.

Limited access to fisheries resources is considered essential for responsible fisheries (FAO, 2003: 62), and is an important means for tackling the severe consequences of open-access regimes, including the depletion of stocks, excess harvesting capacity, shortened fishing seasons and related negative social and economic effects. Limited access can, however, be used to limit the possibilities of vulnerable fishing communities to secure their livelihoods through fishing. A right to food approach would therefore require that access for these communities to resources is prioritized or not encroached upon when scarce resources are being allocated. (This is discussed further in Section 3.6, below). If continued fishing by vulnerable communities is not compatible with responsible fisheries management, these groups should be supported in finding alternative livelihoods.

Use rights may be allocated to a community, an individual, a company or a vessel, and the fisheries legislation should clearly define and protect these access rights. In general, allocation of use rights to a community is done to serve social goals, such as provision of employment and income. As such it can be seen as a step towards strengthening people’s capacity to feed themselves in an autonomous and dignified manner (This is discussed further in Section 3.5, below.) Use rights for individuals and companies, in combination with the right to transfer these rights, may, in contrast, be associated with loss of employment opportunities due to economic rationalization, the formation of monopolies and the transfer of ownership from coastal communities (FAO, 1997). Provisions in law that allocate use rights to small-scale, subsistence and indigenous fishers would therefore be crucial in ensuring that these groups have equitable access to fisheries resources. Moreover, the conditions and procedures for granting use rights and quotas have to be in conformity with the principles of transparency, accountability and rule of law. (This is discussed further in Section 3.11, below).

The importance of incorporating the principle of non-discrimination when allocating fishing rights is illustrated by an example from South Africa, given in Box 1 below.

BOX 1.

Access to fishing rights for artisanal fishers in South Africa

Prior to the Marine Living Resources Act (MLRA) of 1998, the fisheries framework under the Sea Fisheries Act No. 12 of 1988 granted fishing quotas based on racial considerations, aggregating permits and rights predominantly for the white population and industrial fishing. The MLRA was designed to transcend discrimination of fishing rights on racial grounds, by creating the new category of “subsistence fisher” in addition to the existing commercial and recreational ones, but omitted artisanal fishing groups.

Despite the considerable debate over the definition of artisanal fishers caused by this omission in the law and recommendations issued by the Subsistence Fisheries Task Group (SFTG) appointed in 1999, which recommended a slightly revised definition of ‘commercial’ to include small-scale fishers who failed to meet the ‘subsistence’ criteria; they could be subsumed under ‘small-scale’ commercial fishers (See Sowman, 2006), no amendments were made towards giving the group legal recognition under the statute, and the group was thus regulated as commercial fishers (Jaffer and Sunde, 2006; High Court Affidavit by Naseegh Jaffer). The design and implementation of this scheme failed to accommodate the interests and needs of artisanal fishers. Only a small percentage of artisanal fishers were able to acquire “limited commercial rights,” which have been noted to cover only one fishery and comprise unfeasible quotas.

With the help of NGOs, such as Masifundise Development Trust, a group of about 5000 artisanal fishers launched a class action in the High Court and in the Equality Court in Cape Town, claiming that the Fisheries Minister had failed to provide them with just access to fishing rights, and seeking an order giving them equitable access to marine resources. The fishers moreover argued that the implementation of the MLRA violated their right to food, a right that is protected in the South African Constitution of 1996. In 2007, the Minister issued a decision, granting traditional fishers the right to catch and sell West Coast Rock Lobster for commercial purposes. This decision followed an order by the Equality Court in May 2007, issued after an agreement among the parties that the artisanal fishers were entitled to some form of relief through fishing until the government had finalized its new subsistence fishing policy. It is to be noted that although the decision was not compatible with the long-term sustainable use of the resource, the Minister still authorized the interim relief, based on the argument that the fishers depended on the resource for their survival. In its ruling of 7/10/2008, the Cape High Court said that the Minister had acted reasonably when taking his decision as an interim relief measure pending finalization of a new fishing policy that formally took their needs into account (Breytenbach, 2008).

The establishment of fishing zones that grants preferential access to small-scale and subsistence fishers in the marine waters closest to shore is another measure through which the states can fulfil their duty to protect the existing availability and accessibility of food for fishing-dependent communities.

With respect to fishing access agreements for foreign vessels, the legislation should put in place safeguards to ensure that these access rights are not at odds with the needs of small-scale and subsistence fishing communities, or of indigenous communities who depend on fisheries for their livelihoods.

The Philippine Fisheries Code (1998) reserves exploitation of fisheries resources exclusively for Filipinos (Section 5). This can contribute to protecting the local population dependent on these resources from the overexploitation associated with access agreements that enable foreign vessels to harvest fish in Philippine waters. However, fishers that might have migrated to the Philippines from neighbouring countries in order to harvest fish, but with no documentation to support their status, fall outside the protection of the law. Commercial fishing requires registration and possession of a fishing licence, and is not permitted in municipal waters with a depth of less than seven fathoms (Section 18(a)), while small and medium-sized vessels can operate within the 10.1 and 15 km boundary for commercial fishing (Implementing Rules and Regulations, Rule 18.1.a). Registered municipal fisherfolk are granted use of municipal waters (Section 18) and registered fisher cooperatives have a preferential grant of fishery rights (Section 17). Furthermore, penal provisions of the Fisheries Code stipulate that those found without permits or registration papers will be presumed to have engaged in unauthorized fishing, but this presumption does not apply to subsistence fishers who fish for daily food sustenance (Section 86.1).

Under the Namibian Marine Resources Act (2000), commercial fishing requires an authorization, while non-commercial fishing is exempt from licence requirements. There are several allusions to issues of relevance to the right to food in the terms and conditions governing the access to fishing rights. When considering an application, the Minister may have regard to “the contribution of marine resources to food security.” (Sections 32(1) and 33(4)(k)). When issuing a vessel licence, the Minister may refuse to grant a licence if such permission “might threaten the sustainability of a particular marine resource.” Human rights standards are recalled by prohibiting the issuance of a licence that would be inconsistent with Namibia’s international obligations (Sections 40(4)(d) and (e)).

To ensure the continued availability of fish, entry to fisheries can also be regulated by setting catch controls based on the determination of a total allowable catch (TAC) (FAO, 2003: 38) for each commercial fishery on a yearly basis. As scientific data about fish stocks are often inadequate, TACs can be set too high and thus cause overexploitation of the resources. To mitigate this, the law could prescribe for the application of the precautionary approach when setting the TACs. TACs are subsequently split into quotas and allocated to authorized users. When allocating quotas, national authorities will have to make a policy decision as to who should receive what share of the TAC, with industrial and small-scale fishers often competing for the same resources. In allocating these quotas, states do have a particular responsibility in securing the right to food of vulnerable groups.

The Philippine legal framework contains several of the basic elements of a quota management system that is intended to prevent the over-allocation of fishing rights

and overexploitation of fisheries resources. Under the Philippine Fisheries Code (1998), the issuing of fishing permits and licences is subject to the limits set by the MSY, which refers to “the largest average quantity of fish that can be harvested from a fish stock/resource within a period of time (e.g. one year) on a sustainable basis under existing environmental conditions.” (Section 4, item 53). When allocating the MSY, preference shall be given to local fishers, namely “resource users in the local communities adjacent or nearest to the municipal waters.” (Section 7). The law also prescribes the setting of catch ceiling limitations, which are limitations or quotas on the total quantity of fish that can be captured for a specific fishery, time and area. In municipal areas, setting a catch ceiling limitation must be “established upon the concurrence and approval or recommendation of [...] the concerned LGU in consultation with the FARMCs for conservation or ecological purposes.” (Section 8).

The New Zealand Fisheries Act (1996) prescribes the establishment of a TAC for each stock under quota management (Section 14). The Minister shall set a TAC that maintains the stock at a level of the MSY, or that enables the restoration of stocks in a way that will produce the MSY. Among factors considered in determining TACs are biological or environmental conditions of the stocks and the interdependence of stocks. Pursuant to a recent amendment, the precautionary approach shall also be taken into consideration (New Zealand Fisheries Act 1996 (Amendment Bill (No.2)), section 4). Access to fishing by commercial fishers, including small-scale, is regulated by permits, while amateur fishers, non-commercial (including subsistence) and customary Maori fishers are excluded from the ambit of these provisions (Section 89). Fishing permits specify the stocks that may be taken under the permit and whether such stocks are subject to the quota management system (Section 92(1)). Other conditions relate to areas, quantities, methods of fishing, equipment used, etc. Those who have been allocated quotas are under obligations to take reasonable steps to minimize the taking of stocks (Section 14(B)(4)).

Individual transferable quotas (ITQ) are perpetual fishing rights or quotas allocated to an individual that can be sold to others. In Iceland, an ITQ system was established on a permanent basis in 1990 with the adoption of Fisheries Management Act (1990). The quota system was, however, challenged by two of its citizens for violating the non-discrimination principle in the International Covenant on Civil and Political Rights (ICCPR), Article 26. Under the Icelandic ITQ system, fishing vessels were allocated fishing quotas based on catch performance during a specific reference period. While essentially restricting commercial fishing to rights owners only, the Act also included a clause stating that fishing banks around Iceland are common property of the Icelandic nation. In an opinion by the UN Human Rights Committee, it was found that the property entitlement privilege accorded permanently to the original quota owners, and which was to the detriment of the victims lodging the complaint, represented a violation of Article 26 of ICCPR (HRC, 2007).

3.5 MECHANISMS FOR STAKEHOLDER PARTICIPATION

The human rights principle of participation entails that everyone has the right to be actively involved in decisions that affect them. It requires fisheries legislation to provide

mechanisms for engaging, as much as possible, local fishing communities and other stakeholders in the formulation and implementation of policies and management measures affecting the livelihoods of these communities. Right to Food Guideline 2.6 echoes this concern by encouraging states to “promote the participation of the poor in economic policy decisions”. Stakeholder involvement is also encouraged under Right to Food Guideline 5.4, which calls on states to ensure that institutions provide for “full and transparent participation of the private sector and of civil society, in particular representatives of the groups most affected by food insecurity”. Accommodating the interests of a wide range of stakeholders, who often represent competing or conflicting interests, recognizes that the efficiency of policies and management measures often depend on the support gained from the interested parties. Broad stakeholder involvement will not only improve fisheries management, but also give people a direct stake in the efforts to realize the right to food. Mechanisms for decentralization of decision-making are also in line with a human rights approach, which encourages the transfer and delineation of powers to local entities.

Increased stakeholder participation in fisheries management encompasses a wide range of arrangements, from setting up advisory bodies for stakeholder consultation, to the establishment of mechanisms for co-management. The latter would typically imply sharing fisheries management and enforcement responsibilities between central government authorities and local communities or institutions, such as local fisheries associations. Such arrangements could also vest fishing rights in these local communities.

Legal provisions providing for increased stakeholder participation and co-management could significantly contribute to the empowerment of fishing-dependent communities. However, it must be borne in mind that poorer fishing communities often lack cohesive social institutions and face challenges in organizing themselves, expressing their needs and negotiating with the local government (FAO, 2007b). When formulating legislative tools that strengthen their ability to participate in policy and decision-making, it has to be ensured that participation is available to all vulnerable groups. The roles and responsibilities of the local government and various management groups should be explicitly delineated and defined by law, and procedures for participation should be simple, clear and accessible. When formulating mechanisms for participation and stakeholder involvement, capacity and needs assessments and evaluations to tailor partnership arrangements to local contexts should be carried out, considering factors such as enhanced compliance through greater satisfaction among the interested parties, and reduced costs and conflicts (FAO, 2007b).

Legal mechanisms allowing for stakeholder participation will also enable fishing-dependent communities to use legal institutions and procedures to assert and defend their rights, including the right to food. However, when establishing these mechanisms in legislation, provisions that ensure the enforceability of the rights associated with participation have to be provided for. The practice of co-management has had a long history in Japan, with the Fisheries Cooperative Association Law (1948) providing the legal foundation of fishery cooperative associations (FCAs). The current fisheries management policies are housed in the Basic Fisheries Law (2001) (Macfadyen, Ccaud and Kuemlangan, 2005).

While there is a variation of practices across coastal areas, their basic legal structure is similar: FCAs, which are recognized as legal entities, are endowed with territorial use rights or common fishing rights. Each FCA regulates its own membership and authorize when and how the members are entitled to fish within stipulated boundaries (Macfadyen, Cacaud and Kuemlangan, 2005). Enforcement is primarily facilitated through peer pressure, and FCAs are responsible for the implementation of their own schemes, although state assistance through regional Fisheries Ministry offices is provided for. The Basic Fisheries Law decentralizes authority and decision-making, and creates coordination mechanisms between the various tiers of government, from local to national (Macfadyen, Cacaud and Kuemlangan, 2005). The Marine Fisheries Resource Development Promotion Law of 1971 (revised in 1990) launched an autonomous agreement system of resource management among fishers. Once such an agreement has achieved a certain level of adhesion and compliance in the community, the state can then officially endorse the agreement as law. The Japanese model has enjoyed sixty years of success, often generating profits for the communities, and illustrates how the fishers have benefited from a considerable degree of autonomy where the state codifies their regulations instead of imposing a top-down management strategy.

The Namibian Marine Resources Act (2000) allows for stakeholder involvement in decision making through the establishment of the Marine Resources Advisory Council (Section 24), which shall advise the Minister on any matter in which its counsel and investigation is sought. This body has wide representation, including five experts and five individuals “fairly representative of the fishing industry,” who are appointed by the Minister after consultations with trade unions, taking gender balance into consideration (Sections 25(2) and 25(6)). While this provision can be seen as facilitating participation of the concerned stakeholders in decisions that can affect them, leaving the selection to discretion of a Minister may open the way to discriminatory practices or unequal representation.

Similarly, the Advisory Councils established under the Namibian Inland Fisheries Resources Act (2003) also contribute towards employing the principles of accountability and participation through representation of members nominated by regional and local authorities and bodies (Section 4(1)). In line with these principles, the Minister is required to consult local or traditional authorities in the development or application of policies for a particular area (Section 2(2)). Further, traditional authorities are sanctioned to nominate an individual to undertake the role of inspector to ensure observance of the rules set out in the Act (Section 23(3)).

The Philippine Fisheries Code (1998) is another interesting example of involving local fisherfolk in the planning, management and implementation of policies and programmes, and thereby contributing to the empowerment of fisher communities. Under this law, municipal governments, in consultation with the FARMCs, are responsible for the conservation, management, development and utilization of all aquatic resources in municipal areas (Section 16). FARMCs are formed by fisherfolk cooperatives and local NGOs, and are assisted by government entities (Section 69). Many provisions throughout the Fisheries Code integrate FARMCs into the decision-making process.

While preferential treatment for stronger participation is useful to assist disadvantaged groups such as fisherfolk, it is crucial to ensure that other factors do not work to negate these benefits. Specifically, the criteria for eligibility in the Fisherfolk Registry established under the Fisheries Code should not result in omitting vulnerable individuals and groups who would most benefit through cooperative mechanisms. FARMCs require registration in this registry for membership, although the Code does not indicate any conditions for registration, such as fees. Inclusion in the registry is particularly important considering that it shall be used to limit entry into the municipal waters.

Section 12 of the New Zealand Fisheries Act (1996) promotes the consultation and participation of interested parties and of indigenous groups. Here, the Minister is under certain obligations to consult representatives of those having interest in the fish stocks, including Maori groups, in relation to, inter alia, the formulation of fisheries plans and in determining TACs. The Minister is required to have particular regard to Kaitiakitanga, which is the customary exercise of guardianship or stewardship based on the nature of the resources (Section 12).

3.6 MEASURES FOR DISADVANTAGED GROUPS (PREFERENTIAL TREATMENT)

The principle of non-discrimination entails that the fisheries law does not exclude individuals or groups on the basis of race, sex, religion, language or social status. In addition, corrective measures should be taken to redress de facto discrimination. According to the Right to Food Guidelines, states should give special attention to indigenous people and their relation to natural resources, and take steps so that members of vulnerable groups can have access to opportunities and economic resources in order to participate fully and equally in the economy (Right to Food Guidelines 8.1 and 8.2). Right to Food Guideline 3.7 encourages states to, in a sustainable manner, increase the productivity of the fisheries sector through the adoption of policies targeting small-scale and traditional fishers. The obligation of the state to prioritize disadvantaged groups requires them to design measures that confer an explicit benefit to these groups or which compensate for disadvantages they suffer due to economic, geographical or physiological reasons.

An example of such treatment is provision granting open access to subsistence fishers, for which fishing potentially is an important source of food. Open access regimes may, however, not be sustainable, and should in any case be subject to restrictions on fishing gear, as well as other control measures. Open or preferential access is, however, often insufficient for marginalized groups if they cannot benefit from other facilitating measures offered by the state, such as access to credits and technology, which would facilitate their better integration into the economy.

Ensuring respect for traditional and customary fishing practices is also important to deal with in fisheries legislation, and when regulating a previously unregulated fishery it should be determined whether traditional use rights exist. If these rights have been ignored in the legislation at an earlier stage, provisions protecting these rights should be included in the law. Customary access rights do, however, not always apply to women, and these practices may have to be changed to remove gender discrimination (FAO, 2009a).

Where the law envisions incentives, rights and support measures for disadvantaged fishers, such as preferential access to water bodies and land suitable for aquaculture, fishing quotas or credit, these groups should be promptly and appropriately informed about such measures and how to benefit from them.

The legislation should furthermore place a greater emphasis on protecting the employment and other rights of female fishworkers (For labour rights in general, see Section 3.9, below). Despite the fact that women have a significant role in small-scale fish processing and marketing activities in many parts of the world, many fisheries laws neither recognize this role, nor contain adequate social protection measures that are particular to women. Special measures promoting greater inclusion of women in the workforce are also often missing, contrary to Right to Food Guideline 8.6, which prescribes that states should promote women's full and equal participation in the economy.

When reviewing fisheries legislation, the gender context in which rules are to be implemented should therefore be given more attention. Better policies can be created for women based on legally mandated research on the socio-economic conditions in fishing communities, highlighting aspects such as food security and the right to food. Such an approach is given support by Right to Food Guideline 17.5, which endorses the monitoring of the "food security situation of vulnerable groups, especially women, children and the elderly, and their nutritional status, including the prevalence of micronutrient deficiencies."

Several of the reviewed national laws contain specific provisions on facilitating measures for disadvantaged groups. Many laws exempt subsistence or customary fishing from licensing requirements, including the Namibian Inland Fisheries Act (2003) (Section 31(2)). Subsistence fisheries are here defined as

"those fishing activities whose fishers regularly catch fish using traditional fishing gear for personal and household consumption and engage from time to time in the local sale or barter of excess catch."

However, subsistence fishers are still subject to measures relating to fishing gear and methods, such as the prohibition on use of chemicals, explosives or electrical devices for fishing (Section 17). The Minister may furthermore prescribe conditions for subsistence fishers related to fishing methods and gear (Section 29).

In a similar vein, the Gabonese Fisheries Code (2005) prescribes that fishing activities carried out pursuant to customary rights are not subject to a licensing regime (Article 4). The practice of customary rights can, however, be subject to restrictions, in particular related to catch size and fishing methods (Article 42).

Under the Namibian Marine Resources Act (2000), non-commercial fishing is not subject to a licensing regime, thereby granting free access for subsistence fishers (Section 32). In order to grant preferential access and to achieve non-discrimination, the Act empowers the Minister to take into account, inter alia, the following when granting a right to harvest for commercial purposes:

"the advancement of persons in Namibia who have been socially, economically or educationally disadvantaged by discriminatory laws or practices which were enacted or practiced before the

independence of Namibia; [...] regional development within Namibia; [...] socio-economic concerns; [and] [...] the contribution of marine resources to food security.” (Section 33(4))

The Philippine Fisheries Code (1998) grants preferential access to duly registered fisherfolk organizations and cooperatives in municipal waters (Section 17), and in granting licences, priority shall be given to local communities nearest or adjacent to the municipal waters (Section 7). A Municipal Fisheries Grant Fund, with a minimum input of 100 million pesos, was also created by the Fisheries Code, for the development, management and conservation of municipal resources and to finance fishery projects “primarily for the upliftment of the municipal fisherfolk” (Section 109). These provisions seek to protect the livelihoods of small-scale fishers and may also contribute to avoiding overexploitation of areas closer to shore.

The Code also targets women in provisions governing the requisite compositions of FARMCs, but does not specify how these representatives will be elected or on what basis (Section 75(g)). The Code also includes provisions on market development programmes to facilitate women’s contribution to economic activities (Section 65(m)).

One of the ways the Philippine Agriculture and Fisheries Modernization Act (1997) seeks to empower fisherfolk, and particularly women among them, is through providing for technical assistance with respect to information and marketing support services (Chapter 5). Women are also targeted for special training projects for absorption into rural industrialization programmes (Section 107). Measures are also included to improve the credit situation of small-scale fishers: the Land Bank of the Philippines shall, inter alia, focus on the delivery of credit services to small farmers and fisherfolk (Section 24). This Act furthermore promotes the employment of workers in rural areas to increase their standard of living and reduce the likelihood of migration to urban areas. This essentially advocates alternative livelihood strategies through education and training, and is a strategy that enhances adaptability and promotes industrialization and entrepreneurship. This can ultimately result in increased income generation and can therefore contribute to the realization of the right to food (Section 97).

The Philippine fisheries framework, however, does not make provisions specifically catering for subsistence fishers or indigenous groups and their customary fishing practices and rights. Even though rules on the rights of indigenous communities are found in other legislation, such as the Indigenous Peoples Rights Act (1997), this may be a problematic omission in the Philippine fisheries framework.

The legislation of several Pacific countries provides useful illustrations of clear and strong protection of customary, traditional or indigenous fishing rights. Under the Papua New Guinea Fisheries Management Act (1998), “the rights of customary owners of fisheries resources and fishing rights shall be fully recognized and respected in all transactions affecting the resource of the area in which the right operates.” In order to make this operational, the act states that management plans shall identify any relevant customary fishing rights or practices (Sections 26 and 28). Further protection is granted to customary rights through requiring access agreements “to respect and comply with the customs, traditions and customary practices of the indigenous inhabitants.”

Finally, the Act requires that licensed vessels be operated in a way that does not disrupt or adversely affect customary fishing activities (Sections 35(c) and 43(5)). The Act does, however, not include any mechanism for redress against violations of indigenous rights to fishing.

According to the Fijian Fisheries Act (1942) (Chapter 158 Ed 1992), fishing from areas registered by the Native Fisheries Commission in the Register of Native Customary Fishing Rights is restricted to holders of native customary rights or to holders of a permit. Before a permit is granted, however, the group of the Fijian people whose fishing rights may be affected by the grant shall be consulted (Section 13). In order to facilitate this system of recognized fishing rights, the Act provides for the establishment of a Native Fisheries Commission, which is composed of commissioners responsible for ascertaining the “rightful and hereditary” native owners of customary fishing rights in each province of Fiji (Section 14). Inquiries are held into the title of all existing customary fishing rights and recorded in a register together with the boundaries and names of communities (Fiji Native Fisheries Commission (Inquiries) Rules, (Chapter 158 Ed 1992), Section 15), and the Commission has the power to summon witnesses (Section 18) to be examined under oath. Significantly, the rules mandate that proceedings are carried out in the Fijian language, which is an important inclusion into the Act from a human rights perspective. This facilitates accessibility to and understanding of the Act by all those involved, as well as greater participation in the proceedings and deliberations. These findings are then announced to the concerned communities. An Appeals Tribunal is established under the Act (Section 17) to hear appeals from those affected by the decisions of the Commission. The Act also specifies that the aggrieved persons must appeal with a notice by 90 days, indicating the grounds for appeal.

Under New Zealand legislation, the Maoris have been granted special fishing rights. Although Article II of the 1840 Treaty of Waitangi guaranteed Maori “the full, exclusive and undisturbed possession of their (...) fisheries and other possessions”, these fishing rights have been increasingly threatened by the expansion of commercial fishing activities and technology. New Zealand has since attempted to rectify this by introducing legislation specifically addressing Maori fishing rights and customary practices. The explicit objective of Part 9 of the New Zealand Fisheries Act (1996) is to make better provisions for the recognition of “*rangatiratanga* and of the right secured in relation to fisheries by Article II of the Treaty of Waitangi (1840)” in relation to areas of estuarine or coastal waters that have customarily been of special significance as a source of food or of spiritual or cultural significance (Section 174). Under the Act, the Governor-General has the authority to declare any area a *taiapure*-local fishery, i.e. a fishery that is important to Maori as a source of food or for customary or cultural reasons. In doing so, they are compelled to take into consideration the size of the proposed area, its impact on general welfare of the surrounding community, on those having a special interest in the area, and on fisheries management (Sections 175–176).

Any individual can make a proposal that any area be declared a *taiapure*-local fishery, but must detail why the proposed area has been of special customary significance as a source of food (Section 177(3)(a)(i)). Management of *taiapure*-local fishery areas shall

be conducted by a committee comprised of individuals nominated by the Minister to be representative of the Maori Community (Section 185). This body is then authorized to formulate regulations for the management of the fishery area. Non-discrimination provisions are clearly espoused in this section, which legislates against the denial of access or use of any *taiapure*-local fishery area on the basis of the “colour, race or ethnic or national origins of that person or of any relative or associate of that person.” (Section 185(5)(b)). Subsistence food practices in relation to fishing are explicitly protected by the act by providing for the Governor-General to formulate regulations

“recognizing and providing for customary food gathering by Maori and the special relationship between tangata whenua [Maori customary authority] and places of importance for customary food gathering, to the extent that such food gathering is neither commercial in any way nor for pecuniary gain or trade.” (Section 186)

The New Zealand Maori Fisheries Act (2004), Section 3, identifies as its objective to “provide for the development of the collective and individual interests of iwi in fisheries, fishing and fisheries-related activities in a manner that is ultimately for the benefit of all Maori.” This is put in place through a framework for the allocation and management of settlement assets. The act establishes the Te Ohu Kai Moana Trustee Limited to administer settlement assets, and to deal with appropriate classification of quota shares, register settlement quota interests, allocate and transfer settlement assets (Section 33). The Te Putea Whakatupu Trust is designed to fund educational and capacity building programmes, fund fisheries related development skills, provide scholarships and grants for tertiary education, support research, and facilitate entry of Maori in fishery-related occupations (Section 83). While no mention is made of the funds being available in emergencies or to meet food needs as such, the law (Section 35) does authorize the Te Ohu Kai Moana Trustee Limited to “act to protect and enhance the interests of iwi and Maori in those activities”—a suitably broad worded provision that could be used in the furtherance of right to food goals.

3.7 AQUACULTURE

Although increasingly important for food security, the rapid and largely unregulated expansion of aquaculture is causing significant environmental damage, and governments are increasingly recognizing that inappropriate legislative arrangements are seriously hindering the sustainable development of the sector (FAO, 2002). Environmental risk factors contribute to diseases and related health problems, which are associated with lower production levels and economic losses. This in turn may be a challenge to food security. The Right to Food Guideline 8.13, by referring to the prevention of water pollution and protection of soil fertility, points to elements that are important to consider in the context of aquaculture management. An aquaculture legal framework should therefore address measures to mitigate environmental impacts, including provisions related to aquatic animal health and disease control.

The provisions on aquaculture licence requirements under the Namibian Aquaculture Act (2002) show the high degree of regulation in this subsector as a result of the potentially negative consequences of this type of industry on the surrounding environment.

Thus, licences will be issued only upon the satisfaction of a number of criteria, such as environmental impact assessments, and land or water use approvals (Section 12). When properly conducted, such assessments can prevent negative impacts on the capacity of persons to exercise their right to food. In addition, the Aquaculture Act provides that aquaculture licences may be conditioned on aspects relating to water quality, the composition of the feed, types of fertilizers and hormones used, the disposal of dead or diseased products, etc. (Section 14(4)). Once operations have started, the state agency responsible for public health may order isolation, quarantine, treatment or destruction of infected organisms if diseases and harmful organisms are reported. The water quality of aquaculture operations is also monitored, and where an area is deemed to be affected by pollution or “natural phenomenon,” a determination must be made (Section 16). Failure to report diseases and harmful organisms can result in suspension or cancellation of the licence (Section 19) and is considered an offence under the law.

While detailed procedures and clearly established criteria for aquaculture licences, as well as strengthened control of aquatic animal health and water quality, are necessary and conform to right to food standards and human rights principles, they should not be such as to result in hindering small-scale and community aquaculture.

Considering the growing contribution of aquaculture to peoples’ livelihoods, facilitating sustainable aquaculture development for poor communities is potentially an important element for the realization of their right to food. The aquaculture legislation should therefore also establish mechanisms for facilitating fish farmer’s access to water bodies and land for aquaculture production.

An interesting example in this regard is Article 13 of the Vietnamese Fisheries Law (2003), which caters for those who are re-organized out of capture fisheries by providing alternative livelihoods, including “guidance, training, capital support, allocation of land and marine areas for aquaculture.” This demonstrates a respect for the situation of fishers, in particular their lack of alternative employment options, and can also be seen as a means to ensure that they are not deprived of dignity, by ensuring continuity of work and the ability to support themselves and their families.

The New Zealand Maori Commercial Aquaculture Claims Settlement Act (2004) provides a suitable illustration of the state taking proactive steps to support the development of the aquaculture sector among its indigenous population. The Act seeks to enable the growth of the aquaculture industry unhindered by the risk of litigation under the Treaty of Waitangi (Fisheries Claims) Settlement Act (1992), and ensures indigenous groups access to marine spaces to develop aquaculture enterprises. The Act directs 20 percent of space in new or revised regional coastal plans that provides for aquaculture activities to be allocated to the trustee (Section 9), which is defined as the Te Ohu Kai Moana Trustee Limited company, established under Section 33 of the Maori Fisheries Act (2004). The law furthermore details the criteria that must be fulfilled for the allocation of this new space.

Section 45 of the Philippine Fisheries Code (1998) authorizes the disposition of public lands for fish pond development “primarily to qualified fisherfolk cooperatives and associations.” Interestingly, and in line with a right to food approach, the section also

states that “public lands such as tidal swamps, mangroves, marshes, foreshore lands and ponds suitable for fishery operations shall not be disposed or alienated.” The Philippine Agriculture and Fisheries Modernization Act (1997) authorizes the establishment of Agriculture and Fisheries Development Zones to ensure that lands are efficiently and sustainably utilized for food production. These zones are identified in consultation with LGUs, fisher associations, NGOs and appropriate government bodies (Section 6).

3.8 FOOD SAFETY AND TRADE

As previously mentioned, the right to food implies consumption of food “in a quantity and quality sufficient to satisfy the dietary needs of individuals, free from adverse substances” (CESCR, 1999, para. 8). The highly perishable nature of fish and fishery products makes it vulnerable to pathogens. Adopting laws that adequately protect the hygiene and quality of fish and fishery products is therefore essential for ensuring the adequacy component of the right to food. Protecting the health of consumers is equally important with respect to products targeting the domestic market as those that are targeting the export market, but national law makers have a tendency to focus more on hygiene and quality requirements for the export market.

Exports of fishery products comprise an important source of revenue for many developing states. The role of well functioning markets and trade in the realization of the right to food is stressed in Right to Food Guideline 4.5, which calls on states to “promote the development of small-scale local and regional markets and border trade to reduce poverty and increase food security, particularly in poor rural and urban areas.”

The benefits or positive impact of trade on poorer fishing communities, which are generally vulnerable to food insecurity, is, however, debatable. Gains from foreign income and increased employment in fish-processing facilities may be offset by resource depletion linked to lucratively traded species, the loss of fish for local consumers, and the loss of job opportunities for female artisanal fish processors, who cannot compete with larger, export-destined processors (FAO, 2004). Trade in fishery products must therefore be regulated based on an understanding of the context in which these trade regulations apply, and on suitable safeguard mechanisms incorporated in the law through application of human rights principles. This is recognized in Right to Food Guideline 4.7, which emphasizes the need to ensure that food trade and policies “are conducive to fostering food security for all”.

Given the importance for developing countries of the foreign exchange revenues generated from exports of fishery products, the implementation into national legislation of internationally recognized standards adopted by the Codex Alimentarius Commission (CAC) and the World Organisation for Animal Health (OIE), which have both become reference points under the World Trade Organization (WTO) and its Agreement on Sanitary and Phytosanitary Measures (SPS), has become increasingly important. However, problems arise when the national application of these and other international standards lacks transparency and is used to arbitrarily deny imports from certain countries by requiring excessively stringent requirements under the guise of sanitary or veterinary protection. In this context, Right to Food Guideline 4.4 cautions that measures for

consumer protection should not constitute unjustified barriers to international trade. In particular small-scale fish producers face challenges in meeting the standards laid down by some target export countries as they are resource and capital intensive; it has been seen that high certification costs and complex procedures marginalize these groups (SAMUDRA, 2003).

The Philippine Fisheries Code (1998) recognizes the negative impact that export can have on food security by articulating that the “export of fishery products shall be regulated whenever such exportation affects domestic food security and production” (Section 61(a)). Moreover, imports of fishery products are allowed “only when the importation has been certified as necessary by the Department, in consultation with the FARMC ...” (Section 61(c)).

3.9 LABOUR RIGHTS AND SAFETY AT SEA

The fisheries sector is a major source of employment in many parts of the world. By providing employment for workers, both on board commercial vessels and ashore in fish processing plants, it plays an important role in the realization of the right to food, as this right not only entails physical access to food, but also encompasses the means for its procurement. Economic accessibility is enabled through employment or income, and wages earned should be sufficient to purchase food for an adequate diet, without threatening other basic needs and rights. This concern is mirrored in Right to Food Guideline 2.5, which emphasizes the importance for “fishers to earn a fair return from their labour”. In addition to minimum wages, ensuring adequate working conditions, safety and similar social protection measures are also components of the right to food.

While working hours, minimum wages and other labour right issues are likely to be regulated by relevant laws external to the fisheries sector, safety at sea is typically addressed in fisheries-specific legislation. In this section, we focus on how both these issues are covered in fisheries legislation.

The Philippine Fisheries Code (1998) includes provisions on worker and welfare rights within its remit. These issues, found in Section 25, are phrased in a broad and sweeping manner, stating that fishworkers also benefit from the Labour Code provisions, the Social Security System and other social regulations for workers. Interestingly, the Implementing Rules stipulate that fishworkers aboard any vessel shall not be subject to the regulations on normal working hours and overtime, although other provisions of the Labour Code apply (Rule 25.1). For the sake of creating comprehensive and unequivocal rights, the Code could benefit from the inclusion of provisions reiterating fishworker’s rights to elements such as minimum wage, standardized fair working hours, working conditions and safety aspects, even though the broad wording of Section 25 would encompass these aspects.

Safety at sea is addressed through provisions stating that fishing vessels must contain medical supplies and life-saving devices to be determined by the Occupational Safety and Health Center (Section 37). Section 104 of the Code also stipulates a penalty for all commercial fishing vessel operators that employ unlicensed fisherfolk, which could

be interpreted as a method of regulating fishworker rights and the safety of those aboard commercial vessels.

A Vietnamese decree⁵ adopted pursuant to the Vietnamese Fisheries Law (2003), details the responsibilities and duties of ship owners, captains and crew with respect to safety of vessels and crew members. Ship owners are obliged to equip vessels with safety and rescue equipment and to have accident insurance for crew members. They are moreover obliged to sign a labour contract with each crew-member in accordance with laws in force (Article 5). The decree furthermore includes rules regarding the registration of vessels and crew, as well as the inspection of vessels.

3.10 CREDIT, EXTENSION AND SUPPORT SERVICES

The provision of extension and credit services, technology assistance and education are important ways in which poor fishing communities can be empowered to provide for themselves. This can also contribute to increased fish production, and to the diversification of income sources for the purchase of other types of food. Right to Food Guideline 11.1 encourages states to support investment in human resource development, including education, literacy and skills training, which are noted as being essential to sustainable development, including fisheries. Right to Food Guideline 8.9, however, stresses the importance of education and training programmes as a way to improve access to the labour market, which is important when alternative livelihoods are sought.

The Right to Food Guidelines also recognize the importance of providing credit services: Right to Food Guideline 4.1 suggests the improvement of national markets

“by developing appropriate credit policies, by generating sustainable adequate levels of national productive investment through credits on concessional terms and by increasing human capacity.”

Laws facilitating and promoting both private and government investment in coastal infrastructure and facilities (cold storage, transport facilities, clean water, etc.), and which thus make these more readily available and affordable, can be seen as measures facilitating the implementation of the right to food for small-scale fish producers. It is also important that post-harvest provisions include the possibility of upgrading and transferring post-harvest technology, which is a constraint in the small-scale fish processing sector. The legislation should also envision technical and advisory services and capacity building to assist small-scale fishers and producers to comply with the regulations and to understand trade rules and processes.

The Philippine legal framework provides good examples of legislative frameworks that are conducive to the implementation of the Right to Food Guidelines related provision of extension, credit, education and infrastructure support services to vulnerable groups. The Philippine Fisheries Code (1998) addresses many problems associated with the socio-economic vulnerability of small-scale fisheries, which play a major role in food

insecurity. These include the inability to access credit and technology, high levels of post-harvest losses, and constraints of trade-related infrastructure, such as cold storage and transport. The Code specifically provides for credit guarantees and grants with preference given to fisheries cooperatives for rural credit grants (Sections 109, 110 and 114). These issues are developed further in Section 34 of the Code, governing incentives for municipal and small-scale commercial fisherfolk. Under Section 24 of the Code, and further expounded in the corresponding article of the Implementing Rules, the Department of Agriculture and the LGUs are directed to

“provide support to municipal fisherfolk through appropriate technology and research, credit, production and marketing assistance and other services such as, but not limited to training for additional/supplementary livelihood.”

The Philippine Agriculture and Fisheries Modernization Act (1997) also contains several provisions on credits and financing systems. For example, it stresses a policy of non-discrimination in the promotion of the access of fisherfolk to credit and

“particularly women involved in the production, processing and trading of agriculture and fishery products and the small and medium scale enterprises [...] engaged in agriculture and fisheries” (Section 20).

This is in line with a right to food approach advocated by Right to Food Guideline 8.6 regarding promotion of women’s full and equal participation in the economy. The law transfers the management of some government credit programmes, through a new structure (the Agro-Industry Modernization Credit and Financing Programme (AMCFP)), to cooperative and rural banks, government financial institutions and viable NGOs (Section 21). This new programme was designed to, inter alia, facilitate the acquisition of fishery products, equipment and machinery and fishmeal, purchase products for storage and trade, construction repair and maintenance of facilities, and to provide working capital for long-term projects and for fisheries graduates (Section 23).

The Agriculture and Fisheries Modernization Act also emphasizes extension services that involve training and advisory services in fishing communities (Sections 87 and 90–91), while the Fisheries Code mandates the inclusion of fisheries conservation in the school curriculum (Section 117), and takes steps towards mainstreaming fisheries into the educational sector in the Philippines.

With specific reference to aquaculture, Article 25(3) of the Vietnamese Fisheries Law (2003) specifically grants individuals and organizations the right to enjoy the transfer of and training in new aquaculture techniques and fish fry production, as well as fish disease prevention. Furthermore, these shall be provided with information on the environment and fish marketing. Under Article 46(3) of the law, the Ministry is obliged to provide to fish trading enterprises information on markets, processing technology, and the rules regulating the import and export of fishery products.

3.11 PROCEDURAL AND INSTITUTIONAL ISSUES

The human right principles of accountability and transparency refer, to a great extent, to the institutional framework and are important for creating a legal environment conducive to the implementation of the right to food. Under Right to Food Guideline 5.1, states

“should assess the mandate and performance of relevant public institutions and, where necessary, establish, reform or improve their organization and structure to contribute to the progressive realization of the right to adequate food in the context of national food security.”

Under Right to Food Guideline 5.2, states are encouraged to provide for national intersectoral coordination mechanisms to ensure the concerted implementation, monitoring and evaluation of policies, plans and programmes.

In line with this, the legislation needs to clearly provide the mandates of each government body in order to avoid overlaps and ensure coordination among these. When the functions and responsibilities of government bodies are clearly espoused in the legal framework, it is easier for users to hold these bodies accountable for their duties, their actions, as well as for any failure to act. As the implementing arm of government policies, their mandates should be designed to balance the need of the state as the protecting authority, with the needs and expectations of the users. Their legitimacy vis-à-vis the users is also important for the efficiency of the body.

Another important dimension of transparency is to assure processes that are open and accessible to all, where outcomes are predictable and consistent with predetermined situations laid down by the law. The provision of information is crucial to this principle, through detailed laws that govern procedures and functions, and by mandating institutions to make such information available. In the latter case, individuals can better make informed choices and decisions by being aware of all the avenues available to them. In this way, transparency is interlinked with empowerment.

Clear provisions that articulate the procedures and conditions for a process, such as granting fishing permits (and grounds for denial or revocation), are important in this regard. Laws should also avoid lengthy, complicated or costly application procedures in areas where the relevant population is largely illiterate or unaware of the way registration, licensing or accessing support measures offered by the government can be obtained. There should also be clear provisions allowing individuals to complain before a higher administrative authority, and possibly also before a competent court. This would ensure compliance with the principle of rule of law.

The Papua New Guinean Fisheries Management Act (1998) contains rather detailed provisions on the granting of fishing licences. The Act (Section 44) also sets out the appeals process, whereby persons denied a licence by the National Fisheries Authority Board can appeal in writing within 30 days to the Minister. The latter must then convene a Licence Appeals Committee, comprising the Departmental Heads of transport and of provincial affairs, and a Magistrate, with their views going forward to the Minister for a final decision. A Managing Director is then responsible for giving effect to this

decision. There is also a recourse mechanism for those whose rights may not have been legitimately recognized in the first instance. The presence of a Magistrate injects into the process a legal dimension and the assurance of adherence to the rule of law. This is useful in particular for small- and medium-scale fishing establishments, which may not have the financial or political clout to influence decision-making, and serves to level the playing field between the different actors.

The Namibian Aquaculture Act (2002) includes rather detailed provisions regarding the terms and conditions for granting aquaculture licences. With respect to the suspension and cancellation of such licences, Article 19 of the Act clearly details under what conditions the Minister may suspend or cancel these licences, thereby ensuring accountability in this process. Transparency is provided for by Article 20, which prescribes that where the Minister refuses to grant or renew a licence, or suspends or cancels a licence, “the Minister must in writing notify the licensee of the decision and the reason for the decision.”

While Philippine legislation sets out procedural requirements for permit issuance, no detailed reference is made to criteria for eligibility, reasons for revocation, appeals or other due process guarantees. Similarly, there are no mechanisms in the Philippine Fisheries Code (1998) for hearings or appeals in the case of arbitrary denials of fishing permits. These omissions reduce the transparency of the process of issuing permits, and hinder the accountability of the government body responsible for granting permits. In order to ensure conformity with the right to food standards and human rights principles, the relevant government body should be required—when making changes, revoking, altering or issuing new notices, rights or permits—to notify the persons affected and provide them with an explanation. Affected persons should also be given the right to appeal and should be informed of the existence of such a right.



Fisheries and the Right to Food

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ABBREVIATIONS AND ACRONYMS USED IN THE TEXT

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1. THE RIGHT TO FOOD AND HUMAN RIGHTS PRINCIPLES IN INTERNATIONAL LAW
2. THE RIGHT TO FOOD AND INTERNATIONAL FISHERIES INSTRUMENTS
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Given its importance for people's livelihoods and their capacity to provide for themselves, fisheries and aquaculture plays an important role in the realization of the right to food. Ensuring that the benefits from the sector accrue to society at large, including, in particular, small-scale and subsistence fishers and indigenous peoples, is one of the major challenges that the sector must deal with. As has been demonstrated in this study, fisheries legislation is a necessary tool towards reaching this goal. However, if states fail to ensure conservation and sustainability of the aquatic resources, this will not only mean that the access to food for many fishing communities will be encroached upon, but also that the access of future generations to this vital food resource will be seriously jeopardized. When implementing the right to food in fisheries legislation, it is therefore crucial that the adopted measures are compliant with responsible fisheries management, in line with the sustainability dimension of the right to food.

Although developed without necessarily integrating a deliberate human rights based approach, the national fisheries legislation selected for review do reflect, to various degrees, several elements relevant for the realization of the right to food. Some of the recent trends in this regard are provisions dealing with conservation and sustainable use of fisheries resources, the establishment of co-management mechanisms, the granting of use rights to local fishing communities and provisions on preferential access for subsistence fishers. Provisions regarding safety at sea, credit and extension services and other measures targeting vulnerable fishing communities are also seen in recent legislation. The influence of international fisheries instruments on these trends cannot be underestimated.

At the same time, many fisheries laws are still weak on some of the legal components that would be conducive to the realization of the right to food, including participatory procedures and mechanisms that would allow all concerned stakeholders to actively and meaningfully take part in the decision-making processes. Other laws may omit mechanisms that protect customary fishing rights, or might not provide for such rights within their ambits. The role and rights of female fishworkers is another issue that is often neglected in national legislation. Many laws do include measures for disadvantaged groups—such as open-access regimes for subsistence fishers—but the necessary mechanisms to protect these rights may be omitted. Ensuring compliance with the legislation is a big challenge that is particularly acute in developing countries, and stems in part from the lack of effective enforcement mechanisms and adequate sanctions in law.

This study has shown that the right to food and human rights principles can be implemented in national fisheries legislation through the inclusion of a number of different legal provisions. It has also demonstrated the complexity of this implementation exercise, due to the great variety of issues that need to be addressed in order to make a fisheries legal framework that is compliant with a right to food approach. The list below includes some of the components that have been identified as being conducive to the implementation of this approach in fisheries legislation:

- i. due regard for customary and traditional fishing rights and practices;
- ii. preferential access to fisheries resources for subsistence fishers;
- iii. allocation of use rights to local fishing communities;
- iv. clear and transparent rules for the allocation of fishing rights;
- v. active involvement of all relevant stakeholders in the decision-making processes at all levels;
- vi. adequate measures for the most disadvantaged groups of the population, including granting credit, extension and support services to these groups;
- vii. exit strategies for disadvantaged groups that need to find alternative livelihoods;
- viii. promotion of a gender-responsive approach and the role of women in fisheries organizations, policy and decision-making bodies;
- ix. adoption of labour rights and safety at sea measures for fishers;
- x. transfer and delineation of powers and decision-making to local government and entities;
- xi. clearly defined roles, responsibilities and powers of institutions involved in fisheries development and management, including enforcement; and
- xii. mechanisms allowing individuals to hold governments to account and to obtain redress when their rights are violated.

In addition, the inclusion of adequate conservation and management measures and MCS measures is instrumental for ensuring the conservation and sustainability of aquatic resources.

In order to ensure that national fisheries legislation is truly conducive to the realization of the right to food in a country, a sound understanding of the interface between the right to food and the fisheries sector is necessary. What is needed at the national level is an analysis of the fisheries sector to identify and address the problems in the local context, and to frame laws in such a way as to protect and facilitate vulnerable fishers' access to fish and enable their livelihoods. A multi-sectoral approach based on consultation and consensus should be developed, coupled to the necessary legal and institutional reforms. However, without the necessary human and technical capacity to implement and enforce national laws, efforts to implement a right to food approach in fisheries legislation will fail. Legal reform will therefore have to be coupled with capacity building for law enforcers and others involved in implementing the legislation.

Beyond initiatives at the national level, cooperation at the regional and international level is vital for the realization of the right to food for fishing-dependent communities. This study has shown that several international fisheries instruments are conducive to the realization of the right to food, while regional bodies play an important role in advocating for the rights of small-scale fishers.

As pointed out by the Global Conference on Small-Scale Fisheries, held in October 2008, although the small-scale fisheries sector contributes to food security, poverty reduction and rural development in developing countries, the sector can only fully realize its potential to significantly contribute to sustainable development and the attaining of the UN Millennium Development Goals when the precarious and vulnerable living and working conditions under which small-scale fishers live have been improved. The Conference recognized that human rights are critical in this context, and identified several ways to secure the social, economic and human rights and the use and access rights of small scale fishers, as well as the rights of indigenous peoples (FAO, 2009a). Most of these steps mirror the legal components that have been identified in this study as being important for the implementation of a human rights and a right to food based approach in fisheries legislation. Echoing the concerns raised by the Global Conference, it is time to move from negligence to action in order to realize the human rights—including the right to food—of fishers and fishworkers.



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