Traditional Fishing Rights in Papua New Guinea

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TRADITIONAL FISHING RIGHTS IN PAPUA NEW GUINEA

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Introduction

It is said that the Papua New Guinean fishermen follow "traditional fishing rights". But the definition and the nature of these rights are not clear. The objective of this paper is to try to understand the rights from a legal aspect by reviewing government publications.

Traditional Fishing and Traditional Fishing Rights

A. Traditional Fishing in the Fisheries Acts of Papua New Guinea

1) Fisheries Act 1974

The Fisheries Act of 1974 prohibits some kinds of fishing, provides fishing licences, and so on.

Section 1(1) of the Act provides that:

"In this Act, unless the contrary intention appears ...
'traditional fishing' means fishing by natives where –
(a) the fish are taken in a manner that, as regards the boat, the equipment and the method used, is substantially in accordance with the traditions of the indigenous inhabitants of Papua New Guinea; and
(b) the fish are landed in the country by the boat from which they are taken, or are transhipped from that boat to a boat the licence in respect of which is specially endorsed under Section 6(4)(b)."

The Act does not apply to the taking of fish by traditional fishing (Section 4 of the Act).

2) Continental Shelf (Living Natural Resources) Act 1974

The Continental Shelf (Living Natural Resources) Act of 1974 prohibits the taking, during a specified period, of sedentary organisms of a specified kind in the shelf area; and provides licences for the taking, and so on.

Section 1(1) of the Act defines "traditional fishing" the same as in the Fisheries Act except that the fishing is for sedentary organisms.

The Act does not apply to or in relation to the taking of sedentary organisms by traditional fishing (Section 4(1)(b) of the Act).

3) Fisheries (Torres Strait Protected Zone) Act 1984

The Fisheries (Torres Strait Protected Zone) Act of 1984 applies to the Protected Zone (Section 3(1) of the Act).

Section 2 of the Act provides that:

"In this Act, unless the contrary intention appears ...
'Protected Zone' means –
(a) the area the boundaries of which are described in Annex 9 of the Torres Strait Treaty; and
(b) in relation to traditional fishing, includes –
(i) any area adjacent to the area referred to in Paragraph (a) and to the north of the line described in Annex 5 to the Torres Strait Treaty declared by the Minister, by notice in the National Gazette, to be an area in the vicinity of the area referred to in Paragraph (a) for the purposes of traditional fishing; and
(ii) any area adjacent to the area referred to in Paragraph (a) and to the south of the line described in Annex 5 to the Torres Strait Treaty that is, under Australian law, declared to be an area in the vicinity of the area referred to in Paragraph (a) for the purposes of traditional fishing; ...

'Torres Strait Treaty' means the Treaty between the Independent State of Papua New Guinea and Australia concerning Sovereignty and Maritime Boundaries in the area between the two Countries, including the area known as Torres Strait, and related matters, that was signed at Sydney on 18 December 1978; ...

'traditional fishing' means the taking, by traditional inhabitants for their own or their dependants' consumption or for use in the course of other traditional activities, of the living natural resources of the sea, seabed, estuaries and coastal tidal area, including dugong and turtle".

The Act prohibits the taking of fish, provides fishing licences, and so on.

The Act, with some exceptions, does not apply to traditional inhabitants engaged in traditional fishing and to boats used by traditional inhabitants for traditional fishing (Section 3(2) of the Act).

B. Traditional Fishing Rights

We did not find the word "fishing right" or "traditional fishing right" in the fisheries Acts. We found, however, many occurrences of the phrase "traditional fishing rights" in the documents of fisheries in Papua New Guinea. I think that the traditional fishing rights are based on Common Law or customary law. But I don't yet know anything about Common Law or customary law in Papua New Guinea.

In this paper I understand that "traditional fishing rights" means the rights to do such "traditional fishing" as is defined in the fisheries Acts.

It seems that traditional fishing right means traditional ownership of fishing grounds. JARMAN et al. (1989, p. 1) writes:

"Traditional aquatic rights are defined by subsistence fishing practices. Where fishing was unimportant in the local economy, such rights may not even have existed in the past, whereas where fishing is an important activity, traditional fishing grounds are jealously

guarded and subject to a system of rules defining ownership."

Industrial Fisheries and Traditional Fishing Rights

A. Baitfishing and the Tuna Fishery

From 1970 to 1981 foreign fishing boats were engaged in pole and line tuna fishing in the sea near Papua New Guinea. Most of the boats belonged to Japanese fishing companies. Fish taken in pole and line tuna fishing are mainly skipjack tuna. Live baitfish is essential to the fishing. The foreign fishing boats have fished for bait in the waters of coastal villages of Papua New Guinea.

According to JARMAN et al. (1989, p. 4), the "Government of Papua New Guinea has collected royalties for bait fishing which has been given to provincial authorities to distribute to coastal villages whose waters were being fished. The problem has been who should receive the royalties." The problem is, in other words, who is the subject of traditional fishing rights because the waters of coastal villages were the fishing grounds of traditional fishing rights.

WALTER et al. (1986) conducted a study in East New Britain and New Ireland Provinces to ascertain whether traditional marine rights could provide a framework for the distribution of royalties. "They found that settlements claimed rights over territories (without defined boundaries) of coastal water and that the traditional social structure did not offer a useful means of allocating royalties" (JARMAN et al., 1989, p. 4).

The study recommended that payments determined for the village or group of villages whose waters actually supplied the baitfish, should be divided between all resident heads of household (HHs). All HHs should be registered with the provincial government. Each registered HH should be given his own account into which all payments are made. Withdrawals should be allowed only for purposes approved by the provincial government. The system of individual accounts and approved withdrawals should anyway be fully explained to villagers beforehand (WALTER et al., 1986, p.17).

B. The Prawn Fishery

The prawn trawl fishery is one of the important industrial fisheries in Papua New Guinea. According to OTTO (1989, p. 19), payment "of royalties for bait fish was introduced by the Minister for Natural Resources, Mr B.R. Jephcott, on 30/6/1975." The baitfish royalty scheme has created a precedent leading to submissions from the Premiers of the Papuan provinces in 1987 to the effect that royalties should be collected from prawn fishing companies to compensate the "owners" of the resource (JARMAN et al., 1989, p.4). According to JARMAN et al. (1989, p. 4), "VONOLE (1988) suggests that the basis of legitimacy for such claims is that the nursery grounds (as distinct from the spawning grounds) for prawns are in Papuan coastal water; adult prawns migrate into deeper and more distant waters. These nursery grounds fall within the traditional inshore fishing grounds of coastal villages, who harvest small amounts of prawn for subsistence purposes."

Traditional Fishing Rights and Law

A. Ownership of Marine Resources

According to OTTO (1989, pp. 27–28), in New Hanover and Tigak Islands in New Ireland

Province ownership" of marine resources is vested in village communities as a whole. It differs from ownership of land which is a matter of clan and sub-clan groups and even individuals. Royalty payments should be understood as compensation for the use of a resource and should therefore go to the owners of the resource."

In New Hanover and Tigak, generally the unit which owns marine property is the village community. "There is no differentiation of rights among the members of the community. As a rule the residents have equal access to the marine resources claimed by the village as a whole. It appears, then, that the principle on which co-ownership is based is residence rather than descent" (OTTO, 1989, p.14). This concurs with the findings of WALTER et al. (1986).

According to OTTO (1989, p. 54), in Seeadler Harbour in Manus Province the "same groups hold rights in land and marine property, namely patrilineages." "The units which own marine property are patrilineages or sub-lineages. Traditional rights on marine property consist of one or a combination of the following three elements: the right to catch a certain species, the right to use a certain technique and the right to fish in a certain area. The elements of different rights may overlap."(OTTO, 1989, p. 48).

B. Traditional Fishing Rights and Law

It seems that written laws in Papua New Guinea don't prescribe for fishing rights or traditional fishing rights. On the other hand the Customs Recognition Act states in section 5 (OTTO, 1989, p. 58):

> "Subject to this Act and to any other law, custom may be taken into account in a case other than a criminal case only in relation to –
> b) the ownership by custom of rights in, over or in connection with the sea or a reef, or in or on the bed of the sea or of a river or lake, including rights of fishing; or
> c) the ownership by custom of water, or of rights in, over or to water".

"This law thus provides for the acknowledgement of existing traditional rights of ownership of inland and coastal waters and fisheries" (OTTO, 1989, p. 58).

"The nature of traditional fishing rights varies considerably between and even within geographical areas. The character and the size of the groups having traditional rights varies as well" (OTTO, 1989, p. 59).

References

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