

Securing effective and transparent prosecutions of fisheries violations in Ghana

Recommendations for the reform of the fisheries law framework

Summary | November 2023

Summary

- The manner in which the Fisheries Out-of-Court Settlement Committee (FOCSC) – a committee established by the Fisheries Commission – has engaged in the handling of criminal matters relating to fisheries appears to be unconstitutional. The FOCSC has exercised quasi-judicial powers without the consent of the courts, effectively resulting in the imposition of fines without proper judicial oversight. This violates key constitutional principles – the Constitution of Ghana vests judicial power exclusively in the courts, ensuring safeguards such as independence, due process and transparency in the criminal justice system.
- The lack of a clear legal basis and framework governing the mandate, composition and processes of the FOCSC raises further legitimacy concerns. The confusion surrounding its name and composition, combined with its exercise of quasi-judicial powers without consent of the courts, has created uncertainty and opacity in its processes. This lack of transparency and accountability has undermined public trust and confidence in the FOCSC's decisions and actions.
- The inclusion of money obtained from compounded offences into the Fisheries Development Fund may incentivise the Fisheries Commission to collude and abuse the compounding process in order to amass more funds, rather than relying on the court system for proper adjudication. Serious offenders may evade proper accountability through the payment of fines which are often far less than the minimum fines required by law. This undermines the deterrent effect of the law and may lead to a culture of non-compliance and increased violations in the long term.
- The Government of Ghana is obligated to act immediately to uphold the Constitution and the authority of the courts, and ensure that any committee established to adjudicate on fisheries violations is not allowed to overreach or take unlawful actions.
- Implementation of the following measures would improve the effectiveness of fisheries prosecutions in Ghana and ensure constitutional legality and integrity of the process:
 - Amending the Fisheries Act to clearly define the creation and composition of the committee mandated to compound fisheries offences, specify its mandate, and provide safeguards such as transparency, accountability, and adherence to constitutional principles.
 - Requiring the involvement and permission of the courts before the power to compound offences may be exercised.
 - Creating a Fisheries Division of the High Court to handle criminal and other matters involving fisheries.
 - Delegating prosecutorial powers to Fisheries Commission officers and ensuring consistent capacity building of fisheries officers authorised to prosecute fisheries offences.

1. Introduction

This briefing summarises the key findings of legal advice delivered by TaylorCrabbe to the Environmental Justice Foundation (EJF) in October 2023. In the advice, TaylorCrabbe analyses the key gaps and weaknesses in Ghana's current prosecution system for fisheries violations, both in terms of the legal framework and in terms of practical implementation, and provides recommendations for addressing these issues, considering the ongoing reform of the national fisheries law framework.

The advice responds to a need identified by a number of institutions for the urgent reform of the alternative dispute resolution (ADR) and court processes for the prosecution of violations in the fisheries sector. The current system has come under criticism in recent years for failing to achieve effective and deterrent prosecution outcomes, which has severely hampered efforts to eradicate widespread and systemic illegal fishing activities from Ghana's waters.

- In April 2017, a World Bank mission identified issues with the current system including: the large gap between the number of offences and the number of prosecutions; inconsistent prosecution amounts; provision of penalty waivers without clear reasons; licence renewal for offenders; irregular infraction reporting and follow-up; and a high proportion of uncollected fines.¹
- A 2019 Political Economy analysis published by USAID set out recommendations for addressing weaknesses in the system, including requiring that final settlement conditions be returned to court to ensure they comply with judicial guidelines and improving transparency to minimise political interference in proceedings.²
- EJF has identified similar issues in its observations and analyses of fisheries-related cases, for example: fines imposed at well below the statutory minimum, despite a requirement that the minimum fine be paid whether the case is settled in or out of court;³ the relicensing of vessels that have failed to pay fines imposed;⁴ failure to return cases to the court in the case of non-payment of fines;⁵ repeated failure of accused persons to appear before the court;⁶ and non-referral of final settlement conditions to the court.⁷

The failures in the current system of sanctions and prosecutions were a key consideration in the European Commission's decision, in June 2021, to issue a warning to Ghana for failing to adequately address illegal, unreported, and unregulated (IUU) fishing, in line with the country's obligations under international law.⁸

The legislative proposals put forward by TaylorCrabbe in their analysis focus on how to improve transparency in prosecutions to enhance outcomes and create greater accountability in the system.

2. Overview of the process for the prosecution of fisheries-related offences

Arrests in the fisheries sector can be made by officers of the Monitoring, Control and Surveillance (MCS) Division of the Fisheries Commission, the Ghana Navy, or the Marine Police (a unit of the Ghana Police Service specialised in marine affairs). The mandate of the MCS Division and the Navy ends at arrest: following arrest, the offending party is placed in the custody of the Marine Police, although the MCS Division and Navy may assist and cooperate with the Police in gathering evidence to help in prosecution.

Upon arrest, the Police will take a statement from the offender or offending party and collate exhibits that will serve as evidence during prosecution. The Police then prepare the docket – containing details of the offence and all other exhibits – which is sent to the Attorney General's office for advice and prosecution. The Attorney General is responsible for the initiation and conduct of all criminal prosecutions in the country. The Attorney General may also authorise other persons to initiate and conduct criminal prosecutions on its behalf.⁹ Such persons currently include officers of the Police, the Forestry Commission and the Petroleum Commission.

When an offence is committed under the fisheries legislation, the offender or offending party has two options. The offending party may either be brought before a court or may opt for compounding of the offence, referred to informally as "arbitration".

(a) Prosecution in court

Once the documents have been prepared and advice given by the Attorney General, the offender or master in charge of the offending vessel is sent before a court of competent jurisdiction. In practice, most fisheries offences are tried in the Circuit Court; however, offences that involve foreign vessels are required to be prosecuted in the High Court.¹⁰ The procedure for the prosecution of all fisheries-related offences follows that prescribed in the 1960 Criminal Procedure Code (Act 30) for prosecuting criminal offences. Penalties in the fisheries sector are mostly in the form of a fine; however, in a few instances, the Fisheries Act prescribes a custodial sentence.

Request to the court for out-of-court settlement (arbitration)

In the fisheries sector, it is common practice for the offending party to request for out-of-court settlement (arbitration) after court proceedings have been initiated. When a court refers cases to arbitration, the parties are required to report back to the court for the court to adopt the outcome of the arbitration as the judgement.¹¹ The judgement, like any other court judgement, forms part of the public record. In such cases, there is often high compliance with penalties imposed, unlike in voluntary arbitration where the offending party often does not pay the (full) fine imposed.

Under the previous Minister for Fisheries and Aquaculture Development, the Fisheries Out-of-Court Settlement Committee (FOCSC) had the mandate to deal with the arbitration of fisheries offences and violations. This mandate is now reportedly carried out by the Fisheries Settlement Committee (FSC).¹² See **Section 3(a)** for further discussion of the respective mandates and composition of the FOCSC and FSC.

(b) Compounding of offences

The second route for dealing with fisheries offences is through the process referred to as “compounding” under section 116 of the 2002 Fisheries Act – a process also referred to as “arbitration”.¹³ Compounding of fisheries offences is one of the significant administrative powers of the Fisheries Commission. It has the effect of releasing a person accused of an offence under the Fisheries Act from criminal liability as soon as the conditions imposed are met.¹⁴ Compounding allows for the more rapid settlement of disputes since it does not directly involve the courts. However, to ensure fairness, a person whose offence is compounded has the right to appeal to the High Court.¹⁵

Before compounding the offence, the Fisheries Commission must be satisfied that the person has committed the alleged offence, usually by way of a written statement from the person admitting to having committed the crime.¹⁶ The person also has to document their willingness to have the offence compounded.¹⁷ The prosecutor – a government official – has to provide their consent prior to the exercise of the Commission’s power to compound.¹⁸

In practice, the compounding process begins with the offender writing to the Commission to request the offence be compounded. An authorised representative of the company then appears before the committee (see **Section 3(a)**) for the hearing. The representative of the accused may request mitigation of any penalty, however the committee is not permitted to go below the minimum fine¹⁹ or above the maximum as prescribed by law. Once the committee and representative agree on the level of the fine, a bill is prepared indicating the agreement and terms of payment. Payments are to be made within 30 days²⁰ and, following payment, the receipt is to be sent to the Commission. The secretary of the committee is mandated to ensure payment is made.

Monies paid to the Commission are not considered a fine, and so are paid directly in to the Fisheries Development Fund²¹ (as opposed to the Consolidated Fund²²). The Commission therefore has direct access to the funds for the promotion of its activities and management of its liabilities. It is noted that penalties imposed for compounded offences have frequently gone unpaid or have been subject to interference by politicians, resulting in fines being reduced without the involvement of the committee.²³

Under the previous sector Minister, the compounding of offences was carried out by the FOCSC and took place without approval of the court. Currently, the power to compound offences is reportedly exercised by the Commission through its FSC in Tema (see **Section 3(a)** below).²⁴

3. Legislative proposals to address failures identified

(a) Lack of clarity concerning the powers and functions of the FSC and FOCSC

Under the previous Minister for Fisheries and Aquaculture Development, the FOCSC was created to perform functions related to the settlement of fisheries offences (i.e., to solely exercise the mandate of the Commission to engage in arbitration/compounding of offences - see **Section 2** above). The FOCSC was created out of an administrative power of the Commission to appoint committees it considers necessary for the effective implementation of its functions.²⁵ Such committees may have members and non-members of the Commission as part of their composition. However, according to reports from officers of the Fisheries Commission, the FOCSC has reportedly been dissolved following the appointment of the new sector Minister and its mandate is being performed by the FSC in Tema.

Therefore, in addition to its statutory mandate, the FSC is also currently tasked with adjudicating fisheries offences and violations. The 2002 Fisheries Act creates the FSC to “hear and settle complaints from persons aggrieved in respect of matters arising from or related to the fishing industry”.²⁶ The FSC is, by law, to be composed of three to five members of the Fisheries Commission²⁷ (representatives from ministries, authorities and associations concerned with the fisheries sector) and may co-opt any specialist to assist in the settlement of issues before it.²⁸ The five members of the FSC are currently: (i) an attorney from the office of the Ministry of Justice and Attorney General who is Chair of the FSC; (ii) a representative from the artisanal fishing sector; (iii) a representative from the industrial fishing sector; (iv) a representative from the Fisheries Commission board; and (v) a representative from the Navy (the Commodore). The two co-opted members are a Police Prosecutor (normally a lawyer from the legal division of the police service) and a Marine Police Investigator. The Secretary to the FSC is currently the Director of the MCS Division.

In recent years, the existence of both the FOCSC and FSC has created confusion as to the composition and legal justification for the committee that was employed by the Commission to settle disputes out of court. There was no certainty as to whether both the FOCSC and FSC were supposed to exist and function alongside each other and, critically, the scope of their respective mandates and how those mandates overlapped. This lack of clarity was a cause for concern as it detracted from the transparency and accountability that should be attached to state institutions.

There was also no way to assess whether the committees as set up were fit for purpose. The FOCSC was established solely by the Fisheries Commission – the Commission had absolute discretion to place any person on the FOCSC without question²⁹ creating the potential for abuse. The general administrative power granted to the Commission to establish committees under Section 9 of the 2002 Fisheries Act resulted in a general lack of consistency in the establishment and composition of these committees. Indeed, the FOCSC has reportedly now ceased to act under the current fisheries administration.

Recommendations:

- Amend the Fisheries Act to expressly provide for the creation and composition of a Fisheries Out-of-Court Committee to carry out the mandate of compounding offences and ensure its mandate is distinct from that of the Fisheries Settlement Committee.
- Set out in the legislation the specific qualifications and appointment process for Committee members, and provide for periodic reviews and re-appointment processes to enhance transparency and reduce the potential for bias or conflicts of interest.
- Provide legislative safeguards in the form of transparency and accountability. This should include requiring the decisions and penalties adopted by the Fisheries Out-of-Court Committee to be published, as well as its guidelines and detailed procedures to be followed. Records of the committee’s deliberations should be accessible to the public.

(b) Unconstitutionality and illegality of functions of the FOCSC

The practice of the FOCSC to compound offences without the consent of the courts appears to be both unconstitutional and illegal.

In usurping both the power of the Attorney General to prosecute, and the court to convict an accused person, the FOCSC's actions appear to be unconstitutional. The Attorney General has sole power to commence criminal proceedings against any person who is alleged to have committed a criminal offence.³⁰ This power may be delegated by executive instrument by the Attorney General to other public officers.³¹ However, no such powers have been delegated to the Fisheries Commission. Judicial power is also exclusively vested in the courts by the 1992 Constitution.³² Yet, the FOCSC has exercised quasi-judicial powers, to the extent it investigated allegations of non-compliance with the fisheries laws, and took decisions to impose penalties on operators in the form of fines. This effectively resulted in the imposition of fines without proper judicial oversight.

The vesting of judicial power in the courts ensures various safeguards in the criminal justice system. The judges and the courts themselves are expected to be independent and free from interference. There is due process of accused persons to ensure that their constitutional rights to a fair trial are protected. Proceedings are public and judges are bound by judicial oath to do justice and be fair to all parties. There is accountability and transparency associated with the courts that cannot be found in the processes and powers of the FOCSC.

The exercise of the power to compound offences without the consent of the court is furthermore illegal. Section 234 of the 1960 Criminal Offences Act (Act 29) provides that an offence may only be compounded with leave of the court.³³ In addition, a state official who compounds an offence and in effect converts criminal liability to a civil liability without leave of court commits a criminal offence which is punishable with a term of imprisonment of up to three years.³⁴

Aside from questions of legality, the payment of money obtained from compounding offences to the Fisheries Development Fund (see **Section 2(b)** above) provides an incentive for the Fisheries Commission to use the process to generate funds. The Commission may therefore be more inclined to compound offences than allow the court system to deal with offenders where the gravity of the offence so requires. In the long term, this could lead to increased non-compliance with and disregard for the law.

Recommendations:

- Amend the Fisheries Act to require the involvement and permission of the court before the power to compound offences may be exercised to improve transparency and integrity of the process.
- Petition the Chief Justice to create a Fisheries Division of the High Court to handle criminal and other matters involving fisheries to enhance efficiency and effectiveness of criminal proceedings.
- Petition the Attorney General to pass an Executive Instrument delegating prosecutorial powers to officers of the Fisheries Commission, as is already the case for officers of other natural resource commissions such as the Forestry Commission. This would help to increase capacity to conduct prosecutions and secure convictions on resource specific offences which are often very technical.

(c) Lack of court supervision of dispute resolution mechanisms

The laws of Ghana allow for the settlement of some criminal proceedings out of court. Section 73 of the Courts Act 1993 (Act 459) allows a court to encourage and facilitate settlement in an amicable manner any offence not amounting to a felony and not aggravated in degree, on payment of compensation or on any other terms approved by the court. Where the court wishes to refer the matter for arbitration, the court is required to stay proceedings and, in the event of a successful settlement, dismiss the case and discharge the accused person. Since the passage of Practice Direction (Disclosures and Case Management in Criminal Proceedings) 2018, the courts are now mandated to consider whether any criminal case brought before it may be settled by arbitration before the case goes to trial.

In practice, however, the FOCSC operated without recourse to the court of law for an order that cases be settled out of court. Furthermore, the decisions of the FOCSC were not confirmed by the courts and penalties could not be enforced as fines. This lack of supervision has reportedly led to significant political interference, where fines below the statutory limits were imposed or where fines imposed were not fully paid.

Recommendation:

Amend the fisheries laws to require that all cases be referred to the courts for an order to settle the matter out of court before they are brought before any committee.

4. Conclusions and recommendations

This briefing has outlined significant concerns regarding the practice of the FOCSC and its role in handling criminal matters related to fisheries. The FOCSC has exercised quasi-judicial powers without the consent of the courts, effectively resulting in the imposition of fines without proper judicial oversight. This violates key constitutional principles – the Constitution of Ghana vests judicial power exclusively in the courts, ensuring safeguards such as independence, due process and transparency in the criminal justice system.

The lack of a clear legal basis and framework governing the mandate, composition and processes of the FOCSC raises further legitimacy concerns. The confusion surrounding its name and composition, combined with its exercise of quasi-judicial powers without consent of the courts, has created uncertainty and opacity in its processes. This lack of transparency and accountability has undermined public trust and confidence in the FOCSC's decisions and actions.

There is an urgent need to amend the Fisheries Act, to clearly define the creation and composition of a committee to deal with the out-of-court settlement of fisheries violations, specify its mandate, and provide safeguards such as transparency, accountability, and adherence to constitutional principles. The involvement and permission of the courts should be required before the power to compound offences may be exercised to ensure constitutional legality and integrity of the process.

Based on the above analysis, we recommend that the following measures be implemented to improve the effectiveness of fisheries prosecutions in Ghana and ensure constitutional legality and integrity of the process:

- Amend the Fisheries Act to expressly provide for the creation and composition of a Fisheries Out-of-Court Committee to carry out the mandate of compounding offences and ensure its mandate is distinct from that of the Fisheries Settlement Committee.
- Set out in the legislation the specific qualifications and appointment process for Committee members, and provide for periodic reviews and re-appointment processes to enhance transparency and reduce the potential for bias or conflicts of interest.
- Provide legislative safeguards in the form of transparency and accountability. This should include requiring the decisions and penalties adopted by the Fisheries Out-of-Court Committee to be published, as well as its guidelines and detailed procedures to be followed. Records of the Committee's deliberations should be accessible to the public.
- Require the involvement and permission of the courts before the power to compound offences may be exercised.
- Petition the Chief Justice to create a Fisheries Division of the High Court to handle criminal and other matters involving fisheries.
- Petition the Attorney General to pass an Executive Instrument delegating prosecutorial powers to officers of the Fisheries Commission and ensure consistent capacity building of fisheries officers authorised to prosecute fisheries offences.
- Strengthen liaison between the Fisheries Enforcement Unit and other relevant agencies, such as the Ghana Air Force and the National Intelligence Bureau to enhance enforcement.

- 1 World Bank (2019). *Implementation Completion and Results Report 4979-GH, TF010905 GH, on an International Development Association Credit in the amount of SDR 31.1 million (US\$50.3 million equivalent) and a Global Environment Facility Grant in the Amount of US\$3.5 million to the Republic of Ghana for a Ghana Project under the First Phase of the West Africa Regional Fisheries Program (P14775)*. 28 March 2019: <http://documents.worldbank.org/curated/en/866911554409721545/pdf/Ghana-Under-the-First-Phase-of-the-West-Africa-Regional-Fisheries-Program-Project.pdf>
- 2 Stark, J., Schuttenberg, H.Z., Newton, M., Edminster, S., Asiedu, G., Ekekepi, E. and Torrens-Spence, G.J. (2019). *Advancing Reforms to Promote Sustainable Management of Ghana's Small Pelagic Fisheries*. Washington, D.C., USA: USAID. 57pp.
- 3 Section 116(1), 2002 Fisheries Act (Act 625)
- 4 Anon (2020). 'Trawler re-arrested in Ghana for repeated illegal fishing crimes after refusing to pay fine', *EJF*, 10 June. <https://ejfoundation.org/news-media/notorious-trawler-re-arrested-in-ghana-for-repeated-illegal-fishing-crimes-after-refusing-to-pay-fine> (accessed 25 August 2020).
- 5 Section 116(7), 2002 Fisheries Act (Act 625)
- 6 *EJF* observations of court proceedings, for example cases involving the fishing vessels Zhong Lu Yu 1004, Lu Rong Yuan Yu 956 and Lu Rong Yuan Yu 920.
- 7 Sections 116(4) and (6), 2002 Fisheries Act (Act 625)
- 8 European Commission (2021). Commission Decision of 2 June 2021 notifying the Republic of Ghana of the possibility of being identified as a non-cooperating third country in fighting illegal, unreported and unregulated fishing 2021/C 215 I/03. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX-%3A32021D0607%2802%29&qid=1664718230449>
- 9 Article 88 of the 1992 Constitution of Ghana (Act 527)
- 10 Section 115(1), 2002 Fisheries Act (Act 625)
- 11 Section 73 of the 1993 Courts Act (Act 459)
- 12 Section 10(1) of the 2002 Fisheries Act (Act 625)
- 13 According to Section 116(1) of the Fisheries Act, when a person is charged with an offence under the fisheries laws, the Fisheries Commission may compound the offence by accepting from the person a sum of money of not less than the minimum penalty specified for the offence, plus the fair market value of any fish caught illegally. The amount charged will take into account the details and severity of the offence and the minimum penalty level, as well as whether the person is a repeat offender.
- 14 Section 116(9) of the 2002 Fisheries Act (Act 625)
- 15 Section 116(8) of the 2002 Fisheries Act (Act 625)
- 16 Section 116(1) of the 2002 Fisheries Act (Act 625)
- 17 *Ibid.*
- 18 Section 116(4) of Fisheries Act 2002, (Act 625).
- 19 Section 116(1) of Fisheries Act 2002, (Act 625).
- 20 Section 116(7) of Fisheries Act 2002, (Act 625).
- 21 Section 116(1) of Fisheries Act 2002, (Act 625). The Fisheries Development Fund as established by section 36 of Act 625 is managed by the Commission in accordance with its objectives as set out in section 38 of the Act. Though it is also a public fund it is sector specific.
- 22 The consolidated fund is the public fund of Ghana as per Article 175 of the 1992 Constitution (Act 527)
- 23 Friends of the Nation (2017). *Strengthening the Prosecutorial Chain Working Meetings*. The USAID/Ghana Sustainable Fisheries Management Project (SFMP). Narragansett, RI: Coastal Resources Center, Graduate School of Oceanography, University of Rhode Island and Friends of the Nation. GH2014_POL078_FON. 23 pp.
- 24 According to reports from officers of the Fisheries Commission, at the time of writing, the compounding of offences is being performed by the FSC, which only hears and settles offences and violations with approval of the courts. All fisheries offences and violations are reportedly first filed in court and an offender may only request settlement by the FSC with the approval of the court. The terms agreed by the FSC must then be submitted to the judge for adoption as consent judgement. This has reportedly improved compliance with the terms of the arbitration, although it was not possible to confirm this assertion through the present research.
- 25 Section 9 of the 2002 Fisheries Act (Act 625)
- 26 Section 10(1) of the 2002 Fisheries Act (Act 625)
- 27 *Ibid.*
- 28 Section 10(3) of the 2002 Fisheries Act (Act 625)
- 29 Section 9 of the 2002 Fisheries Act (Act 625)
- 30 Article 88 of the 1992 Constitution (Act 527)
- 31 Section 56 of the 1960 Criminal Procedure Code (Act 30)
- 32 Article 125 of the 1992 Constitution (Act 527)
- 33 Section 234 of the 1960 Criminal Offences Act (Act 29)
- 34 *Ibid.*