



LEGAL OPINION ON TRANSHIPMENT IN GHANA

Submitted by

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A. INTRODUCTION

We render this legal opinion following the formal instruction and engagement of our services on the 11th of May 2018. This opinion carefully examines relevant provisions of the Fisheries Act, 2002 (Act 625) and Fisheries Regulations, 2010 (L.I 1968) in relation to transshipment of fish in Ghanaian waters.

This opinion seeks to answer the following questions:

1. What is the legal status of transshipment of fish at sea from local (i.e. Ghana-flagged) industrial trawlers to canoes (referred to as “saiko”)? Is this activity rendered illegal by Section 33 of the 2010 Fisheries Regulations (LI 1968)? What is the current status of Section 132 of the Fisheries Act regarding “supervised transshipment” read in light of Section 33 of LI 1968?
2. Is it possible for the Minister for Fisheries and Aquaculture Development to issue an administrative decision (in the form of a Ministerial Directive or other communication) allowing for transshipment of fish at sea from industrial trawlers to canoes under certain circumstances, e.g. if the activities are supervised by an authorised officer of the Fisheries Commission? Or is such a decision precluded by Section 33 of LI 1968?

This opinion reflects our understanding of the current state of the law. It has been rendered based on our skill and learning. It is however not on the same footing as an opinion or judgement of a court of competent jurisdiction. This legal opinion is subject to judicial interpretation by a court of competent jurisdiction.

B. RELATIONSHIP BETWEEN THE FISHERIES ACT, 2002 (ACT 625) AND FISHERIES REGULATION, 2010 (L.I 1968).

The legal framework for the management of the fisheries as a natural resource is primarily provided for in the 1992 Constitution. The Constitution provides that “...Parliament shall by or under an Act of Parliament, provide for the establishment,...of...a Fisheries Commission...which shall be responsibility for the regulation and management of the utilization of the natural resources concerned and the co-ordination of the policies in relation to them.”¹

Consequent to this constitutional imperative, the Act of Parliament regulating fisheries as a natural resource is the Fisheries Act, 2002 (Act 625). The Act was further complemented with an implementing regulation in 2010 – L.I 1968. The sources of law contained in the 1992 Constitution of Ghana² creates a hierarchy of laws. This hierarchy enables us to resolve both vertical and horizontal inconsistencies in law. At the apex of the hierarchy is the Constitution followed by the Acts of Parliament and then Legislative Instruments.

“Although the courts treat subsidiary legislation as legislation and therefore such legislation has the power to amend earlier inconsistent legislation, there are

¹ Article 269(1) of the 1992 Constitution.

² Article 11 of the 1992 Constitution

constraints on the amending power of subsidiary or delegated legislation flowing from the doctrine of ultra vires. Subsidiary legislation is made pursuant to enabling power in the principal legislation. This enabling power may not be wide enough to authorise the amendment of delegated or subsidiary legislation under a different principal legislation. For example, LN 140a was made by the Rules Committee pursuant to its powers under section 107 of the Court Ordinance. It is very doubtful whether the enabling power in section 98 of Act 372 is wide enough to enable the repeal under its authority of the express rule made by the Rules Committee in Order 42 r 15.”³

Thus, where there is a conflict between a substantive parent Act and subsidiary legislation, the parent Act is deemed in law to be the provision that must be respected. The Fisheries Act, 2002 (Act 625) is the parent Act while the Fisheries Regulation (2010) L.I 1968 is the subsidiary or subordinate legislation.

C. AMENDMENT OF ACT AND REGULATIONS

1. Amendment of Fisheries Act, 2002

An Act is made pursuant to the powers of Parliament to make law under article 106 of the 1992 Constitution. The same procedure as outlined in article 106 will be required to be complied with in any amendment to the Act. Thus to amend Act 625:

- i. An amendment Bill will have to be introduced with an explanatory memorandum setting out the policy and principle behind the amendment, the defect in the existing law and the remedy to deal with the defect.
- ii. The amendment bill should be published in the Gazette 14 days from introduction in Parliament.
- iii. It should go through all the processes in Parliament
- iv. Should be assented to by the President.

2. Amendment of Fisheries Regulations, 2010

Regulations are generally made pursuant to a provision in a parent Act⁴ or a provision in the Constitution⁵. These have to follow the requirement under article 11(7) of the 1992 Constitution before it can come into effect.

In the case of the Fisheries Regulations, 2010, the regulations were made pursuant to section 139(1) of Act 625 and on the recommendations of the fisheries commission. A Minister wishing to amend these regulations will have to demonstrate that the amendment is on the recommendation of the commission.

The amendment will then have follow the same procedure set out under article 11(7) of the 1992 Constitution before it can come into effect. Where there is a conflict between the original regulations and the amendment, the amendment, being the latest in time, will be held to override the original regulations.

³ Butt v Chapel Hill Properties & Anor. [2003-2004] 1 SCGLR 636

⁴ Legislative Instrument

⁵ Constitutional Instrument

Also, the Regulations can be amended by the Minister introducing an amendment to Act 625 with the main purpose of amending the regulations or repealing Act 625 and repealing any regulation made pursuant to that Act.

D. GENERAL SCOPE OF TRANSHIPMENT IN SECTION 132 OF THE FISHERIES ACT, 2002 (ACT 625)

Section 132 of the Act provides for supervision of transshipment. In the Memorandum to the Bill, it was suggested that the intention of the section is to provide for the “prohibition of transshipment of fish in the fishery waters unless it is done under ... supervision...”

The general scope of the provisions in section 132 can thus be subdivided into two interrelated sub headings:

1. Authorized and Supervised Transshipment by the Commission

This first level of the scope of transshipment under the Act is at the level of the Fisheries Commission. The Commission has the mandate to allow transshipment of any form except other forms prohibited by law. However, within this scope, the transshipment ought to be authorized in writing and the process supervised by an authorized officer of the Commission.

This provision is the benchmark of legal transshipment in Ghana and makes any form of transshipment illegal if it does not satisfy the requirement of authorisation and supervision in section 132.

2. Transshipment under approved conditions and arrangements by the Council.⁶

The second level of the scope of transshipment under Section 132 of the Act is at the level of the governing Council of the Fisheries Commission. The governing council has the power to approve transshipment under other arrangements and conditions. This part of the provision reads **“under any other arrangement and conditions approved in advance by the Council”**.⁷ It appears from the text that this second level of approved transshipment may only be possible if the arrangement and condition are approved in advance by the governing council.

It is our considered view that in the absence of the prior approved arrangements and conditions by the governing council, the only form of legal transshipment is that which is approved in writing by the Commission and supervised by an authorized officer.

Thus the legality or otherwise of a transshipment is dependent on either of the two procedures of approval set out in law. The procedure provided for in the first section 132 is the default process while the procedure in the second part of section 132 is the exception to the process.

⁶ Section 140 of Act 625 - “Council” means the governing body of the Commission

⁷ Section 132 of Act 625

E. SPECIFIC PROVISIONS FOR THE TRANSHIPMENT OF TUNA

While section 132 provides generally for transshipment of fish, section 133 of the Act provides specific provisions for the transshipment of Tuna.

Similar to the preceding provision, section 133 provides two conditions precedent before the transshipment of Tuna can be legal.

1. The first condition requires a license, an authorization or a grant from the Minister responsible for fisheries before the transshipment of Tuna can be undertaken⁸. The provision however, does not provide the nature of the license, authorization or grant. It does not also provide the processes to be undertaken to acquire such a licence, authorization or grant. However, it requires the Minister to act on the recommendation of the Commission.
2. The second condition for transshipment of Tuna is the requirement of first landing of the Tuna in the Republic.⁹ It suggests that the transshipment of Tuna although under a license, authorization or grant will be an illegality unless the tuna being transhipped is first landed in Ghana before transshipment.

We are of the opinion that the specific provisions in section 133 should be read together with section 132. Consequently, transshipment of Tuna will require, a license, authorization or grant, first landing in the republic and under the supervision of an authorised officer.

F. GENERAL SCOPE OF TRANSHIPMENT IN REGULATION 33 OF THE FISHERIES REGULATION,2010 (L.I 1968)

The implementing regulations, L.I. 1968, passed pursuant to Act 625 addresses transshipment in more detail.

1. Permitted Transshipment
 - i. *Transshipment with consent from one canoe to another canoe or from a semi-industrial vessel in areas lacking safe landing facilities. It is unclear whether such transshipment must conform to the standards in section 132.*
 - ii. *Verifiable emergency transshipment from one canoe to another canoe or from a semi-industrial vessel*
2. Not Permitted
 - i. *Transshipment to unlicensed Ghanaian fishing vessel to foreign fishing vessel, vice versa. Thus, where such transshipment is done by a licensed Ghanaian fishing vessel within the terms of section 132, it is legal.*
 - ii. *Transshipment of fish from industrial vessel to a semi-industrial vessel or canoe or vice-versa.*

⁸ Section 133(1)(a) of Act 625

⁹ Section 133(1)(b) of Act 625

Also, there is tonnage limit on transhipments. Fishing vessels of fifty gross registered tonnage and above or licensed as an industrial vessel shall deposit their catches at approved ports in the country.

It is our considered opinion, the forms of transhipment contained in the regulations must be read in light of the provisions in the Act. Where the form of transhipment is explicitly barred then the commission and the council are precluded from authorising or supervising such transhipments.

G. OPINION

1. *What is the legal status of transhipment of fish at sea from local (i.e. Ghana-flagged) industrial trawlers to canoes (referred to as “saiko”)?*

Act 625 does not specifically provide for transhipment of fish from local industrial trawlers to canoes. It provides generally for the authorisation of transhipment by the Commission. L.I 1968 provides for these. The regulations were made pursuant to section 139 of Act 625. Section 139(1)(g) provides that regulation may be made for “... catching, loading, landing, transshipping, transporting, possession and disposal of fish...”

The Minister having exercised his power under the Act, the Commission has been limited in the activities and forms of transhipment it may authorise and supervise.

We are of the opinion that the transhipment of fish at sea from local (i.e. Ghana-flagged) industrial trawlers to canoes has been rendered illegal since the passing of L.I 1968.

2. *Is this activity rendered illegal by regulation 33 of the 2010 Fisheries Regulations (LI 1968)?*

As noted above, to the extent that the regulation 33 is made pursuant to Act 625 section 138(1)(g) and to the extent that it does not contradict any provision in the parent Act, regulation 33 has rendered the transhipment of fish at sea from local (i.e. Ghana-flagged) industrial trawlers to canoes (referred to as “saiko”) illegal.

3. *What is the current status of Section 132 of the Fisheries Act regarding “supervised transhipment” read in light of regulation 33 of LI 1968?*

The question appears to suggest that regulation 33 may have amended section 132 of the Act. As noted earlier, Act 625 is a parent law while L.I 1968 is a subsidiary law subordinate to the parent law. Therefore, L.I 1968 cannot amend Act 625.

As it stands, certain categories of transhipment in fishery waters are legal provided they have not been prohibited by L.I 1968 and they are done under supervision by an authorised officer of the Commission or the requirement for approval or supervision has been dispensed in advance by the Council through other approved arrangements and conditions.

Supervised transshipment under Section 132 is still required under law as long as the transshipment is authorised by the Commission and it is not contradicting any of the prohibitions in LI 1968.

The *generalia specialibus non derogant*¹⁰ rule of interpreting statutes will not apply here since the L.I 1968 is not a special regulation to Act 625. The L.I merely sets out the implementing rules for the Act.

4. ***Is it possible for the Minister for Fisheries and Aquaculture Development to issue an administrative decision (in the form of a Ministerial Directive or other communication) allowing for transshipment of fish at sea from industrial trawlers to canoes under certain circumstances, e.g. if the activities are supervised by an authorised officer of the Fisheries Commission? Or is such a decision precluded by regulation 33 of LI 1968?***

Section 3 (2) of the Fisheries Act gives the Minister the power to give general directions in writing on matters of policy and the Commission shall comply with the directions. It is our view that this provision means that the directives are to be directed at the Commission and the Commission is to comply. The eventual decision, assuming it is legal, on any matter will still have to be a decision to be communicated by the Commission and not the Minister.

In connection to the question, a combined reading of the Act and L.I indicates that the only entities allowed to authorize and approve supervised transshipments is the Commission or the Council. The Minister has no mandate in issuing administrative directives directly for supervised transshipment if such a directive is not originating from the Commission or approved in advance by the Council.

In any case, by exercising the power to pass regulations under Section 139 of the Act, and by expressly providing for the prohibition of the transshipment of fish at sea from local (i.e. Ghana-flagged) industrial trawlers to canoes, with the regulations the Minister cannot use an administrative directive to override clear provisions of law.

¹⁰ The provisions of a general statute must yield to those of a special one. Also known as the rule of implied exception.