
Legal opinion on the requirement for Parliamentary approval for industrial fishing licences in Ghana

SUMMARY

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Key points:

- Currently, industrial fishing licences in Ghana are processed by the Fisheries Commission and approved and issued by the Minister for Fisheries.
- The 1992 Constitution states that any application for a licence to exploit a natural resource requires parliamentary approval. Fisheries are considered a natural resource for this purpose.
- Parliament has not issued a resolution to provide for an exemption to this requirement in the Constitution.
- The current practice for the issuance of industrial fishing licences has no basis in law. Any application for a fishing licence must be subject to Parliamentary ratification.

This briefing summarises the key findings of a legal opinion delivered by Ghanaian legal consultancy the Taylor Crabbe Innitiative (TCi) to the Environmental Justice Foundation (EJF) in November 2019. In the opinion, TCi analyses the procedure for licensing industrial vessels to fish in Ghanaian waters and alignment of current practice with the provisions of the 1992 Constitution.

Current practice – procedure for issuing industrial fishing licences in Ghana

The Fisheries Commission processes all applications by operators of industrial vessels for licences to fish in Ghanaian waters. Applications are submitted to the Fisheries Commission, which then refers the application to a Fishing Licence Evaluation Committee for review.

The Minister takes the final decision, subsequently approving and issuing the licence. At no stage is Parliament consulted or ratification required in the process. The legal basis for the current practice is set out in Sections 69 and 70 of the 2002 Fisheries Act (Act 625)¹.

Constitutional provisions on the exploitation of natural resources

According to Article 268 of the 1992 Constitution, any transaction including but not limited to the application for a licence to exploit a natural resource requires Parliamentary approval.

Parliament has the power to exempt certain types of transactions from the rule in Article 268(1). Article 268(2) of the Constitution requires a resolution supported by the votes of not less than two-thirds of all members of Parliament before Parliament can divest itself of its power of Parliamentary ratification. This is limited in scope to specific contracts and transactions for which Parliament deems fit to provide an exemption.

Constitution of the Republic of Ghana (1992)

Protecting natural resources

Parliamentary ratification of agreements relating to natural resources

268. (1) Any transaction, contract or undertaking involving the grant of a right or concession by or on behalf of any person including the Government of Ghana, to any other person or body of persons howsoever described, for the exploitation of any mineral, water or other natural resource of Ghana made or entered into after the coming into force of this Constitution shall be subject to ratification by Parliament.

(2) Parliament may, by resolution supported by the votes of not less than two-thirds of all the members of Parliament, exempt from the provisions of clause (1) of this article any particular class of transactions, contracts or undertakings.

Findings of the legal opinion

Are fisheries considered a natural resource?

The Constitution recognizes that fisheries resources are within the scope of those resources that require Parliamentary ratification for any transaction that involves their exploitation. Articles 268 and 269 come under the sub-heading 'Protecting Natural Resources'. Article 269(1) provides for the establishment of a Fisheries Commission, alongside other natural resource commissions. These commissions are enjoined under Article 269(2) to regulate and manage the natural resources concerned, and co-ordinate policies in relation to them.

Has the Parliament of Ghana granted an exemption to the requirement for parliamentary ratification?

There is no evidence of any resolution where the Parliament of Ghana has determined that the application for a fishing licence does not require Parliamentary ratification.

An exemption to the requirement for Parliamentary ratification requires a resolution supported by a majority of not less than two-thirds of all members of Parliament. The constitution requires that an exemption be limited in scope to the specific class of contracts, transactions or undertakings as determined by Parliament.

To the extent that such a resolution does not appear to exist, any such application for a fishing licence must be subject to Parliamentary ratification.

What is the effect of the 2002 Fisheries Act?

The current practice for the issuance of industrial fishing licenses has its basis in Sections 69 and 70 of the 2002 Fisheries Act (Act 625).

Through Act 625, Parliament has provided that the grant of an industrial fishing licence does not fall within those categories of agreements that require Parliamentary ratification.

However, this is at odds with the clear imposition by the Constitution for this exemption to be provided for by a resolution. The constitution recognises the inherent differences between an Act and a resolution². It earmarks certain actions to be taken by Acts of Parliament and others –such as the grant of permission to exploit natural resources –to be subject to a resolution. That distinction must be respected. Act 625 cannot derogate from the explicit constitutional provisions as provided for in Article 268. Therefore, the current practice for the issuance of industrial fishing licenses has no basis in law.

What is the remedy in law?

In this case, Sections 69 and 70 of Act 625, which allow the Minister to issue licenses based on the recommendation of the Fisheries Commission, derogate from Article 268 of the Constitution, and may be subject to challenge in court.

This defect in procedure may be rectified by an action in the Supreme Court under Article 2(1) that grants a citizen or a body corporate a right to challenge an enactment as being in contravention of a constitutional provision.

Endnotes

- 1 Sections 69 and 70 of the 2002 Fisheries Act, Act 625, read as follows:

69. Application for a fishing licence

- (1) Subject to an authorisation given under an access agreement made under this Act in relation to foreign fishing vessels, and except as otherwise provided under this Act, an application for a fishing licence in respect of local industrial or semi-industrial fishing vessel or a foreign fishing vessel shall be made to the Commission.
- (2) The application shall be in the prescribed form and shall be submitted with, as determined by the Commission
 - (a) the relevant documents, and
 - (b) the application fee.

70. Recommendations to the Minister

- (1) The Director shall on an application being submitted to the Commission refer the application, where applicable, to a fishery licence evaluation committee established under section 11.
 - (2) Where an application is referred to a fishery licence evaluation committee, the committee shall evaluate the application and may request the applicant to provide further particulars the committee considers necessary for the purpose of evaluating the application and shall, unless delay occurs because of the request for further particulars, submit its evaluation to the Commission within fourteen days of the reference by the Director.
 - (3) The Commission shall, within fourteen days of receipt of an evaluation of an application, submit its recommendations to the Minister for the granting or otherwise, of the licence the subject of the application.
 - (4) The Minister shall on the basis of the recommendations of the Commission issue the licence.
- 2 While an Act of Parliament is a bill that has duly passed the House and has received Presidential Assent, a resolution is a motion adopted by the house in order to make a declaration of opinion or agreement with a particular subject.