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Rights and ownership in sea country: implications of marine renewable energy for indigenous and local communities

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ABSTRACT

The adoption of UN Convention of the Law of the Sea in 1982 created optimism for indigenous peoples and marginalised coastal communities that they may (re)gain control of, or improve access to, marine resources. However concerns were also raised that opening the seas to industrial development might create threats for traditional users of the sea. Twenty-five years later the potential enclosure of large areas of coastal seas to marine renewable energy development is reigniting debates about marine governance, access and control over marine resources. Case studies in Scotland, Canada, New Zealand and Australia reveal a dynamic tension between: an economic development 'blue growth' agenda requiring the creation of private rights in the sea; and socio-political drivers which seek to address historic injustices and increase access to natural resources by indigenous and marginalised coastal communities. As yet there is little evidence of this tension being adequately addressed by emerging institutional frameworks for managing marine resources.

1. Introduction

Indigenous and community-based management of marine resources has been the subject of debate for some time [1,2]. In 1989, a quarter of a century before the writing of this article, Mark Valencia and David VanderZwaag [3] published 'Maritime Claims and Management Rights of Indigenous Peoples: Rising Tides in the Pacific and Northern Waters'. Their study concluded that the United Nations Convention on the Law of the Sea (UNCLOS) changes to marine governance, and the establishment of 200 nautical mile Exclusive Economic Zones (EEZs), were catalysts for empowerment of indigenous minorities. Their analysis, based on case studies of fishing and hunting rights, was supported by a parallel literature suggesting that traditional marine management practices may represent a form of sustainable development and an alternative to neo-liberal development strategies [4–6].

Traditional management methods also figure in the debate about contemporary conservation objectives [7,8]. Valencia and VanderZwaag [3] saw change as a positive opportunity for the assertion of indigenous rights. However in 1997, Christopher Dahl noted that 'system perturbation' in the form of new marine activities creates significant challenges for indigenous and first nation peoples [9]. Despite the paradigm shift it caused in international oceans governance, the UNCLOS does not mention indigenous rights, or public participation. It was finalised in 1982, long before the UN Declaration on the Rights of Indigenous Peoples (2007). The Declaration affirms indigenous rights over lands, territories, waters, coastal seas and resources (Articles 25 and 26). In 2013, the UN Permanent Forum on Indigenous Issues[1] concluded that treaties, including the UNCLOS, should be re-visited and reformed to take account of Indigenous rights.

The aims of this article are first to understand the derivation and contemporary status of indigenous maritime rights in four case study jurisdictions; second, to determine the actual and potential interactions of marine renewable energy (MRE) activities with coastal communities; and third, to examine the possible role of indigenous and community rights in securing a fair balance between the needs of the industry and a just settlement for the affected communities.

2. Context

Freedom of the seas and common pool marine resources is long held tenets of marine governance. As a result, truly private property rights in marine spaces are rare. These principles are

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[1] UN Permanent Forum on Indigenous Issues 12th Session – New York 30th May 2013

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challenged by new technologies which grant viable and economic access to marine resources. Traditional maritime activities are often transient in nature. Shipping and fishing require no permanent occupation of marine space. In contrast offshore oil and gas, aquaculture and, now, MRE are industries requiring exclusive settlement of areas of sea. To allow these industries to flourish, new rights of occupation and ownership are needed which displace or re-allocate the rights of old [10].

Jurisdiction to allow national legislation for marine rights is allowed under international law, largely as a result of UNCLOS. However, national legislation comes up against the ancient maritime rights of indigenous communities. In the colonial sweep of the 19th and early 20th centuries, the terrestrial claims of many indigenous communities were generally ignored, with private property rights imposed through legislation or the royal prerogative, while any indigenous rights in the marine environment were almost completely ignored. At the same time, commonly held maritime rights were left largely untouched, until recently. Yet re-allocation or removal of these marine rights is no longer as simple as it was previously on land: marine jurisdictions and laws are relatively new and untested and international policies and protections for the rights of first nation and indigenous peoples are actively debated and in some cases enforced.

The opportunities and challenges foreseen by Valencia & VanderZwaag and Dahl have shifted somewhat in the intervening decades [3,9]. UNCLOS was driven largely by concern about prospective deep-sea mining for minerals and fisheries management. In fact it is the emerging maritime industries of aquaculture and renewable energy which are the early driving forces of a 'Blue Growth Agenda'[2] and contemporary moves towards Marine Spatial Planning (MSP). In the UK and elsewhere, the planning controls support a regime of developmental consents and licences. Of these new industries aquaculture and MRE have a high degree of interaction with the interests of island and coastal communities. They have the potential to permanently occupy very large areas of sea close to shore where most of the existing activities, such as fisheries and tourism, take place. Their influence spreads to adjacent land with demand for onshore support infrastructure and services [11,12]. This article focuses on the impact of MRE, as an example of the 'system perturbation' foreseen by Dahl [9]. MRE is a potentially significant challenge to the rights of indigenous communities to fish and navigate their waters and manage their own marine environment. This change could also be an opportunity for the assertion of indigenous rights, as concluded by Valencia & VanderZwaag [3].

Four case studies are presented. One, Scotland, is focussed on community rights, while the other three focus on indigenous and aboriginal rights in Canada, New Zealand and Australia. Literature and document review together with selective interview techniques are used to reveal respective indigenous maritime rights as they are currently understood. Where possible and relevant the claims of indigenous groups are identified. The individual country reviews are analysed jointly to identify similarities, overarching themes and trends.

2.1. Case study contexts

The four case studies represent countries with abundant and accessible MRE resources (wind, wave and tide).[3] Scotland in particular is currently the world leader in MRE development with full-scale prototype devices generating power to the grid and advanced plans for commercial-scale deployment. Associated marine governance and planning regimes are being developed and implemented. All four countries demonstrate different, but long standing and continuing, debate about the rights of indigenous and first nation peoples, including marine rights. The case studies highlight many of the issues involved in the change of use of the seas from commons to private or state control.

Scotland is an old nation where 50% of the land is owned by just 432 people [13]. Land reform is a longstanding and continuous debate. In contrast, marine rights and resources are relatively free to all and held in common. MRE and emerging marine industries threaten to perturb the system exacerbating discontent and upsetting the current balance between land and sea.

Canada is a former colonial territory of Great Britain. Indigenous rights to land are defined in treaties with the colonial power. Nineteenth century legislation, now under challenge, gave the federal government power over all matters of life involving aboriginal people. Aboriginal rights to the marine environment are less well defined although the federal and provincial governments claim exclusive rights over marine energy.

New Zealand, also a former British colony, recognised Māori land rights in the 1840 'Treaty of Waitangi'. The Treaty underpins much of the subsequent debate. Contemporary (2003-Present) disputes have arisen over the question of foreshore and seabed rights; these disputes have driven opposition to MRE development

Australia, again formerly a British colonial territory, was for previously regarded as *terra nullius* at the point of colonisation, a legal fiction that persisted until 1992. The Native Title Act 1993 recognises the survival of some aspects of beneficial native interest surviving acquisition of title by the Crown.

2.2. Ocean industrialisation and the blue growth agenda

For millennia the seas have sustained coastal communities and facilitated trade. They have enabled the movement of people, ideas and even whole cultures. In the modern era the combined effects of globalisation, the economic cycle and urbanisation have simultaneously increased maritime activity and focused it in specific areas [14]. Arguments about the pressures that these new patterns of use place on the environment are well rehearsed, particularly the industrial exploitation of marine living resources [15]. Following the 2008 economic crash many nations looked to the oceans to stimulate future economic development, particularly through the advancement of a 'Blue Growth' agenda [16]. The EU in particular has targeted energy, aquaculture, tourism, mineral resources and biotechnology as key "value chains" that could deliver "sustainable growth and jobs in the blue economy" [17]. Blue Growth is now at the heart of Europe 2020 the European Union's ten-year growth and jobs strategy [18]. Talk of blue growth is not just a European phenomenon: China in particular is re-evaluating its maritime economy [19,20] and the retreat of the Arctic icepack is fuelling claims over mineral resources [21] and creating opportunities for shipping [22].

2.3. Marine renewable energy (MRE)[4]

In terms of installed capacity offshore wind is currently the most significant, with tidal current and wave at an advanced stage of research and testing. Offshore wind is a commercial reality with most activity focused in Europe. In the ten years to 2013, starting from a very low base, over 6.5 GW (2,000 devices) of offshore wind capacity had been installed in Europe. Available individual turbine capacities increased from 0.5 MW to 7.5 MW in the same period. Planned

[2] The 'Blue Growth Agenda' of the European Union is a policy designed to encourage the economic growth and employment from the exploitation of marine resources in European waters. Similar policies are in place elsewhere.

[3] The focus here is on wave and tidal energy.

[4] Sometimes also referred to as 'ocean energy'.