United Nations Permanent Forum on Indigenous Issues
Ninth Session, 19 – 30 April 2010
New York

Item 7c – Report on Indigenous fishing rights in the seas with case studies from Australia and Norway.

Statement by Permanent Forum Member, Professor Mick Dodson.

At its eighth session, in May 2009, the Permanent Forum appointed Carsten Smith and I to prepare a study on Indigenous fishing rights in the seas, and to submit our Report here at the ninth session.

I will deal with the section of our study which relates to Australia.

Mr Chairman

Culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of Indigenous Peoples. Indigenous Australians including my people the Yawuru have a long history of close association with the sea and its resources for our subsistence, economic livelihood, spirituality and cultural identity. These connections are well supported by archaeological and anthropological evidence. We do not distinguish between landscape and seascape, both being equally part of country. This contrasts markedly with the worldview, reflected by the Australian legal system which perceives boundaries where Indigenous conceptualisations provide a geographically integrated understanding of land, rivers, estuaries, beaches, reefs, seas and associated flora and fauna.

Indigenous rights and interests in Australian lands and waters predated and survived the imposition of British sovereignty. This was recognised by the High Court of Australia in 1992 through the recognition of native title in Mabo versus Queensland.

Since then, a complex legislative system has taken precedence in defining the framework regulating the field of native title law. The Native Title Act 1993, specifically includes fishing rights as capable of falling within native title interests. While the Native Title Act does not treat sea country claims differently to those over land, section 212 protects the existing Crown ownership in natural resources, in the control and regulation of water flow and the existing public access to and enjoyment of various offshore waters such as foreshores and beaches.

In Australian native title law to date, there has been no recognition of exclusive commercial Indigenous rights to sea country. Until the Croker Island case in 2001, which dealt solely with native title rights over sea country, there was no determination of any form of native title offshore. Native title is subject to rights under other Commonwealth and State laws allowing, for instance, recreational and commercial fishing and shipping in native title areas. Croker Island was the first successful case determining that both the Act and common law are capable of recognising native title offshore.

Since Croker Island, various cases have extended the recognition of native title along Australia's coastline and over its seas and seabed. The Wellesley Islands case in 2004 provided useful guidance on how and in what form native title is recognised below the high watermark. Affirming the reasoning in Croker Island, this case also recognised non-exclusive, non-commercial native title rights over parts of the areas claimed, finding the continued existence of native title rights of control of access and use in the waters and submerged lands of the intertidal zone and territorial seas impossible without fatal inconsistency with common law public and international law rights.

The Blue Mud Bay native title case in 2007, involved claim areas over both land and offshore waters. The Court in this case recognised the Yolgnu peoples' non-exclusive right to the intertidal zones and adjacent sea areas claimed. In relation to the intertidal zone, the Court found that even in non-navigable waters, the common law public right to fish would be exercisable in the entire intertidal zone, which includes waters affected by 'arms of the sea' such as rivers, streams and estuaries.

The Torres Strait is the body of water between Australia and Papua New Guinea where the Pacific and Indian oceans meet and where there are 133 islands, sandy cays and rocky outcrops of which 38 are inhabited. These waters and islands cover approximately 49,000 square kilometres. This region is unique as in native title law in the respect that it is home to Australia's Torres Strait Islander Indigenous peoples who are culturally distinct from mainland Aboriginal peoples and it is the subject of an international treaty. Native title was first recognised in this region through the Mer Island case. This did not involve offshore rights, but rights to land.

The Torres Strait Treaty between Australia and Papua New Guinea entered into force in 1985 and recognises Indigenous offshore rights to fish. It enables a protected zone to safeguard traditional ways of life and livelihoods of traditional inhabitants.

A significant proportion of Australian fisheries production is exported including valuable products such as rock lobster, pearls, abalone and tuna. Australia's federal Constitution vests exclusive authority to control Australian fisheries in the Commonwealth which possesses power to control all activity in its territorial waters.

Although conceptually nearly inseparable from native title, cultural heritage can also encompass much wider notions than sites of significance and it is accordingly subject to separate legislative arrangements. Cultural heritage matters frequently overlap with native title interests in land and waters and sometimes with land rights. 'Land rights' is a term that refers to a variety of statutory grants under different conditions, capable of a variety of legal remedies, in some instances, compensation. Title is usually communally held by a group rather than individuals and there are usually restrictions on alienating and dealing with title.

The High Court of Australia recently decided on a land rights case involving competing interests created under statutory permits for non-indigenous fishers on the land that was the subject of a statutory grant of Indigenous land rights title under the Fisheries Act of the Northern Territory. The Court held that despite obtaining a permit, non-indigenous fishers still required permission from the Indigenous peoples to enter and fish on their land.

Thank you Mr Chairman, that concludes my report to the Forum.