

# TRADITIONAL FISHING RIGHTS BEYOND NATIONAL JURISDICTION: ANALYSIS OF STATE PRACTICE

POLITE DYSPRIANI

UN-NIPPON FELLOW 2010-2011

MINISTRY OF MARINE AFFAIRS  
AND FISHERIES OF RI



NEW YORK, 26 JANUARY 2010

# Outline

- I. INTRODUCTION
- II. THEORITICAL FRAMEWORK OF TRADITIONAL FISHING RIGHTS
- III. CASE STUDIES: BILATERAL AGREEMENTS or ARRANGEMENTS OF TRADITIONAL FISHING RIGHTS
- IV. ANALYSIS AND DISCUSSION
- V. CONCLUSION

# I. INTRODUCTION

- **Definition of traditional fishing rights (TFRs):**  
TFRs are defined as fishing rights granted to certain groups of fishermen of a particular State who have habitually fished in certain areas over a long period
- The TFRs are inherited from the previous generations and kept in practice by the current generation.
- The TFRs have become State practice and were accepted by the international community and once become part of customary international law.

# Rationale of Research

- **There are some contentious issues in legal, political and practical aspects of TFRs.**
- The issues are becoming important in international and domestic concern.
- All the issues need to be addressed
- This will ensure the continuation of good relations among States and long term sustainable use of marine living resources and biodiversity.

## Two types of TFRs:

- 1. At purely domestic level:** TFRs exercised by traditional inhabitants or indigenous peoples within their national jurisdiction.
- 2. At international level:** TFRs exercised by nationals of one State in another State's jurisdiction. The practice is conducted outside their national jurisdiction (beyond the national jurisdiction). It can have obligation under or be independent to the Law of the Sea Convention (LOSC).

**Objective:** To understand the concept and types of TFRs as well as the issues through the analysis of some case studies arising out of bilateral agreements.

## **Research questions:**

- **To what extent** do bilateral agreements between States recognize and regulate TFRs?
- **Who** is accorded or granted TFRs in a particular area?
- **What are the requirements** for acquiring TFRs?
- **Does the use of improved fishing practices** affect TFRs?

**Approach:** Qualitative, Literature Reviews

## 2. THEORETICAL FRAMEWORK

### 2.1. Classification of TFR:

a. At domestic level: Indigenous Fishing Rights within the same State. (LOSC?)

b. At international Level: Rights Exercised by Citizens of One State in another State Territory.

- *Domestic legislation*
- *Bilateral fisheries agreements*
- *Multilateral fisheries conventions*
- *Delimitation agreements*
- *Decisions of International Court of Justice*

## 2.2 Issues and Problems of TFR

### a. Traditional?

- **FAO:** Artisanal fisheries, using relatively small amount of capital and energy, can be subsistence or commercial fisheries, for local consumption or export, small-scale fisheries.
- **Law No 27/2007:** “traditional fishery communities whose traditional rights in fishing activities or any legitimate rights are still recognized in particular areas within the archipelagic waters in accordance with international law of the sea.”

## **b. Identification of the Group:**

1. Indigenous peoples (traditional inhabitants).
2. The group resulted by the extended maritime zone
  - *The immediately adjacent neighboring States within the archipelagic State.*
  - *Distant water fishing nations, LLS and GDS.*
  - *The group are based on the geographical/political arrangements.*

## **c. Exemptions from Conservation &**

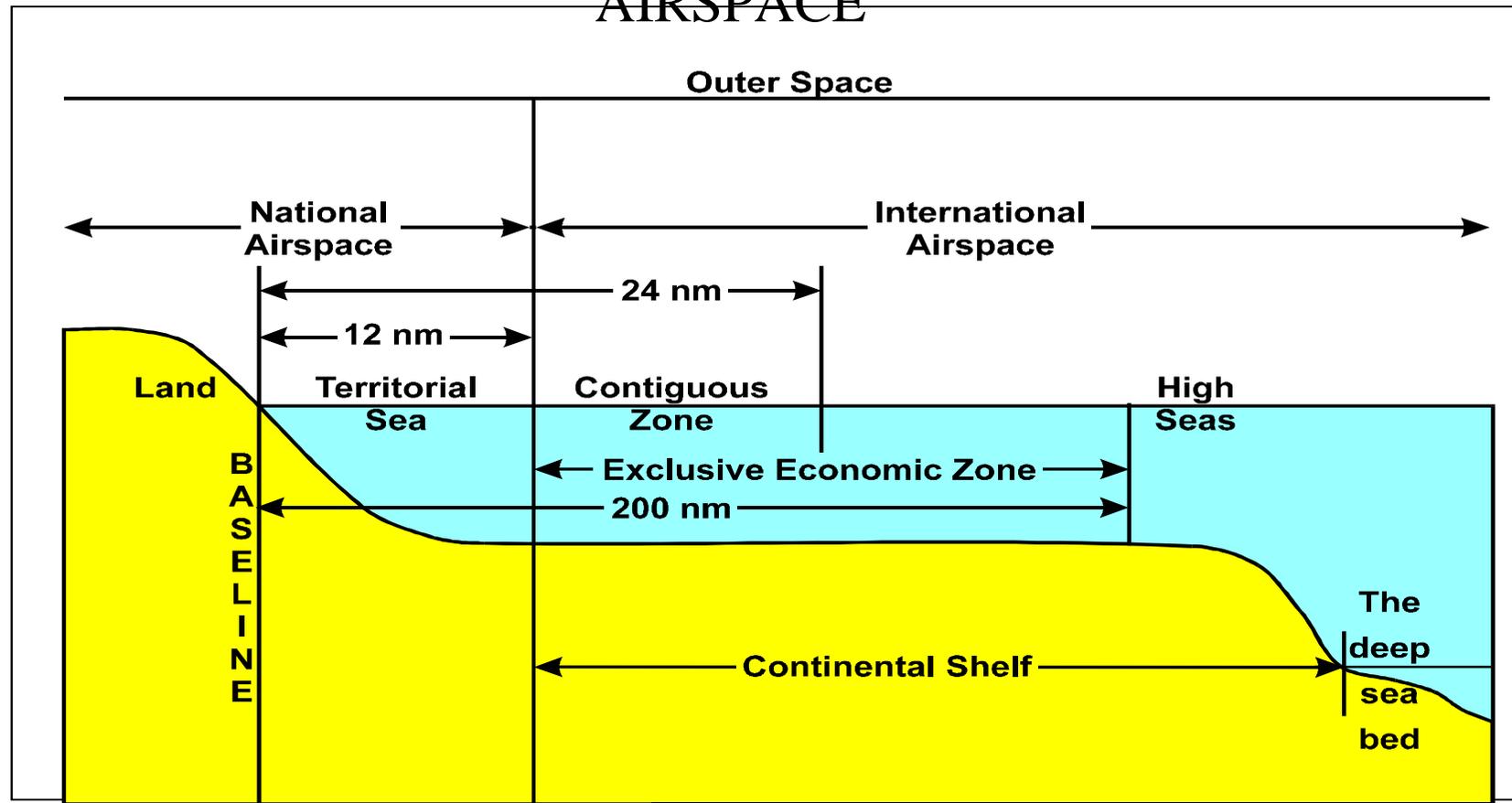
**Management Issues:** Particularly applied for the traditional and indigenous peoples, regulated through the domestic legislation.

# 3. Case Studies of TFR

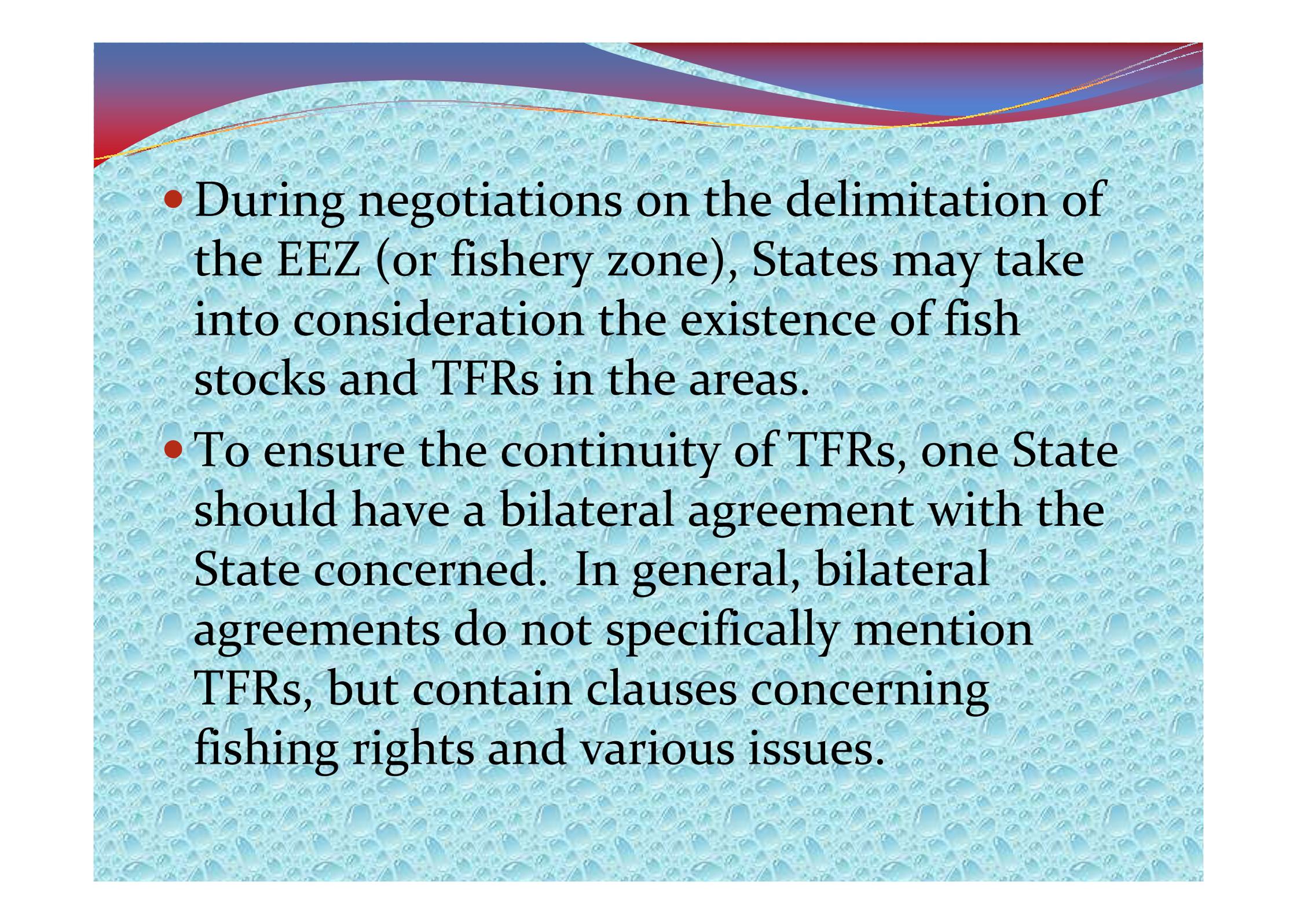
## 3.1. Bilateral Ocean Agreement under LOSC: Basic Rights and Obligations

### *Development of Maritime Zones Jurisdiction*

#### LEGAL REGIMES OF THE OCEANS AND AIRSPACE



96-CD603

- 
- During negotiations on the delimitation of the EEZ (or fishery zone), States may take into consideration the existence of fish stocks and TFRs in the areas.
  - To ensure the continuity of TFRs, one State should have a bilateral agreement with the State concerned. In general, bilateral agreements do not specifically mention TFRs, but contain clauses concerning fishing rights and various issues.

## 3.2 Some Case Studies

### a. TFRs Based on the LOSC:

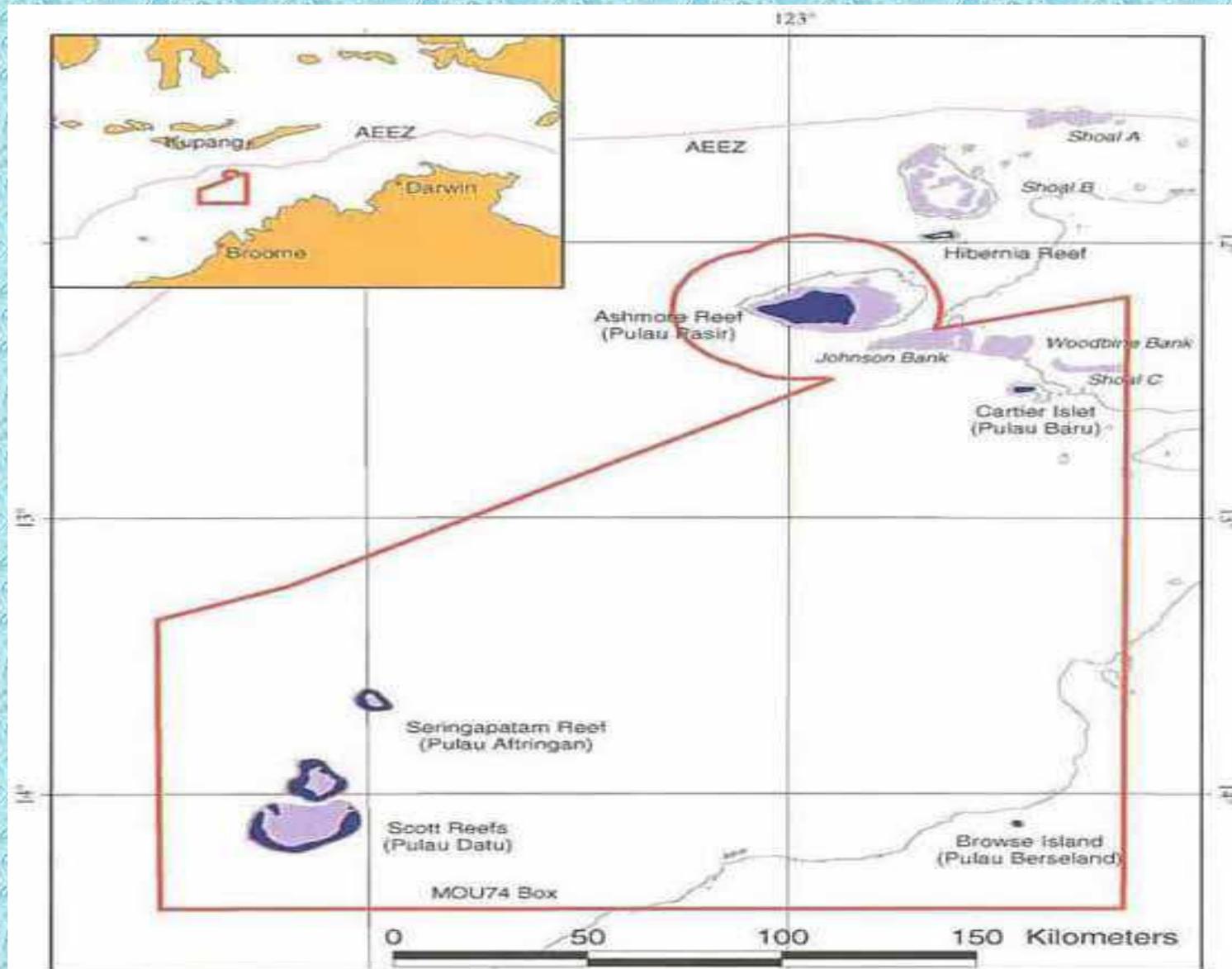
- ❖ Indonesia – Malaysia: MOU 74, Record of Discussion 76, Treaty 1982.
- ❖ PNG-Solomon Islands: *Pacific Islands Treaty 1989. Customary Fishing Rights (CFR).*
- ❖ Indonesia – PNG : *Agreement 1973 and 1980: CFR.*

### b. TFRs Independent to the LOSC:

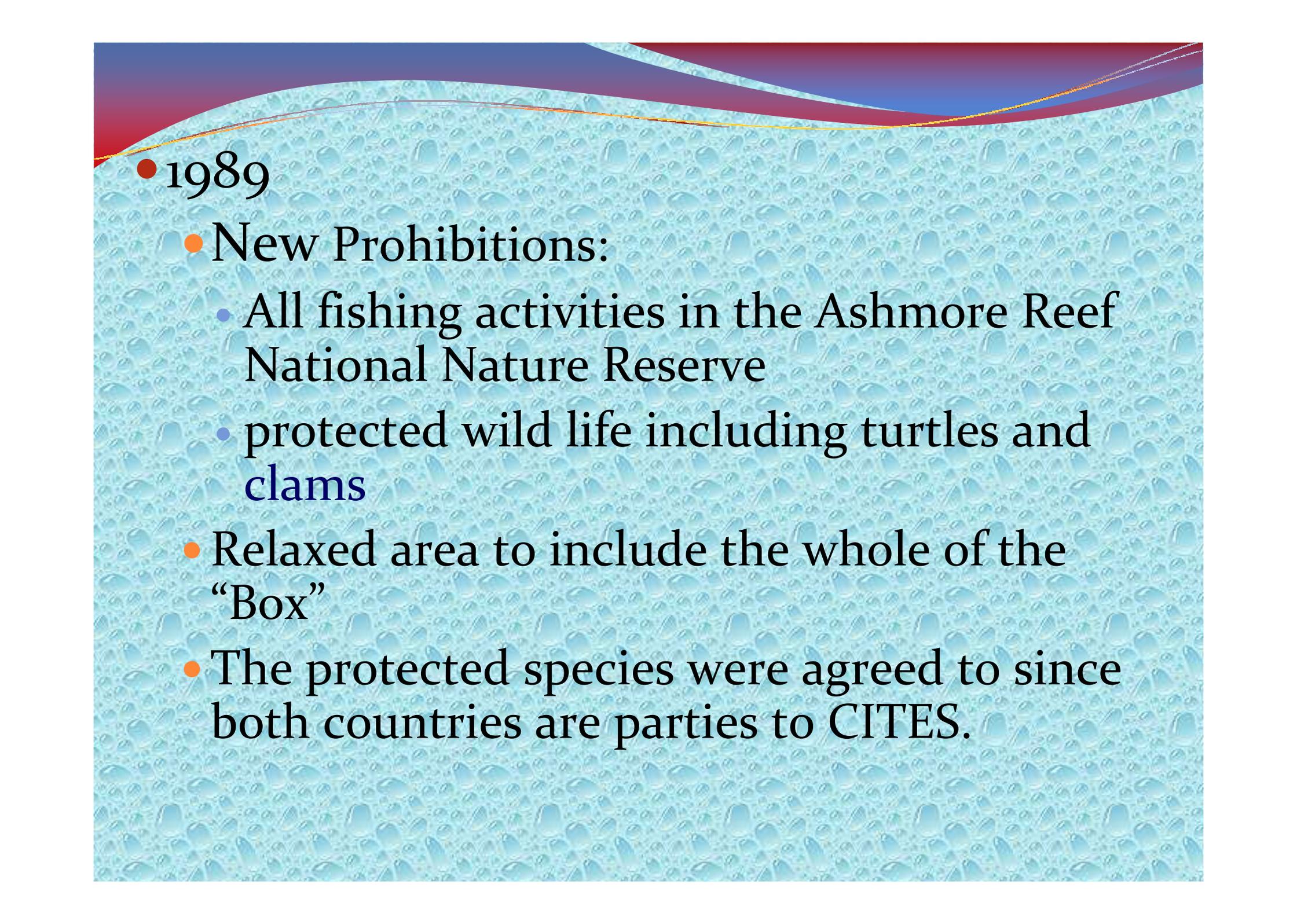
#### **Geographical/Political arrangement**

- ❖ Indonesia- Australia: MOU 1974 and Agreed Minutes 1989 (MOU Box 1989)
- ❖ *Australia And PNG In Torres Strait: Torres Strait Treaty 1978: CFR*

# MOU BOX ARRANGEMENT



- In the 1974 MoU and 1989 Guidelines some species were prohibited
- 1974
  - Prohibited taking turtles
  - Permitted: Trochus (lola), beche de mer (teripang), abalone, green snail, sponges, and all molluscs.
    - from the seabed adjacent to Ashmore and Cartier Islands, Browse Islet, Scott and Seringapatam Reefs. Fish from the 12nm areas around the islands.



- 1989

- New Prohibitions:

- All fishing activities in the Ashmore Reef National Nature Reserve

- protected wild life including turtles and clams

- Relaxed area to include the whole of the “Box”

- The protected species were agreed to since both countries are parties to CITES.

# Targets of Fishermen's Activities

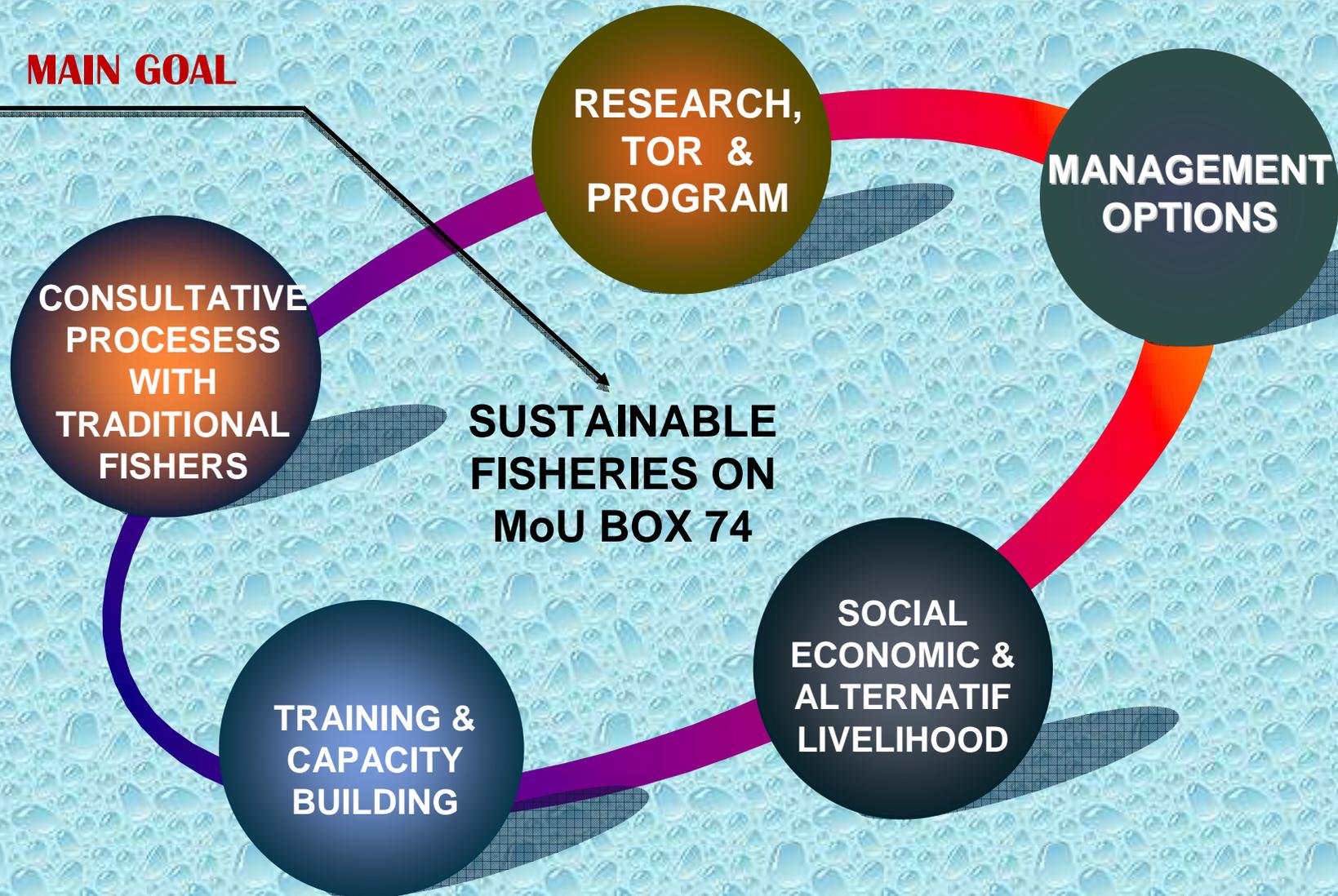


# Pending Issues

| <b>MoU Box 1974<br/>(7 November 7<sup>th</sup>,<br/>1974)</b>   | <b>PRACTICAL<br/>GUIDELINES (Review<br/>on MoU Box on 1989)</b>  | <b>UNCLOS PART IV ARCHIPELAGIC STATES<br/>Article-51: Existing agreements, traditional<br/>fishing rights &amp; existing sub marine cables</b>   |
|---|--|--|
| <p>‘Traditional fishermen’ is meant the fishermen <b>who have traditionally rights</b> taken fish and sedentary organism in Australian waters by methods, which have been the tradition over decades of time.</p> | <p>Access to the MoU Box would continue to be limited to Indonesian traditional fishermen using traditional methods and traditional vessels consistent with the tradition over decades of time, which does not include fishing methods or vessels utilizing motors or engines.</p> | <p>Without prejudice to article 49, an archipelagic State shall respect existing agreements with other States and shall recognize traditional fishing rights and other legitimate activities of the immediately adjacent neighbouring States in certain areas falling within archipelagic waters. The terms and conditions for the exercise of such rights and activities, including the nature, the extent and the areas to which they apply, shall, at the request of any of the States concerned, be regulated by bilateral agreements between them. Such rights shall not be transferred to or shared with third States or their nationals .</p> |
| <p><i>Indonesia considered that the definition of ‘traditional’ methods and access to the MoU Box under Practical Guidelines <b>should be amended</b> with respect to the UNCLoS.</i></p>                         |  |  |

# KEY ELEMENTS OF ROADMAP MOU BOX MANAGEMENT

**MAIN GOAL**



# 4. Analysis and Discussion

## ➤ Case Studies under LOSC

### Concept and Practice of TFRs:

#### 1. Granting of TFRs should be legitimate.

The rights are recognized if the practice has been *actually traditionally exercised* in the area for a sufficient length of time.

#### 2. The concept of TFRs differ from the traditional right to fish or traditional fishing areas.

- **The TFRs are a mechanism to regulate fishing rights, generally beyond national jurisdiction and between crossing border neighbouring State.**
- **The traditional right to fish refers to the right of all States to fish in the high seas or in the waters which once were high seas, regardless of whether such right has been actually exercised or not.**
- **The traditional fishing area is the fishing ground given to traditional fishermen within the limits of national waters or marine conservation areas.**

## ➤ TFRs in Indonesia's perspective:

- ❖ are restricted specifically to people who can demonstrate a temporal and geographical connection to an area and apply “traditional technology.”
- ❖ should be based on real, actual and existing practices and must be clearly defined by bilateral agreement.

## ➤ **Some requirements:** (Djalal, 1993):

- ❖ **The existence of sufficiently long fishing practices** in certain areas of the Indonesian archipelagic waters.
- ❖ **The foreign States comply with Indonesian regulations** and the practice should not be in conflict with the Indonesian government's efforts to develop its fishing industry for the prosperity of its own fishermen.
- ❖ **The elements** under the notion of TFRs should refer and respond to some criteria: **fishermen themselves, the gear type, the catch and the area, and be judged in terms of time frame.**

Continued

## Some requirements: (Syahmin, 1988)

- ❖ practices carried out continuously and inherited in certain areas are mutually agreed by the two States for at least 4 generations.
- ❖ using selective and non-static fishing gears that are not forbidden in Indonesia.
- ❖ The activities must be carried out by individuals rather than corporations and must comply with regulation.
- **The existence of bilateral agreements as basis for legal protection of traditional fishing. *If the agreement cannot be reached, the archipelagic State need not permit foreign States to have access to its waters for the purpose of exercising traditional rights.***

# Challenges

- ❖ **The sustainability of fishery resources**
- ❖ **The aspects and indicators of “traditional” are not clearly defined.**

The differences over the definition of what constitutes ‘traditional’ have been a major barrier to allocating and recognising the TFRs.

- ❖ **The limited provision under the LOSC as well as the other international law.**
  - Only apply for archipelagic States.
  - What are legitimate activities, immediately adjacent neighbouring States?
  - No agreed criteria and requirement.

# V. Conclusion

## 1. EVALUATION

- **Any form of recognition of TFRs, deal with a degree of political power and negotiation.**
- **The recognition of TFRs can not be obtained automatically.**

It depends on the bilateral agreement, taking into account other legislation and law, both at the national and international levels.

# **SOME LESSON LEARNT**

- 1. The TFRs have become State practices even before the LOSC established in 1982.**

However the practice of the TFRs has undergone evolution since the regime of EEZ stipulated by the LOSC.

- 2. MOU Box arrangement does not have the obligation under the LOSC.**

- 3. The protection of the TFRs shall be followed by effective management and conservation measures.**

The decision of further management for the traditional fishers who have a historic fishing in the area should not extinguish their TFRs.

- 4. The obligation to recognize TFRs under the LOSC only applies for archipelagic States.**
- 5. In the case between Indonesia and PNG; PNG and Solomon, the practice of the TFRs could be considered under the LOSC or independent of the LOSC.**
- 6. The implementation of the bilateral agreements and the issue must be further discussed through bilateral meetings.**

## **2. RECOMMENDATION**

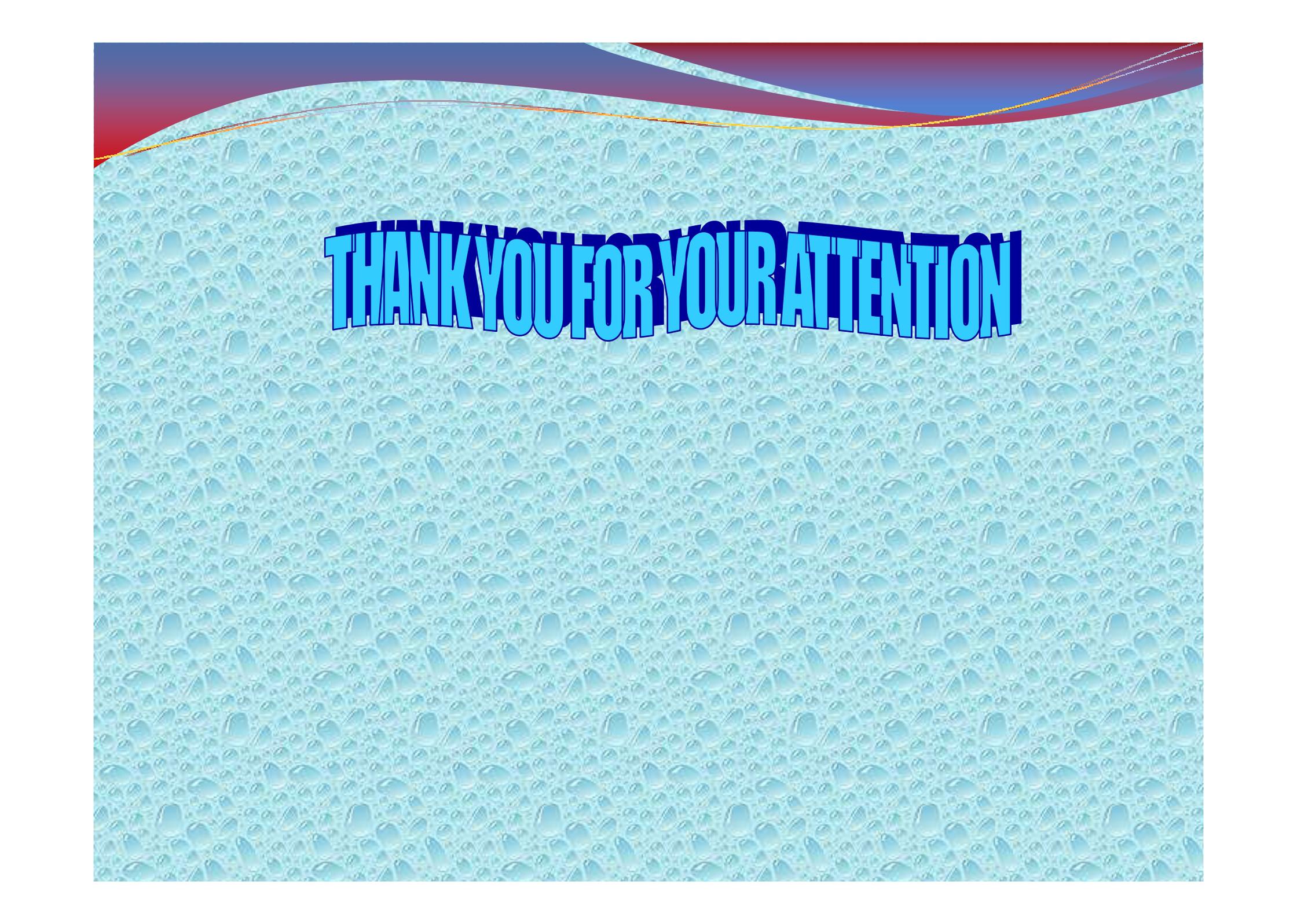
- 1. The practise of TFRs should not interfere with the common law applied in that State.**
- 2. The context of “traditional” should not necessarily denote being primitive and static.**  
The recognition of the TFRs should move from the undeveloped technology to the rights of certain people that have habitually exercised in the certain area for a long period of time.
- 3. Learning from the practice of Indonesian traditional fishermen in the AFZ, it needs to be defined who traditional fishers are, ideally by recognizing groups who have traditionally used the areas within the MOU Box.**

Continued

4. Indonesia needs to discuss the practice of TFRs with other neighbouring States in forms of bilateral agreements.
5. The need to discuss about the practice of TFRs among States through multilateral meetings.

## **Future Work**

**In order to address the whole range of issues associated with TFRs, it needs further research and assessment.**



**THANK YOU FOR YOUR ATTENTION**