# TRADITIONAL FISHING RIGHTS:
# ANALYSIS OF STATE PRACTICE

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# Abstract

The recognition of traditional fishing rights is a major resource and environmental policy issue at both national and international levels. The nature of the issue itself is also split at two levels. The first is at a purely domestic level relating to the recognition of indigenous rights. The second level arises from the implication of the United Nations Convention on the Law of the Sea of 1982 (LOSC).

The LOSC has resulted in extended coastal jurisdiction over marine living resources. One consequence of this has been that areas previously fished by nationals of other States have now come under the sovereignty and sovereign rights of the adjacent or opposite coastal State; necessitating the need to make legal arrangements to ensure the continuation and management of such rights.

The LOSC only makes provision for traditional fishing rights of nationals of other States in the context of archipelagic States and archipelagic waters, whilst other practices of traditional fishing rights outside the context of archipelagic States are regulated under bilateral agreements, arrangements or treaty not as part of the LOSC.

This research focuses primarily on the second aspect of traditional fishing rights; the rights that are guaranteed by one State to the nationals of another State, either as part of the LOSC or outside the framework of the LOSC. Case studies will be undertaken of arrangements between Indonesia and Malaysia, Indonesia and Papua New Guinea, Papua New Guinea and Solomon Islands, Indonesia and Australia, as well as Papua New Guinea and Australia. Lessons learnt from the implementation of these arrangements will be drawn upon so as to make recommendations to ensure the continuation of good relations among States and the long term conservation and sustainable use of marine living resources and biodiversity.



***Keywords:*** *traditional fishing rights, recognition, LOSC, archipelagic State*

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# Acronyms

| | |
|---|---|
| AFZ | Australian Fishing Zone |
| CCRF | Code of Conduct for Responsible Fishing |
| CBD | Convention on Biodiversity |
| CFB | Capture Fishery Business |
| CITES | Convention on International Trade in Endangered Species |
| Cwlth | Commonwealth |
| DWFN | Distant Water Fishing Nation |
| DOALOS | Division for Ocean Affairs and the Law of the Sea |
| EEZ | Exclusive Economic Zone |
| EEC | European Economic Community |
| EFZ | Exclusive Fishing Zones |
| FAO | Food and Agriculture Organization |
| GBRMPA | Great Barrier Reef Marine Protection Authority |
| GDS | Geographically Disadvantaged States |
| GPS | Global Positioning System |
| ICJ | International Court of Justice |
| ILO | International Labour Organization |
| IUU | Illegal Unreported and Unregulated Fishing |
| IUCN | International Union for the Conservation of Nature |
| ICCPR | International Covenant on Civil and Political Rights |
| LOSC | Law of the Sea Convention |
| LLS | Land Locked States |
| MMAF | Ministry of Marine Affairs and Fisheries |
| MOU | Memorandum of Understanding |
| NWIFC | Northwest Indian Fisheries Commission |
| nm | nautical mile |
| PNG | Papua New Guinea |
| PZJA | Protected Zone Joint Authority |
| PZCF | Protected Zone Commercial Fisheries |
| PIC | Public Information Campaign |
| Qld | Queensland |
| TAC | Total Allowable Catches |
| UN | United Nations |
| UNCLOS | United Nations Conference on the Law of the Sea |
| UK | United Kingdom |

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# 1. Introduction

## 1.1 Background and Context

Fishing has been practiced throughout human history, especially by communities of traditional inhabitants living in coastal areas. For these people, fishing has been the main source of food and livelihood and also been important for social and cultural reasons. In general, this type of fishing is categorized as small scale, artisanal and sometimes as traditional fishing.

The practice of traditional fishing reflects cultural attitudes and may be strongly influenced by religious practices or social customs.[1] It can also turn into "commercial'' fishing when the market and prices are good.[2] However, traditional fishing is usually restricted to local or inshore waters due to technological limitations, including the ability of local fishing communities to go farther offshore and their limited methods of which to preserve their catch.[3] Nevertheless, the widespread adoption of motorization in small-scale fisheries worldwide, recently, traditional or small-scale fisheries now include a range of fishing activities targeting anything from sedentary molluscs in littoral waters to highly migratory tuna stocks in distant waters.[4]

Since artisanal or traditional fisheries are limited by access and ownership to the areas or waters where they fish, it is necessary to grant them fishing rights in order to secure the continuation of their fishing activities. In addition, with the pressure of a growing population, urban migration and the rapid expansion of industrial fishing, the survival of small-scale, artisanal or traditional fisheries depends to a large extent on the recognition and protection of traditional or acquired fishing rights.[5]

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[1] Food and Agriculture Organization (FAO). 2005-2010. Types of Fisheries. Topics Fact Sheets. Text by Andrew Smith. In: FAO Fisheries and Aquaculture Department. Rome. Updated 27 May 2005. Accessed 21 June 2010, available http://www.fao.org/fishery/topic/12306/en

[2] FAO, Small-scale and Artisanal Fisheries. accessed 3 September 2010, available http://www.fao.org/fishery/topic/14753/en

[3] Campbell and Wilson, The Politics of Exclusion: Indonesian Fishing in the Australian Fishing Zone, Indian Ocean Centre for Peace Studies No. 5. Australia. 1993, p. 5

[4] Sebastian Mathew, Small-Scale Fisheries Perspectives On An Ecosystem-Based Approach To Fisheries Management, p.6, available ftp://ftp.fao.org/fi/document/reykjavik/pdf/04Mathew.pdf, Accessed 18 October 2010

[5] FAO, *supra note* 2

The term “fishing rights” generally refer to an interest that a person or a collective can claim to have access to a fish stock or to the harvest from it.[6] The term might be different with the traditional fishing rights codified by the Law of the Sea Convention (LOSC). The LOSC contains provisions on traditional fishing rights in the context of archipelagic waters,[7] but does not define the concept and criteria of the rights in more details. In addition, there is no explicit definition of traditional fishing rights in any international convention. The traditional fishing rights have become State practice before the LOSC was established in 1982 and were generally accepted by the international community and become part of customary international law.

The definition and criteria of traditional fishing rights can be derived from the practice by examining the relevant regulations of some States' domestic legislation and bilateral agreements or arrangements between the States concerned.[8] In this regard, traditional fishing rights 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.[9] These rights are based on the habitually practices for long ago and inherited from the previous generations.

There are some contentious issues with respect to the legal, political and practical aspects of traditional fishing rights. The issues of traditional fishing is an important in international and domestic concern, particularly in relation to the sustainable use of resources and the recognition of existing rights of some fishing communities. In addition, the differences over the definition of what constitutes “traditional” have been a major barrier to allocating traditional fishing rights. Some of the literature argues that fishing should be termed traditional, in terms of people, the method of fishing and its objective which is mainly for subsistence. Whilst other literature argues that traditional should not be determined by method or technology, but rather on the basis of the activities and “tradition” that has been practiced from generation to generation. In other words, the fishing practices, methods, technology or vessels may not necessarily be the same as those used in the past as long as they are no more destructive or threatening to the sustainability of fishing resources than

[6] Philip A. Neher, Ragnar Arnason and Nina Mollet, Rights Based Fishing, Series E.Applied Sciences-Vol. 169, Kluwer Academic Publishers, (eds),1989, pp.5-10

[7] LOSC, Part IV, Article 47 (6) and 51

[8] ibid

[9] ibid

they had previously been. All these issues need to be considered as part of solutions for State practice to ensure the continuation of good relations among States and long term sustainable use of marine living resources and biodiversity.

In general, there are two types of traditional fishing rights: traditional fishing rights exercised by traditional inhabitants or indigenous peoples within their national jurisdiction, which are also known as customary fishing rights. An example of this includes the fishing rights of indigenous peoples in Western Australia who have fished for cultural and religious reasons for thousands of years. The second type, are traditional fishing rights granted by one State to the nationals of another State outside their national jurisdiction. These rights may have arisen out of multilateral obligations, such as those regulated under the LOSC. In other cases, the rights may be regulated under bilateral agreements, arrangements or treaties that are outside the framework of the LOSC.

When one State extended its maritime jurisdiction legitimately under the LOSC, it has some consequences. One of the consequences is that the fishermen who have habitually fished in the waters which were formerly part of the high seas lose their rights to fish in the waters which now come under the sovereignty and sovereign rights of coastal States. This adversely affects the economic livelihood for certain fishing communities of one State. In addition, the provision under the LOSC also affects the national policy of one State to manage and conserve resources in a sustainable way, as well as to recognize the existence fishing rights of other States.

Traditional fishing rights discussed in the research are specifically focused on the practice of traditional fishing rights beyond one State's national jurisdiction. It means that the fishing practice is conducted by nationals of one State in another State's jurisdiction. The area of fishing may involve Economic Exclusive Zone (EEZ) in which a State has sovereign rights respectively over the natural resources, whether living or non living resources.

In order to be granted for the traditional fishing rights, nationals of one State should request such rights. The recognition is based on principles, norms and legal approach and with through the political consideration; it can be implicitly or explicitly mentioned. Moreover, the recognition can be undertaken by domestic legislation or it must be regulated by the bilateral agreements with the States concerned to recover some of fishing grounds which they had fished traditionally as stipulated by the LOSC. In this regard, the

recognition of traditional fishing rights exists on two levels. The first is at a purely domestic level in terms of the recognition of the rights of indigenous peoples to fish and conduct other traditional and cultural activities, such as for personal, domestic, ceremonial, educational or non-commercial needs. The second is at the international level, bearing in mind the implication of the provisions of the LOSC, which, among others, resulted in extended coastal jurisdiction over marine and fisheries resources.

The LOSC provides provision of traditional fishing rights and other legitimate activities only in the context of archipelagic States subject to Part IV of the Convention, Article 47 (6) and 51. These rights include existing rights and other legitimate interests in certain areas of the archipelagic waters, traditional fishing rights, and existing submarine cables.

Article 47 (6) of the LOSC stipulates that:

> If a part of the archipelagic waters of an archipelagic State lies between two parts of an immediately adjacent neighboring State, existing rights and all other legitimate interests which the latter State has traditionally exercised in such waters and all rights stipulated by agreement between those States shall continue and be respected.

Furthermore, Article 51 (1) of the LOSC stipulates that:

> 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.

The provisions of the LOSC imply that only rights and interests pertaining to archipelagic waters are secured and not areas seaward of the archipelagic baselines.[10] It also implies that the obligation to recognize the traditional fishing rights apply for the archipelagic State. However, some terms contained in the provision such as “immediately adjacent neighbouring States” and “other legitimate interests” are not clearly defined and may lead to practical difficulties in implementation.

[10] H. W Jayewardene. The Regime of Islands in International Law. Publication on Ocean Development, Martinus Nijhoff Publishers. p. 157

Hence, in order to understand State practice of the traditional fishing rights, it is necessary to analyse the practice in depth a small number of case studies. These case studies will give information among others legal framework, the nature of recognition, and other related issues emerging from such practices. The purpose of this analysis is not only to clarify the bilateral agreements upon which they are based, but also to ensure the continuation of good relationship among the States concerned and the long term sustainability of marine living resources, biodiversity and ultimately the traditions and livelihoods of the fishers. However, some bilateral agreements provided in some case studies may have obligation under the LOSC or not. A part from that, there are some bilateral agreements emerging before and after the LOSC entered into force.

## 1.2 Scope and Objectives

This research aims to understand and examine the concept and types of traditional fishing rights through the analysis of some case studies both at the domestic level and the international level. This research focuses primarily on State practice of the traditional fishing rights beyond national jurisdiction both under and independent of the LOSC. The research analyzes the States' perspectives and how they address particular issues arising out of their implementation of traditional fishing rights. The research also analyzes and discusses some case studies and bilateral agreements or arrangements which acknowledge and recognize traditional fishing rights between the States concerned. These case studies are also necessary to look in depth at particular issues of interest, as well as the development of these bilateral agreements.

The findings of this research will provide some recommendations on the issue of traditional fishing rights in order to improve the relationship between States concerned with due consideration of environmental and biodiversity protection as well as fisheries conservation. The research addresses the following research questions:

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

## 1.3 Approach

The research uses qualitative methodology and literature reviews from books, public documents, journals, articles, official reports, theses, newspapers and internet sources. The research also refers to the provisions of the LOSC and other related international conventions, relevant domestic legislation and bilateral agreements on traditional fishing rights. This research will present some selected case studies of State practices with respect to traditional fishing arising out of bilateral agreements, arrangements, and treaty within the definition provided under the LOSC and also some examples of traditional fishing rights practiced independent of the LOSC. The case studies of archipelagic States which is contemplated under the LOSC are those between Indonesia and Malaysia, Indonesia and Papua New Guinea, as well as Papua New Guinea and Solomon Islands. The case studies of some selected States outside the framework of the LOSC are those between Indonesia and Australia, and Papua New Guinea and Australia. The bilateral agreements have been selected as case studies because these agreements explicitly grant traditional fishing rights to the nationals of other States who have fished in the waters of another States for a sufficiently long period of time. Lessons learnt from the implementation of these bilateral agreements, arrangements, and treaties as well as recommendations will be presented.

This research has some limitations in terms of time, data, as well as bilateral agreements and the provision of the traditional fishing rights. Some data and information are also confidential, inaccessible and undated. No survey or field work has been conducted for this research in order to evaluate and assess the effectiveness of those bilateral agreements due to time limitations given the duration of the program. Similarly, the issues, problems and challenge of the practising of traditional fishing rights are also limited. Hence, not all the case studies of the State practice in traditional fishing rights beyond national jurisdiction in forms of bilateral agreements can be investigated more in details in this research.

## 1.4 Structure of Report

The report consists of five chapters. Chapter 1 presents an introduction, the rationale, and the importance of the study. Chapter 2 provides the theoretical framework of traditional fishing rights. It defines an overview of the importance of “traditional”, the classification of traditional fishing rights, which consists of rights practiced by indigenous people (ethnic minorities) within the same State and rights exercised by citizens of one State in another

State jurisdiction. The emerging issues and problems associated with the practice of traditional fishing rights are also highlighted.

Chapter 3 presents case studies of bilateral agreements, arrangements or treaty related to the practice of traditional fishing rights between Indonesia and Malaysia, Indonesia and Australia, Papua New Guinea and Solomon Islands, and Papua New Guinea and Australia. The case studies describe the State practice of traditional fishing rights in the context of archipelagic State under the LOSC and out the context of archipelagic State.

Chapter 4 analyses and discusses the issues and problems of the practice of the traditional fishing rights. The overview of the approaches and actions taken by the States to follow up the agreement is also discussed. The last chapter, Chapter 5, concludes the report with a summary of findings by drawing lesson learned and recommendations. Future work is also addressed in this chapter to improve the research.

# 2. Theoretical Framework

## 2.1. An Overview of the Importance of "Traditional"

Traditional and indigenous peoples have historical practices, as well as a long association and close dependence on sea, inherited from generation to generation. Traditional fishing practice does not only have a significant contribution to their economy and livelihood, but also reflects their identity, as well as the social and cultural importance they place upon education and spiritual beliefs. In exercising such fishing practice, the traditional and indigenous peoples often have traditional knowledge or local wisdom in managing resources which play an important role for conservation and sustainable management. Some traditional communities use their local knowledge to know for example, recruitment and nursery areas, migratory and spawning aggregations, as well as to record their observations of climate change and its impacts on the environment.[11] Such value is now being more broadly recognized, and this can help scientists to improve bottom-up strategies for the management of marine and coastal ecosystems and resources to deal with resource allocation, biological solutions and resource management problems.[12]

Traditional peoples recognized traditional knowledge, in terms of traditional seasonal, species closures, taboo areas, behavioral prohibitions, and food avoidance created as part of and as a reflection of, the cultural diversity.[13] They also have spiritual value, knowledge of the sea such as navigational, weather conditions and fishing grounds passed down from generation to generation. For example, traditional peoples living in the Eastern part of Indonesia, called Bajo have "perahu lambo" as a particular cultural and ritual value as well as symbolic significance within the Bajo community. All captains (and "punggawa") are expected to have some esoteric knowledge ("pangatonang" or "*ilmu"*) which can be

[11] Bob Johannes. The need for a centre for the study of indigenous fishers' knowledge**.** Wise Coastal Practices for Sustainable Human Development Forum. 1 November 2001, accessed 15 February 2011, available http://www.csiwisepractices.org/?read=388. See UNESCO. The Role of Traditional and Local Knowledge in Climate Change Adaptation. A session at the 5th Global Conference on Oceans, Coasts, and Islands: Ensuring Survival, Preserving Life, and Improving Governance, May 3-7, 2010, at UNESCO in Paris

[12] ibid

[13] Vierros, M, Tawake, A., Hickey, F., Tiraa, A. and Noa, R. (2010). Traditional Marine Management Areas of the Pacific in the Context of National and International Law and Policy. Darwin, Australia: United Nations University – Traditional Knowledge Initiative

ritually powerful.[14] It involves a variety of skills or capacities: to determine auspicious days to travel; to perform prayers and ritual activity associated with sailing and fishing; to control the dangerous weather conditions that may result from failure to observe taboos; to repel evil spirits; to repair parts of a boat damaged at sea; or to cure sickness among the crew.[15] Once the Bajo sailors are at sea, they regard sailing and fishing as sacred activities, they have crossed into the domain of their ancestors and their fortunes depend on appropriate behavior towards these beings. At this cosmological level, Australian ownership of marine resources in the Australian Fishing Zone (AFZ) is not recognized, and continued activity in waters now claimed by Australia is partly driven by a belief that the Bajo have a legitimate right to fish in the AFZ controlled by their ancestors.[16]

This type of traditional fishing practices may belong to the intangible cultural heritage containing cultural value and traditional knowledge which needs to be preserved and safeguarded. The importance of intangible cultural heritage is not the cultural manifestation itself but rather the wealth of knowledge and skills passed from one generation to another.[17] The intangible cultural heritage, transmitted from generation to generation, contains a sense of identity and continuity which are important factors in maintaining cultural diversity in the face of growing globalization.[18] In addition, modernisation is a part of globalization which has a negative affect on the social and ecological dimensions as well as can dismiss traditional or local knowledge, which leads to damage to coastal and marine resources.[19] Globalization, ecosystem health, social justice, livelihood and employment, food security and food safety are fisheries concerns and challenges to everyone, particularly poor people which should be addressed.[20]

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[14] Natasha Stacey, Boats To Burn: Bajo Fishing Activity In The Australian Fishing Zone. National Library of Australia, Published by ANU E Press, The Australian National University Australia, 2007, p.136-137

[15] ibid

[16] ibid, p.152

[17] UNESCO. Convention for the Safeguarding of Intangible Cultural Heritage, 2003 (hereinafter UNESCO Convention 2003) accessed 15 February 2011, available http://www.unesco.org/culture/ich/index.php?lg=en&pg=00002

[18] ibid. Intangible culture heritage is manifested by social practices, rituals and festive events as well as knowledge and practices concerning nature and the universe

[19] Arif Satria. Ekologi Politik Nelayan. PT. LKis Printing Cemerlang, Yogyakarta. 2009. 411 p

[20] Maarten Bavinck, et al. Interactive Fisheries Governance: A Guide to Better Practice. Delft: Eburon Publishers. 2005, p. 9

Safeguarding of intangible cultural heritage is of general interest to humanity, and to safeguard activities of intangible cultural heritage needs the widest possible participation of communities in management.[21] Measures shall be taken in appropriate cases to safeguard the right of the peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities, specifically for nomadic peoples and shifting cultivators in this respect.[22] Moreover, the best way to safeguard traditional knowledge is to restore the resource base. However, the knowledge base can decline with the decreasing of resource base to a low level; and in this regard, the important aspect of culture begins to die or becomes irrelevant.[23]

Customary or traditional practices do not remain static but instead change through the years in response to societal and economic changes. They are generally accompanied by strategies and resources to support sustainable use, viable livelihoods and equitable sharing of benefits.[24] However, for traditional peoples, changing job from being traditional fishermen to another job is difficult since it has been a tradition and something which has close relationship with their ancestors. This needs the support from relevant authorities to ensure their continuity and to protect their rights and do partnership in the management of rights and sustainable use of resources.

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[21] UNESCO Convention 2003, Article 19 (2) and 15 respectively

[22] ILO Convention (No. 169) concerning Indigenous and Tribal Peoples in Independent Countries. Adopted on 27 June 1989 by the General Conference of the International Labour Organisation at its seventy-sixth session.

[23] Boedhihartono, *et al*. Is there a need for a centre for the study of indigenous fishers' knowledge? Wise Coastal Practices for Sustainable Human Development Forum. 22 February 2002

[24] Vierros, M, Tawake, A., Hickey, F., Tiraa, A. and Noa, R. (2010). Traditional Marine Management Areas of the Pacific in the Context of National and International Law and Policy. Darwin, Australia: United Nations University – Traditional Knowledge Initiative, p. 8 and p. 11

The issues of traditional related to access, knowledge, utilization of resources, and their social, cultural and biodiversity implications have been addressed by some international organizations and instruments.[25] Basically, all the instruments emphasize the importance of maintaining "traditional" and recognition of the rights of traditional and indigenous peoples as part of their identity, heritage, culture, and spirituality. For example, ILO Convention (1989) stipulates that:

> the social, cultural, religious and spiritual values, the integrity of the values, practices and institutions of these peoples and practices of the traditional peoples shall be recognized and protected, and shall be taken of the nature of the problems which face them both as groups and as individuals.[26]

Likewise Convention on Biodiversity (2002) recognizes:

> the close and traditional dependence of many indigenous and local communities embodying traditional lifestyles on biological resources, and the desirability of sharing equitably benefits arising from the use of traditional knowledge, innovations and practices relevant to the conservation of biological diversity and the sustainable use of its components.[27]

In addition, the Government has a role and a responsibility to protect the rights of the traditional peoples and to guarantee respect for their integrity. Governments also need to recognize the special importance of cultural and spiritual values that the traditional peoples placed upon their relationship with the lands or territories, or both as applicable, which they occupy or otherwise use.[28]

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[25] For examples, Agenda 21**,** Convention on Biological Diversity (CBD), Economic and Social Council**,** Human Rights Council**,** Indigenous and Tribal Peoples Convention (ILO Convention 169), International Fund for Agricultural Development (IFAD), International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA), United Nations Conference on Trade and Development (UNCTAD), United Nations Educational, Scientific and Cultural Organization (UNESCO**),** United Nations Permanent Forum on Indigenous Issues (UNPFII),United Nations University **(**UNU), World Health Organization (WHO), World Intellectual Property Organization (WIPO), and World Trade Organization (WTO). (United Nations University). accessed 15 February 2011, available http://www.unutki.org/default.php?doc_id=23&title=Traditional+Knowledge+&+the+UN).Other instruments including International Covenant on Civil and Political Rights (ICCPR), International Covenant on Economic, Social and Cultural Rights, and World Wildlife Fund (WWF)

[26] ILO Convention (No. 169), Art 5 (a) and (b)

[27] Convention on Biodiversity (2002), Preamble

[28] ILO Convention (No. 169) *supra note* 22, Art 2 and 13 respectively

FAO categorized traditional fishing as artisanal and sometimes referred to as small-scale fisheries.[29] Similarly, The Code of Conduct for Responsible Fishing (CCRF) also recognizes the important contributions of traditional, artisanal and small-scale fisheries to employment, income and food security.[30] The CCRF stipulates that States should appropriately protect the rights of fishers and fish-workers, particularly those engaged in subsistence, small-scale and artisanal fisheries, to a secure and just livelihood, as well as preferential access, where appropriate, to traditional fishing grounds and resources in the waters under their national jurisdiction.[31]

Traditional practices are now facing some challenging and need to be strengthened through the recognition and protection of traditional rights of traditional peoples and their fishing grounds as part of their historical and cultural heritage. There are several reasons to maintain the traditional fishing practice conducted by traditional peoples. First, generally they possess traditional knowledge as a key of sustainable in order to maintain a healthy ecosystem and the sustainable use of resources. Second, they are not greedy, they fish just to fulfill traditional purposes and to maintain their livelihood. Thirdly, they use traditional fishing gears that do not damage the environment or are considered eco-friendly such as fishing rods, spears, hooks, and net. Last but not the least, they are vulnerable; with the scarce of resource, the traditional peoples usually use small boats, sail or oars without engine, whilst facing competition from large or industrial-scale fisheries.

Besides the protection of their rights, traditional fishing practices also need to be managed in order to enable people to provide for their social, economic, and cultural well-being as well as to meet the reasonably foreseeable needs of future by giving traditional fishermen proper education, knowledge, and training. There are some reasons for management. Firstly, traditional fishermen are very dependent on the seasons; which means they cannot go out to sea during seasons when big waves are prevalent. Thus, during these seasons they are in need of temporary alternative forms of livelihood in order to have a source of income. Secondly, they are usually prone to abuse by money lenders because of their need for capital to rent a boat and buy fuel in order to fish. Thirdly, traditional fishermen

[29] FAO. Small Scale and Artisanal Fisheries. Fisheries and Aquaculture Development, accessed 11 February 2011, available http://www.fao.org/fishery/topic/14753/en

[30] FAO, Code of Conduct for Responsible Fishing (CCRF). 1995, Art. 6.18, accessed 21 October 2010, available http://www.fao.org/DOCREP/005/v9878e/v9878e00.htm

[31] ibid, Art 6.4

generally have low levels of education which could be a poverty trap for their family and children. Last but not the least, in fishing, some traditional fishermen still uses destructive devices and practices such as bombs, tubal sea or water toxins which destroy the ecosystem as well as marine and fishery resources.

To conclude, traditional is still important to be maintained in the contemporary circumstances. The traditional reflects an important intangible expression of specific groups that depend on the marine resources and have close relations among culture, heritage and sea. Traditional peoples have traditional knowledge that needs to be protected and strengthened as an indefectible part of national maritime culture identity as well as a key of sustainable management. Protective measures, such as legal mechanisms or social welfare programs will contribute to maintain cultural identity, sustainable use of resource as well as improve the livelihood of coastal communities.

## 2.2. Classification of Traditional Fishing Rights

### 2.2.1. Indigenous Fishing Rights within the same State

The concept of indigenous fishing rights is a relatively modern one, although the practise has been taking place for a long time. Indigenous fishing rights are the rights given by a State to indigenous peoples to have access to fishing and other traditional and cultural activities.[32] These activities may take place in seas and associated areas such as bays, lakes, estuaries, rivers, fjords, etc within the same State. The rights of the indigenous peoples become relevant, when large-scale fishing and fisheries management rules directly or indirectly impact on the access of indigenous communities to traditional fishing grounds, their traditional fisheries management systems or fishing practices.[33]

Fishing and other uses of the ocean are important to many indigenous peoples living in marine and coastal areas for livelihood and cultural reasons. For a long time, indigenous peoples have been struggling to get recognition and protection both nationally and

[32] IUCN, Inter-Comission Task Force on Indigenous Peoples, Indigenous Peoples and Sustainability: Cases and Actions. 1997. The Netherlands, Chapter 13, p. 28-29. Indigenous peoples insist to be recognized as peoples not people. The distinction is necessary, because it symbolizes not just the basic human rights to which all individuals are entitles, but also land, territorial and collective rights, subsumed under the right to self-determination (IUCN).

[33] Marion Markowski. The International Law of EEZ Fisheries. Principle and Implementation. Europe Law Publishing, Groningen. 2010, p. 83

internationally in order to sustain their livelihood, culture and environment. The indigenous peoples' territories are expropriated by the State or their ownership transferred to corporations and individuals. Often, Governments claim ownership of indigenous peoples' lands and afterwards remove them or allow them only limited usufruct rights over the resources therein.[34]

The struggle of indigenous peoples for recognition of their rights to their territories operates at three levels: indigenous, national and international law; and usually at all three levels simultaneously.[35] The first concern of indigenous peoples is that their rights not to sell commodities, or have expropriated from them certain domains of knowledge and certain sacred places, animals, and objects be respected.[36] The issue of rights and access to and exploitation of certain resources for groups of indigenous peoples and ethnic minorities[37] is often a politicized question. An indigenous group that is not able to organize itself politically to defend its interests and forge links with international organizations might find their traditional rights endangered and their livelihood seriously threatened.[38] Without ownership rights to their territory, indigenous peoples and ethnic minorities cannot easily control access to their resources and find their livelihood threatened.[39]

Many indigenous communities have lost their rights of access and exploitation over marine resources because of increasing State control and the transformation these resources into marketable commodities.[40] Fishing communities, particularly the ethnic minorities group,

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[34] IUCN, *supra note* 32, p. 74-75, IUCN also defines that usufruct refers to rights of access and use, but not full ownership). It is also considered that indigenous fishing rights could exist as a usufructuary right (See Warwick Gullet, Fisheries Law in Australia, 1st ed, 2008, p. 97 )

[35] Andrew Gray. Indigenous Peoples and Their Territories, edited by Adolfo de Oliveira, Decolonising Indigenous Rights, New York. 1st published by Routledge, 2009, p 41. See also IUCN, *supra note* 32, pp. 74-75

[36] IUCN, *supra note* 32, p. 77

[37] Feagin and Feagin 2003:8 in Stephen Cornell and Douglas Hartmann,. Ethnicity and Race, Making Identities in a Changing World. Pine Forge Press. 2nd edit. 2007. p. 17. Feagin and Feagin defined ethnic as a group socially distinguished or set apart, by others or by itself, primarily on the basis of cultural or national-origin characteristics. Minorities are defined as those non dominant groups in a population which posses and wish to preserve stable ethnic, religious or linguistic traditions or characteristics markedly different from the rest of population (United Nations, 1949. edited by C. Fried, Minorities: Community and Identity. Life Sciences Research Reports. 1983, p. Government)

[38] Juan L. Suarez de Vivero, *et al*, ''International Institution,'' in Fish for Life. Interactive Governance for Fisheries, ed. Kooiman, J., Bavinck, M., Jentoft, S. and Pullin, R., Amsterdam. 2005, p.213

[39] IUCN, *supra note* 32, p. 75

[40] Juan L. Suarez de Vivero, *et al*, *supra note* 38, p. 216

have to struggle with the hardships caused by global processes that seriously harm the relations between society and the environment.[41] Accordingly, for indigenous peoples, knowledge and traditional resources are central to the maintenance of their identity; human rights are the starting point for sustainability.[42] The question of rights to traditional resources has become highly political and in this regard and all those involved in planning and implementing sustainability strategies can no longer be ignorant of the legitimate concerns of the indigenous peoples.[43]

The efforts toward gaining acceptance of indigenous rights in the international forum have been a long process of negotiation. The elevation of indigenous rights as an international issue started in 1973 at the Arctic Peoples' Conference in Copenhagen where Greenlandic, Sami and Northern Canadian hinterland peoples shared their experiences in aspects of resource development and their marginalization by Government and industry.[44] An important change occurred when the Brundlant Report was released in April 1987.[45] The report emphasized that measures need to be taken to ensure that traditional rights given to local communities include the use of their resources in a responsible manner, which the following recommendation:

> Hence the recognition of traditional rights must go hand in hand with measures to protect the local institutions that enforce responsibility in resource use. And this recognition must also give local communities a decisive voice in the decisions about resource use in their area.[46]

In addition, indigenous peoples which are also referred to as aboriginal peoples, were an integral part of the worldwide grassroots mobilization leading up to the "Earth Summit'' at Rio de Janeiro in 1992.[47] The contribution of the indigenous peoples and their communities to the socio-economic, cultural and environmental advancement of all the countries of the world has also been recognized by the UN General Assembly. Through its

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[41] ibid, p. 216

[42] IUCN, *supra note* 32, p. 99

[43] ibid, p. 78

[44] Peter Jull. Chapter 2, The Politics of Sustainable Development: Reconciliation in Indigenous Hinterlands, edited by Svein Jentoft et al. Indigenous Peoples: Resource Management and Global Rights. Eburon Delft. 2003, p.25

[45] ibid, p. 25

[46] Brundland 1987, 115-116 cited in Peter Jull. Chapter 2. *supra note* 44, p. 22

[47] Svein Jentoft, Henry Minde and Ragnar Nilsen, Indigenous Peoples: Resource Management and Global Rights, Eburon Delft. 2003. p. 45

resolution 48/163 of 21 December 1993, the UN General Assembly proclaimed the International Decade of the World's Indigenous People, commencing on 10 December 1994.[48] The goal of the resolution is to strengthen the international cooperation to address the problems faced by indigenous peoples in such areas as human rights, the environment, development, education and health.[49]

Furthermore, the UN General Assembly Resolution 49/214 of 17 February 1995 encourages the Commission on Human Rights to consider the draft United Nations Declaration on the Rights of Indigenous Peoples.[50] The resolution also recognizes the importance of considering the establishment of a permanent forum for indigenous people within the United Nations. In this regard, the Commission on Human Rights discussed the draft principles and Guidelines for the Protection of the Heritage of Indigenous Peoples on 28 February - 1 March 2000.[51] Accordingly, the draft United Nations Declaration on the Rights of Indigenous Peoples was also discussed through the 8th session of the open-ended inter-sessional Working Group in December 2002 in Geneva. Similarly, the UN Permanent Forum for Indigenous Issues was also established in 2002, as an important recognition by the world community of the particular problems, interests and aspirations of indigenous people.[52]

In 2007, after a long process of discussion, a positive improvement in the recognition and protection of the rights of indigenous peoples was finally achieved through the United Nations Declaration on the Rights of Indigenous Peoples which was established and adopted by General Assembly Resolution 61/295 on 13 September 2007.[53] The Declaration recognizes that indigenous knowledge, cultures and traditional practices contribute to sustainable and equitable development and proper management of the environment.[54]

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[48] UN General Assembly, 86th plenary, A/RES/48/163.21 December 1993

[49] ibid

[50] UN General Assembly Resolution 49/214 of 17 February 1995, Art 5

[51] UN Economic and Social Council. Commission on Human Rights. Sub-commission on the promotion and protection of human rights. 19 June 2000

[52] Svein Jentoft, *et al*, supra note 47, p. 2

[53] UN Declaration on the Rights of Indigenous Peoples. (hereinafter UN Declaration), United Nations September 2007, Preamble, accessed 9 December 2010 available http://issuu.com/karinzylsaw/docs/un_declaration_rights_indigenous_peoples?mode=embedandlayout=http%3A%2F%2Fskin.issuu.com%2Fv%2Fdark%2Flayout.xmlandshowFlipBtn=true and available also from http://www.un.org/esa/socdev/unpfii/en/drip.html

[54] ibid, Preamble

Indigenous peoples have the right to maintain and develop their political, economic and social systems, to strengthen their distinctive spiritual relationship with their traditionally used lands, waters, and other resources and to uphold their responsibilities to future generations.[55] The Declaration also requires States to

> establish and implement a fair, independent, impartial, open and transparent process, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used.[56]

In implementation of fisheries management measures, coastal States must respect and protect the rights of indigenous peoples over fisheries resources, guarantee the protection of the resources, and involve the indigenous peoples in fisheries management. In this regard, States must not introduce fisheries management systems without the informed consent of the indigenous peoples who have traditional rights over the resources in question.[57] The Declaration stipulated that "indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.''[58] The State must then ensure that the indigenous peoples benefit from the management system, and allocate a fair share of fishing rights to them.[59] The coastal State must actively protect indigenous fishing activities if large-scale commercial fishing undermines indigenous rights.[60]

There is no specific binding framework for indigenous rights in international law. There are also no other rules or principles in international law specifically dealing with indigenous fishing rights. However, the legal instruments can be derived from other general instruments, containing the provisions regarding indigenous peoples. For example, Agenda 21, the Convention on Biological Diversity, the International Covenant on Civil and Political Rights (ICCPR) and International Labour Organisation (ILO) Convention No. 169 (relating to indigenous and Tribal Peoples in independent Countries) as well as the UN

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[55] ibid, Article 20 and 25

[56] ibid, Article 27

[57] Marion Markowski, *supra note* 33, p. 90

[58] UN Declaration, *supra note* 53, Article 18

[59] Marion Markowski, *supra note* 33, p. 90

[60] ibid, p. 90

Declaration on the Rights of Indigenous Peoples. Such international instruments basically recognize the importance of indigenous rights of self determination and knowledge to participate in the use, management and conservation of resources. In addition, the World Wildlife Fund (WWF), the first major conservation organization recognizes the rights of indigenous peoples based on historical claims and long term presence and establishes safeguards to ensure that their conservation actions would not contribute to erosion of these rights.[61]

The recognition of fishing rights for many indigenous peoples represents an affirmation of their unique political status and opportunity within the nation-State to improve their employment, income and social conditions.[62] The indigenous peoples have decided that the affirmation of their rights must be developed to ensure their survival.[63] In most cases, where legal protection has been granted as a result of indigenous peoples' unceasing efforts to protect the environment and social conditions for the present and future, while in the other cases, indigenous peoples are not covered under any treaty at all.[64] In African nations, very few ethnic groups, such as those in Uganda, Western Zambia and Eritrea, have no legal basis to claim over land and resource.[65] Some case studies on the practice of indigenous people's rights will be presented below.

*Maori Fishing Rights*

There is a growing concern in New Zealand about the issues associated with traditional fishing rights, and the recognition of Maori fishing rights are made under the Treaty of Waitangi (1840) between Maori Chiefs and the of New Zealand and the English Crown on 6 February, 1840.[66] The Fisheries Act (1989) inserted new part into the Fisheries Act (1983), which was intended (as an interim settlement) to better recognize Maori fishing

[61] WWF International 2008. Indigenous Peoples and Conservation: WWF Statement of Principles. Gland, Switzerland: WWF International

[62] See Anthony Davis and Svein Jentoft, The Challenge and the Promise of Indigenous Peoples's Fishing Rights: From Dependency to Agency in Indigenous Peoples: Resource Management and Global Rights, eds. Svein Jentoft, Henry Minde and Ragner Nilsen, Eburon Delft, 2003, p. 185

[63] IUCN, *supra note* 32, p. 109

[64] ibid, p. 111

[65] ibid

[66] R.A. Sandrey. Maori Fishing Rights in New Zealand: An Economic Perspective (Agricultural Economics and Marketing Department, Discussion Paper No. 101, June 1986, New Zealand, p. 1

rights in customary fisheries waters.[67] The Maori Fisheries Act (1989) provides for an integrated management approach and accommodates the different use of groups, including by[68]

- making better provision for the recognition of Maori fishing rights secured by the Treaty of Waitangi;
- facilitating the entry of Maori into, and the development by Maori of, the business and activity of fishing; and
- making better provision for the conservation and management of the rock lobster fishery.

Then the Maori Fisheries Act (1989) as well as details procedures relating to assets provided to Maori (1989) as an interim settlement and those assets contained Treaty of Waitangi Fisheries Settlement (1992) were replaced by The Maori Fisheries Act (2004).[69]

It is interesting to note that Maori fishing rights are not only limited to the cultural fishing practices but also to participate in modern commercial sectors and management systems. The actual management of the fishery is determined by the local guardians (*Kaitiaki)* who are appointed by the tribes.[70] The local guardians establish certain underlying principles and will be responsible for fisheries in each area, and who in turn are responsible both to the tribe and to the Ministry of Fisheries.[71] The fisheries are limited by the guardians, not the State and in many cases, the *Kaitiaki* restrictions on catch and catch limits are more stringent than the traditional State regulation.[72] However, recent legal decisions in a number of areas have highlighted Maori claims to traditional fishing rights which lead to

[67] Johanna Sutherland, Rising Sea Claims on the Queensland East Coast, Aboriginal Law Bulletin, 1992, accessed 9 August 2010, available http://www.austlii.edu.au/au/journals/AboriginalLB/1992/30.html, p. 96

[68] ATNP. Agreements, Treaties and Negotiated Settlements Project, accessed 21 February 2010, available http://www.atns.net.au/agreement.asp?EntityID=1736

[69] ibid, available http://www.atns.net.au/agreement.asp?EntityID=2371

[70] Bjorn Hersoug, Maori Fishing Rights: Coping with the Aboriginal Challenge in Indigenous Peoples: Resource Management and Global Rights, edited by Svein Jentoft, Henry Minde and Ragnar Nilsen, Delft: Eburon, 2003, p. 142

[71] ibid

[72] ibid

indirect conflicts with the quota management system, and in some cases with elements of the legislation dealing with conservation.[73]

*Mi'kmaq Fishing Rights*

In Canada, the legal basis of recognition of Mi'kmaq fishing rights is made under the provision of Treaties of Peace and Friendship (within the 1760-61), negotiated between leaders of the Mi'kmaq, Maliseet, Passamaquoddy First Nations and representatives of Imperial Britain.[74] These Treaties provide these First Nations peoples with the rights to fish for commercial purposes, such as to catch and sell marine resources to make a living.[75] These Treaties are applied specifically for collective and not individual rights. In addition, there was an interesting case related to the claim of native fishing rights of Mi'kmaq in Canada. Donald Marshall, a Mi'kmaq was charged with fishing eels out of season, fishing without a licence, and fishing with an illegal net. He argued that the 1760s Treaties gave him the right to catch fish for sale and excused him from current fisheries regulations. Marshall brought his case to the Canadian Supreme Court and the Court agreed and upheld the native fishing rights of Marshall on 17 September 1999.[76] However, the Canadian Supreme Court released a new ruling on 17 November 1999, known as Marshall 2, to clarify points made in the original Marshall decision.[77] One of the most important points of the Marshall's decision was that the Government still had the power to regulate native fishing for the purposes of conservation.[78] The Supreme Court ruled that the Mi'kmaq rights to participate in capturing wildlife for the purposes of trade is explicitly limited to the economic outcome of satisfying livelihood needs.[79] The Court argues that the moderate livelihood limit provides the basis for regulating Mi'kmaq commercial exploitation.[80]

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[73] Philip A. Neher, Ragnar Arnason and Nina Mollet, *supra note* 6, p. 144

[74] Anthony Davis and Svein Jentoft, *supra note* 1, p. 189

[75] ibid

[76] The Marshal Decision. CBC News Online. 9 May 2004, accessed 10 February 2010, available http://www.cbc.ca/news/background/fishing/marshall.html

[77] ibid

[78] ibid

[79] ibid, pp. 191-192

[80] ibid. In the Court's opinion, the determination of a moderate livelihood is established through some unspecified mechanism.

*Saami Fishing Rights*

The Saami people are the only indigenous people within the European Union, the majority of whom live in Norway and the rest residing in Sweden, Russia and Finland.[81] Most of the Saami people have lived along the northern coastline of Norway for centuries, and fishing is necessary to maintain aspects of their social and cultural practices as well as for their livelihood. The recognition of fishing rights for coastal Saami people have gradually evolved into a major legal and political issue for the Norwegian Government and the Saami Parliament. [82] The legal basis of recognition of Saami Fishing Rights was made by the Saami Parliament by reconceptualising the Sami Fisheries Zone as a Fisheries Policy Zone for Saami Areas.[83] A Draft Nordic Saami Convention, prepared by a joint Finnish-Norwegian-Swedish-Saami group of experts, has been presented in 2005 and adopted by the Saami Parliament in all three countries.[84] The purpose of the convention is to develop a legal basis for the Saami as a separate people, regardless of whether individual Saami live in or are citizens of one or another of the three countries.[85]

In addition, the Coastal Fishing Committee in 2008 concluded that Saami living in fjords and along the coast of Finnmark, Norway do have rights to fish which are based on their historical use and rules of international law regarding indigenous peoples and minorities.[86] The fishing rights for coastal Saami residents in the most northern districts intermingle with the non-indigenous Norwegian population were therefore recognized as collective and district-limited rights, rather than indigenous-specific rights.[87] This means that non-

[81] Aune Rummukainen, Indigenous Peoples' Right to Land - the Saami People in Finland and the Veddha people in Sri Lanka as examples, FIG Congress 2010, Facing the Challenges – Building the Capacity, Sydney, Australia, 11-16 April 2010

[82] Permanent Forum on Indigenous Issues, Report on Indigenous Fishing Rights in the Seas with Case Studies from Australia and Norway. UN Economic and Social Council. Ninth Session, New York, 19-30 April 2010

[83] Anthony Davis and Svein Jentoft, *supra note* 62, p. 207

[84] Permanent Forum on Indigenous Issues, *supra note* 82, p.19

[85] ibid.

[86] ibid, p.16. Coastal Fishing Committee was established in 2006 to undertake research and make recommendations regarding Saami demands for rights to fish in the ocean north of Finnmark

[87] ibid

indigenous Norwegian fishers in Finnmark would therefore also benefit from international law-based rights pertaining to indigenous peoples like the Saami.[88]

*Native American Fishing Rights*

For Native American tribes, fishing is an important part of daily life. Many legal developments with respect to Native American fishing rights have broad application, yet treaty rights pertaining to fishing often vary from tribe to tribe and depend on the language and historical context of the treaties involved.[89] Indian tribes also retained the right to fish at locations off the reservation in many cases. For example, in the Pacific Northwest, many Indian tribes signed treaties guaranteeing them the right to take fish at their traditional fishing locations, whether those locations were on or off the newly created reservations.[90]

There are many Treaties in the United States which recognize indigenous American fishing rights and several inter-tribal fisheries management agencies have been formed to manage the resource allocation.[91] For example, the Columbia River Inter-Tribal Fish Commission, the Northwest Indian Fisheries Commission (NWIFC) and the Chippewa-Ottawa Treaty Fishing Management Authority in Oregon, Washington and Michigan.[92] In 1974, a landmark decisions by US Federal Judge George Boldt on affirmed the hunting and fishing rights of Native Americans as well as allocated 50 percent of the annual catch to treaty tribes.[93] Bold mentioned that "It was not up to the State to tell the tribes how to manage something that had always belonged to them" and ordered the State to take action to limit fishing by non-Indians.

The Boldt decision was used to define Indian hunting and fishing rights across the United States, and around the world. The decision gave Indian tribes an allocation of the resource and set co-management in motion where the tribes and the State Government work together as joint managers of the area's natural resources. In order to define harvest quotas for such an allocation of the resource, the tribes created the NWIFC to assist in conducting

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[88] ibid.

[89] Fish and Fishing - Native American Fishing Rights, accessed 23 February 2010, available http://law.jrank.org/pages/6916/Fish-Fishing-Native-American-Fishing-Rights.html

[90] ibid

[91] Johanna Sutherland, *supra note* 67, p. 102

[92] ibid

[93] The Boldt Decision, 1974

and maintaining orderly and biologically sound fisheries.[94] Moreover, the Boldt decision reaffirmed the Treaty-Indians of Washington States' right to one half of the salmon resource and also the guarantee of preservation of that resource.[95] Recently, the Bolt decision applies not only for salmon but also other resources, including shellfish.

*Aboriginal and Torres Straits Islanders Fishing Rights*

Indigenous peoples in Australia have a long history of close association with the sea area and natural resources for subsistence, economic livelihood, spirituality and cultural identity.[96] Traditional fishing rights for the indigenous peoples in Australia are considered a native title rights which consists of the limited access to the traditional sea country for the purpose of non-commercial fishing. In the absence of specific fisheries legislation, Aboriginal fishing rights in South Australia are established by the Commonwealth Native Title Legislation.[97] The recognition of customary or traditional fishing rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters has been made under in the Native Title Act (1993) Commonwealth (Cwlth) and Fisheries Management Act (2007). The Native Title Act provided a national scheme for the recognition and protection of native title and for its coexistence with the existing land management systems.[98]

The Native Title Act 1993 (Cwlth) defines the native title rights as the rights and interests of aboriginal peoples or Torres Strait Islanders under the traditional law and customs, have a connection with the land or waters and those rights must also be recognised by the common law.[99] The act explicitly permits native title holders to continue their tradition of hunting, gathering, fishing on lands and waters or to conduct other kinds of cultural and spiritual activities where they have practiced. However, the protection provided in the Native Title Act (1993) is limited to certain circumstances; for example, it does not allow

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[94] Rebecca Sheppard, Indigenous Fisheries Management, Experiences from the United States, Canada and Alaska, Churchill Report. 2004

[95] R.A. Sandrey, *supra note* 66, p. 2

[96] Permanent Forum on Indigenous Issues, *supra note* 82, p.9

[97] Kelly Crosthwaite and Sean Sloan, Establishing A Framework For Allocating And Managing Aboriginal Cultural Fishing Access In South Australia, Primary Industries And Resources South Australia, Fisheries Division, p.1

[98] Native Title Act (1993). Preamble (6)

[99] Johanna Sutherland, *supra note* 67, p. 2

Aboriginal persons to exercise traditional fishing rights in areas where they do not have native title rights or where their native title rights do not include fishing rights.[100] The Native Title Act (1993) provides a mechanism for negotiated agreement regarding native title. For example, the act stipulates that native title holders may, under an agreement with the Commonwealth, State or a Territory, surrender their native title rights and interests in relation to land or waters.[101]

In addition, the Fisheries Management Act (2007) defined aboriginal traditional fishing as those engaged in by an Aboriginal person for the purposes of satisfying personal, domestic or non-commercial, communal needs, including ceremonial, spiritual and educational needs, and using fish and other natural marine and freshwater products according to relevant aboriginal custom. Both acts state that the main purposes of indigenous activities are to satisfy personal, domestic or non-commercial communal needs. However, the existence of native title rights in the act is only limited and recognized under some circumstances for specified group and areas of waters. Furthermore, fish taken cannot be sold under a permit and can only be sold if the fisher holds an authority issued by the Government to do so, such as a commercial fishing licence.[102]

Last but not the least, the legal recognition of indigenous rights concerning access to resources and participation in commercial fisheries is understood by aboriginal peoples as a critical step towards dismantling dependency and to achieving agency.[103] Affirmation and expression of these rights offer indigenous peoples the possibility to develop their capacity of further developing their social and economic bases.[104]

### 2.2.2 Rights Exercised by Citizens of One State in another State Territory

The traditional fishing rights exercised by citizens of one State in the territory of another State find basis in the LOSC. As discussed above, this pertains to the rights of other States in the archipelagic waters of archipelagic States. In addition, there is another type of right, independent of the LOSC, which emerged out of geographical or political arrangements on

[100] Warwick Gullet, Fisheries Law in Australia, 1 st ed. 2008, p.100

[101] Native Title Act (1993) Section 21, See also Johanna Sutherland, *supra note* 67, p. 40

[102] New Rules for Indigenous Fishing, Queensland the Smart State, on 8 December 2008

[103] Anthony Davis and Svein Jentoft, *supra note* 62, p. 208

[104] ibid, p. 208-209

the basis of the unilateral declaration of some States.[105] These rights are regulated by bilateral agreements or arrangements between the States.

The rights exercised in the context of archipelagic waters and archipelagic States are provided for under Articles 47 (6) and 51 of the LOSC. This applies, for example, to the rights of Malaysian traditional fishermen in certain areas of Indonesia's archipelagic waters. In this case, Indonesia regards traditional fishing rights as applicable to those who have already fished in the area for a long period of time and differ from the traditional right to fish that are applicable to everybody.[106]

The rights exercised outside the context of archipelagic States are conducted by foreign States in another States territory which may arise out of a geographical or political arrangement resulted from a unilateral declaration of extended maritime jurisdiction for some States. These rights are independent from and not regulated by the LOSC. When the States extended their territorial seas or declared exclusive fishing zones of up to 12 nautical miles (hereinafter nm) or even more, they also unilaterally recognized the traditional fishing activities of other States in these zones by bilateral or even multilateral agreements.[107] For example, the rights exercised by traditional fishermen from Indonesia and Papua New Guinea in Australian waters, the rights of British and German fishermen in Iceland's waters and the rights of India's fishermen in Sri Lankan waters.

The fishing rights exercised by citizens of one State in another State's territory are recognized through any of the following ways: [108]

- Domestic legislation. Some States have explicitly recognized the traditional fishing rights of third States in certain zones in their domestic legislation. For example, the Fishery Limits Act of the UK (1964) and the Territorial Sea and Fishing Act of New Zealand (1965).

[105] The unilateral declaration from 3 nm to 12 nm fishing zone by a number of countries was received by the International Court of Justice (ICJ) in 1974. For example, declarations were made respectively by Australia and Iceland of a 12 nm territorial zone affect the loss rights of some States.

[106] J.I. Charney, L.M. Alexander, eds. International maritime boundaries, Volume 1. American Society of International Law. Martinus Nijhoff Publishers. 1996, p.86

[107] Huan-Sheng Tseng, Ching-Hsiewn Ou. The evolution and trend of the traditional fishing rights. Ocean and Coastal Management 53. 2010, p. 271

[108] ibid, pp. 271-272

- Bilateral fisheries agreements. These agreements were conducted between adjoining States or States adjacent to each other. The importance of fisheries resources in States practice has been shown by a number of delimitation agreements. Occasionally, one of the main concerns of States in the negotiation of maritime boundary delimitation is the preservation of traditional (historic) fisheries.[109] It can be achieved simply by guaranteeing access to fisheries to traditional fishermen on both sides of the line.[110] For example, in the 1967 Exchange of Notes constituting an agreement between the United States of America and Mexico on traditional fishing in the exclusive fishery zone contiguous to the territorial seas of States, American and Mexican fishing vessels could continue to fish in each other's Exclusive Fishing Zones (EFZ) for five years.[111] However, the States which are not adjacent to each other, and in fact are separated by great distances such as Distant Water Fishing Nations (DWFNs) may also sign bilateral agreements on traditional fishing. For example, the 1967 Exchange of Notes constituting an Agreement between the United States of America and Japan concerning certain fisheries off the coast of the United States of America, the 1967 Agreement on Fisheries between Japan and New Zealand, the 1972 Agreement between Canada and France on their Mutual Fishing Relations, and the 1972 Exchange of Notes constituting an agreement between the Government of Canada and the Government of the United Kingdom concerning fisheries relations between the two States; and the 1968 Agreement between Australia and Japan on Fisheries, in which Australia agreed to allow Japanese fishing vessels to operate in certain Australian waters using special fishing patterns.[112] Other examples include the 1977 Agreement between Japan and the Union of Soviet Socialist Republics on fishing off the coast of Japan; and the 1974 Memorandum of Understanding (MOU) between Australia and Indonesia regarding the operations of Indonesian Traditional Fishermen in Areas of the Australian Exclusive Fishing Zone and Continental Shelf.

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[109] Division for Ocean Affairs and Law of the Sea (DOALOS). Handbook on the Delimitation of Maritime Boundaries. Office of Legal Affairs, United Nations, New York. 2000, p. 39

[110] ibid, p. 39

[111] Huan-Sheng Tseng, Ching-Hsiewn Ou, *supra note* 107, p. 271. EFZ refers the zone of waters extending 12 seaward from the baselines in which the territorial sea is measured

[112] ibid, p. 271

- Multilateral fisheries conventions. For example, the European Economic Community (EEC) held a fishery conference in 1970 to grant traditional fishing rights to third States for a period not exceeding 5 years in certain waters of EEC member States.[113] In addition, European Fisheries Convention (1964) gave each coastal States the exclusive right to fish in a 6-mile belt measured from the baselines of its territorial sea.[114] With regard to the area between the belt between 6 and 12 miles from the baseline, the Convention stipulated that "the right to fish shall be exercised only by the coastal State, and by such other Contracting Parties, the fishing vessels of which have habitually fished in that belt between 1 January 1953 and 31 December 1962".[115] This to accommodate the desire of coastal States to extend their jurisdiction over a greater portion of the sea on one hand and to preserve fishing rights of other States on the other hand.
- Delimitation agreements. Delimitation agreements signed between adjoining or geographically opposed States may involve the traditional fishing rights of two States. Besides the main goal was to establish delimitation agreements, these agreements in essence also recognized the practice of traditional fishing rights. For example, the MOU between Eritrea and Yemen (where Yemen had to continue to give access to Eritrean artisanal fishermen to the waters of islands whose sovereignty had been awarded to Yemen); Trinidad and Tobago and Barbados (1990) which granted Barbadian fishing vessels access to fish in Trinidad and Tobago's EEZ; India-Sri Lanka Maritime Boundary in 1974 and 1976 concerning historic waters in Palk Bay; Australia and Papua New Guinea in the Torres Strait in 1984; and the 1980 Agreement between Indonesia and Papua New Guinea concerning maritime boundaries. However the establishment of maritime boundaries should not disturb the continuity of traditional fishing activities of fishermen from either State.
- Decisions of the International Court of Justice (ICJ). The two most well known fisheries jurisdiction cases include the case between the United Kingdom of Great Britain, Northern Ireland and Iceland; and between the Federal Republic of

[113] ibid

[114] European Fisheries Convention (1964), Art 3

[115] ibid

Germany and Iceland in 1974.[116] In this case, Iceland declared a 12-mile Exclusive Fishing Zone in 1952 which it extended to 50 miles and imposed restrictions on fishing activities of other States in these areas. This adversely affected the rights of British and German nationals which had long fished in these waters and led to a dispute over fisheries jurisdiction. The United Kingdom (UK) pointed out that its vessels had been fishing in Icelandic waters for centuries and the restrictions imposed by Iceland affect the economy and livelihood of whole communities. In this case, Iceland, the UK, Germany and other States had the obligation to negotiate this particular issue by considering some factors, such as the preferential rights of Iceland, established rights of the UK and Germany, the interests of other States, conservation of fishery resources, and joint examination of measures.

Moreover, in its ruling on the dispute between Iceland and the UK over Iceland's unilateral 50 nm fishing claim in July 1974, the ICJ concluded that since the 1958 Geneva Conference, two concepts had attained the status of customary law:

- the concept of the fishery zone up to 12 miles limit, and
- the concept of preferential fishing rights in adjacent waters of the coastal State beyond the distance of 12 miles

The ICJ stated that a State could claim exclusive right to a 12 nm fishing zone, but that any claim beyond 12 nm was limited to preferential rights.[117] In those situations, it was necessary that the preferential fishing rights of Iceland should be reconciled with the traditional fishing rights of the United Kingdom, taking into account the rights of other States and the needs of conservation. The decision by the ICJ upheld the traditional fishing rights of third States with long-term fishing interests in the waters off coastal States and provided the most appropriate method for the solution.

The issue of preferential fishing rights was raised during the first United Nations Conference on the Law of the Sea (UNCLOS) in Geneva 1958 where the Convention on the High Seas was adopted. In Article 2 of the Convention contained the principle of the freedom of the high seas, which included freedom of fishing, among others was codified as

[116] ICJ, Summary of the Judgment of 25 July 1974. Fisheries Jurisdiction Case (United Kingdom v. Iceland), and Fisheries Jurisdiction Case (Federal Republic of Germany v. Iceland)

[117] ibid

to "be exercised by all States with reasonable regard to the interests of other States in their exercise of the freedom of the high seas".[118] The concept of preferential fishing rights had originated in proposals submitted by Iceland at the Geneva Conference of 1958, which had confined itself to recommending that:

> Where, for the purpose of conservation, it becomes necessary to limit the total catch of a stock or stocks of fish in an area of the high seas adjacent to the territorial sea of a coastal State, any other States fishing in that area should collaborate with the coastal State to secure just treatment of such situation, by establishing agreed measures which shall recognize any preferential requirements of the coastal State resulting from its dependence upon the fishery concerned while having regard to the interests of the other States. [119]

Furthermore, there is another type of rights brought about by international practice regarding acceptance of “historic” or “traditional’’ transitional or other claims to the rights of continued fishing in waters which were formerly high seas brought under the jurisdiction or exclusive control of a coastal State.[120] The term “traditional” and “historic” are (correctly) used interchangeably in UNCLOS III and in commentaries.[121] The difference between the historic rights and traditional rights is that the former is a legal term whose applications depend upon the fulfillment of the preconditions imposed by international law, while the latter is a general term for the rights existing in history.[122] However, it seems more accurate to refer to ‘traditional’’ (and not historical) fishing rights in relation to the delimitation of areas extending beyond the territorial sea.[123]

The claim of any “traditional’’ or “historic’’ rights or privileges by any nation assumes that the nation claiming such rights recognizes the extended jurisdiction or exclusive control of the

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[118] ICJ, Summary of the Judgment of 25 July 1974.Fisheries Jurisdiction Case (United Kingdom v. Iceland), and Fisheries Jurisdiction Case (Federal Republic of Germany v. Iceland)

[119] ibid

[120] David W. Windley. International Practice Regarding Traditional Fishing Privileges of Foreign Fishermen in Zones of Extended Maritime Jurisdiction, p 490 (pp 490-503). For examples, agreements between United States-USSR (King Crab Fishery), Denmark-United Kingdom, Iceland-United Kingdom, United States-Japan (King Crab Fishery), USSR-United Kingdom, New Zealand-Japan, Australia-Japan, Norway-United Kingdom, United States-Canada.

[121] Campbell and Wilson, *supra note* 3, p.86

[122] Zou Keyuan, Historic Rights in International Law and in China's Practice, *Ocean Development and International Law*, 32:149–168, 2001, p. 163

[123] J.I. Charney, L.M. Alexander, *supra note* 106, p.86

coastal State.[124] Historic claims are usually applied to certain sea areas are intended to confirm the internal or territorial waters.[125] Historic rights are also claimed in respects of straits, estuaries and others similar bodies and continuously apply with respect to areas up to 12 mile. There are two types of historic rights: the exclusive rights with full sovereignty, such as historic waters and historic bays,[126] and non-exclusive rights without full sovereignty, such as historic fishing rights in particular areas of high seas.[127]

The concept of historic waters may be claimed only where strict adherence to the geographical conditions required for internal waters (such as bays, straight baselines) might lead to a somewhat inequitable result because of the longstanding exercise of powers by the coastal States concerned.[128] In State practice, the concept of historic waters has been established as a criterion to determine the jurisdictional extent of a coastal State. Furthermore, States may also make provision in their own laws for recognition of "traditional'' or "historic'' fishing for foreign fishermen on a basis of reciprocity. For example, their fishermen would have similar rights in the Exclusive Fisheries Zone of the foreign nation whose fishermen were permitted to continue fishing.[129] Based on the cases, generally the factor of fishing rights can be regarded as a circumstances included in the wider formula of "special circumstances'' relevant to maritime boundary delimitation.[130] The issue of historic rights or historic waters was not discussed in LOSC, remains underdeveloped and left to be governed by customary international law.[131]

## 2.3. Issues and Problems of Traditional Fishing Rights

The issue of traditional fishing rights apparently emerged at the domestic and international levels. The issues, among others, involved the definition of "traditional'', the determination of the group which precisely has traditional fishing rights, conflict of interests, as well as conservation and management issues such as over-exploitation of the resources,

[124] David W. Windley, *supra note* 120, p 490

[125] Zou Keyuan, *supra note* 122, p.160

[126] The waters are almost completely surrounded by land, such as the waters between India and Sri Lanka

[127] Zou Keyuan, *supra note* 122, p.160

[128] J.I. Charney, L.M. Alexander, *supra note* 106, p.85

[129] David W. Windley, *supra note* 120, p 490

[130] J.I. Charney, L.M. Alexander, *supra note* 106, p.86

[131] Zou Keyuan, *supra note* 122, p.152

biodiversity and ecosystem destruction. The issue in Australia, for example, emerged from the recognition of customary or traditional fishing rights in the Native Title Act (1993) (Cwlth) related to the important fisheries management which are not being addressed by the Commonwealth Government or State and Territory Governments.[132] The issues include resolving conflict over rights of access to resources and addressing the impact of commercial and recreational fisheries activities or coastal development on species traditionally fished and hunted by indigenous peoples, according to their native title rights and interests.[133] Another example is the issue of Indonesian fishing activities in the Australian Fishing Zone with respect to the definition of what constitutes "traditional" activities.[134] Notwithstanding, the term "traditional" as applied to Indonesian fishermen by Australian authorities always refers to rights, often appearing to be describe customary norms of behaviour.[135] In this case, the term "traditional" has been given no unequivocal and broadly accepted definition, either in legislation or in policy statements and the term has become an impediment to clear discussion.[136]

### 2.3.1 What is Traditional?

Traditional has a variety of meanings, depending on the scope of interpretation. The broader meaning of traditional are associated with old-fashioned, primitive, simplistic, conventional tradition, subsistence, non-commercial, non-modern, customary, historical and heritage. The term "traditional" is generally associated with descriptions such as "backward" and "primitive" especially with reference to culture. Even in the current era of modernisation and globalisation, some areas still have traditional practices, which have now become an issue at the domestic and international levels. One particular issue pertains to the importance of maintaining "traditional" practices in contemporary circumstances. Other issues are related to the recognition and protection of what are considered "traditional", as well as to create sustainable use of resource for such traditional practices. There are terms such as "tradition", "traditional" and "custom" which are commonly used; nevertheless, they can in fact be quite hard to operationalise because they are subjective,

[132] Johanna Sutherland, *supra note* 67, p.3

[133] ibid, p.3

[134] Campbell and Wilson, *supra note* 3, p. 74

[135] ibid, p. 75

[136] ibid, p. 74

ambiguous and dynamic in nature.[137] The notion of tradition contains two alternative perspectives. On one hand, it reflects something that is relatively fixed, clear, definable, and located at a particular point in the past.[138] On the other hand, tradition reflects something that is relatively uncertain, dynamic, undefinable, and related to contemporary circumstances.[139]

The "traditional" discussed in this research specifically deals with fishing activities conducted at sea. In this regard, the traditional can be considered as referring to people, culture, fishing ground, vessel, methodology, technology and catch. From the perspective of maritime anthropology, traditional is considered to refer to maritime culture and traditions related to the utilization of marine resource, which is dynamic, in terms of knowledge and in creating "new tradition". One of the contributors of "Wise Coastal Practices for Sustainable Human Development Forum", Ms. Matthews (Palau) proposed to use the term "local" rather than "traditional" since this kind of knowledge is dynamic, evolving as people incorporate outside ideas and techniques into their knowledge base.[140] Ms. Matthews gave as an example that "in Palau, fewer people are using strictly traditional Palauan fishing techniques, their boats are powered by outboard engines, their nets and lines are monofilament."

Another contributor, Mali Voi (Samoa) agreed to use "local" and referred to Ron Crocombe, a noted Pacific writer and anthropologist, who suggests that human beings can create "new traditions". Mali Voi gave as an example the case of Palau, where the traditional people no longer use traditional techniques of fishing. In the context of fisheries, the primary meaning of traditional is temporal and relates to time, traditional activities are always characterized by being undertaken over an extensive time span.[141] The term "traditional" is often applied to societies that are thought of as backward and unsophisticated, that are considered to be "out of time". This reflects cultural traits and

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[137] Bill Arthur. Tradition and Legislation: Analysis of Torres Strait Treaty and Fisheries Act Terms. Centre for Aboriginal Economic Policy Research. July 2004. The Australian National University

[138] ibid

[139] ibid

[140] B. Aliaga, M. Baker, *et al*. Indigenous Fishers' Knowledge – Further Discussion. Wise Coastal Practices for Sustainable Human Development Forum 9 April 2002, accessed 15 February 2011, available http://www.csiwisepractices.org/?read=415

[141] Campbell and Wilson, *supra note* 3, p. 85

attitudes and may be strongly influenced by religious practices or social customs, usually small-scale or artisanal.[142]

Something can only be considered traditional if it has a demonstrable history of being handed down by generations, or of existing over a relatively long period of time.[143] Because its primary meaning relates to "time past'', the term "traditional'' is used as synonym for "non-commercial'' and it often opposed to "modern'' (meaning commercial). In addition, the traditional is often used to describe cultures or sub-cultures that are not part of the mainstream, such as some of the activities of Aborigines which are described as traditional.[144] Since the term "traditional" connotes a time span as its principal meaning, it can describe societies (and fisheries) as well as their behaviour which is considered non-contemporary.[145] Furthermore, the meaning of "traditional'' used by the broader society will be primarily associated with the granting of rights. However, its meaning within the sub-group will depend less on rights and more on accepted norms of behaviour.[146]

The traditional fisheries are categorized by the FAO as artisanal fisheries. The FAO Glossary indicates that artisanal fisheries are:

> traditional fisheries involving fishing households (as opposed to commercial companies), using relatively small amount of capital and energy, relatively small fishing vessels (if any), making short fishing trips, close to shore, mainly for local consumption. In practice, definition varies between countries, e.g. from gleaning or a one-man canoe in poor developing countries, to more than 20-m. trawlers, seiners, or long-liners in developed ones. Artisanal fisheries can be subsistence or commercial fisheries, providing for local consumption or export. They are sometimes referred to as small-scale fisheries.[147]

The Law of the Republic of Indonesia Number 27 of 2007[148] has defined ''traditional'' in dealing with communities, that is "traditional fishery communities whose traditional rights

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[142] FAO, *supra note* 1

[143] Campbell and Wilson, *supra note* 3, p. 74

[144] ibid, p. 74

[145] ibid, p. 85

[146] ibid, p. 74

[147] FAO. *supra note* 30

[148] Law of the Republic of Indonesia Number 27 of 2007 concerning the management of coastal zones and small islands, The Ministry of Marine Affairs and Fisheries Republic of Indonesia (MMAF), Division Legal, Organization and Public Relation, Directorate General of Marine, Coast and Small Islands Affairs

in fishing activities or any legitimate rights are still recognized in particular areas within the archipelagic waters in accordance with the international law of the sea". This definition has been preserved for indigenous communities (*adat*) and local communities living in the coastal zone and small islands of Indonesia. An indigenous community is defined as:

> a group of coastal communities which for generations have lived in particular geographic area because they are bound by root ancestors, and has a strong bond with the coastal zone and small islands resources, together with the existence of value system which determined the economic, politic, social and legal institutions.[149]

In one instance, the term traditional fishing has been reserved exclusively for indigenous peoples, the group that has evolved in the last decades into a special category of international concern.[150] For instance, in North America, Canada and New Zealand "traditional rights" have been acknowledged to indigenous inhabitations that have used land and waters since time' memorial.[151] In addition, indigenous peoples are associated with "traditional resources'' to encompass in one term all knowledge and resources of potential or actual use.[152] Traditional resources include tangible such as plant, animals, and other material objects, from minerals to cultural, which may have intangible qualities (such as sacred, ceremonial, heritage or aesthetic) and intangible resources with no physical manifestations, such as systems of knowledge.[153] Many case studies illustrate how the indigenous peoples, through the integration of their knowledge with practical strategies for conservation, have historically been and are still successful in achieving sustainability.[154]

The relevant factors which determine whether an activity carried out by indigenous peoples can be considered "traditional" lie in the intent and purpose of such activities, they should be undertaken for food, for traditional and cultural events, and not for commercial purposes. For example, when "traditional'' is discussed in relation to Australian Aboriginal

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[149] ibid

[150] W. Michael Reisman and Mahnoush H. Arsanjani. Some Reflections on the Effect of Artisanal Fishery on Maritime Boundary Delimitation. in Law of the Sea, Environmental Law and Settlement of Disputes: Liber Amicorum Judge Thomas A. Mensah. edited by Tafsir Malick Ndiaye, Rüdiger Wolfrum. 2007, p. 631. For example Treaty 1978 between Australia and Papua New Guinea on Maritime Boundaries, Art 1 (1) (l) defines traditional fishing and Art 1 (1) (m) assigns a very specific reference to traditional (W. Michael Reisman and Mahnoush H. Arsanjani, 2007)

[151] Campbell and Wilson, *supra note* 3, p. 85

[152] IUCN, *supra note* 32, p. 74

[153] ibid, p.74

[154] ibid, p. 159

activities, technology is largely ignored and the "purpose of the activity becomes the defining factor".[155] Since the purpose for which Aborigines historically hunted and fished was to provide sustenance to the families and clans, "subsistence'' and not technology was recommended to define the characteristic of what is considered "traditional".[156] For instance, the traditional applied for the Torres Strait Islander people (aboriginal and Papua but not to Australia's other indigenous group), is construed liberally to include modern adaptations of traditions, including in fishing methods.[157]

Furthermore, the Australian Law Reform Commission argued that in determining whether an activity is "traditional'', the attention should focus on the purpose of the activity rather than the method.[158] This has been applied to foreign fishermen, as regulated by the Torres Strait Treaty of 1978. The Treaty defines traditional fishing as "the taking, by traditional inhabitants for their own or their dependants' consumption or for use in the course of other traditional activities, of the living natural resources of the sea, seabed, estuaries and coastal tidal areas, including dugong and turtle."[159]

By contrast, the term traditional in dealing with Indonesians fishing in the Australian Fishing Zone (AFZ), is used to describe fishermen's activities, even though it actually refers to rights. The term traditional as applied to foreign fisheries operating in the AFZ can be defined as having a demonstrable history of operations that precede the appropriation of its fishing ground by Australia.[160] In the MOU between Indonesia and Australia, "traditional'' refers to fishermen who have practiced fishing in the same area for several decades using vessels or methods without motor. This differs from the Indonesian Government's perspective, exemplified by their own campaign to motorise traditional boats, but still consider the modified boats as "traditional".[161] In a now repealed section of the Fisheries Act of 1952, traditional fishing was defined as when "fish are taken in a manner that, as regards the boat, the equipment and the method used, is substantially in

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[155] Campbell and Wilson, *supra note* 3, p. 78

[156] ibid, p. 78

[157] Permanent Forum on Indigenous Issues, *supra note* 82, p. 15

[158] Campbell and Wilson, *supra note* 3, p.78

[159] Torres Strait Treaty 1978, Art 1. Australian Treaty Series, Australian Treaty Series 1985 No 4 accessed 31 October 2010, available http://www.austlii.edu.au/au/other/dfat/treaties/1985/4.html

[160] Campbell and Wilson, *supra note* 3, p. 89

[161] ibid, p. 118, para 2

accordance with the traditions of those inhabitants (indigenous inhabitants of an external territory)''[162] The definition given by the MOU is less specific compared with the repealed section of the Fisheries Act of 1952, where the approved technology was "traditional'' technology.

Meanwhile the analysis of the Eritrea/Yemen award as well as a review of Treaty practice indicates that traditional artisanal fishing need not be primitive.[163] It may be conducted for commercial purposes and the harvest may be traded, though in some of the treaties, the commerce is limited to the State of the artisanal fishermen.[164] In addition, traditional artisanal fishing rights are often not internationally transferable, they may be transitive within their national community but they cannot be transferred to member of other national communities.[165]

Last but not least, the traditional can be used to describe among others: activities, behavior, resources, law, knowledge, methods, boat, equipments, technology, management, area and rights. The traditional fishing has always been small-scale fisheries, but not always subsistence and this is different with large-scale or industrial fisheries. The fishery considered to be "traditional'' may depend on the level of technology investment and boat size. However, the technological investment in the traditional (small-scale) is contemporary and improves gradually over time.

The primary meaning of "traditional'' as applied in fisheries should lie in the intersection of the expansion of maritime boundaries and obligations governing such expansion as established in UNCLOS III and customary international law.[166] To understand whether or not a fishery is traditional depends on whether the contemporary fishery is the same as the fishery that historically fished these waters have since been appropriated by another country.[167] It can be seen among others from the objective of fishing, target of species, fishing ground and the same origin of fishermen. However, when "traditional" is applied in aquaculture, it generally implies the traditional technology and method used in growing

[162] ibid, p. 73

[163] W. Michael Reisman and Mahnoush H. Arsanjani, *supra note* 150, p. 632

[164] ibid, p. 632

[165] ibid, p. 632

[166] Campbell and Wilson, *supra note* 3, p. 87

[167] ibid, p. 87

fish. In other words, there have different perspective between capture and aquaculture fisheries.

### 2.3.2 Identification of the Group

The identification of the group which has traditional fishing rights are quite complex and requires that some criteria be fulfilled. The identification of the group is necessary to be considered not only for getting the recognition, but also to determine who has the responsibility for the sustainable management of the fisheries resources. The group which can claim traditional fishing rights can be determined by some requirements, among others, origin of people, technology, time frame, equipment, fishing methodology, area, catch and purpose of activities. However, the appropriate criteria and requirements for traditional fishing rights to be recognized are still debatable. Hence, it needs to identify people or individuals who have actual traditional fishing rights in a particular area, and also to decide whether the descendants of groups with traditional fishing rights will automatically have the same rights when they live in a different area.

Generally, the group which possesses traditional fishing rights can be grouped into several categories. First, is the practice of a group at a purely domestic level. The practice is based on each State and regulated by domestic legislation of certain States, traditional law, customs, bilateral agreements or treaty. This group consists of indigenous peoples, aborigines, and those holding native title who had practised fishing within the same State's territory for the main purposes of maintaining cultural needs and values. In customary fishing, it explicitly defines the people who have the traditional fishing rights, those who are:

- Aboriginal descent, that is consistent with definitions of Aboriginal persons contained in the *Native Title Act 1993* (Section 253) and the *Aboriginal Affairs Planning Authority Act 1972* (Section 4);
- persons who are fishing for the purpose of satisfying personal, domestic, ceremonial, educational or non-commercial communal needs; and
- persons who are accepted by the Aboriginal community in the area being fished as having a right to fish in accordance with Aboriginal tradition.

Secondly, is the practice of a group at the international level. In this regard, the group has a long history of fishing in certain areas of another State, over areas which have now come

under the sovereignty and sovereign rights of adjacent or opposite coastal States because of their extended maritime jurisdiction. The group consists of:

- The immediately adjacent neighboring States who had traditionally fished in certain areas of the archipelagic waters within the archipelagic State. This is the situation contemplated under Article 51 of the LOSC. An example of this is the practice of Malaysian traditional fishermen who fish in particular areas of Indonesian archipelagic waters;
- Distant Water Fishing Nations (DWFN), Land Locked States (LLS) and Geographically Disadvantaged States (GDS) who had exercised fishing in adjoining coastal States. For example, the fishing activities of fishermen from Singapore and Laos in the EEZs of coastal States. This is in accordance with Articles 69 and 70 of the LOSC which allow LLS and GDS to utilize the surplus fishing resources in the EEZs of other coastal States; and
- Groups who have exercised the rights in the adjacent or opposite coastal States' waters before these States delimitated their maritime zones. These types of rights are based on the geographical/political arrangements between States concerned which is independent of the LOSC. For example, traditional fishermen from Indonesia and Papua New Guinea fish in the particular areas of adjacent State Australia.

The determination of which group specifically possesses traditional fishing rights is generally done by negotiation between the parties concerned. In addition, it is necessary to engage in negotiations and enter into an agreement or arrangement to discuss and determine the conditions and requirements to be met for traditional fishing rights to be exercised. In the case of Indonesian traditional fishermen in the AFZ, particularly for vessels sailing to Ashmore Reef, the identification of the homeport is the first step in an analysis of who the "traditional fishermen" are and what their activities are.[168]

### 2.3.3 Exemptions from Conservation and Management Issues

In general the exemptions are applied for indigenous peoples or a person engaged in traditional fishing activities. In most cases, the management of fishing effort or of catch (input and output control) are seen as pure conservation measures which are applied by States to preserve and protect the resource as well as the environment. The exemptions

[168] James J. Fox and Sevaly Sen, A Study Of Socio-Economic Issues Facing Traditional Indonesian Fishers Who Access The MOU , A Report for Environment Australia, October 2002, p. 18

from conservation and management issues include size limits, fishing licence, area and time closure, gear restriction, types of species, and so on.

In addition, indigenous fishing communities usually have their own internal regulatory mechanisms for the management of their fishing activities which are integrated in the nature of their fishing rights. A most difficult conservation and management issue concerns the indigenous hunting and fishing of protected species (such as dugong and turtle) which are regarded as highly culturally significant but are in need of sustainable management to ensure their survival.[169] There are some other exemptions from conservation and management measures applied in the case of traditional and indigenous peoples that have been implemented by States, for example in Indonesia, Australia, the United States and New Zealand.

In the case of Indonesia, for example, all fishing activities in Indonesian waters shall respect and take into account the traditional fishing rights of the indigenous coastal population as well as the specific rights of local Governments to regulate fishing along the coastlines under their respective jurisdictions, as outlined below:[170]

- The Pearl and Coral Collecting Act of 1916 has given exclusive and traditional rights to local fishermen anywhere in the sea where depth is less than 9 meters at low tide for collecting pearl, anemone and coral within 3 miles from the coasts;
- The Whaling Act of 1927 mentioned that whaling within 3 miles of the coasts (now within Indonesian archipelagic waters and the 12 miles territorial sea) is allowed only under special permission from the President of Republic except whaling activities traditionally conducted by the indigenous coastal population; and
- The Territorial Sea and Maritime Circle Act of 1939 stipulated that fishing activities are prohibited within the Indonesian maritime circles,[171] except by the Indonesian indigenous population or by those with special permission from the Naval Chief of Staff.

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[169] Johanna Sutherland, *supra note* 67

[170] Hasyim Djalal. Indonesia and the Law of the Sea. 1st ed. Centre for Strategic and International Studies. 1995, p. 146

[171] Indonesian maritime circles are located on 3 miles from the coasts at low tide or from straight baselines where there are bays, river mouths or estuaries less than 6 miles wide; or where there are island fringes along the coasts, or where there is a strait less than 6 miles wide and both of its coasts belong to Indonesia (Hasyim Djalal *supra note* 170, pp 146-147)

Moreover, the exemptions for conservation and management issues are also applied to some traditional and indigenous peoples in fishing endangered species, for example allowing the hunting of green turtles and dugongs for aboriginal in Australia as well as whales for traditional peoples in Lamalera, East Nusa Tenggara (Indonesia). These traditional activities always use traditional methods and contain traditional knowledge as well as local wisdom for traditional purposes, such as educational, spiritual and cultural values. From the sociological perspective, the "bravery" of the Lamalera whale hunters using very primitive technology is as unimaginable as the resilience of the barter institution in the age of globalization.[172]

In Australia, there are some examples of legislation exempting native title and indigenous people from conservation and management measures. The Native Title Act of 1993 explicitly permits native title holders to continue their tradition of hunting, gathering, fishing on lands and waters or to conduct other kinds of cultural and spiritual activities where they have practiced. In doing such activities, the Act exempts native title holders from permit and licence requirements if the activities are done for personal, community, cultural, other traditional, but non-commercial purposes. Apart from that, the new rules for indigenous fishers only restrict the type of apparatus used and introduce some specified areas closed to all forms of fishing, including indigenous fishing, while other recreational fishing rules such as size and possession limits, seasonal closures and other closures, will not apply to indigenous fishers.[173]

The Fisheries Act 1976 Queensland (Qld) currently allows the taking of fish or marine products in closed waters or closed seasons, and allows the taking of protected species for inhabitants of Trust Areas (formerly Reserves) and Aboriginal.[174] In addition, it is a defence in a proceeding against a person for an offence against the Fisheries Act (1994) (Qld) for an Aboriginal person or a Torres Strait Islander, and for the purpose of satisfying a personal, domestic or non-commercial communal need.[175] Meanwhile, the new Nature Conservation Act 1992 (Qld) allows for the taking and use of wildlife for traditional

[172] J.B. Blikololong, Lamalera, Subsistence Whaling, and Barter, the Jakarta Pos, Opinion, 18 April 2009

[173] New Rules for Indigenous Fishing, Queensland the Smart State, on 8 December 2008.

[174] Johanna Sutherland, *supra note* 67

[175] Fisheries Act (1994) (Qld), accessed 11 February 2011, reprinted as in force on 1 December 2010 available http://www.legislation.qld.gov.au/LEGISLTN/CURRENT/F/FisherA94.pdf

purposes, even in National Parks, but only in compliance with conservation plans for areas and wildlife. In addition, Part 7 of the act provides that departments may issue permits for taking wildlife and the International Union for the Conservation of Nature (IUCN) categories for protected species will be applied.[176] It is understood that the Great Barrier Reef Marine Protection Authority (GBRMPA) is considering enlisting the support of traditional custodians of coastal estates to aid the enforcement of its permit system for dugong hunting.[177] Accordingly, the traditional fishing is freely allowed in the GBRMPA in unrestricted zones and with a permit under Regulation where fishing is otherwise restricted. [178]

In the United States, on-reservation fishing and hunting rights can be subject to tribal law, and not to state regulation, except for conservation purposes. Whilst off-reservation fishing and hunting rights include access rights over private lands are based on reserved Treaty, and are exempted from licence fees, fishing gear limitation and catch limit, except necessary for conservation purposes.[179]

The Maori fishing rights were protected by successive provisions exempting the exercise of customary fishing rights from statutory legislation. The provisions guaranteed Maoris certain rights to continue their own use of fisheries according to Maori custom.[180] The provisions did not empower Maoris to act to protect the integrity of those fisheries from pollution, over-exploitation and resultant degradation by others. However, the treatment of fisheries serves as an example of the limits placed on the capacity of Maoris to fully express the cultural rights and responsibilities in having relationship between customary and natural resources.[181]

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[176] Once the Act is proclaimed in whole, any protected wildlife under the Act will be removed from the definition of "fish" for the purposes of the *Fisheries Act* and the *Fisheries Industry Organisation and Marketing Act 1982* (Qld) (Johanna Sutherland, *supra note 67*)

[177] Johanna Sutherland, *supra note* 67

[178] ibid

[179] ibid, p.103, for example, most tribes in Washington and Oregon has the right to fish at all their usual and customary fishing places, which includes fishing sites off reservation. However, a member from a Washington tribe cannot fish without a license in Virginia, because it is not part of their treaty rights, cited in Native American fishing rights, accessed 16 July 2010, available http://www.avvo.com/legal-answers/native-american-fishing-rights-63.html

[180] IUCN, *supra note* 32, p. 341

[181] ibid.

Additionally, the exemptions from conservation and management issues also appear in the case of practice of Indonesian traditional fishing rights in the AFZ under the MOU Box arrangement between Indonesia and Australia. MOU Box is an area of the eastern Indian Ocean subject to an MOU between Australia and Indonesia signed in 1974 and reviewed in 1989.[182] In this arrangement, Australia refrains from applying its fisheries laws to Indonesian traditional fishermen who have traditionally taken fish using traditional methods over decades of time. In this regard, the exercise of traditional fishing activities in the areas of MOU Box does not necessarily consider the aspect of conservation and management issues as long as it is conducted by traditional fishermen using traditional methods and vessels. As a conservation measure, Australia has declared Ashmore Reef as a national nature reserve in 1983. However, for example, in Ashmore Reef Nature Reserve, all fishing in the area is prohibited, except for a small area where fish for immediate consumption could be taken within the reserve boundaries. In other words, it was accepted to adopt a management plan for the reserve which might allow some subsistence fishing by the Indonesian traditional fishermen.[183] Furthermore, aside from these conservation measures there has been no management of traditional Indonesian fishing in the MOU Box.[184]

Apart from that, the Torres Strait Fisheries Act (1984) stipulated some exemptions to conservation and management measures for a person engaged in traditional fishing in terms of size limits, retention of live finfish, gear restrictions, as well as seasonal closure for Barramundi. In this regard, some exemptions are given to traditional fishing from the prohibitions:[185]

- of the taking, processing or carrying of finfish,[186] other than barramundi;
- of the taking, processing or carrying of barramundi in the area of the finfish fishery

[182] Commonwealth of Australia 2002, *Ashmore Reef National Nature Reserve and Cartier Island Marine Reserve (Commonwealth Waters) Management Plans* Environment Australia, Canberra, Glossary.

[183] Practical Guidelines for Implementing the 1974 MOU

[184]A strategic plan of research for the MOU Box traditional fisheries: 2010-2014, presented by Australia in bilateral meeting between Indonesia and Australia, on 8-9 April in Bali, Indonesia

[185] See Torres Strait Fisheries Act 1984 , Fisheries Management Notice No. 78, Torres Strait Finfish Fishery: Prohibitions Relating to the Taking, Processing and Carrying of Finfish (Gear, Size and Area Restrictions and Take and Carry Limit)

[186] Finfish means all fish of the *Superclass Pisces* other than mackerels *(Scomberomorus* spp.*)*, Shark mackerel *(Grammatorcynus bicarinatus)*, tunas (*Thunnus* spp.), skipjack tuna (*Katsuwonus pelamis*), fish of the Family *Bramidae* (pomfrets); and fish of the Families *Istiophoridae* and *Xiphiidae* (billfish). See *Torres Strait Fisheries Act 1984* , ibid

- to take, process or carry finfish in the area of the finfish fishery with the certain of requirements in minimum length in millimetres.
- to take, process or carry some species of finfish in the area of the finfish fishery, namely potato cod (*Epinephelus tukula*), Queensland groper (*Epinephelus lanceolatus*), chinaman fish (*Symphorus nematophorus*), paddletail (*Lutjanus gibbus*), humphead Maori wrasse (*Cheilinus undulatus*), hammerhead shark (*Sphyrna lewini*), grey nurse shark (*Carcharias taurus*) and tiger shark (*Galeocerdo cuvier*)
- to retain, store or carry live finfish on a boat in the area of the finfish fishery
- in the area of the finfish fishery to take finfish, by a method other than line fishing methods, and a bait net
- of the taking of finfish by line fishing methods in that part of the finfish fishery west of Longitude 142°31'49"
- of the taking of barramundi in the area of the finfish fishery during the period commencing 1200 hours on 1 November in a year and ending 1200 hours on 1 February the following year.

In the Torres Strait Fisheries Act (1984), specifically in Torres Strait turtle fishery a person is exempt from the prohibition on the taking of turtle (gear restriction) in the course of traditional fishing. Besides that, a person is also exempt from the prohibition of taking or carrying of turtle on a commercial fishing boat in the course of traditional fishing from a boat operating under the conditions of a Traditional Inhabitant Boat (TIB) licence where the boat is no more than 6 metres in length.[187] In this regard, marine turtles and dugong are taken in accordance with traditional fishing rights provided for under the Treaty.[188]

In conclusion, the practices of traditional fishing rights either exercised by indigenous peoples within the same State or by nationals of one State in another State's territory have become State practices in some States and have been recognized by international community. Such traditional practices are recognized by some instruments, such as

[187] Torres Strait Fisheries Act 1984, Fisheries Management Notice no. 66, Torres Strait Turtle Fishery, Prohibition on the Taking of Turtle (Gear Restrictions), Art. 5.1, Art. 5.2, Art. 6.1 and Art. 6.2

[188] N. Bensley and J. Woodhams. Torres Strait Fisheries Overview, Chapter 14. Fishery Status.2008, accessed 20 Augustus 2010, available, http://www.daff.gov.au/__data/assets/pdf_file/0011/1396532/Chapter_14_TSF.pdf

conventions, bilateral agreements and domestic legislations. These instruments basically contain mechanisms for the recognition and protection of these rights. In addition, the LOSC does not provide provisions related to the recognition and protection of indigenous fishing rights. However, the provisions to recognise the traditional fishing rights apply only for the archipelagic States and do not apply for other States which are not archipelagic.

The section below provides relevant case studies related to State practice with respect to traditional fishing rights in terms of bilateral agreements, arrangements and treaty.

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# 3. Case Studies: Bilateral Agreements, Arrangements, Treaty

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

*Development of Maritime Zones Jurisdiction*

Under international law, the oceans were traditionally divided into two distinct jurisdictional regimes: the territorial sea and the high seas.[189] In territorial sea, a State has full sovereignty subject to the right of innocent passage for foreign fishing vessels. By contrast, access to the resources of the high seas was open to all, belonging to no one but capable of being reduced to possession by capture. The common property problem emerges when many fishermen from many States compete for the same resources, and no one would be responsible for management and conservation, which led to the depletion of fishery resources.

In 1958 and 1960, the UNCLOS I and II respectively established the breadth of the territorial sea and fishery limits.[190] It was followed by extending the territorial waters and fishing zones from 3 nm to 12 nm unilaterally by many countries in the following decade. Furthermore, it was continued by extending the maritime jurisdiction from 12 nm to 200 nm by the LOSC. There are two newly created regimes under the LOSC, namely archipelagic States and EEZs. The LOSC defined three categories in maritime zones of jurisdiction:[191]

- Zones under sovereignty of States, including internal waters, territorial sea and archipelagic waters;
- Zones under sovereign rights of States, including Exclusive Economic Zone and Continental Shelf as well as contiguous zone (buffer zone); and
- Zones not subject to sovereignty and sovereign rights of States consist of the high seas and the area (deep seabed, which is common heritage of mankind).

[189] Donald McRae and Gordon Munro. Coastal State's Rights Within the 200-Mile Exclusive Economic Zone, in P.A. Neher et. Al. (eds), Rights Based Fishing, by Kluwer Academic Publishers, pp 97-111, 1989

[190] UNCLOS 1 (1958), and UNCLOS II (1960) respectively, accessed 11 February 2011, available http://untreaty.un.org/cod/diplomaticconferences/lawofthesea-1958/lawofthesea-1958.html

[191] See LOSC Part II, Part I, Part V, Part VI, Part VII, and Part XI respectively

The LOSC does not provide any provision and regulation on resources, both living and non-living in zones under sovereignty, except for archipelagic waters which was regulated in the LOSC, Part IV. Prior to the establishment of EEZs and other concepts in the LOSC, most marine areas were open access and considered as common property resources whereas not subject to sovereignty and sovereign rights on one State. In other words, one State could exercise freedom of high sea to exploit marine and fisheries resources. However, this changed under the LOSC when former high seas areas open to access and exploitation by all States were made subject to the exclusive rights of coastal States.[192] Since then, the former international waters have come under the jurisdiction of coastal States fishing rights are held by those EEZs.[193] The categories in maritime zones of jurisdiction are described in Figure 1 below.

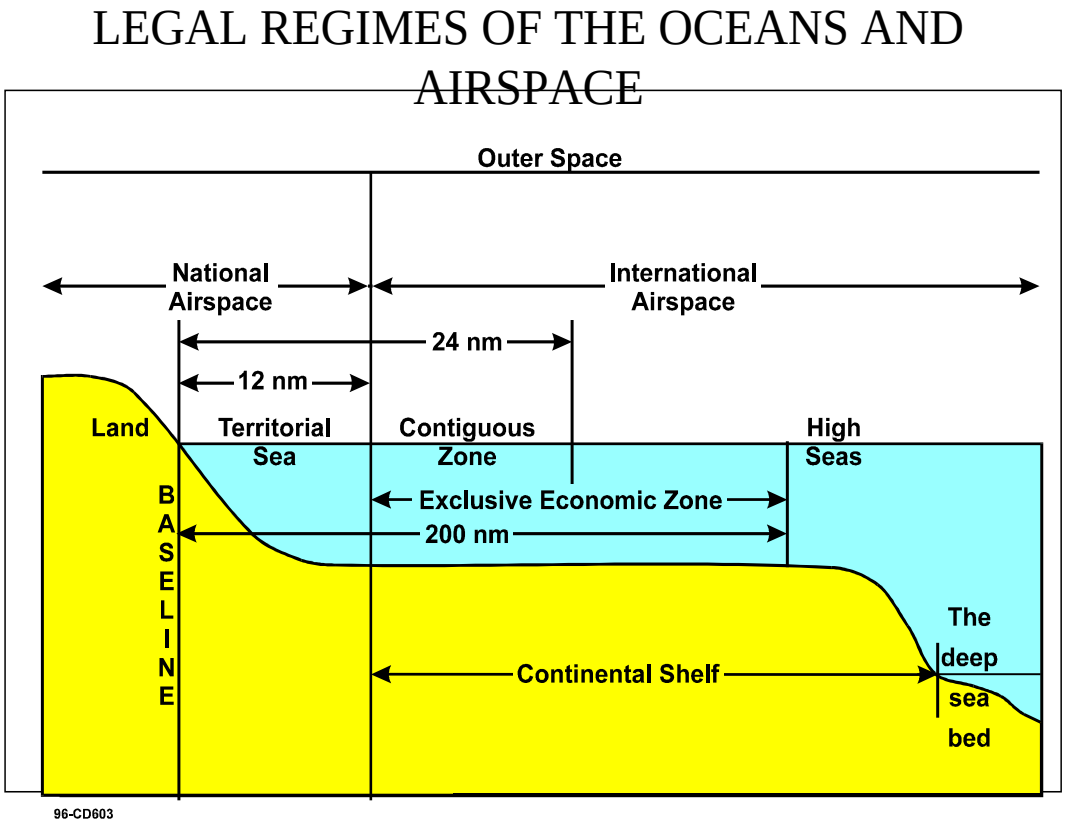


Figure 1. Maritime Zones of Jurisdiction
(Source: ANCHORS, Wollongong University)

[192] Marion Markowski, *supra note* 33, p. 59

[193] D.J.Atttard. The Exclusive Economic Zone in International Law, Clarendon Press, Oxford, 1987

Three different approaches appear in the attempt by coastal States to gain control of fisheries off their coasts.[194]

> The first was one of extension of jurisdiction beyond the traditional territorial sea and the exclusion of foreign fishing from that area. A second approach to the legal regime for the management and control of offshore fishery resources was proposed by Canada at UNCLOS III and supported by the United States, namely the species approach or was called the "zonal'' approach. The species approach did not involve the extension of sovereignty over the area of extended fisheries jurisdiction. The third approach, which emerged in judgment of the *International Court of Justice* in the *Fisheries Jurisdiction Case,* also involved the concept of preferential rights. In this regard, the coastal State had to take account of competing historic rights of other States, including distant water States that had fished in the area.[195]

The clear need to protect marine living and non living resources from over-exploitation has led countries to expand their zone of economic control of the sea off their coast.[196] The EEZ regime contains mechanisms for accommodating to some extent the interests as well as rights and obligation of other States adversely affected by the establishment of the 200 nm of EEZ. In other words, the LOSC attempts to balance the fisheries interests of the coastal State and foreign States in the EEZ.

During negotiations on the delimitation of the EEZ (or fishery zone), States may take into consideration the existence of fish stocks and traditional fishing rights or practices in the areas through which the dividing line passes.[197] The EEZ regime concerns all natural resources, including living and non-living resources, and other activities relating to the utilization and conservation of the resources. The new EEZ regime established through or codified in the LOSC indicated that nationals from third States can no longer practice traditional fishing within the EEZ of coastal States.[198] The EEZ was among the major

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[194] ibid.

[195] ibid.

[196] Andon Blake, Gary A. Campbell, Conflict over flying fish: The dispute between Trinidad and Tobago and Barbados Marine Policy 31 (2007) 327–335. Received 28 July 2006; accepted 14 September 2006

[197] DOALOS, *supra note* 109, p. 81

[198] Quality means that the traditional fishing activities are no longer a "right" enjoyed by a third State but merely one of the factors to be considered by a coastal State when deciding whether to grant a third State access to its EEZ. Quantity refers to that the third States may only take what was specified in bilateral agreements or an appropriate quota from the surplus of the TAC of the coastal State (Huan-Sheng Tseng, Ching-Hsiewn Ou. *supra note* 107, p. 277)

developments in the Law of The Sea emerging from UNCLOS III.[199] In addition, the greatest beneficiaries of the LOSC and its EEZ regime were probably the archipelagic States and States with long coastlines, because they were granted more extensive EEZs.[200] The adoption of EEZs under LOSC has meant that 37,745,000 square miles of water are now incorporated into the EEZs of coastal States.[201] The areas of EEZ are equivalent to 36% of the world's ocean, possessing over 90% of global yield,[202] while the 63% of the ocean remains high seas with a productivity of 10% of the world food resources. The EEZ regime placed 90% of the world's fisheries under national jurisdiction and led to dramatic changes in the pattern of fishery exploitation and the ownership of fishing vessels.[203]

In addition, the exercise of the EEZ rights depends on express proclamation. If a State does not claim an EEZ, the area adjacent to the territorial sea still remains high seas.[204] On the contrary, if a State has declared an EEZ, the shelf's superjacent waters are not longer part of the high seas but form part of the EEZ.[205] However based on the Articles 55 and 56 of the LOSC, it seems to suggest that the EEZ does not depend on express proclamation and there is no reason for the LOSC to place an obligation upon the coastal State to establish an EEZ, if the State does not wish to have such a zone.[206]

It is different in the case of the continental shelf. The LOSC expressly provides that the coastal State's rights in the continental shelf do not depend on occupation or any express proclamation.[207] Furthermore, the LOSC, Part V on the EEZ does not apply to sedentary species as defined in Article 77 (4), because the sovereign rights of the continental shelf

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[199] S.P.Jagota, Maritime Boundary, Publication on Ocean Development, Vol. 9, General Editor: Shigeru Oda, Martinus Nijhoff Publihers, 1985, p. 35

[200] Huan-Sheng Tseng, Ching-Hsiewn Ou *supra note* 107, p 274

[201] ibid, p. 270

[202] ibid

[203] Stuart M.Kaye. International Fisheries Management. International Environmental Law and Policy Series. Published by Kluwer Law International. 2001, p 2

[204] D.J. Attard *supra note* 193, p. 141

[205] ibid, p. 141

[206] M.Dahmani *supra note* 225, p. 35

[207] LOSC, Art. 77 (3)

flow from its sovereignty over the land.[208] Hence, the sedentary species on the continental shelf are regulated and enforce through domestic fisheries legislation.

Under the LOSC, a coastal State has sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, including the rights to utilize marine living resources in the EEZ.[209] In this regard, one State could no longer conduct any fishing activities within the EEZ of another State without its permission, and when permission is given, one State must comply with the fishing regulations set by the other State. However, the rights given by the LOSC come with some general responsibilities for coastal States, including the duty:[210]

- To determine the allowable catch of the living resources in its EEZ;
- To ensure that the maintenance of the living resources in its EEZ is not endangered by over-exploitation through proper conservation and management measures;
- To design measure to maintain or restore populations of harvested species at sustainable levels, as qualified by relevant environmental and economic factors, including the economic needs of coastal fishing communities and the special requirements of developing States. It needs to maintain or restore populations of such species above levels at which their reproduction may become seriously threatened;
- To promote the objective of optimum utilization of the living resources in the EEZ; and
- To determine its capacity to harvest the living resources in the EEZ, and if the coastal States does not have capacity to harvest the entire allowable catch, it shall "give other States access to the surplus of the allowable catch'' through agreements or other arrangements, laws, regulations and under reasonable conditions.

In general, there are three broad groups of States which are primarily interested in the utilization of living resources.[211] First, are the coastal States, which have preferential

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[208] M. Dahmani *supra note* 225, p 35-36. See also LOSC-Art. 77 (3): The rights of the coastal State over the continental shelf do not depend on occupation, effective or notional, or on any express proclamation

[209] LOSC, Part V Article 56, 61 and 62 respectively

[210] See LOSC, Article 61 (1), 61 (2), 61 (3), 61 (4), 62 (1) and 62 (2) respectively. See also J. Ashley Roach and Robert W. Smith, United States Responses to Excessive Maritime Claims, 2nd ed, Publications on Ocean Development Vol. 27, 1996, published by Kluwer Law International, *supra note*, p. 586

[211] D.J.Attard *supra note* 204, p. 157

fishing rights and the right to limit the allowable catch for conservation purposes. Second, are the distant fishing States, which have historic fishing rights based on the freedom of the sea. Third, the Land-Locked States (LLS) and Geographically Disadvantaged States (GDS), demanding their fair share of the ocean's fisheries resources on the basis of the common heritage of mankind concept. In dealing with this utilization, every coastal States shall allow other States, especially the LLS and the GDS to have access to the surplus of its living resources in the EEZ.[212] The mandatory obligation of the coastal States to give the landlocked States share access to the surplus of the allowable catch naturally would be subject to mutual determination by both the landlocked and the coastal States concerned.[213]

The LOSC allows coastal States a wide discretion in giving other States access to their EEZs.[214] When it is alleged that a coastal State has arbitrarily refused to determine, at the request of another State, the allowable catch and its capacity to harvest living resources with respect to stocks which that other State is interested in fishing, the dispute is subject to conciliation.[215] In order to give surplus, the coastal States would have to determine the maximum allowable catch of the resources, its domestic harvesting capacity and the surplus catch based on scientific evidence, although it is not utilized by the coastal States itself.[216] The objective of giving access of the surplus catch within EEZ to foreign States is to optimize the utilization of the resource in the zone. This could be done by establishing the conditions, regulations and bilateral agreements or arrangements between the States concerned. In addition, the LOSC also stipulates that the utilization of living resource in the EEZ is not endangered by over-exploitation and takes into consideration fishing pattern and management measures for sustainable levels as well as economic needs of coastal fishing communities.[217]

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[212] LOSC, Art. 69 and 70 respectively

[213] Tariq Hassan, Third Law of the Sea Conference Fishing Rights of Landlocked States, Lawyer of the Americas, Vol. 8, No. 3 (Oct. 1976), pp. 686-742, published by Joe Christensen, Inc.p. 709-710

[214] Marion Markowski, *supra note* 33, p. 63

[215] LOSC, Art 297 (3) (b) (ii)

[216] Marion Markowski, *supra note* 33, p. 59 and p. 63

[217] LOSC, Art. 61 (2) and (3) respectively

Generally, there is no indication that the allowable catch is determined jointly by the parties in bilateral fishing agreements, yet a number of agreements provide for consultation and negotiations between the coastal States and foreign States before deciding the portion of allocated surplus.[218]Accordingly, the legislation or bilateral agreements provide that the foreign fishermen is not allowed to fish in the area close to the coast which is preserved for the local fishermen, and also in the certain areas of fishing ground to protect fishing resources and ecosystem. Article 62 (3) of the LOSC also stipulates that in giving access to other States to its EEZ, the coastal State shall take into account all relevant factors, such as the significance of the living resources of the area to the economy of the coastal State concerned and its other national interests, subject to the provisions of Articles 69 and 70 of the LOSC on LLS and GDS, as discussed above.[219] The coastal State shall also take into account the need to minimize economic dislocation in States whose nationals have habitually fished in the zone or which have made substantial efforts in research and identification of stocks. The rationale and explanation are given below:

> The effect of the development of the concept of the EEZ has been to push the modalities of phasing out and traditional fishing rights from the twelve-mile limit, which has become a totally exclusive zone, into the remaining 188 miles. There the notion that the coastal State must share the fishery resources with other countries having a sound interest has taken on a hard aspect with requirement of allocation.[220]

In addition, coastal States are free to determine the conservation measures, other terms and conditions of foreign fishing in its EEZ established in the laws and regulations of the coastal State which shall be consistent with the LOSC and established by agreement.[221] The regulations and conditions of the utilization of the resource in the EEZ are stipulated in Article 62 (4), including among other things, the determination of the species and quotas of catch, regulation of seasons and areas of fishing as well as the number and sizes of gear and fishing vessels, fixing the age and size of fish, providing catch and effort statistics and vessel position reports, and conducting and regulating specified fisheries research programmes.[222] In this case, nationals of other States must comply with the laws and

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[218] D.J. Attard *supra note* 204, p. 165

[219] LOSC, Articles 69 and 70 provide the rights of LLS and GDS to participate in the exploitation of coastal States' resources

[220] O'Connell 1982:538 cited in Campbell and Wilson, *supra note* 3, p. 59

[221] LOSC, Art. 62 (2)

[222] LOSC, Art. 62 (4) (b), (c), (d), (e) and (f) respectively

regulations of the coastal States, and coastal States shall give due notice of conservation and management laws and regulations. With regard to State practice, it was observed that almost all coastal States provide for foreign access to the fisheries in their EEZs, a number of which have expressly incorporated the surplus rule in their legislation and fishery agreements.[223] However, the accommodation of the fishing interests of LLS and GDS have not been achieved in practice.[224]

*Types of Agreement*

In order to ensure the continuity of fishing rights in the area of coastal State, one State should have the agreement with the State concerned. As a result of the extension of coastal States' fisheries jurisdiction, more than 100 bilateral fisheries agreements have been established by developed as well as developing States since 1975, consisting of three types:[225]

- The agreement provides for the phasing out of foreign fishing from waters within the jurisdiction of the coastal States. For example, the agreement between Mexico and USA in 1976 concerning shrimp and the agreement between Norway and Portugal in 1977;
- The agreement grants reciprocal fishing rights to fishing vessels of each party within the other's jurisdiction. For example, the agreement between UK and US in 1977 with respect to the Virgin Islands, and the agreement between Norway and the USSR in 1976, and between Canada and the USA in 1977; and
- The agreement grants fishing vessels of the other party the rights to operate within the State's own jurisdiction subject to certain terms and conditions. For example, the 1977 Fisheries Cooperation Agreement between Chile and the Spain, and the 1978 Agreement between New Zealand and Japan on Fisheries.

Since fisheries issues are by their nature diverse, complex and dynamic, matters dealing with living marine resources should be dealt with separately from agreements concerning maritime boundary delimitation. If the fisheries aspects are included in such agreements,

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[223] Kwiatkowska in Marion Markowski,*supra note* 33, p. 165

[224] Marion Markowski, *supra note* 33, p. 66

[225] M.Dahmani, The Fisheries Regime of the Exclusive Economic Zone, Publications on Ocean Development, Vol 11, Martinus Nijhoff Publishers, 1987, pp77-78, (188 p). General Editor: Shigeru Oda. See also Huan-Sheng Tseng, Ching-Hsiewn Ou. *supra note* 107, p 274.

these may give rise to reopening the agreement as a whole, including the part on delimitation. It is also possible to discuss these fisheries issues through meetings between the two States concerned. For political reasons, sometimes, States prefer address all issues, including exploration and exploitation of marine living resources in a single document and not to have a separate round of negotiations, such as in the Treaty between Trinidad and Tobago and Venezuela.[226]

In general, bilateral agreements do not specifically mention traditional fishing rights but contain clauses concerning fishing rights and various issues. This is the case with Indonesia, who has bilateral agreements pertaining to fishing rights which will be discussed in the next section. Similarly, maritime boundary agreements accommodate the historical/traditional fishing rights. However, foreign States who have habitually fished in the EEZ of coastal States are no longer treated as exercising traditional fishing rights.[227] So far, the bilateral agreements and treaties regarding the acknowledgment of the existence of traditional fishing rights having obligation under LOSC 1982 have been made between Indonesia and Malaysia, Indonesia and Papua New Guinea (PNG), as well as Solomon and PNG.. Meanwhile, bilateral arrangements and arrangements which do not have framework under the LOSC have been made by Australia for Indonesian traditional fishermen and aboriginal peoples in PNG.

The section below will specifically describe the agreements between Indonesia with other States as well as the national legislation of Indonesia in relation to fishing rights.

*Agreements between Indonesia with Other States Related to Fishing Rights*

Like other coastal States, Indonesia also has sovereignty over marine living resources within its archipelagic waters, limited only by its obligation to recognize traditional fishing rights of other States in the same waters. Some neighbouring States such as Japan, Singapore, Thailand, Philippines, and Malaysia have claimed that their fishermen had traditionally fished in the archipelagic waters of Indonesia before the extension of Indonesia's maritime jurisdiction under the LOSC.

[226] See DOALOS, *supra note* 109, p. 81

[227] Huan-Sheng Tseng, Ching-Hsiewn Ou *supra note* 107, p 275

Around 1957, Japan claimed that their fishermen had traditionally fished in far-deep waters of Indonesia, including in the Banda Sea area, especially for tuna fisheries.[228] In 1969, Singapore claimed traditional fishing rights within the Indonesian archipelago.[229] They claimed that its fishermen had traditionally fished in certain parts of the Indonesian archipelagic waters.[230] Similarly, Malaysia and the Philippines also asked for the recognition of traditional fishing rights in certain areas of Indonesian archipelagic waters. In addition, Thailand, considered a distant water fishing nation, still traditionally visited Indonesian archipelagic waters within the last several years.[231] Thailand, in supporting the Indonesian archipelagic State concept, was also asking for concessions in the form of a special arrangement and cooperation on fishing in Indonesian waters.[232]

In dealing with the recognition of fishing rights of other States, Indonesia entered into agreements or arrangements with other States to allow them to continue their fishing activities within specific areas of the Indonesian archipelagic waters. The nature of the agreements can be temporary or permanent, depending on the agreement. The agreements between Indonesia and foreign countries, include *inter alia* the interim arrangement with Japan, the arrangement with South Korea, the arrangement negotiated with Singapore and Thailand, the arrangement with Australia and the agreement with Malaysia.[233] Some of the agreements, arrangements or treaty may or may not be included within the concept of traditional fishing rights; whilst, some of them may or may not have obligations under the LOSC.

The interesting case is that concerning the Philippines, whereas the Philippines once have requested Indonesia to open the traditional fishing rights for Philippine fishermen in Indonesian territory. Indonesia and the Philippines had a bilateral agreement in 1976 in which one of the clauses containing the traditional fishing rights proposed by the

[228] Hasyim Djalal, *supra note* 170, p. 152

[229] Campbell and Wilson, *supra note* 3, p. 52

[230] See Hasyim Djalal, *supra note* 170, p. 161

[231] ibid, p. 163

[232] ibid

[233] ibid

Philippines had been denied by the Indonesian Government.[234] The request of Philippines was granted shortly after meeting of both two Presidents in Jakarta, 12 September 2001.[235] As a result of the Indonesian Government policies at that time, has placed a large-scale fishing of the Philippine fishermen to fish in the waters of the Indonesian's EEZ, particularly in waters of the north Sulawesi, which is not yet firmly agreed by the two States. In this regard, Indonesia was placed in the disadvantage position of the Philippines's proposal.[236] Many Indonesian fishermen on the northern border experienced 'famine' catches at sea. The modern fishing vessels used by the Philippines fishermen that could remove hundreds of tons of fish from the seas of Indonesia had an extremely adverse impact on local Indonesian fishermen.[237]

Recently, the issues of traditional fishing rights and a "corridor" between the two EEZ boundaries between Indonesia and Philippines have emerged in the latest bilateral meeting between the Republic of the Philippines and the Republic of Indonesia on Marine and Fisheries Cooperation.[238] As stated in the bilateral meeting between the Philippines and Indonesia (hereinafter Record of Discussions), "the Philippine proposed for traditional fishing rights for pump boat and for the establishment of the possible Philippine-Indonesia friendship Corridor at the northernmost part of the Sulu-Sulawesi Sea." In this regard, it was difficult to accept the Philippine's proposal for Indonesia. Indonesia defined those categorizing pump boats activities to be recognized as traditional fishing activities are not applicable under the LOSC and common practice.

Moreover, Indonesia argued that "such activities may only be characterized as traditional fishing activities by taking into account comprehensively the traditional fishermen, the traditional fishing equipments, traditional fishing catch and area."[239] With regard to the Philippine's request for a corridor, "Indonesian regulation does not define and regulate corridors in Indonesian waters other than or intended for communication and transportation

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[234] Warning World Ocean Conference (WOC), Meninjau Konsep Traditional Fishing Rights, 16 July 2008, Accessed 11 August 2010, available http://stevenpailah.blogspot.com/2008/07/warning-woccti-2009.html

[235] ibid

[236] ibid

[237] ibid

[238] Record of Discussions, 2 May 2008. The bilateral meeting was held on 1-2 May 2008 at the Dusit Thani Hotel, Makati City, Philippines

[239] ibid, para 17

purposes only, and not for any other activities."[240] Last but not least, Indonesia welcomed the Philippine's initiative to draft a new arrangement for governing their operation of traditional fishing boats and gears such as pump boats and small-scale manual or mechanical net boats in Indonesian waters.[241] In this regard, Indonesia further requested to postpone the operation of the Philippine's fishing boats until a new arrangement has been reached.[242]

Among the bilateral agreements or arrangements related to traditional fishing rights, the arrangement with Australia (MOU Box) and the agreement with Malaysia (Jakarta Treaty) are two examples of agreements which remain in force to this date. The MOU Box, which was followed by Practical Guidelines in 1989, allowed Indonesian traditional fishermen to continue fishing in areas within the Australian Exclusive Fishing Zone.[243] In this regard, the Australian Government has shown its willingness to consider the Indonesian traditional fishermen who have traditionally visited in its national jurisdiction through the MOU Box. The Indonesian and Australian officially agreed to have further consultation, if necessary to ensure the effective implementation of the MOU Box and other related arrangements.[244]

With regard to the recognition of Malaysian traditional fishermen in Indonesian archipelagic waters, Indonesia and Malaysia signed The Treaty on 25 February 1982, and the Record of Discussions was signed in Jakarta on 2 April 1982, which is part of the treaty in relation to its application and interpretation.[245] This treaty stipulates and regulates Malaysia's traditional rights and interests in the territorial sea and archipelagic waters as well as in the airspace above the territorial sea, archipelagic waters and the territory of the Republic of Indonesia lying between Indonesia and West Malaysia.

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[240] ibid, para 18

[241] ibid, para 20

[242] ibid, para 21

[243] MOU between Indonesia and Australia was signed on 7 November 1974, regarding the Operations of Indonesian Traditional Fishermen in Areas of the Australian Exclusive Fishing Zone and Continental Shelf, followed by Practical Guidelines in 1989. Since 1989, the MOU is also known as MOU Box, because the permitted area looks like Box

[244] MOU Box, para 6

[245] The Treaty between Indonesia and Malaysia (hereinafter Jakarta Treaty) was signed on 25 February 1982, related to the Legal Regime of Archipelagic State and the Rights of Malaysia in the Territorial Sea and Archipelagic Waters as well as in the Airspace above the Territorial Sea, Archipelagic Waters and The Territory of the Republic of Indonesia Lying between East and West Malaysia

Both the MOU Box and the Treaty as legal frameworks of the State practice in traditional fishing rights are discussed in more detail in the next section.

To sum up, when States extended their maritime jurisdiction, the people who have previously fished in the area were evicted from their traditional fishing ground. The States endeavour to recognize some form of the traditional fishing rights of other States by conducting bilateral agreements, arrangements or treaty for legal framework. Under the LOSC, the coastal States have obligation to give surplus of the allowable catch to other States in their EEZ if they do not have capacity to harvest it. On the other hand, other States also must comply with the regulations and legislations stipulated by the coastal States, particularly related to the utilization and conservation of the resources.

*Domestic Legislation of Indonesia*

In October 2005, in order to protect Indonesian local fishermen as well as the domestic fishing industry, the Indonesian Ministry of Marine Affairs and Fisheries (MMAF) refused to permit fishing by foreign fishermen in all areas of national waters, specifically large-scale or industrial fishing. In this regard, Indonesia has established the regulation, which among others, govern foreign fishing activities in the Indonesian EEZ.[246] The new Ministerial Decree issued on 8 February 2008 was formulated to optimize the fisheries resources of Indonesia, to regulate responsible fishing practices and to accelerate the development of Indonesian fishery.

Furthermore, the CFB Regulation stipulates that before any foreign individual or legal entity conducts business related to fisheries, it shall invest in a processing business with integrated capture fishery business scheme. It is done by establishing at least a domestic fish processing unit.[247] This regulation also requires a foreign company to cooperate with an Indonesian legal entity and must be located in Indonesia with an investment of at least 20% from domestic capital in order to develop the domestic fishing industry.[248] The regulation is affirmed by the Indonesian Fisheries Act Number 45/2009. The Act imposes that at least 70% of the total crew of all foreign fishing vessels operating in the Indonesian

[246] Through Ministerial Decree No. PER.05/MEN/2008 on Capture Fishery Business (hereinafter CFB Regulation) and the new Fisheries Act No 45/2009 on Fisheries

[247] CFB Regulation, Art 50

[248] LOSC, Articles 53 and 54

EEZ be Indonesian nationals.[249] In order to support policy management fish resources, this act also stipulates that the Minister of MMAF determines fishery management plans, potentials and allocation of fish resource and Total Allowable Catch (TAC).[250]

Unfortunately, until now the MMAF has not yet established the TAC, as well as the minimum sizes and weights of allowable catch of the living resources in the Indonesian EEZ, which are important instruments for developing and managing fisheries as mandated in Articles 61 and 62 of the LOSC 1982. One of the main reasons is the absence of sufficient scientific data and information on the state of Indonesian fish resources, especially in the EEZ.[251]

Furthermore, the Fisheries Act also stipulates that licensing of foreign fishing vessels operating in the Indonesian EEZ should be preceded by agreement, arrangement access or other arrangements between the State of Indonesia and the other State concerned. The agreements should also include a statement from the foreign fishing vessel to be responsible and comply with the fisheries agreement. These two regulations, both the CFB regulation and the Indonesian Fisheries Act are in accordance with the provisions of the LOSC 1982 concerning management, conservation and utilization of the living resources in the EEZ.[252]

In addition, the Decision of Director General of Processing and Marketing, MMAF No. 033/2008 stipulated that every foreign vessel is required to process their catch in Indonesia. This is to increase the value added of the product and to develop a domestic fishing industry. However, there is a list of exportable fish species under the Decision that is exempted from the onshore processing requirement after being reported and recorded at the designated fishing ports in Indonesia.

It is clear that the exercise of traditional fishing rights by adjacent neighbouring States in Indonesian archipelagic waters as well as fishing activities in the Indonesian EEZ would be recognized by bilateral agreements between the States concerned. To date, a bilateral

[249] Fisheries Act, Art 35 A

[250] Fisheries Act, Art 7

[251] Laode M. Syarif, Promotion and Management of Marine Fisheries in Indonesia in Winter, Gerd (Ed). 2009. Towards Sustainable Fisheries Law. A Comparative Analysis. IUCN Environmental Policy and Law Paper No. 74, Gland, Switzerland, p. 70

[252] LOSC, Art. 61 and 62

agreement relating to traditional fishing rights of neighbouring States has been concluded between Indonesia and Malaysia, through the Jakarta Treaty.[253] In this regard, the recognition of traditional fishing rights of neighbouring States immediately adjacent to the Indonesian archipelagic waters under the LOSC equally applies to Malaysian fishermen and definitely excludes fishermen from other States, such as Japan, Korea and other far-distant fishing nations.[254] A map of Indonesia archipelagic State with other neighbouring States is presented in Figure 2 below.


Figure 2 Indonesia with other neighbouring States
(Source: Bjorn Grotting, Maps of Indonesia)[255]

In order to analyze a number issues regarding State practice with respect to traditional fishing rights in other national jurisdictions, some relevant case studies are presented below.

[253] Jakarta Treaty *supra note* 245

[254] Hasyim Djalal, *supra note* 170, p. 163

[255] available from http://www.indonesiaphoto.com/maps/item/157-maps-of-indonesia, accessed on 7 June 2010

## 3. 2. Traditional Fishing Rights Based on LOSC

### 3.2.1 Indonesia and Malaysia

Legal Framework

When the archipelagic regime was established by the LOSC, the designated area which was previously high seas now come under the sovereignty or subject to sovereignty rights of coastal States. It means that no other State could sensibly expect to exercise the freedoms of the high seas without having permission.

Indonesia is the one of countries supporting the regime of archipelagic States, even before the 1982 LOSC. In dealing with Malaysia, it is notable that some parts of the archipelagic waters and the territory of the Republic of Indonesia lie between East and West Malaysia (lying between the Malaysian territories).[256] Indonesia realizes that in the spirit of the LOSC, being an archipelagic State has some rights and obligations. To fulfil with the obligation, Indonesia established an equitable solution to the impact and problems arising from the application of the legal regime of archipelagic States. In this regard Indonesia and Malaysia had conducted series of meetings and negotiations between 1974 and 1982. Firstly, through the 1974 MOU between Indonesia and Malaysia; while reaffirming its support, Malaysia made Indonesia recognize and protect its existing rights and other legitimate interests. The 1974 MOU involved two major issues:[257]

- Malaysia's conditional support of the Indonesian archipelagic concept; and
- A Malaysia's request for a special corridor of passage.

Secondly, the 1976 MOU concluded on 27 July 1976. Actually the LOSC, Article 47(6) is the formulation adopted in the 1976 MOU. Pending the conclusion of a bilateral treaty, Indonesia and Malaysia agreed on the following issues: [258]

- Recognition and support from Malaysia of the Indonesian archipelagic State regime;

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[256] Jakarta Treaty *supra note* 245. Full text available at United Nations for Ocean Affairs and Law of the Sea, The Law of the Sea: Practice of Archipelagic States, United Nations, New York, 1992, pp. 144-155: See also Hamzah, B.A. Indonesia's Archipelagic Regime. Marine Policy. Butterworth and Co (Publishers) Ltd. January 1984

[257] See the 1974 MOU between Indonesia and Malaysia. See also Hamzah, B.A. Indonesia's Archipelagic Regime. Marine Policy. Butterworth and Co (Publishers) Ltd. January 1984, p. 35

[258] ibid, p. 36

- Recognition from Indonesia to the right of access and communication through Indonesian territorial waters and archipelagic waters between East and West Malaysia by sea or air for civil or military purposes, including naval and aerial maneuvers, excluding third parties;
- The continuation of traditional fishing in existing areas of Indonesian waters before the application of the archipelagic regime;
- Protection of existing cables and pipelines between East and West Malaysia and the laying of new ones after due notice (emphasis added);
- Protection of other legitimate interests; and
- The conclusion of a bilateral treaty before the final adoption of an international convention.

Thirdly, a bilateral agreement, which was signed on 25 February 1982 in Jakarta, and entered into force on 25 May 1984. Another document, namely the Record of Discussion was also signed separately; and this Record shall apply in relation to the interpretation and application of the treaty. The content of the Jakarta Treaty is identical to the 1976 MOU. The only major difference lies in the fact that the treaty has stipulated in more detail what Malaysia can and cannot do in the Indonesian archipelagic waters, and in almost all areas treaty represents ideas in the LOSC.[259] The treaty seeks to cushion the anticipated consequence resulting from the application of the archipelagic regime on the Republic of Indonesia which would relatively affect the existing rights and other legitimate interests traditionally exercised in certain areas of Indonesian archipelagic waters by Malaysian traditional fishermen.

The treaty is in accordance with the application of Articles 47 (6) and 51 (1) of the LOSC and based on good neighbourly policy between the two States. The Jakarta Treaty goes, beyond the requirements of the LOSC in recognizing the previously existing rights of Malaysia in the Indonesian territorial waters and in the Indonesian air space above its territorial sea and the archipelagic waters.[260] In addition, the Jakarta Treaty is the only treaty of its kind which underscores the specific character of the provisions of the LOSC relating to the interests of immediately adjacent States in areas of archipelagic waters.[261] In

[259] ibid, p. 37-38

[260] Mohamed Munavvar, *supra note* 407, p. 161-162

[261] ibid

this regard, none of the other States which have claimed archipelagic waters have yet provided for the interests of immediately adjacent States in their national legislation, except for Indonesia, since this may not be an issue in the case of other archipelagic States.[262] The treaty has been ratified by the Government of the Republic of Indonesia by the enactment of Law No.1/1983 on 25 February 1983.[263]

*The Nature of Recognition*

The Treaty regulates among other things, the Malaysian recognition of the legal regime of the Indonesian archipelagic waters and Indonesian recognition to the existing rights and other legitimate interests of Malaysia in Indonesia's archipelago.[264] The nature of recognizing such rights and legitimate interests were also defined in the Treaty.[265] One of them was the traditional fishing rights of Malaysian traditional fishermen in the designated area, referred to as the "fishing area".[266] The designated fishing area shall not include maritime belts of 12 nm, measured from the low water mark, around Indonesian islands as confined in the agreed map on fishing area attached to the treaty (area lies between East and West Malaysia).[267] The further provision of traditional fishing was provided in Part V of Jakarta Treaty, consisting of general provisions and fisheries arrangements.[268] The provision stipulated that Indonesia shall allow Malaysia to continue the exercise of traditional fishing rights of Malaysian traditional fishermen in the fishing area.[269]

Under the Jakarta Treaty, a fishing area around Anambas islands is designated for Malaysian traditional fishermen, who depend on fishing for their main livelihood.[270] The

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[262] ibid

[263] See the Law No.1/1983 on *Ratification Treaty between the Republic of Indonesia and Malaysia Relating to the Legal Regime of Archipelagic State Law and the Rights of Malaysia in the Territorial Seas and Archipelagic Waters as well as in the Airspace above the Territorial Seas, Archipelagic Waters and the Territory of the Republic of Indonesia Lying Between East and West Malaysia*

[264] Jakarta Treaty, *supra note* 245, Art. 2

[265] ibid, Art.2 (2)

[266] ibid, Art.2 (2) e

[267] See Record of Discussion in Respect of the Jakarta Treaty *Relating to the Legal Regime of Archipelagic State Law and the Rights of Malaysia in the Territorial Seas and Archipelagic Waters as well as in the Airspace above the Territorial Seas, Archipelagic Waters and the Territory of the Republic of Indonesia Lying Between East and West Malaysia*, para. 7 about Fishing Area

[268] ibid, Art. 13 and 14 respectively

[269] ibid, Art. 13 (1) a

[270] Hamzah, B.A, *supra note* 257

treaty guarantees permits to Malaysian fishermen to fish by traditional methods in parts of Indonesia's archipelagic waters, east of the Anambas Islands, an area where Malaysian fishermen have fished for decades.[271] The area about 2,000 square miles and comprises a portion of the archipelagic waters east of Anambas, but excludes any waters within 12 nm of any island in the Anambas group.[272] The Anambas is a small archipelago of Indonesia, as a part of Riau Islands, located in the South China Sea between East and West Malaysia and Kalimantan. In practice, Malaysian fishermen from Chukai and Kemaman from Trengganu State on the east coast of the Malay Peninsular have been fishing in the area for decades. The map of the Anambas Islands and the Trengganu State are presented in the Figure 3 below.


Figure 3. Anambas Islands and Trengganu State[273]

However, the catch from the designated area in the Indonesian archipelagic waters seems to remain insignificant compared to the country's total catch since the mode of fishing allowed by the bilateral treaty is confined to traditional methods only. By way of background, 23 Malaysian fishing boats landed a total annual catch of 272 tonnes from the

[271] Robin Rolf Churchill, Alan Vaughan Lowe. The Law of the Sea. 2nd eds, Manchester University Press. 1988, p. 104

[272] Hamzah, B.A, *supra note* 257, p. 41. In fact, this is not included in the treaty but provided for in the Record of Discussion for fishing area where the traditional fishing rights of Malaysia can be exercised. This area is about 10,000 square miles within the Indonesian Exclusive Economic Zone, north of the Anambas Islands (Hamzah, B.A, *supra note* 257, p. 41)

[273] Available http://www.lib.utexas.edu/maps/middle_east_and_asia/malaysia_admin_1998.pdf, accessed 8 December 2010

area in 1978, compared with the total Malaysian annual catch of 614,223 tonnes in 1981.[274] Moreover, the Malaysia's total catch and the catch have recently declined in volume owing to the difficulty of obtaining licences from the Indonesian local authorities. Notwithstanding, such amount of catch forms a substantial means of livelihood for the local fishermen from Chukai and Kemaman. In addition, Malaysia was allowed to "exercise the right on innocent passage which shall not be hampered for Malaysian traditional fishing boat in the territorial sea and archipelagic waters of Republic of Indonesia lying between East and West Malaysia."[275]

The treaty stipulates that Malaysia shall take the necessary measures to ensure that the traditional fishing activities shall not hamper the existing fishing activities of the Indonesian fishermen in the fishing area as well as not disturb the exploration and exploitation of the mineral resources of the seabed conducted by or on behalf of the Government of Indonesia.[276] In order to conduct the traditional fishing rights of Malaysian fishermen, Indonesia and Malaysia shall enter into fisheries arrangements. The arrangements are dealing with the proper and rational exercise, the inadvertent transgression made by traditional fishing boats of Malaysia in the territorial sea and archipelagic waters of the Republic of Indonesia lying between East and West Malaysia, and the utilization of certain Indonesian islands for temporary shelter of Malaysian fishermen and traditional fishing boat in times of emergency.[277]

It is observed that Indonesia, as an archipelagic State has fulfilled its obligation to recognize the Malaysian traditional fishing rights in archipelagic waters of Indonesia as stipulated by the LOSC. Indonesia has conducted a series of meetings and bilateral agreements with Malaysia to ensure the continuity of such rights. However, since the Jakarta Treaty (1982), there have been no bilateral meetings between Indonesia and Malaysia to discuss the issues of traditional fishing rights. Hence, in order to ensure the effective implementation of traditional fishing rights, Indonesia and Malaysia should hold consultations from time to time as agreed in the Record of Discussion.

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[274] Hamzah, B.A, *supra note* 257, p. 41

[275] ibid, Art. 13 (1) b

[276] ibid, Art. 13 (2) a and b respectively

[277] ibid, Art. 14 (1) a, b, and c respectively

### 3.2.2 Indonesia and Papua New Guinea

*Legal Framework*

The protection of the traditional rights and customs of people living in proximity to the border constituted by the boundaries of Indonesia and Papua New Guinea (PNG) was made through a bilateral agreement. The agreement concerning administrative border arrangements as to the border between PNG and Indonesia was signed by the Australia,[278] at Port Moresby on 13 November 1973. The agreement was affirmed by further agreement concerning Maritime Boundaries between the Republic of Indonesia and PNG and Cooperation on Related Matters signed in Jakarta on 13 December 1980 and has been emanated by the Presidential Decree No. 21 in 1982. The agreement took into account the recent developments in the Law of the Sea regarding the regime of the continental shelf and EEZ. It settled permanently the limits of the areas in which the Indonesia and PNG shall respectively exercise sovereignty with respect to the exploration of the continental shelf and sovereign rights over the exploitation of its natural resources in the EEZ.

Both the agreement and the Presidential Decree No. 21 in 1982 reflected the practice of the traditional fishing rights by the nationals of the two States. The agreement stipulated that "the right of nationals of either Party who have, customarily and by traditional methods, fished in the waters of the other Party is recognized and shall be respected.[279] In addition, the nature and extent of the rights shall be determined by agreement between the States concerned."[280] Similar provision was also included in the Presidential Decree No. 21 in 1982, Article 5 (1) and Article 5 (2). The Presidential Decree, Article 5 (2) stipulated that the nature and extent of the rights mentioned in Article 5 (1) shall be determined by agreement between the States concerned.

*The Nature of Recognition*

The recognition strictly applies for peoples who reside in a border area and undertake traditional and customary activities, such as social contacts and ceremonies including

[278] Papua New Guinea was not independent and still part of Australia in 1973

[279] Agreement between Indonesia and PNG, Art 5 (1)

[280] ibid, Art. 5 (2)

marriage, gardening and other land usage, collecting, hunting, fishing and other usage of waters, and traditional barter trade, which are recognized and continue to be respected.[281]

In addition, such border crossings based on tradition and custom shall be subject to special arrangements which are only temporary in character and not for the purpose of settlement.[282] In this regard, normal immigration and other requirements shall not apply. By contrast, persons who cross the border other than for traditional and customary activities as stipulated in the provisions shall be treated as illegal immigrants and the relevant laws and regulations shall apply. The agreement also stipulates that there shall be no different treatment and conditions apply to other nationals practicing the traditional activities in other States and to its own citizens. As Article 4 of the Agreement stipulates:

> The traditional rights enjoyed by the citizens of one country, who reside in its border area, in relation to land in the border area of the other country and for purposes such as fishing and other usage of the seas or waters in or in the vicinity of the border area of the other country shall be respected and the other country shall permit them to exercise those rights on the same conditions as apply to its own citizens. These rights shall be exercised by the persons concerned without settling permanently on that side of the border unless such persons obtain permission to enter the other country for residence in accordance with the immigration laws and procedures of that country.

To conclude, besides stipulating maritime boundaries, the bilateral agreements between Indonesia and PNG also contains the protection and recognition of traditional or customary fishing rights. This agreement containing mutual recognition of the rights was conducted before the LOSC, and only applies to traditional and indigenous peoples who live in cross boundary of the two States. Because both States are archipelagic States, this type of agreement also has legal framework under the LOSC.

### 3.2.3 Papua New Guinea and Solomon Islands (Pacific Islands Treaty)

*Legal Framework*

The importance of protecting the traditional rights of movement, fishing and other traditional activities of the traditional inhabitants of the special areas on either side of the

[281] ibid, Art 3

[282] ibid, Art 3

maritime boundary between Papua New Guinea (PNG) and the Solomon Islands was contained in the Pacific Islands Treaty Series. The Agreement between the Government of PNG and the Government of Solomon Islands concerning the Administration of the Special Area was signed in Port Moresby on 25 January 1989 and entered into force on 5 March 2004.

*The Nature of Recognition*

The recognition of the traditional customary rights was applied to the traditional inhabitants of PNG and the Solomon Islands in agreed special areas, in respect of which the maritime border forms part of their boundaries. The traditional customary rights were defined in Article 4 of the Treaty as follows:

> Where the traditional inhabitants of one Party enjoy traditional customary rights of access to and usage of land, seabed, sea, estuaries and coastal areas that are located within the limits of the Special Areas and are under the jurisdiction of the other Party and these rights are acknowledged by the traditional inhabitants living in or in proximity to those areas to be in accordance with local tradition, the other Party shall permit the continued exercise of those rights on conditions not less favorable than those applying to like rights of its own traditional inhabitants.

The definition of who are the traditional inhabitants was restricted to the indigenous persons who are citizens of PNG and Solomon Islands and who traditionally live in or come from the special areas of those two States.[283] The recognition was given to the peoples who maintain traditional customary associations with areas in relation to their subsistence or livelihood or social, cultural or religious activities. In addition, the traditional inhabitants were restricted to the indigenous persons conducting the traditional activities, including fishing. The traditional activities were defined as activities performed by traditional inhabitants of the special areas in accordance with local tradition, including fishing, and other usages of waters and customary border trade including non-commercial market trade.[284] Meanwhile, the traditional fishing is defined as fishing conducted by traditional inhabitants from both States using the traditional methods.[285] The traditional methods allowed was limited only to nets, bows, poles, spears, hands or by lines for their

[283] The defined area is stipulated by the Treaty-Art 2, with the Annex

[284] Pacific Island Treaty, Article 1 (c)

[285] ibid, Art. 1 (d)

own or their dependents consumption, or for use in the course of other traditional activities, of the living natural resources of the sea, seabed, estuaries and coastal tidal areas.[286]

For further implementation of the practice, both States shall consult and make the necessary arrangements for the mapping, by a mutually agreed method, of that part of the special areas on their respective sides of the border.[287] The agreement mentions that its provisions shall not be interpreted as sanctioning inhabitants of one Party into areas under the jurisdiction of the other Party not traditionally fished by them prior to the date of entry into force of the Agreement.[288] Thus, the provisions simply apply for the traditional inhabitants who had fished in the areas before the agreement established.

With regard to the protection and preservation of the living natural resources and the marine environment of the special areas, both States shall also coordinate the respective policies in accordance with international law.[289] In order to avoid the abuse of rights, the treaty also stipulates that both States shall provide traditional inhabitants with a Border Crossing Card, which contains his or her name, place and date of birth, citizenship, place of residence, and other necessary details.[290] Dealing with the implementation of the provisions of the agreement, both States designated representatives at the local level as well as established and maintained the Joint Advisory Committee. One of the functions of the national representatives is to consult closely with representatives of the traditional inhabitants of his country, particularly in relation to any problem which may arise in respect of the free movement, traditional activities and other traditional customary rights and convey their views to his Government.[291] The Joint Advisory Committee has tasks, among others to seek solutions to problems arising at the local level as well as to consider and make recommendation on any matters relevant to effective implementation of the Agreement.[292]

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[286] ibid

[287] ibid, Art. 2 (2)

[288] ibid, Art. 3 (2)

[289] ibid, Art. 5

[290] ibid, Art. 6

[291] ibid, Art. 8 (2)

[292] ibid, Art. 9 (2)

In conclusion, PNG and Solomon Islands have recognized mutual traditional or customary fishing rights, contained in Pacific Island Treaty (1989), concerning the Administration of the Special Area. This agreement is applied for traditional inhabitants of both States, and can also be considered to have obligation under the LOSC, because the two States are archipelagic.

### 3.3. Traditional Fishing Rights outside the Framework of the LOSC

#### 3.3.1 MOU Box between Indonesia and Australia

*Historical Perspectives*

The practice of Indonesian traditional fishermen in Australian waters has been going on for centuries and has historic and cultural significance as well as economic association with islands and reefs in Australian waters, mainly for fresh water, fishing, and shelter as well as to visit grave sites.

The historical evidence points to the regular use of Ashmore Reef by Indonesian fishermen beginning sometime between 1725 and 1750.[293] With the establishment of commercial ties with China in the 17th century, an international trade in preserved marine products began; Indonesian artisanal fishermen were regularly visiting northern Australia to harvest trepang by the end of 17th century.[294]

Australia shares a maritime border with Indonesia that extends for some 2,000 kilometres. Australia and Indonesia, as maritime nations, having extensive coastal areas and enormous marine resources, were both vigorous supporters of the LOSC.[295] Historically, Australia has carried out a series of maritime territorial expansions and claims over marine living resources in order to develop its fishing industry and preserve the resources. In 1958, Australia unilaterally claimed the living natural resources of the continental shelf through UNCLOS I, legislated by the Pearl Shell Act of 1952.[296] In this regard, UNCLOS I codified the right of an individual State to have exclusive jurisdiction over the living

[293] James J. Fox and Sevaly Sen, *supra note* 168, p. 12

[294] Campbell and Wilson, *supra note* 3, p. 4

[295] James J. Fox and Sevaly Sen, *supra note* 168 p. 8

[296] Australia became the first country to make a unilateral claim to its entire continental shelf. The claim was in support of the Pearl Fisheries Act 1952, which had as its primary intent to protect the Australian pearl shell from Japanese fishermen (Campbell and Wilson, *supra note* 3, p. 115)

natural resources of its continental shelf, and this gave international endorsement to Australia's unilateral claims in 1952.

In March 1967, the Australian Minister for Primary Industry announced the Government's intention to expand its maritime jurisdiction from 3 nm to 12 nm in order to give protection to the northern prawn fisheries industries.[297] He mentioned the possibility of a short phasing out period for fishermen who had been utilizing the area between 3 and 12 nm, but stated that:

> When in accordance with international law Australia declared a 12 nm Fishing Zone in 1968 under the Fisheries Act 1952 (Cth) the zone was reserved for the exclusive use of fishermen and vessels licensed under Australian law.[298]

Despite the declaration of a 12 nm fishing zone which was considered to be for the exclusive use of Australian vessels and fishermen licensed under Australian law, the Australian authorities decided to recognize the Indonesian long tradition of fishing in Australian waters, which was confined to a subsistence level and carried out only in the 12 nm fishing zone and territorial sea adjacent to Ashmore and Cartier Islands, Seringapatam Reef, Scot Reef, Browse Island and Adele Island.[299] This understanding was taken into account in administering the provisions of the Fisheries Act 1952, in the Continental Shelf Act 1968 and is embodied in the 1974 MOU Indonesia-Australia.[300] The Fisheries Act 1952 was amended in 1975 to extend its scope to include all Indonesian fishing, whether commercial or subsistence in the Australian Fishing Zone (AFZ).[301]

Furthermore, Australia claimed the non-living seabed resources in 1973, and continued the expansion of its fishing zone from 12 nm to 200 nm in 1979, pursuant to the LOSC. The series of claims to extended maritime jurisdictions made by Australia has some consequences. On one hand, the establishment of the AFZ (EEZ) from 12 nm to 200 nm gave Australia the third largest fishing zone in the world and the access to a large area of fisheries jurisdiction.[302] However, it did this at the cost of dispossessing the indigenous

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[297] Campbell and Wilson, *supra note* 3, p. 116

[298] DFAT, 1988 in Campbell and Wilson, *supra note* 3, p. 116

[299] Campbell and Wilson, *supra note* 3, p. 116

[300] ibid

[301] ibid

[302] Joanna Vince, Policy responses to IUU fishing in Northern Australian waters Ocean and Coastal Management 50 (2007) 683–698, p. 685

Indonesians of their fishing grounds, which at that time, was neither endorsed by international agreements nor was it part of a broad international trend.[303] The implications were not limited to Indonesian fishermen, but also for other foreign vessels, in what previously had been high seas.

In addition, the imposition of international maritime borders between Australia and Indonesia created a situation of conflict between various groups of Indonesian fishermen seeking access to traditional fishing grounds and the sovereign integrity of Australia's border regime.[304] This conflict caused many Indonesian fishing vessels to be apprehended for illegal incursions into Australian waters each year.[305]

The Australian extended maritime jurisdiction, has particularly affected the continuation of Indonesian traditional fishermen who have traditionally fished in the area within the AFZ. The creation of territorial limit brought within Australian jurisdiction the traditional fishing grounds which had been integral to the survival of the fishing communities of eastern Indonesia.[306] The Australian jurisdictional claims gradually encroached on the traditional fishing grounds of a number of distinct groups from Indonesia and turned Indonesian sailors of the open seas into trespassers and illegal fishermen.[307] For example, with regard to traditional shark fishermen that generally caught sharks outside the 12 nm zone (and sedentary species that are rarely taken), this form of fishing was legal until the Australian expansion of the AFZ to 200 nm. The expansion of the AFZ meant that some existing Indonesian shark fisheries operating in the southern half of the Timor and Arafura Seas became illegal.[308] A part from that, the Indonesian traditional fishermen also visited the more southerly Rowley Shoals, though the documentary evidence is scarce.[309] The only evidence comes from informants in Papela, Roti claiming that perahu from their island

[303] Campbell and Wilson, *supra note* 3, p. 184

[304] Natasha Stacey, Boats to Burn *supra note* 14, p. 1

[305] ibid

[306] Ruth Balint: The Last Frontier: Australia's Maritime Territories and the Policing of Indonesian Fishermen *New Talents 21C*, http://www.api-network.com/main/pdf/scholars/jas63_balint.pdf, accessed 23 February 2010

[307] ibid

[308] Campbell and Wilson, *supra note* 3, p. 182

[309] ibid, p. 27

have visited the shoals regularly for most of century.[310] However, although Indonesian fishermen probably visited the Rowley Shoals earlier than the Europeans, this traditional fishery is not included in the MOU between Indonesia and Australia.[311] Consequently, a number of Indonesian vessels have been reported and apprehended at Rowley Shoals in the past decade were accused of illegal fishing.[312]

*Legal Framework*

When seabed boundaries between Indonesia and Australia were agreed upon in the Arafura Sea and the eastern part of the Timor Sea in 1971, Australia was concerned about the activities of the Indonesian fishermen who regularly sailed beyond the agreed limits. To ensure the continuation of the Indonesian traditional fishermen in the AFZ and continental shelf on the one hand, and to protect the Australian interests on the other hand, Indonesia and Australia have entered into some bilateral agreement/arrangement. The practice of the traditional fishing rights for Indonesian fishermen was regulated under bilateral arrangements between Indonesia and Australia, namely in 1974, 1981, 1988, and 1989. The scope of all these arrangements was addressed to allow the Indonesian traditional fishermen to continue fishing in areas within 12 nm from the Australian baselines with some conditions. However, it is should be noted that these bilateral arrangements do not have obligation under the LOSC, but it is because of the political will of Australian officials.

In 1974, the MOU regarding the Operations of Indonesian Traditional Fishermen in Areas of the Australian Exclusive Fishing Zone (EFZ), [313] and Continental Shelf was signed. The MOU stipulated that the Indonesian traditional fishermen are allowed to fish in the zone and the exploration for and exploitation of the living natural resources of the Australian continental shelf, in each case adjacent to Ashmore Reef, Scott Reef, Seringapatam Reef, Cartier Islet and Browse Islet.

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[310] ibid

[311] ibid, p. 122. Similarly although the Indonesian fishermen (from Roti, Madura and Sulawesi) had visited (including the collecting of trochus) the Kimberley coast for decades, the fishermen had no right under Australian or international law to harvest sedentary species (ibid, p. 65). There is no available information explaining the reason. However, one of the reasons might be related to political issues

[312] ibid

[313] The EFZ is the zone of waters extending twelve miles seaward off the baseline from which the territorial sea of Australia is measured

It confirmed that although Australia had subsequently extended its fishing zone to 200 nm, the 1974 MOU allowed Indonesian fishermen access only to the 12 nm.[314] The 1974 MOU recognises limited traditional fishing rights and provides a framework for preserving area of marine living resources and regulating ongoing access for Indonesian traditional fishermen in an area now under Australian jurisdiction.

The 1974 MOU described the "traditional fishermen" referred to fishermen who have traditionally taken fish and sedentary organisms in Australian waters by methods, which have been tradition over decades of time. The 1974 MOU also stipulates that under Australia's obligations under international law to manage and conserve marine living resources in its AFZ and continental shelf, Australia permits the continuation of Indonesian operations subject to the following conditions:[315]

- Traditional fishermen;
- Landings by Indonesian traditional fishermen shall be confined to East Islet Latitude 120 15' South, Longitude 1230 07' East) and Middle Islet (Latitude 120 15' South, Longitude 1230 03' East) of Ashmore Reef for the purpose of obtaining supplies of fresh water and take shelter; and
- Traditional Indonesian fishing vessels are allowed to take shelter within the five specific areas stipulated in the MOU, but the persons shall not go ashore as allowed in the part b) above.

In accordance with Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) to which Indonesia and Australia were parties, the protected wildlife including turtles and clams, sea snakes, sea birds, and dugongs are prohibited to capture under the 1974 MOU. Accordingly, trochus, beche de mer, abalone, green snail, sponges and all molluscs will not be taken from the sea from high water marks to the edge of the continental shelf, except the seabed adjacent to Ashmore and Cartier Islands, Browse Islet and the Scott and Seringapatam Reef.[316]

In 1981, another MOU regarding the Implementation of a Provisional Fisheries Surveillance and Enforcement Arrangement was signed by Indonesia and Australia. The

[314] The 1974 MOU, Art. 1

[315] ibid, Art. 3

[316] ibid, Art. 4

1981 MOU was entered into to anticipate the extended fisheries jurisdiction respectively by Australia and Indonesia in 1979 and 1980 to 200 nm from their respective territorial sea baselines. The mutual expansions created an overlap in national jurisdiction in the Timor Sea where Indonesia's EEZ overlaps with Australia's continental shelf. In this case, Australian continental shelf extends under Indonesian's water column. The overlapping of the Indonesian EEZ with the continental shelf of Australia has created problems, especially relating to the access rights of fisheries resources in the area.

In order to find a solution to the issue of overlapping jurisdictions in the Timor cleft area, Indonesia and Australia conducted a series of bilateral agreements in 1971, 1972, 1984 and 1997.[317] It was agreed that all living organisms attached to the seabed (sedentary species) belong to Australia, while the fish in the water column (pelagic species) belong to Indonesia. The provisional arrangement did not have any effect on "traditional fishing" but prohibits gathering of sedentary species (trepang) on the seabed floor in the overlapping area by Indonesian fishers. However, the complexity of sea bed boundary appears because Australia can not enforce its sovereign rights without access to the Indonesian water column.

In 1988, the Arrangement for Administering the 1974 MOU was concluded. This arrangement reaffirmed that only Indonesian traditional fishermen in paddle-powered or wind-powered boats and using nets and lines were permitted to fish in the areas stipulated in the 1974 MOU. Meanwhile, vessels with engine and fishing gear powered by engine, such as compressors and hookah gear were not permitted in the area. In addition, taking swimming fish in the AFZ outside the 12 nm limit around the islands and reefs stipulated in the 1974 MOU was prohibited under the Fisheries Act (1952).[318] Whilst taking sedentary organisms from the Australian continental shelf outside the 12 nm limit was prohibited under the Continental Shelf (Living Natural Resources) Act (1968).[319] In 1983,

[317] MMAF, Finding Solutions of Cross-Border Fishermen Indonesia-Australia, News, 18 June 2009 accessed 7 September 2010, available http://www.dkp.go.id/dkp5en/index.php/ind/news/1440/finding-solutions-of-cross-border-fisherman-indonesia-australia

[318] 1988 Arrangement for Administering the 1974 MOU. In 1992 the greater part of the Fisheries Act 1952 and all the Continental Shelf (Living Natural Resources) Act 1968 were replaced by the Fisheries Management Act 1991 (Campbell and Wilson supra note 3, p. 116)

[319] ibid

Australia declared Ashmore Reef as a national nature reserve.[320] The Indonesian fishermen were prohibited to land and to fish in the area of Ashmore Reef National Nature Reserve, which extends over the three islands (West Island, Middle Island and East Island, and on Cartier Island). [321] In addition, Indonesian fishermen may land on West Island only for the purpose of obtaining supplies of water, take a rest and take shelter from storms.[322]

In 1989, the Agreed Minutes of the Meeting Between Officials of Indonesia and Australia on Fisheries were established. The Minutes of Meeting stated that Indonesia and Australia agreed to make arrangements for cooperation in developing alternative income projects in Eastern Indonesia for traditional fishermen traditionally engaged in fishing under the 1974 MOU. Accordingly, both States should take effective measures, including enforcement measures, to prevent Indonesian non-traditional fishing vessels[323] from fishing on the Australian side of the provisional fishing line without the authorisation of the Australian authorities. The minutes of meeting contained Practical Guidelines for implementing the 1974 MOU. The Guidelines reaffirmed the earlier 1974 MOU emphasis on traditional methods and vessels:

> Access to the MOU area 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 using motors or engines.[324]

The Agreed Minutes which is called 1989 MOU Box containing two new provisions. First, Indonesian traditional fishermen would not only be confined to 12 nm around each reef or isle as stipulated in the 1974 MOU but also be permitted to fish in an expanded area which was known as the "MOU Box".[325] Second, fishermen were banned to conduct all fishing activities, including the gathering of sedentary species, in Ashmore Reef National Nature

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[320] ibid. Whilst Cartier Island and surrounding waters to a distance of four nm was declared as a second reserve and fishing was completely prohibited in June 2000 (Commonwealth of Australia 2002 supra note 182, p. 71-72)

[321] ibid

[322] ibid

[323] Using motorised fishing vessels and powered fishing gear, such as compressors and hookah gear are categorized non-traditional fishing (Notes Supplementary to the third person Note on Indonesian Traditional Fishermen Visiting the Australian Fishing Zone)

[324] Practical Guidelines for Implementing the 1974 MOU, para 1

[325] Robert Cribb, and Michelle Ford. Indonesia beyond the Water's Edge: Managing an Archipelagic State, eds., 1st published, Institute of Southeast Asian Studies, Singapore. 2009, p. 201

Reserve, though they were permitted to land at Ashmore's West Islet to replenish their freshwater supplies.[326]

The Agreed Minutes imply that the Indonesian traditional fishermen operating by traditional methods and using traditional vessels are permitted to fish not only in the areas adjacent to the certain reefs and islands stipulated in the 1974 MOU, but also in the wider ''box'' area in the AFZ and over the continental shelf adjacent to the Australian mainland and offshore islands. Consequently, the establishment of the guidelines for implementing MOU Box, as opposed to the 12 nm limits around particular reefs, opened Australia to an increase in illegal fishing, because the MOU Box could be used as a strategic departure point for incursions to the South and West.[327] The maps showing the permitted areas of access for Indonesian fishermen in the AFZ under the 1974 and 1989 MOU are presented in Figures 4 and 5 below.


Figure 4. Map of MOU 1974
(Source: Cited in Natasha Stacey, Boats to Burn, *supra note* 304, p. 90)

[326] ibid, p. 201

[327] ibid, p. 218

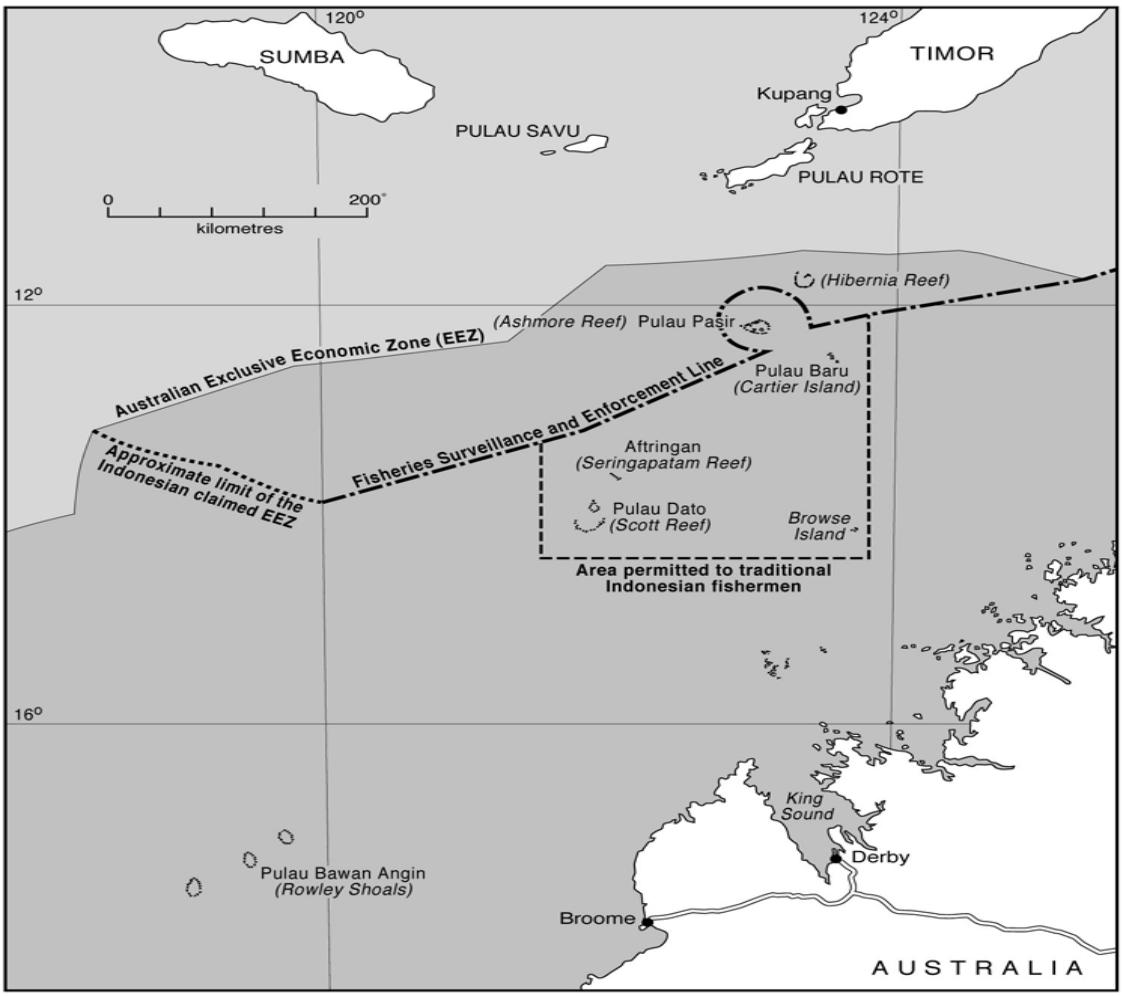


Figure 5. Map of Agreed Minutes 1989
(Source: James J. Fox and Sevaly Sen, *supra note* 168, p. 9)

*Group of Indonesian Traditional Fishermen*

The trips of Indonesian traditional fishermen to the MOU Box are made once to twice a year and most occur over the period March-June and September–December each year.[328] The frequency of fishing depends on weather conditions and prevailing winds rather than resource availability, stock densities, market conditions and fishing seasons. The group of fishermen who fish in northern Australian waters is not homogenous, but heterogonous, in terms of the origin of fishers and type of fisheries. There are at least five distinct fishing and sailing populations in eastern Indonesia: the Madurese, the Makassarese, the Bugis (or Buginese), the Bajau Laut or Sama-Bajau and the Butonese. Whilst the origin of fishermen

[328] James J. Fox and Sevaly Sen, *supra note* 168, p. 19

based on provincial distribution of the homeports according to the Ashmore Database over the period 1988-99 consists of:[329]

- 87.5 % of records relate to fishermen from Nusa Tenggara Timor, mainly Rote;
- 5.6 % of records relate to fishermen from East Java Madura/Raas (including Surabaya);
- 3 % of records relate to fishermen from Sulawesi Tenggara, mainly Wanci and Kaledupa;
- 0.5 % of records relate to fishermen from South Sulawesi, mainly Bonerate; and
- Approximately 3 % of records fail to list a home port, or list a port that cannot be clearly identified, or list a general area.

Recent voyaging of Indonesian fishing consists of five distinct fisheries: [330]

- A relatively high technology industrial open water fishery (includes the industrial shark fishery);
- A medium technology open water fishery (the Artisanal Shark Fishery);
- A medium technology sedentary species fishery (the South-East Sulawesi Trochus Fishery);
- A low technology open water fishery (the Traditional Shark Fishery); and
- A low technology sedentary species fishery (the Rotinese Sedentary Species Fishery-including some *perahu* from Madura).

Fishing technology used by Indonesian fishermen ranges from simple hand-made gear (such as traps, hooks and lines, and spears), to more costly store-bought equipment such as nets and longlines. To enable fishing at greater depths for reef fish, lobster, trepang, and trochus, the fishermen dive with *hookah*, a relatively inexpensive form of breathing apparatus. Blast fishing, involving the use of dynamite on coral reefs, was fairly common in the past but the authorities have made it illegal and regular patrols of the marine park appear to have reduced the practice.[331] For some group of Indonesian fishermen, fishing activity reflect culture and customary norms of behaviour which is governed by *adat*

[329] ibid, p. 18

[330] Campbell and Wilson, *supra note* 3, p. 187

[331] Natasha Stacey, Boats to Burn, *supra note* 14, p. 38

(customs) passed down from one generation to another, following the ancestors' practices, for example, Bajo people. Bajo originates from the villages of Mola and Mantigola in the Tukang Besi Islands, Southeast Sulawesi, as well as Bajo from these communities who have recently migrated and settled in the village of Pepela on the island of Roti in East Nusa Tenggara.[332] For the Bajo, *adat* encompasses more than just customary law, but involving institutions and rituals that are connected with customary practices, as well as social norms, rules, and sanctions that apply to almost every aspect of life.[333] When Bajo talk about 'following the custom of our ancestors', they include all forms of behaviour associated with sailing and fishing.[334] In order to conduct fishing activities and to transport people and cargoes, Bajo use a range of types of watercraft. Some of the fishing vessels are dugout canoe (*sampan*) propelled by paddle, a simple sail, or sometimes with an outboard motor; small 5–10 tonne planked boats (soppe/*sope*); small planked wooden boats with engines, sail-powered and motorised *perahu* (*perahu lambo*, *perahu layer motor*) and larger motorised boats (*kapal layar motor*).[335] Some types of Indonesian traditional boat (perahu) are presented in the figures 6 and 7 below.

Figure 6. A type of *perahu Lambo*
(Source: Natasha Stacey, Boats to Burn, *supra note* 304)

[332] ibid, p. 1

[333] ibid, p. 36

[334] ibid, p. 36

[335] ibid, p. 38

Figure 7. A type of *perahu layar motor*.
(Source: Natasha Stacey, Boats to Burn, *supra note* 304)

In conclusion, when Australia declared the 12 nm and 200 nm fishing zone in 1968 and 1979 respectively, it had implications for all foreign fishing, including Indonesian traditional fishermen. In this regard, the Australian Government decided to recognize the long tradition of Indonesian traditional fishing through a series of bilateral arrangements, namely MOUs in 1974, 1981, 1988 and 1989. However, it is notable that under LOSC, Australia is not obliged to grant access to Indonesian fishers in its territorial sea as well as access to the harvest of sedentary species on the continental shelf, even though it is accepted that Indonesians have fished for a long time in the waters now the Australian territorial sea and EEZ. The MOU and other relevant bilateral arrangements indicate simply the gesture of friendship and political goodwill of Australia.

*Issues of the Implementation of the MOU Box*

Various policy and legislation, as well as number of international treaties which have been embodied in Commonwealth legislation, often driven by environmental concerns, affects the issues of Indonesian fishing in the AFZ, particularly the management of natural areas,

such as the Ashmore Reef and the Rowley Shoals.[336] The issue of traditional Indonesian fishing are included the aspects of biology of resources, ecology and environment on the one hand and the aspect of economic, social, culture on the other hand. The issues among others are:

- Sustainable harvest and competition for resources;
- The options of management measures in the area;
- Navigation safety reason, especially for the traditional fishermen without proper safety equipment; and
- A lack of alternative livelihoods.

The issues and challenges have been further complicated since the late 1980s by a series of waves of illegal fishing activity involving a number of opportunistic groups of people from Indonesia who generally do not demonstrate a history of fishing activity in the Timor and Arafura seas.[337] The insistence on traditional fishing officially and legally opened the MOU Box to a wide range of maritime populations in eastern Indonesia, many of whom have never been previously involved in fishing in Australia. In other words, the fishermen are not able to show that they have traditional fishing rights in the Australian waters.

In addition, over the years, since the MOU 1974 was signed, there is no management measures applied in the area of MOU Box, except for conservation reason. The establishment of Ashmore Reef National Nature Reserve and Cartier Island Marine Reserve on 16 August 1983 and on 21 June 2000 respectively, made these areas close from all type of activities, including fishing. One of the activities regulated in Ashmore Reef National Nature Reserve and Cartier Island Marine Reserve is traditional fishing. The areas regulated in the two Reserves consist of two category zones as presented in Table 1.

The closure of Ashmore Reef National Nature Reserve and Cartier Island from fishing made the Indonesian traditional fishermen shift in fishing target, from gathering sedentary

[336] Campbell and Wilson, *supra note* 3, pp. 118-119. For instance, The proclamation of the Ashmore Reef national Nature Reserve on 28 July 1983 under the National Parks and Wildlife Conservation Act 1975, a signatory to the Convention on the Continental Shelf (is regulated by the Fisheries Management Act 1991). as well as Convention on International Trade in Endangered Species (CITES) agreement (is regulated by the Wildlife Protection Act 1982

[337] James J. Fox and Sevaly Sen, *supra note* 168, p. 3

species in Ashmore Reef and Cartier Island to concentrate more on swimming fish, particularly sharks in an enlarged area of MOU Box or even outside the area of MOU Box.

The shift to shark fin fishing brought the change of fishing pattern and time duration from one or two months into two weeks to a month, and caused an increase in number of voyages.[338] As a result, the traditional fishermen, such as the Rotenese, the Bajau Laut, the Madurese and some Butonese, who have historically drawn upon the resources of the MOU Box, now find themselves involved in a complex and highly competitive commercial system.[339]

Table 1.The Traditional Activities regulated in the Reserve
(Source: cited in Commonwealth of Australia, Canberra. 2002)

| Activity | IUCN Category IA Zones<br>Cartier Island Marine Reserve and the majority of Ashmore Reef National Nature Reserve | IUCN Category II Zone<br>West Island Lagoon and part of West Island in Ashmore Reef National Nature Reserve |
|---|---|---|
| Traditional Fishing | • Access permitted to West, Middle and East Islands to visit grave sites. Protocols will be developed for these visits which are sensitive to cultural needs.<br>• Traditional fishing prohibited | • Traditional fishers allowed access for fresh water and shelter from storms.<br>• Access permitted to visit grave sites. Protocols which are sensitive to cultural needs will be developed for these visits.<br>• Traditional fishing prohibited, except for fishing (finfish only) for immediate consumption and one day's sailing |

In addition, the Papelans tend to join the "traditional shark fishermen'' and make it difficult to differentiate these two groups, between those doing traditional fishing rights and those engaged in illegal fishing. There is insufficient information on the status of northern Australian shark, yet these populations are still fished less than those in eastern Indonesia. However, current scientific evidence shows that low abundances and small sizes of sharks

[338] ibid, p. 33

[339] ibid, p. 56

on the shallow reef-edges and shoals indicate that current fishing efforts may be seriously depleting the shark population.[340]

Moreover, the issue of Indonesian traditional fishing does not only simply concern the MOU Box, but rather the area of sea between the two defined boundaries, namely Australia's seabed boundary and its fishing zone boundary. The problem is that most Indonesian traditional fishermen still do not have sufficient information that taking swimming fish in the column area is permitted, while taking sedentary species is prohibited.

*Motivation of the Indonesian Traditional Fishermen in the MOU Box*

In general, most Indonesian traditional fishermen conduct fishing activities in the area of MOU Box for a variety of reasons as following: [341]

- The ancestors and the elders of the fishermen in the eastern part of Indonesia had fished in the area for centuries before the extended maritime jurisdiction by Australia (historical, social and culture reason);
- The traditional fishermen have little access to land and high economic dependency over the marine resources in the area for maintaining their livelihood. Moreover, high prices and high demand for targeted species, such as reef fish, trepang, trochus and shark fin;
- The absence of alternative livelihood. The fishermen do not have any alternative jobs and other sources of income. The fisheries resources in some areas of Indonesia are no longer available which is underpinned by heavy fishing pressure and over-exploitation; and
- Some fishermen simply want to utilize the marine living resources in the Australian waters. Their mentality is that "if the resources are not utilized by Australians, then they think it is not wrong to fish them.''

In order to address the interest of the Indonesian traditional fishermen in the area of MOU Box, regulating access and management measures are needed to ensure the sustainability

[340] James J. Fox and Sevaly Sen, *supra note* 168, p. 55

[341] ibid., p. 47

for both resources and the fishing activity. The fishermen need awareness to comply with the regulation stipulated in the MOU Box as well as the Australian legislation.

*Management Measures and Approaches of Indonesian Traditional Fishermen*

Management approach does not only deal with the management of the resources but also the management of the people themselves. There is still no fishery management approach that is applied for the traditional Indonesian fishery in the AFZ. The only measures taken are for the environmental protection and conservation of certain species. In addition, the species of sea snakes, seabird, sea turtles, giant clam, dolphins and dugongs are protected species that are prohibited for capture under the MOU Box.

In order to identify and discuss the issues, problems and challenges, as well as to evaluate the measures taken and to determine further management measures, Indonesia and Australia have conducted regular bilateral meetings, discussions or working groups as presented in Appendix 2. Regular meetings are conducted to ensure the continuation of a sustainable fishery in the MOU Box, in terms of biological (stock and resources), ecosystem (environmental), economic and social considerations (traditional Indonesian fishermen).

Furthermore, the Practical Guidelines for implementing the 1974 MOU regulate conservation measures and establishes a management plan only for the Ashmore Reef National Reserve.[342] The Guidelines stipulated that "to cope with the depletion of certain stocks of fish and sedentary species in the Ashmore Reef area, the Australian Government had prohibited all fishing activities in the Ashmore Reef National Nature Reserve." In addition, a management plan for the Ashmore Reef National Reserve is expected to be adopted soon, which might allow some subsistence fishing by the Indonesian traditional fishermen. In this regard, Indonesia would be consulted on the draft plan of the Reserve Management by Australia.[343]

The Guidelines also mentioned that "because of the low level of stock, the taking of sedentary species particularly *Trochus nilotocus* in the Reserve would be prohibited at this

[342] Practical Guidelines, para 3

[343] ibid

stage to allow stocks to recover.''[344] Furthermore, "the possibility of renewed Indonesian traditional fishing of the species would be considered in future reviews of the management plan.''[345] However, the Guidelines did not mention the time frame work for the management plan. It stipulated that all fishing would be prohibited in the Reservation Area without determining the duration of the management plan and the criteria for stock recovery. The content of the future review of the management plan was also not clearly stated in the Guidelines.

In dealing with economic dependency of the fishery resource, an approach of management strategies which have been conducted is the provision of assistance and alternative sources of livelihood to the traditional Indonesian fishermen. The assistance must be multi-focused, must differentiate among the various fishers in eastern Indonesia and requires the joint cooperation of both Indonesian and Australian authorities.[346]

Moreover, in order to develop management measures in the area of MOU Box, Australia and Indonesia have agreed to work to implement a "MOU Box Roadmap". The Road Map is a new approach in management, acknowledging the importance of sustainable management of the MOU Box on the one hand and the interests of Indonesian traditional fishers on the other hand. The key components of the Road Map consist of, among others:[347]

- Research terms of reference and research program;
- Management measures and options;
- Socio-economic and alternative livelihood aspects;
- Training and capacity building needs; and
- Consultative processes with stakeholders and consultations with traditional fishers, taking into account their concerns including the use of technology for fishing practices.

[344] ibid

[345] ibid

[346] James J. Fox and Sevaly Sen, *supra note* 168, p. 56

[347] Agreed Outcomes And Actions, 6th Annual Meeting Of The Working Group on Marine Affairs and Fisheries,19-20 March 2009, Nusa Dua-Bali

Based on wide-ranging discussions, it was agreed that the objectives of the MOU Box Roadmap management are:[348]

- To maximize the long term social and economic benefits for Indonesian traditional fishers;
- To manage the fishery to maintain stocks in a productive state requiring, as necessary, the rebuilding of some stocks; and
- To maintain ecosystem services and protect and preserve the marine environment.

Accordingly, in 2009, a joint research into the sedentary fishery (mostly trepang and, trochus) at Scott Reef was conducted between Indonesia and Australia dealing with fisheries science (species, stock assessments, fishery dynamics and productivity), and socio-economic research (fisher origins, social dynamics, trip costs and fishing revenue).[349] Further research to evaluate the implementation of the management measures (scientific and socio-economic), alternative livelihoods, and capacity building is urgently necessary to better improve policy. In addition, the introduction of any management measure would need to be explained very carefully to traditional fishermen to avoid misunderstanding.

Since 1989, Australia applied conservation and management measures in the area of MOU Box to protect the ecosystem and biodiversity, followed by law enforcement. One of the measures taken was the establishment of the Ashmore Reef and Cartier Islands as marine reserves. This caused Indonesian traditional fishermen who habitually fished in those areas to lose some of their livelihood. However, it needs problem solving to provide alternative livelihood for the Indonesian traditional fishermen, both for the short and long term.

### 3.3.2 Australia And Papua New Guinea in The Torres Strait

The Torres Strait is located between Cape York Peninsula and the Southwest Coast of PNG which is inhabited mostly by the Papuan and the Torres Strait Islanders. The marine and fisheries sectors are the main important resources for the people living in the Torres Strait, not only for food but also for culture and traditional purposes. Prior to its independence in 1975, PNG was an Australian territory and all the waters in the Torres

[348] MOU Box Roadmap. Joint Workshop Australia – Indonesia, 8-9 April 2010 Bali, Indonesia

[349] ibid

Strait were subject to Australian jurisdiction.[350] When PNG attained its independence, the Torres Strait became a border area, and ascertaining which State would have jurisdiction in areas throughout the region became a great concern.[351] This research will primarily look into the recognition of the traditional fishing rights for the traditional inhabitants living in the Torres Strait.

The Papuan people share access to the marine resources of the Torres Strait and have maintained economic and culture relationship with the Torres Strait Islanders over centuries.[352] The rights of the Papuan and the Torres Strait Islanders to have access in the Torres Strait area protected in the Torres Strait Treaty, was signed between Australia and PNG in Sydney on 18 December 1978 and ratified in 1985.[353] The Torres Strait Treaty establishes sovereignty and maritime boundaries in the area between Australia and PNG including the Torres Strait, and other related matters, concerning conservation, management and sharing of fisheries resources the exploration and exploitation of seabed mineral resources. The Treaty recognizes the sovereignty and jurisdiction over some respectively islands of the Australia and PNG. On one hand Papua New Guinea recognises the sovereignty of Australia over the islands known as Anchor Cay, Aubusi Island, Black Rocks, Boigu Island, Bramble Cay, Dauan Island, Deliverance Island, East Cay, Kaumag Island, Kerr Islet, Moimi Island, Pearce Cay, Saibai Island, Turnagain Island and Turu Cay.[354] On the other hand, Australia recognises the sovereignty of Papua Guinea over the

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[350] Kaye, Stuart B, "Jurisdictional Patchwork: Law of the Sea and Native Title Issues in the Torres Strait" [2001] MelbJlIntLaw 15; (2001) 2(2) Melbourne Journal of International Law 381, available http://www.austlii.edu.au/au/journals/MelbJIL/2001/15.html accessed 22 August 2010

[351] Kaye, Stuart B, *supra note* 350

[352] Graeme Kelleher. Sustainable Development for Traditional Inhabitants of the Torres Strait Region, eds. David Lawrence and Tim Cansfield-Smith, Sustainable Development for Traditional Inhabitants of the Torres Strait Region. Workshop Series No. 16. Proceedings of the Torres Strait Baseline Study Conference, 19-23 November 1990, published by Great Barrier Reef Marine Park Authority (GBRMPA), September 1991, p. 16 (535 p)

[353] Treaty between Australia and the Independent State of Papua New Guinea Concerning Sovereignty and Maritime Boundaries in the Area Between the Two Countries, Including the Area Known as Torres Strait, and Related Matters (hereinafter Torres Strait Treaty), signed on 18 December 1978. Full text available at United Nations for Ocean Affairs and Law of the Sea, The Law of the Sea: Practice of Archipelagic States, United Nations, New York, 1992, pp. 178-219; See also Australian Government Publishing Service, The Torres Strait Treaty: Report and Appendixes, Canberra, 1979. See also Australian Treaty Series 1985 No 4, Department Of Foreign Affairs, Canberra , accessed 3 September 2010, available http://www.austlii.edu.au/au/other/dfat/treaties/1985/4.html

[354] ibid, Art. 2, para 1 (a)

islands known as Kawa Island, Mata Kawa Island and Kussa Island.[355] The Treaty describes two main boundaries:[356]

- Seabed Jurisdiction Line. In this line, Australia has rights to all things on or below the seabed south of this line and Papua New Guinea has the same rights north of the line.
- Fisheries Jurisdiction Line. In this line:
  - Australia has rights over swimming fish south of this line and Papua New Guinea has the same rights north of the line.
  - The two States have agreed under the Treaty to share these rights

The map showing the seabed jurisdiction line (shown by an unbroken line on the map) and the fisheries jurisdiction line (shown by a broken line on the map) is presented in the Figure 8 below.

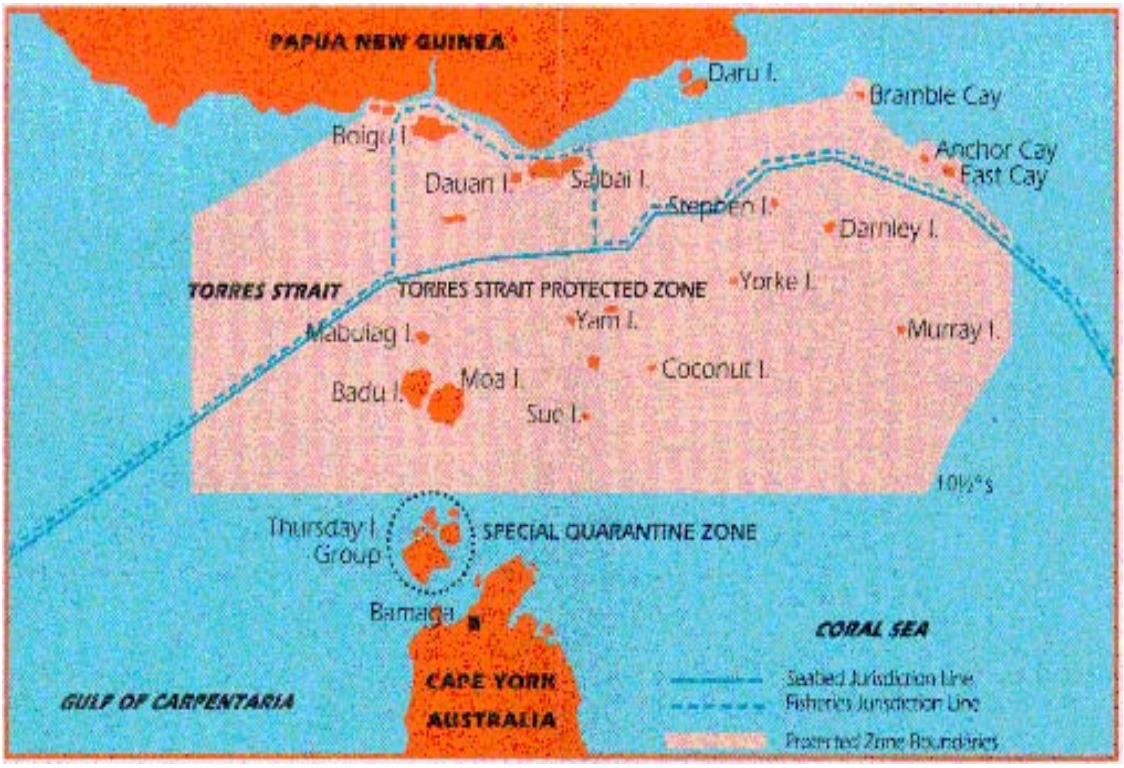


Figure 8. Main boundaries between Australia and PNG
(Source: Australian Government. Department of Foreign Affairs and Trade)[357]

[355] ibid, Art, 2, para 3 (a)

[356] Torres Strait Treaty in Brief. Australian Government. Department of Foreign Affairs and Trade, accessed 3 September 2010, available http://www.dfat.gov.au/geo/torres_strait/index.html

[357] Accessed 3 October 2010, available http://www.dfat.gov.au/geo/torres_strait/map.html

Generally, the Treaty recognizes two relevant things. Firstly, is the importance of protecting the traditional way of life and livelihood of the traditional inhabitants who live in the coastal areas of PNG in and adjacent to the Torres Strait. Secondly, is the importance of protecting the marine environment and ensuring freedom of navigation and over flight for each other's vessels and aircraft in the Torres Strait area.

The Treaty stipulates that the traditional activities, including traditional fishing conducted by the traditional inhabitants are intended for consumption and for other traditional activities in accordance with local tradition, and in relation to activities of a commercial nature, "traditional'' shall be interpreted liberally and in the light of prevailing customs.[358] The Treaty explicitly defines the "traditional inhabitants", for both Australia and PNG as persons who maintain traditional customary associations with areas or features in or in the vicinity of the Protected Zone in relation to their subsistence or livelihood or social, cultural or religious activities.[359]

In relation to Australia, the traditional inhabitants are defined by the treaty as persons of the Torres Strait Islanders who live in the Protected Zone or the adjacent coastal area of Australia, and citizens of Australia.[360] Whilst, in relation to Papua New Guinea, the traditional inhabitants are the persons who live in the Protected Zone or the adjacent coastal area of PNG and citizens of PNG.[361] The Treaty stipulates that the "adjacent coastal area" is the coastal area of the Australian mainland, and the Australian islands, near the Protected Zone; or the coastal area of the PNG mainland, and the PNG islands, near the Protected Zone.[362]

The principal purpose of the Protected Zone is to acknowledge and protect the traditional way of life and livelihood of the traditional inhabitants including their traditional fishing and free movement.[363] It was designed to protect and preserve the marine environment and indigenous fauna and flora in and in the vicinity of the Protected Zone on the other

[358] Torres Strait Treaty *supra note* 353, Art. 1 (k) and k (l)

[359] ibid, Art. 1 (m)

[360] ibid

[361] ibid

[362] ibid, Art. 1 (a)

[363] ibid, Art 10 (3)

hand.[364] The Protected Zone includes all the land, sea, airspace, seabed and subsoil within the area bounded by the agreed jurisdiction line.[365] The fisheries currently managed within the Protected Zone include prawn, tropical rock lobster, Spanish mackerel, reef line, sea cucumber, trochus, pearl shell, crab, barramundi and traditional fishing (including turtle and dugong), and five of the fisheries, namely prawn, tropical rock lobster, pearl shell, Spanish mackerel, and dugong and turtle are jointly managed by PNG and Australia.[366]

Furthermore, there are also four main commercial fisheries, namely: crayfish, prawn, pearl shell and pearl shell cultivation and mackerel are regulated in the Torres Strait,[367] particularly in the Protected Zone. Both those traditional fishing and commercial fisheries in the Australian area of the Protected Zone are managed by the Torres Strait Protected Zone Joint Authority (PZJA), established under the Torres Strait Fisheries Act (1984). The permission of free movement and the traditional activities shall not be interpreted as sanctioning the expansion of traditional fishing by the traditional inhabitants of one State into areas outside the Protected Zone under the jurisdiction of the other State not traditionally fished by them prior to the date of entry into force of this Treaty.[368] In other words, the provision is granted for the traditional inhabitant who has traditionally exercised in the areas of Protected Zone before the Treaty was established.

In addition, the States are also required to allow the traditional customary rights to have access in the Protected Zone, on the similar conditions of rights applied to its own traditional inhabitants:

> Where the traditional inhabitants of one Party enjoy traditional customary rights of access to and usage of areas of land, seabed, seas, estuaries and coastal tidal areas that are in or in the vicinity of the Protected Zone and that are under the jurisdiction of the other Party, and these rights are acknowledge by the traditional inhabitants living in or in proximity to those areas to be in accordance with local tradition, the other Party shall permit the continued exercise of those rights on conditions not less favourable than those applying to like rights of its own traditional inhabitants.[369]

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[364] ibid, Art 10 (4)

[365] ibid, Art 10 (1)

[366] N Bensley and J Woodhams, *supra note* 188, p. 213

[367] The Torres Strait Treaty in Report and Appendixes, Australian Government Publishing Service, Canberra, 1979, p. 25

[368] Torres Strait Treaty *supra note* 353, Art 11

[369] ibid, Art 12

In applying the traditional fishing practices in the Protected Zone, the treaty contained provisions related to the duties of every State to protect the marine environment as well as fauna and flora.[370]

Torres Strait Islanders and PNG nationals living along the adjacent coast fish not only for subsistence, but also to sell products commercially.[371] Since they are not restricted to traditional fishing methods, there is little doubt that commercial fishing will become increasingly important to them as they need cash to maintain Westernized lifestyles.[372] The Torres Strait Treaty Act (1984) which implements the Torres Strait Treaty (1978) recognized the tendency of commercial fishing carried out by traditional inhabitants.[373] The treaty provides that every State shall designate a representative and jointly establish the Torres Strait Join Advisory Council to provide suggestions and recommendations for any problem that arises.

Under the Torres Strait Treaty, Australia and PNG are required to cooperate in the conservation, management and optimum utilization of the Protected Zone Commercial Fisheries (PZCF).[374] If such commercial exploitation endangers the marine environment or species, the measures are taken to ensure that the exploitation does not adversely affect them. Moreover, the Treaty also provides for the sharing of the catch of the PZCF which is the proportion of allowable catch stipulated in Article 23 (4). In the negotiation and implementation of the conservation and management arrangements, the endorsement of licence should be consulted between two States. In addition, the issuing licence shall have regard to the desirability of promoting economic development in the Torres Strait area and employment opportunities for the traditional inhabitants.[375] The Treaty provisions highlight three categories of living resources to be considered for purposes of fisheries jurisdiction, sharing provisions, conservation, management and protection:[376]

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[370] ibid, Art. 13 and 14

[371] Campbell and Wilson, *supra note* 3 p. 81

[372] ibid, p. 81

[373] ibid, p. 81

[374] ibid,

[375] ibid, Art 26 (1), and Art 26 (3)

[376] The Torres Strait Treaty, Report and Appendixes, Australian Government Publishing Service, Canberra, 1979, p. 12

- Swimming fisheries resources (all living marine resources with the exception of sedentary organisms within the meaning of the 1958 Convention on the Continental Shelf);
- Seabed fisheries (most sedentary organisms); and
- Other living resources of the seabed (coral, seaweed, etc, and outside the territorial seas of Australian uninhabited islands north of the seabed line (except Turnagin), pearl shell).

Furthermore, in the recent development favouring indigenous communities was the decision of Justice Finn of the Federal Court of Australia to formally recognize the native title rights of Torres Strait Islanders in the Torres Strait Regional Sea Claim.[377] Importantly, Justice Finn recognized the right of Torres Strait Islanders to use marine resources for commercial purposes, which not only relates to their traditional rights but also as integral to the economic development of indigenous communities.[378] This recognition of commercial fishing rights affirms that the aboriginal peoples in Australia are able to trade products for the purpose of making a profit. The decision making is the most recent in a long line of successful determinations of native title in the Torres Strait.[379]

In conclusion, the Torres Strait Treaty only applies for Torres Strait Islanders and for coastal people from PNG who live in and keep the traditional lifestyle activities of the region. The Torres Strait Treaty allows for the continuation of traditional or customary fishing rights between the peoples of the Torres Strait and coastal villages of the Western Province of PNG.

[377] A final determination is to be made on 30 July 2010, See Successful Torres Strait regional sea claim a cause for celebration! Available http://www.hreoc.gov.au/about/media/media_releases/2010/65_10.html accessed on 19 August 2010

[378] ibid

[379] ibid

# 4. Analysis and Discussion

## 4.1. Status and Development of Traditional Fishing Rights

Fishing rights are commonly understood as property rights, namely the rights to fish the marine fisheries resources.[380] All fisheries, traditional or modern, operate under some form of use right manifested in the right of access to fishery resources in a particular area under certain conditions.[381] First, the rights could be general, as the rights to harvest high seas resources codified in the LOSC. Second, the rights could be very specific, as the rights to harvest a certain amount of fish of a particular species in a designated area in a given period of time, which are usually called a "property right" and implemented only in EEZs.[382] The rights may have an historical foundation (historical rights), or a more formal one (such as the sovereign rights of coastal States on EEZ resources); they may be also area-based (e.g. territorial use rights) or resource-based.[383] Various rights-based approaches are already being created with success in numerous fisheries around the world.[384] Wider use of fishing rights would help address the problem of overfishing, Illegal, Unregulated and Unreported (IUU) fishing and conflicts over access to fishing grounds.[385]

Traditional fishing rights were once universally accepted by the international community and explicitly recognized by domestic legislation, bilateral fisheries agreements, multilateral fisheries conventions, delimitation agreements and the ICJ.[386] Prior to the 1970s, long-standing international practise gave littoral States exclusive fishing rights in their own coastal waters but were required to respect the traditional fishing rights of other States in the same waters.[387] However, the practise of traditional fishing rights of foreign

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[380] Z. Wu, The Fishing-Rights on Marine Resources in China. Looking Forward: Challenges and Opportunities-Chairman: Rebecca Metzner, Fisheries Western Australia, Perth, cited in *FAO Fisheries Technical Paper*. No. 404/2. Rome, FAO. 2000

[381] FAO. 2005-2010. Fisheries Topics: Governance. The use of property rights in fisheries management. Text by Ross Shotton. In FAO Fisheries and Aquaculture Department, Rome. Updated 27 May 2005. accessed 21 June 2010, available http://www.fao.org/fishery/topic/3281/en

[382] ibid

[383] FAO, *supra note* 381

[384] ibid

[385] FAO. Wider use of fishing rights needed to safeguard fishery resources accessed 30 July 2010, available http://www.fao.org/newsroom/en/news/2006/1000239/index.html

[386] Huan-Sheng Tseng, Ching-Hsiewn Ou, *supra note* 107, p. 277

[387] ibid, p.270

States in the EEZs of coastal States' was not mentioned and regulated by the LOSC. Under the EEZ regime regulated by the LOSC, these rights were treated as a reasonable allocation of the surplus of the TAC or dependence on phase-out arrangements in bilateral fisheries agreements.[388]

In this regard, phase-out agreements occur when territorial claims to 12 nm miles are challenged by countries that can demonstrate a history of fishing. It denotes a legal obligation to recognize a special category of rights in fishermen who have long fished the waters. The objective of the phasing-out principle is to ensure that nationals of a foreign State will not be the victims of a sudden and arbitrary expropriation, taking into account the particular circumstances of each case.[389] However, dealing with competing claims beyond the 12 nm limit, for instance between coastal States and a neighbouring State pursuing traditional fishing rights, must receive permanent resolution not based on phasing-out agreements, and the resolution must include an equitable apportionment of the catch.[390] The idea of traditional fishing rights was gradually marginalized during the 1970s, even as the EEZ regime gained footing.[391]

In long term international practice, coastal States have the power to grant their own nationals exclusive access to fish in their coastal waters, while restricting other States from operating in these waters.[392] The notion of traditional fishing rights emerged during discussions in UNCLOS I of 1958 and UNCLOS II of 1960 in the context of proposals submitted by some States concerning the territorial seas and the protection of traditional fishing rights in the fishing zone.[393] In this regard, traditional fishing rights were intended under the regime of the territorial seas.

However, in UNCLOS II, the proposal of a 6 nm fishing zone subject to traditional fishing rights for 10 years and preferential fishing rights beyond the fishing zone was not adopted by the plenary.[394] Both UNCLOS I and UNCLOS II failed to reach an agreement on the

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[388] ibid

[389] O'Connell (1982:537) in Campbell and Wilson, *supra note* 3, p. 87

[390] Campbell and Wilson, *supra note* 3, p. 87

[391] Huan-Sheng Tseng, Ching-Hsiewn Ou, *supra note* 107, p. 274

[392] ibid, p. 270

[393] ibid, p. 272-273

[394] S.P.Jagota, *supra note* 199, p. 27

maximum breadth of the territorial sea and the issue of fishing limit, but it was generally accepted that fishing zones needed to be increased. [395] Ultimately, through negotiation among States, UNCLOS III (1973-1982) was able to stipulate the outer limits of the maritime zones, namely a 12 nm territorial sea, a 24 nm contiguous zone, a 200 nm EEZ and the continental shelf with precise outer limits. These limits apply to the mainland territory of the coastal States as well as to their islands, and to archipelagic States.[396]

Nevertheless, the concept and practice of traditional fishing rights during UNCLOS I, II, and III has undergone an evolution, whereas the traditional fishing rights and the EEZ concept have been mutual changing each other.[397] When the EEZ concept was just beginning to emerge, the traditional fishing activities of third States were at their peak,[398] and vice versa. The traditional fishing activities were gently expelled as the EEZ regime prevailed. Mutually changing of traditional fishing activities and EEZs are presented in the Figure 9 below **(**solid line means situation clear, dotted line means situation uncertain).

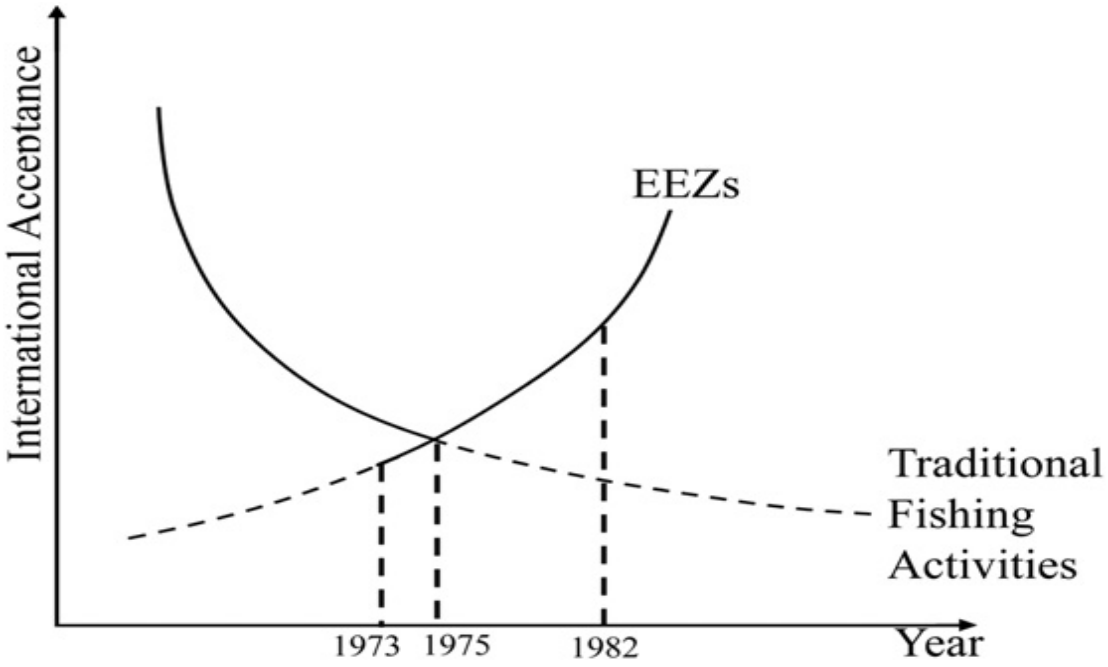


Figure 9. Relationship between the Traditional Fishing Activities and EEZs
(Source: Huan-Sheng Tseng, Ching-Hsiewn Ou, *supra note* 107)

[395] the agreement was reached, however it relates to the continental shelf (Campbell and Wilson, *supra note* 3, p. 116)

[396] S.P.Jagota, *supra note* 199, p.42

[397] Huan-Sheng Tseng, Ching-Hsiewn Ou, *supra note* 107, p. 275

[398] ibid, p. 275

An explanation about general development of traditional fishing rights and EEZs is described by taking some examples as below.[399]

> Between 1973 and 1982, when the UNCLOS III was in progress, the EEZ concept started getting acceptance by the international community. The traditional fishing activities and phase-out mechanisms were still described alongside the EEZ at the 1974 Caracas session; however, at the 1975 Geneva session, the EEZ concept was retained while traditional fishing rights and phase-out mechanisms were excluded. A part from that, in consistent with the spirit of the UNCLOS, China, Japan, and South Korea signed several bilateral agreements regarding a practice of traditional fishing rights in East Asia under the EEZ regime. The agreements, among other things, are the 1997 Fisheries Agreement between China and Japan (Sino-Japanese Agreement), 2000 the Fisheries Agreement between China and South Korea (Sino-South Korean Agreement), 1998 the Fisheries Agreement between Japan and South Korea (Japanese-South Korean Agreement) and the 2000 Fishery Cooperation Agreement between China and Vietnam (Sino-Vietnamese Agreement) in the Beibu Gulf. The most tangible implementation of traditional fishing rights appears in the Sino-South Korean Agreement and the Sino-Vietnamese Agreement. A full implementation of the EEZ regime would mean the loss of large areas of traditional fishing grounds for a large number of fishermen on the Chinese coast and the purpose of the Sino-Vietnamese Agreement was to solve the issue of the historical fishing habits of their coastal fishermen.

### 4.2 The State Practice of Traditional Fishing Rights

*Case Studies under Obligation of the LOSC*

Bearing in mind, there is still no definition and criteria of the traditional fishing rights in any international convention; however it has become the State practice for some nationals of one State. The provision of the traditional fishing rights which is provided by LOSC only addressed the archipelagic States.

In the meantime, there are around 25 to 30 States which fall within the definition of an archipelagic State under the LOSC,[400] but not all of these States appear to have drawn archipelagic baselines yet.[401] Instead, only 26 States have formally claimed archipelagic

[399] ibid, p. 275

[400] James C.F. Wang, Handbook on Ocean Politics and Law, printed in United States of America. 1st published in 1992. p. 48

[401] R.R.Churchill, A.V.Lowe. The Law of the Sea. third edition, Manchester University Press, 1999, p. 122 defined the seventeen states have claimed as archipelagic States

status[402] (See Appendix 1). Moreover, some States such as Japan, the United Kingdom and New Zealand which can also be considered as archipelagic States, appear to have no intention of claiming archipelagic State status.[403]

Archipelagic States have some advantages but also rights. The archipelagic States can draw their baselines from the outermost points of the outermost islands and drying reefs, and therefore, there is no high sea among the islands. Similarly, the archipelagic States have sovereignty over their archipelagic waters, air space, sea bed and subsoil, and the resources contained therein.[404]

The rights granted to other neighbouring States within archipelagic waters stipulated in Article 47 (6) and Article 51 (1) of the LOSC, are based on pre-existing practices in the area, and rights of such States in the waters enclosed within archipelagic baselines. The rights and other activities are recognized if they have been previously exercised before the declaration of the archipelagic regime. In addition, such rights can not be said to prejudice the sovereignty of the archipelagic State within its territorial limits.[405]

Besides having the advantages and the rights, the archipelagic States have some obligations to give navigational and non-navigational rights over the archipelagic waters of archipelagic States.[406] The navigational rights of other States in archipelagic waters include the rights of innocent passage and archipelagic sea lanes passage. Meanwhile non-navigational rights constitute traditionally exercised rights of immediately adjacent neighbouring States over archipelagic waters. The obligation to recognize the existing rights and other legitimate activities of other States in certain areas of its archipelagic waters is stipulated in Articles 47 (6) and 51 of the LOSC. The archipelagic concept gave rise to two sets of conflicting interests, first, the preservation of the island group's unity

[402] Final Report: Evaluasi Kebijakan Dalam Rangka Implementasi Konvensi Hukum Laut Internasional di Indonesia, Secretariat General, Ministry of Marine Affairs and Fisheries Republic Indonesia. 2008, p 16-17

[403] James C.F. Wang, *supra note* 400

[404] Article 49, LOSC.

[405] Mohamed Munavvar, *supra note* 407, p. 175

[406] ibid, p.158-173

which necessarily involves jurisdiction over intervening waters and seabed area; and secondly, the use of such waters by other States.[407]

The traditional fishing rights should be qualified and only applied to certain States and under specific conditions. The rights are recognized if the practice has been *actually traditionally exercised* in the area for a sufficient length of time.[408] In order to have legitimate claims for these rights, the States should demonstrate that the practise has been conducted in a certain area for a long time before the establishment of extended maritime jurisdictions under the LOSC. A group can argue it possesses historic or traditional rights for accessing and utilizing the area of a resource for a long time.[409]

In addition, it must also be noted that the concept of traditional fishing rights is different from traditional fishing areas and the traditional right to fish. 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 actually been exercised. In other words, these are the rights of access given by one State to utilize the surplus living resources in areas that are to become part of another State's EEZ. Whilst, the traditional fishing rights are based on the habitual fishing practice which had been traditionally exercised by nationals of one State in the area of another State before the extended maritime jurisdiction under the LOSC were codified.

Traditional fishing rights are a mechanism to regulate fishing rights, generally beyond national jurisdiction and between crossing border neighbouring State. In other words, these are the rights of nationals of one State to another State's jurisdiction, either in adjacent/adjoining or opposite waters. Whilst, the traditional fishing area is the fishing ground given to traditional fishermen within the limits of national waters or marine conservation areas. The three concept of traditional fishing rights, traditional right to fish and traditional fishing areas must be distinguished each other to avoid any confusion and in order to get acknowledgment of the rights.

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[407] Mohamed Munavvar, Ocean States: Archipelagic Regimes in the Law of the Sea, Publication on Ocean Development, Volume 22, General Editor: Shigeru Oda,Martinus Nijhoff Publishers, p.8

[408] Hasyim Djalal, *supra note* 170, p. 17

[409] Campbell and Wilson, *supra note* 3, p.86

Traditional fishing rights in Indonesia's perspective are restricted specifically to people who can demonstrate a temporal and geographical connection to an area and apply "traditional technology.''[410] On the one hand, Indonesia has an obligation under the LOSC as a result of its archipelagic State claim. On the other hand, Indonesia has an economic interest in ensuring a restrictive definition of traditional rights in which a prohibition on technical development would restrain the operations.[411] This restrictive concept is understandable since Indonesia itself, as an archipelagic State, has considerable obligations to recognize traditional fishing rights.[412]

For Indonesia, the concept of traditional fishing rights should be based on real, actual and existing practices and must be clearly defined by bilateral agreement. In this regard, there are some requirements that need to be established before the traditional fishing rights can be recognized.[413] First, the existence of sufficiently long fishing practices in certain areas of the Indonesian archipelagic waters. Second, that foreign States comply with Indonesian regulations and shall not detract the Indonesian Government from protecting its fisheries resources and the welfare of indigenous coastal communities. In order to practice the traditional fishing rights, it should not be in conflict with the Indonesian Government's efforts to develop its fishing industry for the prosperity of its own fishermen.

In Indonesia's perspective, the elements under the notion of traditional fishing rights 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.[414] Firstly, is fishermen themselves, the rights are granted only to the same fishermen (or their direct descendents) who have been fishing for a sufficient length of time in the area, and could not be considered to apply to newcomers. Secondly is the gear type. The equipment and vessel used by the fishermen must be sufficiently "traditional''. Accordingly, fishermen who use modern equipment and vessels could not appropriately fall under the category of those who possess traditional fishing rights, otherwise, this can adversely affect local and poor fishermen who use traditional equipments and vessels. Thirdly is the catch and the area, the amount and type

[410] Campbell and Wilson, *supra note* 3, p. 53

[411] ibid

[412] ibid

[413] Hasyim Djalal, *supra note* 170, p. 162

[414] ibid.,p. 162

of catch are qualified and normally not very substantial. It excludes the possibility of substantial or steep improvement in the catch by using modern equipment and technology. In addition, the areas of fishing activities must have been frequently visited, the fishing ground should be relatively constant and easier to determine by observing the actual practices. In the case of Indonesian archipelagic waters, the area of traditional fishing rights should be limited or be located along the perimeter or border region of the archipelagic waters.[415] Lastly is time frame, the fishing practice should show evidence of the actual existence of sufficient time duration.

Moreover, in order to gain recognition of traditional fishing rights, particularly in certain areas of archipelagic waters of Indonesia, Syahmin has identified some requirements.[416]. Firstly, the practices carried out continuously and inherited by the natives of the immediately adjacent neighbouring States in certain areas are mutually agreed by the two States for at least four generations. Secondly, fishermen must use selective and non-static fishing gears that are not forbidden in Indonesia (by mentioning the number of crew, types of gear and area).

Thirdly, the activities must be carried out by individuals rather than corporations, and must meet and comply with the legal regulations applicable in Indonesia. Last but not least, the important thing for recognition of traditional fishing rights is the existence of bilateral agreements between the archipelagic States and the immediately adjacent neighbouring States as basis for legal protection of traditional fishing. If the agreement cannot be reached, probably the archipelagic State need not permit foreign States to have access to its waters for the purpose of exercising traditional rights.[417] In implementing Articles 47 (6) and 51, Indonesia, as an archipelagic State has concluded some bilateral agreements with neighbouring States such as Malaysia (as emanated by the Indonesian Law No. 1/1983) and Papua New Guinea (as emanated by the Presidential Decree No. 21 in 1982).

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[415] ibid, p. 17

[416] Syahmin (1988:41) cited in Yeny Sri Wahyuni (*Aceh Justice Resource Centre* (AJRC). *Perlindungan Hukum bagi Nelayan Tradisional Indonesia*.,12 March 2009. available http://ajrc-aceh.org/artikel/perlindungan-hukum-bagi-nelayan-tradisonal-indonesia/ accessed 13 February 2010

[417] William T. Burke. Highly Migratory Species In the New Law of The Sea. Ocean Development and International Law, 14: 3. 1984, 273-314, p. 300

*Case Studies outside the LOSC*

The case studies outside the LOSC include the practice of customary fishing rights for indigenous peoples or traditional inhabitants as well as the practice of fishing outside the context of archipelagic waters and archipelagic States.

Basically, the practice of customary fishing rights and traditional fishing rights has similarities in terms of dependence on marine and fisheries resource, historical traditions, habitually practiced over years, and the primitiveness in culture. The fishing communities live close to coastal areas for generations and have long a history of fishing in the area. They consist of a group of indigenous communities, who have close relationship with the coastal area, resources and have economic dependence of the resources for their livelihood. In general, the people have limited rights over the area and living resources. They have their own cultural and customary practices, which still believe in taboos and mysticism.

Despite the similarities, there is difference with respect to the purpose of the activities. The main purpose of customary fishing is for subsistence and customary practices, such as consumption, ritual, education and other traditional activities. The purpose of traditional fishing is numerous and varied such as for food, subsistence, and for commercial reasons in order to get profit or income. In other words, the purpose of traditional fishing is more general, determined by examining the economic benefits involved in the activity, such as money lender, boat owner, middlemen, and trader.

The distinction between the purpose of the customary fishing rights and traditional fishing rights made the different recognition between them, for example between Australian aboriginal and Indonesian traditional fishermen. The different recognition is applied on the "traditional'' subsistence activities of Australian aboriginal and indigenous peoples, and failed to come to terms with the nature of voyaging by Indonesian fishermen.[418]Generally speaking, Indonesian voyaging has from its beginning been commercial, but certain forms of voyaging have been acknowledged as "traditional'' activities.[419] As a result, Indonesian fishers have been accused of commercialization, of abandoning their customary activities

[418] Campbell and Wilson, *supra note* 3, p. 183

[419] ibid, p. 183

and rights to search for profit, thus making illegitimate their presence in Australian waters.[420]

Moreover, there is different perceptions in determining "traditional'' activities between PNG and Indonesian traditional fishermen in Australian waters, in terms of the purpose of the activities and the methodology or technology used. For PNG, the purpose of the activity is for subsistence, customary and non-commercial purposes. The activities are aimed to fulfil daily food requirements for personal, family and tribe as well as to maintain traditional cultural, educational and ceremonial purposes. Interestingly, despite the Torres Strait Treaty defining traditional in terms of subsistence, the Torres Strait Fisheries Act (1984) extends the scope of "traditional'' to include commercial activities.[421] Similarly, in the case studies between Indonesia and PNG, as well as the Solomon Islands and PNG can also be categorized outside the LOSC because such practices are addressed for the traditional inhabitants who have customarily fishing practices and by using traditional methods.

Meanwhile, all Indonesian fisheries currently operating in the AFZ are "artisanal", some are industrial, and none are subsistence-based.[422] It is argued that Indonesian had always been commercial operators using indigenous technology; they have never been subsistence fishermen and were not in the process of becoming commercial.[423] The purpose of the activity is not only to fulfil one's own necessities, but also to distribute economic benefits to a specific group of people in their community. The continuity of the fishing activity is also supported by vessel owners, and trader/middleman in providing financial interests. The target species are also of high value in the international market. Apart from that, not all of the Indonesian traditional fishermen in the Australian waters fish for commercial purposes. There are also some subsistence fishermen who fish for sustenance and maintain their livelihood. They sail to Australian waters to fish because of poverty and a push by the needs of their family life.[424] In this regard, traditional fishermen from Rote basically sail to

[420] ibid

[421] Torres Strait Fisheries Act (1984), Art. k (iv)

[422] ibid, p. 84

[423] ibid, p. 42

[424] MMAF, Finding Solutions of Cross-Border Fisherman of Indonesia, accessed 24 June 2010. available http://www.dkp.go.id/dkp5en/index.php/ind/news/1440/finding-solutions-of-cross-border-fisherman-indonesia-australia

Australia only for food, with their largest ships being around 7 Gross Tonne (GT) and to look for a living on the sand island (Ashmore Reef).[425]

In addition, using modern fishing methods and technology are permitted for the indigenous peoples as long as they comply with fisheries law, which is set to ensure sustainability of fish stocks. The customary fishing practiced by the indigenous peoples is about the intent of the activity, not the fishing gear used.[426] The indigenous peoples are allowed to adopt introduced technology, such as echo sounders, chemically sharpened hooks, braid line and GPS.[427] On the other hand, the Indonesian fishermen are not allowed to use any types of modern methodologies and technologies, including motors and the other modern equipments for fishing. They are only allowed to use simple fishing gear and un-motorised vessels in order to remain traditional, primitive, stagnant, underdeveloped and technologically unsophisticated.[428] In other words, the practices of the PNG are considered traditional or non-traditional according to purpose of activity, while for Indonesian fishermen depending on the technology.

### 4.3. Challenge of the Traditional Fishing Practice

*Challenge*

For traditional and indigenous peoples, fisheries provide not only for food, but also for community sharing and cultural identity. One of the challenges of fishing practice is related to the sustainability of the fishery, both traditional and modern fishing practices. Under the LOSC, the States have sovereign rights to exploit, conserve and manage over marine and fisheries resources in their EEZ. Some States have implemented conservation measures to preserve and protect the areas and resources from over-exploitation. The technical measures applied for fishing, such as gear, time or area restriction, whether embedded to individual fishing or general laws and regulations would not normally qualify as indirect expropriation, but as a control of the use of property.[429]

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[425] ibid

[426] Government of Western Australia, Department of Fisheries, Fish for the Future, Customary Fishing Policy, 21 December 2009

[427] ibid

[428] Natasha Stacey, Boats to burn, *supra note* 14, p. 175

[429] Marion Markowski, *supra note* 33, p. 83

However, when

> deciding on the use, conservation and management of fisheries resources, due recognition should be given, as appropriate, in accordance with national laws and regulations, to the traditional practices, needs and interests of indigenous people and local fishing communities which are highly dependent on fishery resources for their livelihood.[430]

Moreover, "in the evaluation of alternative conservation and management measures, their cost-effectiveness and social impact should be considered.''[431] Another challenge is with regard to defining the aspects of "traditional". There is still no agreed definition of "traditional", whether it includes among others the aspects of people, vessels, methodology, and technology, fishing ground, time framework, catch or purpose of the fishing activity. Apart from that, there are no indicators and measures established for those aspects will be considered traditional, for example, the duration of time framework, methods and vessels, and so on. This may result in difficulty to recognize and allocate traditional fishing rights.

Accordingly, most Indonesian traditional fishermen in Eastern Indonesia still use "primitive'' technology in fishing, and recently they are facing the challenges of competition with modern foreign vessels. As culture is dynamic, the traditional fishers would be allowed to have a gradual improvement in technology, methodology or vessel to avoid technological freezing. This is for anticipating the competition between traditional fishermen and other foreign fisheries that use advanced and modern technology in the same area, who explain that they unintentionally enter one State's territory due to strong winds and currents, and for safety reasons.

CBD (1982) affirms that the conservation of biological diversity is a common concern of humankind. Hence, as with other fisheries, the traditional fisheries also must be restricted, controlled and managed in order to conserve marine living resources, protect biodiversity and the environment and ensure the recovery of the fishery stock. However, "protect and encourage customary use of biological resources in accordance with traditional cultural practices that are compatible with conservation or sustainable use requirements."[432]

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[430] FAO, Code of Conduct for Responsible Fishing (CCRF) *supra note* 30, Art. 7.6.6

[431] ibid, Art. 7.6.7

[432] Convention on Biological Diversity. 2002. Art. 10 (c)

The practice of traditional fishing rights provided under LOSC is very limited, only provided in Article 51 in the context of archipelagic State and archipelagic waters. The LOSC does not regulate the nature and conditions of traditional fishing rights, and also does not clearly define the people who have the traditional fishing rights. Hence, all matters and concepts relating to the practice of traditional fishing rights must be discussed, negotiated and determined further through bilateral agreements.

Actually, LOSC does not specifically regulate the rights and interests of artisanal fishermen and indigenous peoples, and "the way forward for Australia and Indonesia will depend less on their legal obligations under this convention than on bilateral relations and commitments between the two States."[433] However, Australia has other international obligations with regard to indigenous peoples' rights of access to resources. Multilateral environmental and human rights treaties, to which Australia is a signatory, have recognized that indigenous people retain traditional ecological knowledge and methods of natural and cultural resource management which can contribute to sustainable development.[434]

Traditional fishing is dynamic and changes over time. It reflects the tradition which has been conducted by generation to generation in the particular area for over years. Hence, a traditional fishery must be allowed to develop and change until the certain level of limit. The limits to change should be determined by knowing the purpose to which resources are put.[435] The determination of the concept, criteria, mechanism and measurement of development of traditional fishery in terms of technology and vessels should be determined by negotiation and bilateral agreement between the States concerned. Once traditional fishing rights have been granted by agreement, the fishery should be allowed to develop provided it remains the same as the fishery before the appropriation.[436] The continuity of the traditional fishing right should not be determined by a single factor such as the technology used, or the operation of the same type of vessels as in the past. Other factors, such as the lost access of traditional fishermen to fishing grounds, the history of the fishery

[433] Campbell and Wilson 1993:194; Tsamenyi 1995:10, cited in Natasha Stacey, Boats to Burn, *supra note* 14, such as MOU Box

[434] ibid, p. 193

[435] Campbell and Wilson, *supra note* 3, p. 89

[436] ibid, p. 88

since the appropriation of waters by Australia, as well as the impact of that appropriation should also be taken into consideration.[437] In addition, the purpose of Indonesian traditional fishermen still remain the same prior to the appropriation of the fishing ground by Australia, mainly for economic reasons to maintain their livelihood.

*The Complexity of the Practice in MOU Box*

The implementation of the bilateral agreements or arrangements related to the practice of traditional fishing rights is quite complicated, in terms of legal framework under international law, as well as management and conservation issues. In some cases, the arrangement creates misunderstanding, particularly related to the obligation of Australia to recognize the traditional fishing rights of other States, including Indonesia, as well as conservation and management issues.

These issues have become even more complex as resources in the area defined by the MOU have diminished and many Indonesian traditional fishermen try to get new resources. As a consequence, they have turned to the use of small, motorised *bodi* rather than sailing *perahu* to penetrate deeper into Australian waters in pursuit of shark.[438]

Australia had no interest in restricting the definition of traditional rights in order to offset claims to its waters, in supporting traditional rights agreements in general, or in entering into any specific agreement. It is argued that such MOU was not determined by Australia's obligation under the Law of the Sea or by the state of relations with Indonesia. Instead, it is suggested that the MOU was primarily a tool of control by which a "reservation'' was created within which Indonesian fishermen were confined, with their rights of entry linked to their technical development. Because the "reservation'' lay inside the AFZ, potential would be avoided.[439]

In Australia's interpretation, the 1968 Australian declaration of a 12 nm fishing zone was unilateral, fully endorsed by the ICJ and not based on international agreement or international law.[440] Moreover, the ICJ decision accepting a coastal State's unencumbered

[437] ibid

[438] Natasha Stacey. Boats to Burn *supra note* 14, p. xii

[439] ibid, p. 48

[440] ibid, p. 51 and. 53

rights over the 12 nm zone.[441] The ICJ accepted the rights of coastal States (example Australia, but not Indonesia which is an archipelagic State) to have complete control, without any obligations to other States, over the 12 nm fishing zone.[442] In addition, the special dependence of the coastal State cannot operate to extinguish the rights of other fishing States, particularly when such rights result from a situation of economic dependence and long term reliance on certain fishing grounds.[443]In this sense, it is necessary to balance the respective rights of other States (historic rights on long term practice) and the coastal States (preferential rights) in as equitable a manner as is possible.[444]

It was argued that a fishery can claim to have traditional or historical rights to fish inside Australia's EEZ (the water column stretching from 12-200 nm, or to the point where it abuts another EEZ), for historical traditions over decades, and a clear economic dependence on the resources of the area, is consistent with clauses in the LOSC.

Accordingly, the fishing of sedentary species has been conducted by traditional fishermen of Roti and Makassan in the North West coast of Australia before the Pearl Shell Act of 1952, perhaps before appropriation by Britain to Australia in 1829; it would still not be internationally recognized as a claim to privileged access.[445] In addition, the rights of the coastal State over the continental shelf were stipulated in Article 77: "if the coastal State does not explore the continental shelf or exploit its natural resources, no one may undertake these activities without the express consent of the coastal State, the nature resource includes the mineral and other no-living resources of the seabed and subsoil, together with living organism belonging to sedentary species."[446]

Under the LOSC, Article 77 (2) the foreign States do not have any direct legal rights to the resources on the continental shelf, which relieves Australia of any obligation to grant Indonesian fishermen access to sedentary species around offshore reefs and islands in the

[441] ibid, p. 54

[442] ibid, p. 53. See also ICJ case between Iceland and the United Kingdom over Iceland's unilateral 50 nm fishing claim

[443] M. Dahmani, *supra note* 225, pp. 37-38: As the Court explained in the Fisheries Jurisdiction case between UK and. Iceland in 1974

[444] ibid

[445] Campbell and Wilson, *supra note* 3, p. 192

[446] LOSC, Art. 77 (2) and 77 (4)

area of MOU Box.[447] The provisions of the LOSC dealing with traditional fisheries apply only to the EEZ (in this case the outer AFZ).[448] Furthermore, it was not the constraints of international maritime law that encourage Australia to agree to the MOU with its technology-based definition of what constitutes 'traditional' fishing.[449] It can be understood because the area of MOU Box is located inside the AFZ, whereas Australia has full sovereignty over its territorial sea as stipulated in Articles 2 and 3 of the LOSC.[450] In this regard, the LOSC does not provide any framework and provisions for the living and non-living resources in zones under sovereignty. Moreover, the decision has been made under the MOU 1974, 1981, 1988, and 1989 to recognize the existence of traditional Indonesian fishing in AFZ should be respected.

In addition, under customary law and the LOSC, whilst there is no obligation to give foreign access to shelf resources, there exists an obligation to give other States the right to participate in the surplus allowable catch of the EEZ's living resources.[451] The rights to harvest a certain amount of fish of a particular species, in a designated area, in a given period of time, are usually called a "property right" and implemented in EEZs.[452]

Accordingly, Australia does in fact have some legal obligations to recognize prior fishing activities of Indonesian people in the AFZ[453] (EEZ), namely from 12 nm to 200 nm. Firstly, this is accordance with the Articles 62 (2) and (3) of the LOSC which obliges coastal States which do not have capacity to harvest the entire allowable catch to give other States access to the surplus, and the need to minimize economic dislocation in States whose nationals have habitually (traditionally) fished in the zone.[454] Secondly, it is dealing with the recognition of indigenous peoples' rights of access to resources in order to retain traditional ecological knowledge and methods of natural and cultural resource management which can contribute to sustainable development. Australia has been a party of multilateral

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[447] Natasha Stacey, Boats to Burn, *supra note* 14, p. 192

[448] Campbell and Wilson, *supra note* 3, p. 192

[449] ibid, p. 54

[450] LOSC, Articles 2 (1), 2 (2) and 3 (1)

[451] Marion Markowski, *supra note* 33, p. 141

[452] FAO, The Use of Property Rights in Fisheries Management, Fisheries and Aquaculture Department, accessed 28 July 2010, available http://www.fao.org/fishery/topic/3281/en

[453] Natasha Stacey, Boats to burn, *supra note* 14, p. 192

[454] ibid, p. 192

environmental and human rights treaties, such as the CITES in 1976, ICCPR (1991), and the Convention on Biological Diversity (1993). Furthermore, Australia also formally adopts the UN Declaration of the Rights of Indigenous Peoples on 3 April 2009.

Consequently, the conditions and treatment made in the area of MOU Box and AFZ should be different. As Gordon Hill, the former Minister stated that Indonesians have the same rights as any foreign national to apply for a commercial fishing licence within the AFZ; however it is not relevant to artisanal fishing.[455] To determine whether Indonesian fishery has legitimate claims to traditional rights of access within the AFZ, it must fulfil some conditions. There are suggestions that the Indonesian traditional fishing rights within the AFZ is based on some requirements, such as long period of use, a degree of economic dependency and the need to show that the present fishery is in some ways the "same'' fishery as the one that operated in the areas in the past.[456]

> Firstly, it must be demonstrated that an Indonesian fishery operated in Australian waters prior to their appropriation by Australia and that such fishing was economic importance for the livelihood. Secondly, it must be shown that the present fishery to which rights would be granted is in some way the "same'' fishery as the one which existed before the expansion of Australian maritime jurisdiction.[457]

Notwithstanding, in fact, it is argued that it might not be expected that the present fishery is the same with the past. It is undoubtedly that the change must occur because of fishery is dynamic and not static, in terms of stock availability and cultural development. In addition, since the late 1960s, the Indonesian Government has fostered a major modernization program upon its fisheries by the introduction of a different technology, called the "Blue Revolution.''[458] This is particularly relevant to Indonesia's traditional fishermen, including those with a history of operating within the AFZ, whereas a principal factor is the move from using wind power to the use motor power.

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[455] Letter to the State Secretary of the Labor Party 24 November 1984 cited in Campbell and Wilson, *supra note* 3, p. 55

[456] Campbell and Wilson, *supra note* 3, p. 88

[457] ibid, p. 88

[458] ibid

Although the MOU Box recognized the traditional fishing for the Indonesian fishermen, it failed to designate who exactly such traditional fishermen were or would be.[459] The definition of "traditional" by a double reference to tradition specifically in relation to methods of fishing, left undefined who might be involved in the fishing.[460] In general, the definition of traditional fishermen given by the MOU Box is too broad and vague. The vagueness of the MOU Box creates the misunderstanding and has led to various interpretations. Indonesians insist that "traditional'' included motorised crafts, while the Australians argued that "traditional'' only involved sail and paddle-powered boats.[461]

Since it did not mention the elements of who should be considered traditional fishermen, except for the reference to the use of traditional methodology and vessels, it raises the different interpretation of the meaning and determination of those who have the actual access.[462] Aside from that, the definition of tradition "over decades of time'' is also unclear.[463] It is questionable whether the decades of time refer to the two decades preceding the signing of the MOU Box or two decades from the present.[464] If the former, it would include technology used before 1954, while if the latter, it would include technology in any particular time, which was introduced 20 years ago currently technology used before 1972.[465]

In other words, it may imply that every traditional fisherman from any region of Indonesia has traditional fishing rights in the AFZ, neglecting the origin of the fishermen as long as they comply with the regulation by using the traditional technology, method and vessels. Without the clear determination of the element of traditional fishing rights, there would be no input control in terms of the limitation of fishermen who have actual traditional fishing

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[459] James, J. Fox. Legal and Illegal Indonesian fishing in Australian Waters in Indonesia beyond the Water's Edge: Managing an Archipelagic State, eds. Robert Cribb and Michelle Ford, 1st published, Institute of Southeast Asian Studies, Singapore. 2009, p. 198 (247 p)

[460] ibid. p. 198

[461] Campbell and Wilson, *supra notev* 3, p. 77

[462] Boats to Burn, *supra note* 14, p. 74-75

[463] ibid

[464] ibid. See also Natasha Stacey, Crossing Borders: Implications of the Memorandum of Understanding on Bajo fishing activity in northern Australian waters, South Pacific Regional Environment Programme, Draft paper presented at the Symposium: Understanding the Cultural and Natural Heritage Values and Management Challenges of the Ashmore Region, 4-6 April 2001, Darwin

[465] Campbell and Wilson, *supra note* 3, p. 77

rights in the areas of AFZ. Ultimately, it will lead to a series of problems of over access and the extinction of the fishery resources immediately.

A former West Australian Minister for fisheries, Gordon Hill stated that:

> Relaxation of the engine power prohibition is likely to result in increased vessel numbers within the MOU area (and) in increased Indonesian illegal trochus fishing on the Australian mainland coast, and that (since) any change is not likely to achieve the objective of reducing the number of vessels lost per year it would not be appropriate to relax the prohibition.[466]

The Minister made the important statement that "artisanal fishermen are refused access to improved technology not because traditional rights depend on traditional technology, but on a need to restrict the fishermen's access to the Australian mainland''[467] On the one hand,

> by not restricting the numbers of vessels or the amount of product taken, it opened the area up to an unlimited number of fishermen in sail-powered vessels, of which there is no shortage in eastern Indonesia, and this has resulted in over-exploitation of resources in the MOU Box area, particularly sedentary species on reefs and inshore waters.[468]

In addition, giving motorised vessels access to the area of MOU Box would enable traditional fishermen to reach within 60 nm of the mainland, making surveillance and control more difficult.[469]

On the other hand, the prohibition of using moderate technology for traditional fishermen affects the safety of navigation and in some cases those accused of illegal fishing. By not permitting the use of motorised vessels in times of bad weather, the Government has also been accused of enforcing a policy that subjects the fishermen to unnecessary risks.[470] The reason is that without the use of moderate navigation system, except compass and basic charts, occasionally a fishing boat unintentionally enters the prohibited area while the fishing boat has fished in allowed areas of the MOU Box.

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[466] Letter to the State Secretary of the Labor Party 24 November 1984 in Campbell and Wilson, *supra note* 3, p. 54

[467] Campbell and Wilson, *supra note* 3, p. 54

[468] Natasha Stacey, Crossing Borders, *supra note* 464

[469] Campbell and Wilson, *supra note* 3

[470] Campbell and Wilson 1993; Fox 1998: 121 in Natasha Stacey: Boats to Burn, *supra note* 14

The unintentional encroachment may be caused by factors such as the poor knowledge of the border line of the areas or due to heavy monsoons, such as strong winds and currents. "In periods of little or no wind, or strong currents, when it is impossible to make any headway in a sail-powered vessel, strong currents can easily drag a sail-powered vessel beyond the permitted areas.''[471] Over the last decade, a number of sailing boats and the lives of their crews have been lost during cyclones in the MOU area. For example, in the three years to 1989, more than 30 Papelans drowned while fishing in the allowed area;[472] and in April 1994, four Pepela-owned boats and their mostly Bajo crews drowned during a cyclone in the Timor Sea.[473]

In the regulation of the MOU Box, Indonesian traditional fishermen are permitted to fish in an area defined by straight lines, obviously based on modern concepts of navigation.[474] Furthermore, it is unlikely in the extreme that Indonesian fishermen, who often can not read a maritime chart find it difficult to understand, ever customarily limited their fishing expeditions to areas enclosed by such lines.[475] The borders of the MOU Box only exist as lines with coordinates on maps, but there are no markers or signs put in place. The Indonesian fishermen (Bajo) navigation and fishing activities until recently is based on reference to familiar landmarks, prevailing wind directions, stars and sea features and have never been confined to areas bounded by lines on maps due to limited technology.[476] The MOU restricts access to fishermen using traditional technology, but expects high-tech accuracy to know the borders which can only be accurately located using marine charts and sophisticated navigational equipment such as a GPS.[477] In this regard, the fishermen are required to know modern borders in terms of border latitude and longitudes coordinates to determine the location of the MOU boundaries but are not allowed to use motors and sophisticated equipment under the MOU.[478] This kind of restriction restricts the

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[471] Natasha Stacey: Boats to Burn, *supra note* 14, p. 182

[472] Andre Malan ''Article in the West Australian'' in Campbell and Wilson, *supra note* 3, p. 54

[473] Natasha Stacey, Boats to Burn, *supra note* 14

[474] Campbell and Wilson, *supra note* 3, p. 77

[475] ibid, p. 77

[476] Natasha Stacey: Crossing Borders, *supra note* 464, p. 11

[477] ibid, p. 11

[478] ibid

development of culture and fisheries, and contributes to fishermen being outside the permitted areas.

To conclude, traditional fishing practices are now facing some challenges, including among others, overexploitation, scarcity of resources, conservation and management issues, competition with modern foreign fishing vessels, which lead to vulnerability of ecosystem, biodiversity and livelihood. For example, the practice of Indonesian traditional fishermen in the MOU Box needs to be managed to ensure the sustainable use of resources and the continuity traditional fishing rights as well as good relations between Indonesia and Australia.

### 4.4. Conservation and Management of Traditional Fishing

Basically fisheries management system is dealing not only with resources, but also with people. Fisheries system is difficult to predict and uncertainty, hence and management system has to deal with the multiplicity of stakeholders, often with conflicting interests.[479] It needs inclusive approach and participation from relevant stakeholders of States concerned, including central and local Government, researcher, private institution, community, etc.

Before analysing and discussing the option of management, this section will first describe basic principles in the fisheries management system. Typically, the regulations and provisions containing policy and management measures came only after stocks had been depleted, and they were inadequate to protect fishery resources.[480]

In applying management measures, setting the goals of management is an essential first step. The management measures are applied for all purposes of fishing, including traditional fishing. Generally, the goals of fisheries management deal with biological, ecological, technological, economic, social and cultural considerations as well as those imposed by other parties, these include, for example:[481]

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[479] Maarten Bavinck, et al *supra note* 20, p. 9

[480] Report of the Commission on Fisheries Resources, Governance for a Sustainable Future. II: Fishing for the Future The World Humanity Action Trust, available *http://www.earthsummit2002.org/es/issues/Governance/whatgov2.pdf* accessed 1 September 2010, p. 44

[481] Cochrane, K.L. (ed.), A fishery manager's guidebook. Management measures and their application. *FAO Fisheries Technical Paper*. No. 424. Rome, FAO. 2002. 231p

- to maintain the target species at or above the levels necessary to ensure the sustainable of productivity (biological);
- to minimize the impacts of fishing on the ecosystem, and on non-target (bycatch), associated and dependent species (ecological);
- to maximize the net incomes of fishers (economic); and
- to provide and maximize employment opportunities for those dependent on the fishery for their livelihood (social).

Identifying the particular goals desired to achieve in a management system is necessary in designing the policy. Sometimes, the program and policy set to achieve the particular goal contradict other goals and result in conflicts of interest. For example, the biological and ecological goals may be constraints in achieving the desired economic and social goals. Partly, fisheries were left unregulated and not managed because some fishing grounds were located beyond national jurisdiction (i.e., 3 nm from the coast). In addition, after World War II, there was a tendency from States to extend their maritime jurisdiction from territorial limits at sea. By the early 1960s many States had a 12 nm fishing zone or territorial sea, and from the 1970s, most countries established national fishing zones (EEZs) of 200 nm.

Fisheries managements involve a number of measures and strategies to govern fisheries activities in order to ensure the continued productivity of the resources and the achievement of other management goals as presented in Figure 10 below.

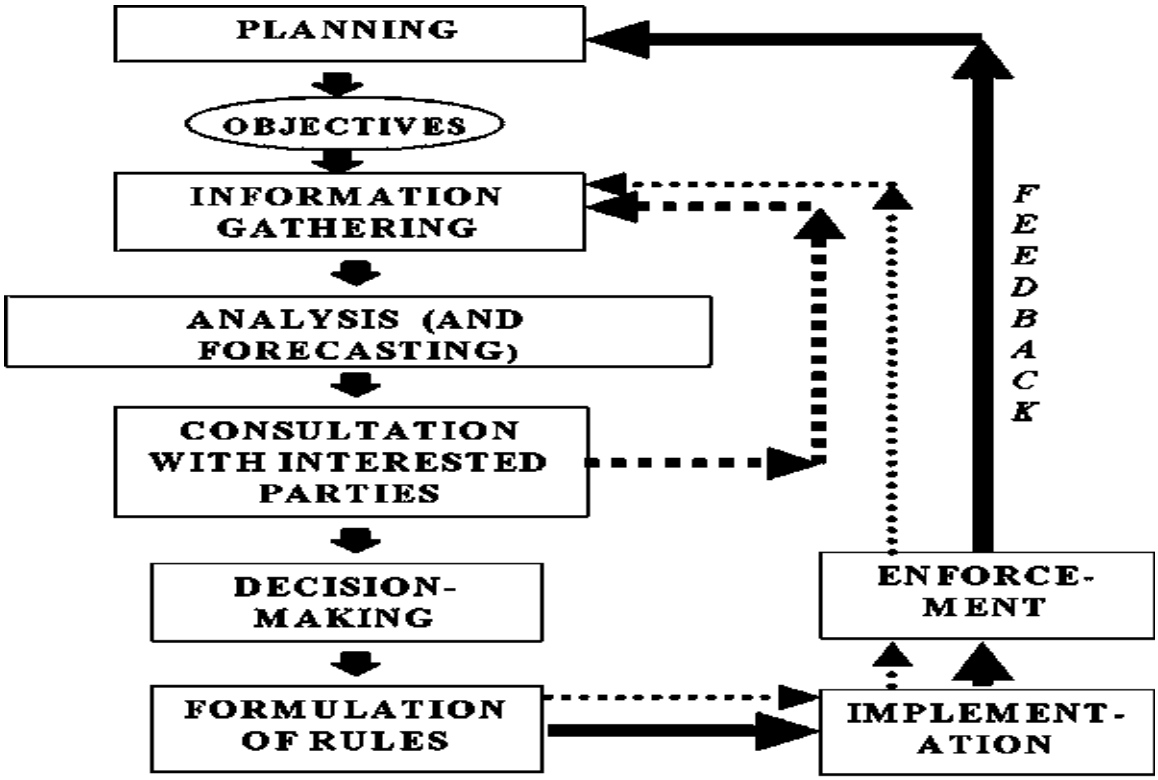


Figure 10. The number of Measures in Fisheries Management
(Source: http://www.fao.org/docrep/005/y3427e/y3427e02.gif)

Planning is the first measure needed to be set in a management system to describe what, when, who, where, why and how to achieve effective management. The next measure is to determine the specific objectives to be achieved and collect information relating to the objectives. The next measures are analysis and consultation with interested parties who will be involved in management, decision-making, formulation of rules in the national policy, implementation, and enforcement. All these measures are also necessary to be reviewed and evaluated to get feedback on the effectiveness of the management system. Ideally, the whole process of fisheries management from planning to implementation should involve representatives of all interested parties, including local communities. However, involving all the representatives into the management process will take a long time of negotiation. The mechanism for establishing fisheries policy which takes into account all the relevant factors is presented in the Figure 11 below.

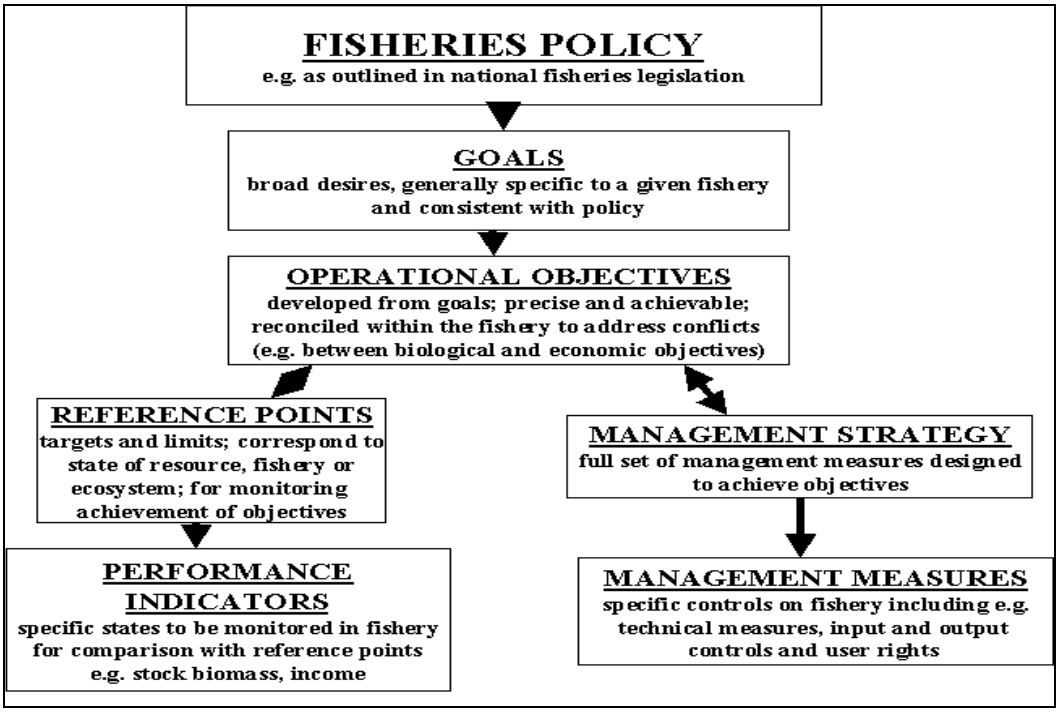


Figure 11. The Framework of Fishery Policy.
(Source: http://www.fao.org/docrep/005/y3427e/y3427e02.gif)

An effective rights-based fishery management system requires a scientific basis for limiting fishing to a sustainable level of the fish resources and an enforcement capability to protect the rights.[482] Moreover, in developing a successful fisheries management system, recognizing the existing rights of fishing communities is a fundamental element.[483] For example, the extended fishing zone by the States resulted in the loss of traditional fishing rights of some fishing communities who have habitually exercised in the area which now fall into the other State's jurisdiction. In order to set the management measures for such rights, it needs to ensure the long-term sustainable use of the fisheries resources and the traditional fishing rights of certain fishing communities. Besides that, it also needs to identify and gather information relating to the issues, problems and challenges of the traditional fishing rights.

Management and conservation of traditional fishing practice are addressed to benefit the community: marine resources are seen as the basis of spiritual, cultural, communal, social and economic wellbeing, and therefore critical to the long-term survival of the

[482] Report of the Commission on Fisheries Resources, p. 46

[483] ibid, p. 31

community.[484] For example, whale conservation programs in the Savu Sea, East Nusa Tenggara (Indonesia) is not intended to ban traditional hunting society from the practice, but rather improve ecosystem healthy and ensure protection of traditional rights of Lamalera communities utilizing marine resources in their area.[485] In traditional whaling, the Lamalera peoples have local taboo to hunt blue whales (an endangered species), and this is part of local wisdom to preserve the environment, and it is really the act of conservation itself.[486] Hence, the way the Lamalera people catch whales by using primitive technology nowadays should be conserved too, which in turn conserves the barter system.[487]

Furthermore, in order to create sustainable development both resources and community, Agenda 21 emphasizes:

> the need to consider multiple use of resources, integrate environmental considerations with economic and sectoral planning and policies, define measures for maintaining cultural and biological diversity and conserve endangered species and critical marine habitats, and take into account the traditional and cultural values of indigenous people[488]

In addition, the poor economic performance of traditional fishing is basically caused by too much fishing efforts in terms of the number of boats, people, gear and long time duration, trying to catch a limited number of fish as much as possible without any control measures. In general, the fishermen are not patient to wait for fishing until the fish stock has recovered. Because of their low education, the fishermen have the perception that if they do not catch today, there will be no available fish tomorrow because other fishermen will catch the fish first.

However, any fishing practices, both traditional and modern will affect the biodiversity, fishery stock and carrying capacity of the environment. Hence, conservation and management measures are needed to ensure the sustainable use of resources for future generations. Nevertheless, there are trade-offs between conservation and management

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[484] Vierros, et al, *supra note* 24, p. 9

[485] Suara Pembaharuan newspaper, 27 March 2009

[486] J.B. Blikololong, *supra note* 172

[487] ibid

[488] Agenda 21, Art. 17.129 (d)

measures and sustainable livelihood for fishing communities. On one hand, the conservation and management measures will impact to loss of traditional fishing rights of fishermen. The fishermen feel that the property rights and access to traditional fishing grounds exercised for a long time have been limited by the presence of conservation. Moreover, by not allowing traditional peoples to have access to resources for conservation reasons (for example permanent closed area) affect on loss of cultural heritage, threatens sustainable livelihood and ultimately leads to poverty. On the other hand, without proper conservation and management measures cause overexploitation and lead to the extinction of resources and loss of biodiversity.

A sustainable livelihood is a way of thinking about the priorities for development in order to enhance progress in poverty elimination and to combat exclusion.[489] The sustainable livelihood contains six principles for the poverty-focused development, including:

- people centred, focusing on the people and adaptive for their current livelihood, social environments;
- responsive and participatory: inclusive approach, to involve people in identifying and addressing livelihood priorities;
- multi-level approach: by working at multiple levels;
- conducted in partnership: involving relevant stakeholders, both the public and the private sectors;
- Sustainable: by balancing the four key dimensions to sustainability, namely economic, institutional, social and environmental sustainability; and
- Dynamic: by recognizing the dynamic nature of livelihood strategies, respond flexibly to changes in people's situation, and develop longer-term commitments of support.

WWF, a conservation organization, recognizes the importance of the conservation of the cultures of traditional and indigenous peoples. WWF is concerned about the loss of biodiversity and the degrading quality of the world's environment, but also progressively

[489] FAO. 2005-2011. Fisheries and Aquaculture topics. The sustainable livelihoods approach. Topics Fact Sheets. Text by Benoit Horemans. In FAO Fisheries and Aquaculture Department. Rome. Updated 27 May 2005. accessed 15 February 2011, available http://www.fao.org/fishery/topic/14837/en

more concerned about loss of cultures and knowledge.[490] Therefore, any policy of conservation and management measures in the fishing area have been traditionally practiced by the traditional peoples is possible to implement. The policy should be acceptable and agreed upon by most fishing communities and accommodate the recent socio-cultural features.

The continuity of fishing activities without control or management leads to the depletion of fish stocks. Although fish is a renewable resource, it has certain limits to grow, and it is also influenced by the carrying capacity of the environment. Various forms of management are possible, including the following:[491]

- Technical management (regulating the types of fishing gears and fishing methods, limiting fish size, and restrictions on times and areas of harvest by close seasons and close areas;
- Economic management and social management;
- Input controls (fishing effort management) and output controls (catch management). Input controls are intended to limit on the total amount of effort allowed in the fishery use, for example by limiting number of people, number of boats, and gear, number of days at sea. Input controls can be conducted by giving limited fisheries license; and
- Output controls are intended to limit the tonnage or the number of fish taken in a period of time (e.g. TAC; in reality, usually total allowable landings), the bag limits (restrictions of the number of fish that may be landed in a day) and limiting by-catch. However, catch controls are often difficult to monitor and to implement because it is difficult to estimate fishing effort precisely, and normally improving technology and developing skills result in on-going increases in the efficiency of fishing operations.[492]

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[490] WWF. Importance of Indigenous Resource Rights and Knowledge, accessed 15 February 2011, available http://wwf.panda.org/what_we_do/how_we_work/partnerships/indigenous_people2222/

[491] John Pope. Norfolk, United Kingdom. Chapter 4: Input And Output Controls: The Practice Of Fishing Effort And Catch Management In Responsible Fisheries in Cochrane, K.L. (ed.) A fishery manager's guidebook. Management Measures and Their Application. FAO Fisheries Technical Paper. No. 424. Rome, FAO. 2002. 231p

[492] Cochrane, KL (ed) *supra note* 481. 231p

The objective of fisheries management should be both the short and long-term. On one hand, the objectives should be to responses to the immediate problems of the fishermen, namely the development of fishing grounds. On the other hand, the objectives should focus on the improvement of social conditions of fishermen and the sustainable development of fishery resources. With regard to the practice of Indonesian traditional fishermen in Australian waters, a number of alternative approaches and regulations have been suggested in some literature indicating that Australia should move to:

- Abandon the current definition of traditional fishing that defines access based on the technology used and assumes traditions cannot change;
- Identify specific groups of fishermen who have historically fished in the AFZ and provide appropriate rights of access for them;
- Introduce some form of management intervention in order to limit the number of vessels fishing to regulate access and to avoid over-exploitation of stocks;
- Provide access to an area that better fits with cultural practices, previous fishing grounds of Indonesian fishermen and resource availability; and [493]
- A need to enhance education on what fisheries management is about along with the need for sustainable fishing practices. By building awareness with the resource users we can start to get the stocks at their optimum levels.

Moreover, the implementation of the appropriate management system applied to Indonesian traditional fishermen, should take into account aspects of the biological resources, the ecosystem on the one hand and economic, social and cultural factors of the fishermen on the other hand. The management measures can consist of, among others:

- Restrictions on the number of people who had historically sailed to Australian waters on a regular basis, limitation of fishing vessels and fishing gear, restriction of type and amount of species, and regulation of fishing seasons; and
- Changing the way traditional fishermen are allowed legal entry into the AFZ, in which no longer would areas of the AFZ be open to all un-motorised Indonesian boats. Only boats licensed by Australia would be allowed entry to make possible good management and conservation. It is conducted by limiting the number of

[493] Natasha Stacey: Boats to Burn, *supra note* 14, p. 188

fishermen and boat entering the AFZ, for instance by giving access to specific number of traditional boat (perahu) which has traditional fishing rights and access.

For example, focusing on the Rotinese (and Madurese) and Tukang Besi fishery would allow to entry the AFZ without restriction on the basis of technology. Entry would be limited to boats licensed on the basis of the traditional purpose. It would be possible to develop appropriate technology, in terms of boat and methods under a management framework based on species preservation. This will provide the responsibility for the traditional fishermen who are actually having the rights to comply with the agreement and regulation imposed.

In determining the type of management measure to be applied in the area of beyond national jurisdiction, the relevant States should go through the processes of consultation, negotiation and bilateral arrangement or agreement, because the decision taken will affect the interests of nationals of other States. It needs continuing cooperation between States concerned to look at options for management and research. Basically, the nature of the options of management should be determined by the nature of the issues, including characteristic of the resources, areas and people.

# 5. Conclusion

## 5.1 Summary

Previously, traditional fishing is not accorded prominence by States. The recognition of the practice of traditional fishing rights recently is made into two categories. First, is at a purely domestic level, in which are traditional fishing rights (also known as customary fishing rights) conducted by traditional inhabitants or indigenous peoples within the same State. The practice of these rights is not provided by the international law, including LOSC, but it is regulated by the domestic law. Second, that is rights guaranteed by one State to the nationals of another State, either as part of the LOSC or outside the framework of the LOSC. The second aspect of traditional fishing rights exists as result of the extended coastal jurisdiction over marine and fisheries resources as the implication of the provisions of the LOSC.

The LOSC only provides provisions concerning the practice of traditional fishing rights of nationals of other States in the context of archipelagic States and archipelagic waters, whilst other practices outside the framework of the LOSC are regulated under bilateral agreements or other related domestic law (legislation). However, the obligation to recognize the practice of traditional fishing rights within the archipelagic States and archipelagic waters stipulated in LOSC (Article 51) is minimal and limited by obligation. It only applies to (a) archipelagic waters and not in the EEZ; and (b) only to immediately adjacent neighboring States, thus excluding all DWFN as well as those States in the neighborhoods but not immediately adjacent.[494] The term neighbouring States suggest that the States must be in the vicinity, while the words immediately adjacent suggest those States share a common maritime or land boundary with the archipelagic State.[495]

Under the EEZ regime, coastal States could extend their EEZ to 200 nm and were quite willing to abide by the LOSC to grant conditional access to their EEZ to DWFNs, though

[494] William T. Burke *supra note* 417, p. 300

[495] Myron H. Nordquist, Shabtai Rosenne, Center for Oceans Laws, UNCLOS 1982: a commentary, Martinus Nijhoff Publishers, p. 452; States are adjacent to each other at the point where their land boundary reach the coast, whilst they are opposite where their coastlines face each other and are nearly parallel: See Robert W. Smith, Geographic Considerations in Maritime Boundary Delimitations (D.g. Dallmeyer and L.DeVorsey, Jr. (eds). Rights to Oceanic resources, 3-14. 1989 by Kluwer Academic Publishers.

no longer in the form of traditional fishing rights.[496] The restrictive character of the recognition required to exercise traditional fishing rights would clearly exclude any new or even recent entrants. The variety of technical terms, nature, area and conditions of all the rights are not acquired automatically but shall at the request of any neighbouring States and be regulated by bilateral agreements, taking into account other legislation and law, both at the national and international levels. Moreover, such rights were only applied for certain groups of nationals stipulated by the provisions in the bilateral agreements between the States concerned and shall not be transferred to or shared with third States or their nationals.

In addition, since many of the Indonesian fishermen who illegally enter the AFZ have not made a claim to any traditional rights, those fishermen who have the real traditional rights, are treated perfunctorily as just another element in a continuing surveillance and control program.[497] In this regard, illegal fishing can not be conducted on behalf of the traditional fishing rights. Someone can not claim to have the traditional fishing rights based only on the traditional method in the same areas of fishing ground. However, fishing is categorized as illegal if the activities do not comply with the provisions in the MOU Box, such as fishing outside the permitted areas in the expanded AFZ, taking prohibited species, landing in the reservation area and using modern technology or vessels.

The issues of traditional fishing rights and illegal fishing especially with the bordering areas of neighbouring States must be discussed and negotiated on the basis of good cooperation, and partnership through bilateral agreement, arrangement or treaty. The discussion and negotiation are expected to overcome the issues and problems that may arise and to avoid conflicts of interest in order to improve relationship between the States concerned. Besides that, every State must respect the provisions contained in the bilateral agreements, arrangements or treaties which have been established as well as have the commitment and good will to implement them. In addition, Australia faces the problem of foreign citizens who previously fished in waters that have now come under Australia jurisdiction. The different approaches and provisions were enacted in dealing with the resolution of the maritime boundaries to preserve the traditional fishing rights and livelihood of both PNG (and aboriginal peoples) and Indonesian in Australian waters. In

[496] Huan-Sheng Tseng, Ching-Hsiewn Ou. *supra note* 107, p. 277

[497] Campbell and Wilson, *supra note* 3, p. 89

this regard, the bilateral agreement between Australia and PNG contained comprehensive provisions which not only delimits the boundaries, but also take into account the sustainable fisheries management, protection of traditional fisheries, and contains conservation and management of fisheries. In practice, there are provisions related to the conservation measures and management arrangements implemented, especially for dugong. The Treaty also established a Protected Zone which gave PNG fishermen much greater rights, than the Indonesian fishermen, even permitting landing on Australian islands and reefs.

There are some lessons learned can be drawn from the States' practice of the traditional fishing rights, among others:

1. The traditional fishing rights have become State practices even before the LOSC established in 1982. The practices were once accepted by the international community and were part of the customary international law. It was accepted and recognized by domestic legislation, ICJ and bilateral and multilateral agreements. However the practice of the traditional fishing rights has evolved since the regime of EEZ stipulated by the LOSC, 1982. In this regard, the provision of the traditional fishing rights by the LOSC only applies for the archipelagic waters of the archipelagic States.
2. Indonesia, an archipelagic State has recognized and respected the traditional fishing rights of its neighbouring States, through bilateral agreements with Malaysia and Papua New Guinea. Regarding the practice of Indonesian traditional fishermen in Australian waters as stipulated by the MOU Box between Indonesia and Australia, it is obvious that the obligation to recognize the traditional fishing rights of Indonesian traditional fishermen does not have the obligation under the LOSC. It is simply because of the political will from the Australian authorities. This can be learned by relevant authorities and other stakeholders and should be addressed prudently. However, Australia has another obligation under the LOSC Article 62 (2) and 62 (3) in terms of giving other States access to the surplus of the allowable catch to its EEZ and minimizing economic dislocation in States whose nationals have habitually fished in the zone. In this regard, Indonesia was not harmed by the MOU Box but it has shown that Indonesia was successful to have negotiated bilateral meeting with Australia.
3. The implementation of the bilateral agreements or arrangements have been made by the States concerned and the issue emerged by the practice must be further discussed through bilateral meeting between them. Particularly, with regard to Malaysia, the

implementation of the treaty must be discussed and consulted through bilateral meeting to ensure the effective implementation of the treaty. Whilst with Australia, since Indonesian traditional fishermen concerned have to be fully educated to understand the arrangement, more time is needed to socialize the provisions to achieve effectively implement and enforce such arrangements.[498]

4. The protection of the traditional fishing rights should be followed by the management and conservation of the stock and resources. The increasing exploitation level causes the extinction of the marine living resources and further adversely impact the traditional fishing ground and livelihood of the coastal community. The decision of further management for the traditional fishers who have a historic fishing in the area should not extinguish their traditional fishing rights now and later on. By respecting the traditional fishing activities of the other State, an immediate impact on the livelihood and economy of their respective coastal fishermen was avoided.[499]

### 5.2 Evaluation/Recommendation

*Evaluation*

This current research focuses on the legal and some technical issues of the state practice of the traditional fishing rights. The historical of traditional fishing rights and perspective of traditional have been discussed briefly in this research. Some case studies and bilateral agreement, arrangement or treaty also have presented. However, any form of recognition of traditional fishing rights, both purely at domestic level within the same States, or between and among different States deal with a degree of political power and negotiation. The recognition, the nature, and conditions of the traditional fishing rights depend on the bilateral agreement between States concerned, taking into account other legislation and law, both at the national and international levels. The traditional fishing rights may be granted under certain conditions, such as traditional people, traditional purpose of activity, period of time, specific catch/species, type of vessel, specific fishing gear, specific fishing area and technology or methodology. Most of the case studies presented in the thesis in which traditional rights are granted, are associated with the attempts to recognize customary fishing rights and to justify unilateral claims. The case studies provided in the

[498] ibid

[499] Huan-Sheng Tseng, Ching-Hsiewn Ou, *supra note* 107, p. 277

research may have obligation under the LOSC (applied only for archipelagic States, such as Indonesia, Solomon and PNG) or outside the framework of the LOSC (Australia).

In case studies between Indonesia and Malaysia, and Indonesia and Australia, it appears that the recognition of the traditional fishing rights is made only by one State and not mutual States. However, the practice of those two States have different obligation under the LOSC. In this regard, Indonesia recognizes the Malaysian traditional fishing rights in Indonesian archipelagic waters, while Australia recognizes the Indonesian traditional fishing rights in Australian waters. Furthermore, the obligation to recognize traditional fishing rights of neighbouring State under the LOSC only applies for archipelagic States, such as Indonesia and not for other States that are not archipelagic States, such as Australia. In other words, Indonesia has obligation to recognize the traditional fishing rights of its neighbouring States, while Australia does not have any obligation under the LOSC, because Australia is not archipelagic State. Meanwhile, in some case studies, such as between Indonesia and PNG, PNG and Solomon Islands, as well as Australia and PNG, both parties agreed to recognize their mutual traditional fishing rights in their own waters. Interestingly, in the case between Indonesia and PNG, as well as PNG and the Solomon Islands, the practice of the traditional fishing rights could be considered under the LOSC (because they are archipelagic States) or independently of the LOSC (because the States exercise traditional customary rights).

*Recommendation*

1. The practise and existence of traditional fishing rights either at the domestic level or beyond national jurisdiction should not interfere and infringe with the common law applied in that State. A numbers of issues of traditional fishing rights need to be negotiated and solved in good faith through bilateral agreements, including: identification and determination of traditional: time framework, people, technology, method, fishing area, catch; over-exploitation and extinction of species; and sustainable use of fisheries, in terms of the biology of the resources, ecosystem, economic, social and cultural factors.
2. The result of the research also suggests that the context of “traditional’’ should not necessarily denote being primitive and static since fishing has become tradition over the centuries. The elements of traditional are not static but dynamic, following time and culture and they can be adjusted to contemporary circumstances. The recognition of the

traditional fishing rights should move from undeveloped technology to the rights of certain people that have habitually exercised in the certain area for a long period of time. The development of gradual technology needs to be adjusted to accommodate the social, economic and cultural development of certain fishing community. In this case, the traditional should not be strictly determined by fishing and other cultural practices, methods, materials and systems used before European interaction.[500] In addition, a definition of "traditional " based only on technology has been widely rejected in Australia, for example by the Law Reform Commission dealing with the traditional hunting and fishing rights of Aboriginal people. In addition, the MOU Box is only a simple document which deals with a complex and dynamic issue of fisheries and its related challenges. The MOU Box might need to be renegotiated on the basis of contemporary circumstances and fishery management principles and practices recently, taking into account the comprehensive aspects: biological, environmental, economic, social, and cultural aspects in accordance with the national and international law.

3. Learning from the practice of Indonesian traditional fishermen in the AFZ, it needs to define who traditional fishers are, ideally by recognizing groups who have traditionally used the areas within the MOU Box. This is to allow the traditional fishermen to improve technology and fishing methodology gradually according to time by considering the sustainability of the resources. Presumably, identity card might be needed for fishermen who have traditional fishing rights to prevent other fishermen who claim the same rights. By acknowledging these people and defining them specifically we could start to do some positive things for both the health of the fishery and the profits of the traditional people whose ancestors enjoyed the areas within the MOU Box. The MOU Box was of course designed to ensure the livelihoods' of these groups of fishers.

4. Particularly with Malaysia, since the treaty was signed in 1982, at the time of writing, there has been no further consultations and bilateral meeting yet to discuss the issues dealing with the practice of Malaysian traditional fishing rights in Indonesian archipelagic waters. It seems that at the moment, Malaysia is not interested in having further discussion and consultation with Indonesia about Malaysian traditional fishing

[500] The New South Wales Aboriginal Land Council's Submission to Department of Primary Industries, Discussion Paper – Cultural Fishing in North South Wales., July 2009, available www.alc.org.au, accessed 14 June 2010, p. 9, para 1

rights in Indonesian archipelagic waters. This maybe be caused by some factors, among others are the way of fishing by the bilateral treaty is confined to traditional methods only, the amount of catch in Anambas Island is low. In addition, the promotion and education about the provisions on the Jakarta Treaty between Indonesia and Malaysia to the relevant officials and stakeholders needs to be fully conducted in order to have better understanding and to create good relations between those two States.

5. Indonesia as archipelagic States are also facing several issues and challenges which needs to be addressed with regard to the recognition of the traditional fishing rights of other neighboring States. Considering that until now Indonesia also has not discussed the exercise of the traditional fishing rights in forms of bilateral agreements with other neighbouring States, except with Malaysia and PNG, many things need to be done. This is important to develop a good relationships between States concerned. However, the nature, the extent and the areas in which neighbouring States apply shall be based on the request of any of the States concerned and be regulated by bilateral agreements among them, as stipulated in LOSC, Article 47 (6) and Article 51.
6. The need to discuss about the practice of traditional fishing rights among States through multilateral meetings, not only in the context of the archipelagic waters of archipelagic States but also outside the context of archipelagic States.

### 5.3. Future Work

As mentioned earlier, for the purposes of this research, it must be emphasized that data and information regarding the implementation and application of some bilateral agreements are difficult to secure for a variety of reasons, such as time and data limitation. Besides that, some data is also confidential. Consequently, not all bilateral agreements and case studies related to the practice of the traditional fishing rights can be investigated and discussed in this research. In order to address the whole range of issues associated with traditional fishing rights, further research and assessment are necessary to evaluate the implementation of the bilateral agreements in more detail.

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Treaty between Australia and the Independent State of Papua New Guinea concerning sovereignty and maritime boundaries in the area between the two countries, including the area known as Torres Strait, and related matters, signed on 18 December 1978.

Treaty between the Republic of Indonesia and Malaysia Relating to the Legal Regime of Archipelagic State Law and the Rights of Malaysia in the Territorial Seas and Archipelagic Waters as well as in the Airspace above the Territorial Seas, Archipelagic Waters and the Territory of the Republic of Indonesia Lying Between East and West Malaysia''. Full text available at United Nations Office for Ocean Affairs and Law of the Sea, The Law of the Sea: Practice of Archipelagic States, United Nations, New York, 1992, pp. 144-155

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Torres Strait Fisheries Act 1984, Fisheries Management Notice no. 66, Torres Strait Turtle Fishery, Prohibition on the Taking of Turtle (Gear Restrictions).

## Appendix 1–List of Countries which have formally claimed Archipelagic Status

1. Antigua and Barbuda (*Maritime Areas Act* 1982);
2. Bahama (Archipelagic Waters and Maritime Jurisdiction Act 1993);
3. Cape Verde (*Law No. 60*/IV/92);
4. Comoros (*Law No.* 82-005);
5. Fiji (Marine Space Act 1977);
6. Indonesia (*Law No. 6 of* 1996);
7. Jamaica (Maritime Areas Act 1996);
8. Kiribati (Maritime Zones Declaration Act 1983);
9. Marshal Islands (United Nations, the Law of the Sea. Practise of States at the Time of the Entry into Force of the UN Convention on the Law of the Sea. New York. 1994, p.9)
10. Papua New Guinea (*National Seas Act* 1977);
11. Philippines (*Act No*. 3046 of 17 June 1961 *as amended by Act No*. 5446 of 18 September 1968);
12. St Vincent and the Grenadines (*Maritime Areas Act* 1983);
13. Sao Tome e Principe (*Decree-Law* No. 14/78 of 16 June 1978);
14. Solomon Islands (Delimitation of Marine Waters Act 1978, Declaration of Archipelagos of Solomon Islands 1979, and Declaration of Archipelagic Baselines 1979);
15. Trinidad and Tobago (Archipelagic Waters and Exclusive Zone Act 1986 and Archipelagic Baselines of Trinidad and Tobago Order 1988);
16. Tuvalu (Maritime Zones Declaration Ordinance 1983);
17. Vanuatu (Maritime Zone Act 1981);
18. Grenada
19. Bahrain (has potency as an archipelagic state);
20. Cuba;
21. Malta;
22. Maldives;
23. Mauritius;
24. Seychelles;
25. St. Kittss and Nevis;
26. Tonga

## Appendix 2 – Selected Bilateral Meetings between Indonesia-Australia

| No | Date | Discussion/Recommendation |
|---|---|---|
| 1. | 8-11 April 2002 | The establishment of Committee of MOU Box Management |
| 2. | 6-9 March 2003 | Management Strategy relates to MOU Box Planning, information exchange of MOU Box, joint research planning |
| 3. | 4-5 March 2004 | The development of implementation of fishermen identity, the evaluation of activities of the MOU Box, activities of Directorate of Economic Coastal Community Empowerment and socialization of MOU Box |
| 4. | 14-15 March 2005 | be followed up by bilateral meeting between Indonesia and Australia on 25-26 Augustus 2005 |
| 5. | 20-21 March 2007 | Sustainable management of fishery resources, stock assessment research, alternative livelihood, definition of Indonesian traditional fishermen who are allowed to enter into MOU Box and type of traditional boat. |
| 6. | 8-9 May 2008 | Development of the alternative livelihood, identification some possible progress to develop alternative livelihood, among others through coastal community empowerment. |
| 4. | 17 June 2008 | Agree to improve dialogue and cooperation, development of both a joint MOU Box and alternative livelihood program |
| 5. | 10 November 2008 | • the need to develop joint efforts and management to address issues relating to the MOU Box, among others through continuing joint research and developing alternative livelihoods for Indonesia traditional fishing communities;<br>• Indonesia proposed that the 1974 MOU in the so-called MOU Box be revisited, especially with regard to the definition fishing of Indonesian fishermen, in accordance with international law |
| 6. | 19-20 March 2009 | • Handling of illegal fishing, information exchange of MOU Box and preparation of Road Map Plan of MOU Box Cooperation Management;<br>• Agreed to establish a small working group to further discuss elements of the Roadmap<br>• Australia acknowledged Indonesia's concerns in relation to the safety of traditional fishers and their access to technology for fishing in the area |
| 6. | 8-9 April 2010 | • To discuss progress about the implementation of joint surveys and research in the MOU Box area<br>• To recommend joint research to assess fishery resources status of MOU Box area<br>• To recommend the created manuals/guidance book that explain the agreement has been made between two States in MOU Box |
| 6. | 8-9 June 2010 | • Positive development of Public Information Campaign (PIC) by persuasive such, was conducted in the fishermen borders' areas as NTT, South Sulawesi, Southeast Sulawesi, Maluku, East Java and Papua. |