Indonesian Traditional Fishing Rights in Ashmore Reef Area an International Law Perspective

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ABSTRACT

The United Nations Convention on the Law of the Sea 1982 (UNCLOS) guarantees a coastal state certain rights as well as obligations to manage the sea, including the right for traditional fishermen to catch the fish in the area. The traditional fishing right is hereditary, inherited by traditional fishermen who have been catching the fish and other sea commodities in a certain fishing ground for generations. The said recognition is given to the traditional fishermen, however, is in stark contrast with the practices taking place in the fishing ground as shown in the case of traditional fisherman catching the fish in Ashmore Reef area. This research is aimed to answer two important issues in this regard: First, the legal protection of Indonesian traditional fishermen under the light of international law, and Secondly the consequences of the changing status of the Ashmore Reef into conservation area on traditional fishing activity. The research method used to answer the problem formulation uses the doctrinal method which is based on international agreements with a conceptual approach. Even though Indonesia and Australia both recognize UNCLOS 1982, and both countries had an agreement outlined in MoU Box 1974 as well as Agreed Minute 1989, Australia giving the new status of Ashmore Reef as a conservation area has brought about the tremendous impact on the traditional fishery as Australian Law is getting harsh on traditional fishermen from Indonesia and hence neglecting the existing agreement as well as the international law that recognizes the traditional fishermen.

Keywords: Ashmore Reef, Traditional Fishing Right, Indonesian Fishermen, MoU Box, UNCLOS.

INTRODUCTION

Indonesia has 17.466 islands stretching from Sabang to Merauke so it is known as an archipelago. Indonesia’s geographical condition, which is two-thirds of its territory is marine waters consisting of coastal sea, high sea, bays and straits, has an area of 1.904.569 km² with 17.508 islands located between the Asia and Australia continent and the Pacific and the Indian Ocean,¹ with the length 95.181 km of coastline, 5,8 million km² of waters area,² 0,3 million km² of territorial seas, 2,8 million km² of archipelago waters, and 2,7 million km² of economic exclusive zone,³ it provides economic and political benefits. These areas are maintained as sovereignty and utilized by the Republic of Indonesia.

United Nations Convention on the Law of the Sea (UNCLOS) 1982 regulates the state sovereignty over the declared seas, as follows:

¹Indonesia, id.m.wikipedia.org, Last visited on 12 October 2017, 17.13 WITA.
³Departemen Marine and Fisheries, Report 2008, Last visited on June 22 2018, 8.59 WITA.
Legal status of the territorial sea, of the air space over the territorial sea and of its bed and subsoil.\(^4\)

1) The sovereignty of a coastal state extends, beyond its land territory and internal waters and, in the case of an archipelagic state, its archipelagic waters, to an adjacent belt of sea, described as the territorial sea;

2) This sovereignty extends to the air space over the territorial sea as well as to its bed and subsoil;

3) The sovereignty over the territorial sea is exercised subject to this convention and to other rules of international law.

Including a 200 nm EEZ towards the open sea from the base of the archipelago.\(^5\) If the distance between the two states is less than 400 nm, the delimitation determination can use median line methods. This practice occurs in Indonesia to establishing its maritime boundaries with Australia which is generally located in the south of the continental shelf coordinates A12 to A25 to the west of the Ashmore Reef and Cartier Islet.\(^6\)

In the law of the sea perspective, the sovereign rights and obligations of the coastal state's owners of EEZ must continue to respect pre-existing rights and other legitimate interests, including traditional activity by a neighboring state.\(^7\) One of these sovereign rights is traditional fishing rights by traditional fishermen which continuously and for generations take place on their fishing ground to catch fish and certain commodities to fulfill their livelihood and not for the fishing industry and large scale.

Indonesia recognizes *Traditional Fishing Right* through on bilateral agreements with neighboring states such as Malaysia, Papua New Guinea and Australia.\(^8\) Indonesia-Australia officially recognized Indonesian traditional fishermen activity through on *Memorandum of Understanding between the Government of Australia and the Government of the Republic of Indonesia Regarding the Operations of Indonesian Traditional Fishermen in Areas of the Australia Exclusive Fishing Zone and Continental Shelf* we are so called MoU Box 1974.\(^9\) However, since the enactment of MoU Box 1974 there has been a fact that the Australian government takes a repressive action to

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\(^7\) Regarding Article 51 paragraph (1) Unclos 1982

\(^8\)Indonesian bilateral agreements that recognize traditional fishing rights, among others: Indonesia-Australia in 1974, Indonesia-PNG in 1979, and Indonesia-Malaysia in 1982.

\(^9\) *Memorandum of Understanding between the Government of Australia and the Government of the Republic of Indonesia Regarding the Operations of Indonesian Traditional Fishermen in Areas of the Australia Exclusive Fishing Zone and Continental Shelf* we are so called MoU Box 1974 is a bilateral agreement made between the Australian government and the Indonesian government which regulates the rights of Indonesian traditional fishermen to operate in Australian waters.
handle the implementation of traditional fishing activity.\textsuperscript{10} Besides, Australian government also unilaterally stipulates a ban on access and activities of Indonesian traditional fishermen in Ashmore Reef areas embodied in the National Parks and Wildlife Conservation Act and declared Ashmore Reef National Nature Reserve on August 16\textsuperscript{th} 1983.\textsuperscript{11}

Based on the change in the legal status of Ashmore Reef which was originally a fishing ground Indonesian fishermen being natural conservation area through on Agreed Minutes 1989 has limited the Indonesian traditional activity to utilize fishery resources in border waters and Ashmore Reef. The implementation of MoU Box 1974 and Australian national policy limits the rights of access and activities to implement the fishing rights of Indonesian traditional fishermen as stipulated in the agreement documents and qualified as Illegal Fishing. In international law perspective, neglect of traditional fishing rights requires measurement of the legal status of the documents agreed between Australia and Indonesia regarding traditional fishing right in Ashmore Reef.

METHODS

In this research, method used a doctrinal approach based on the provisions legislation relating to United Nations Convention on the Law of the Sea 1982, Indonesian-Australian bilateral agreements and the national policy both of country and other international provisions that have relevance to the results of this research.

TRADITIONAL FISHING RIGHTS AN INTERNATIONAL LAW PERSPECTIVE

The existence of traditional fishermen in the eastern Indonesian waters cannot be separated from the history of sea cucumber hunting. In addition to sea cucumbers, they also carry pearls, shells, turtle shells, shark fins and bird nests from northern Australia. The trade history of Indonesia with China in the 16-17th century encouraged the emergence of Teripang Indonesia fisheries.\textsuperscript{12} Traditional Indonesian Fishermen are estimated to know Ashmore Reef (Pulau Pasir/Nusa Solokaek) in the mid-17th century to the end of the 19th century. As many as 85% of fishermen and 80% of ships entering Australian waters come from Rote, 5.6% of fishermen and 6.7% of ships from Madura and Raas, and 3% of fishermen and 5% of ship fishermen from Sulawesi, have sailed to the shore Australia.\textsuperscript{13}

Bugis seafarers are known to have developed a shipping legal system and have a maritime law compiled by Amanna Gappa, head of the Wajo community in Makassar, from 1679 to 1723. One chapter of this rule contains a list of departure areas and

\textsuperscript{10}Australia’s national policy that covers fishing activities, among others Clean Water Operation, AMIZ/AMIS, Rapid Repatriation applied in 2005.


\textsuperscript{13}Kompas,”Nelayan RI Ditangkap”, http://cetak.kompas.com/read/2010/03/30/03132060/nelayan.ri.ditangkap, Last visited on 12 March 2018, 10.26 WITA.
destinations for Bugis boats in those days, and provide instructions on the route of travel. In addition, the Bugis Tribal Maritime Law regulates the planned seafarers' annual South Sulawesi expedition, including the Bugis, Makassar and Bajo Tribes to the northwest of Australia, which was followed by thirty sailors, each of whom had a crew of around thirty peoples.\textsuperscript{14}

In 1729, during a voyage led by Foe Mpura, the boat that was supposed to sail to Batavia was dragged southward until it reached a small island which was about 80 miles from Rote Island, Nusa Solokaek (Pasir Island) as Ashmore Reef for the Rote people. Bajo tribesmen and fishermen from Eastern Indonesia such as Rote Island, Buton, Flores, Madura, Maluku, Sulawesi and surrounding areas have been descending from the 17th century on traditional fishing activities in the southern waters of East Nusa Tenggara to the west coast of Australia. Bajo tribe is also believed by most of the inhabitants of Rote Island as the inventors of Ashmore Reef.\textsuperscript{15} One historical evidence that supports this is a letter written by an official of the Dutch East India Company in Kupang on May 14, 1728 which reported to the Governor-General of Batavia that 40 small Bajo boats were seen around the waters of Rote Island and sailed south (Australia) to find and catch sea cucumbers.\textsuperscript{16}

Australia's unilateral claim is based on the discovery of an island of 155.40 km\textsuperscript{2},\textsuperscript{17} by Captain Samuel Ashmore in 1811.\textsuperscript{18} The British Government designated Ashmore Reef as its colony in 1878 and was officially handed over to the authority of the Commonwealth of Australia through the \textit{Ashmore and Cartier Acceptance Act 1933}. In 1942, Britain included Ashmore Reef under the administration of the Northern Territory until 1978. After 1978, the territory was declared part of the Federal State's direct Australian jurisdiction.\textsuperscript{19}

The tensions between two countries began in 1974, when Ashmore Reef was declared part of the Australian state through on MoU Box 1974. The existence of the MoU Box 1974 was a form of recognition of Indonesian traditional fishing rights by the Australian Government which had been going on for a long time in Australian waters. Tensions between the two countries began in 1974, when Ashmore Reef was declared part of the Australian state through the MoU Box 1974. The existence of the MoU Box 1974 was a form of recognition of Indonesian traditional fishing rights by the Australian Government which had been going on for a long time in Australian waters.

\textsuperscript{14}Laila Najmu, 2011, \textit{Pengakuan Terhadap Hak Penangkapan Ikan Tradisional Menurut Hukum Laut Internasional}, P. 160, Last access on 20 June 2018, 23.20 WITA.
\textsuperscript{15}See, Fox and Sen, 2002, \textit{A Study of Socio-Economic Issues Facing Traditional Indonesian Fishers Who Access The Mou Box, A Report For Environment} Australia, P.13. The same expression was expressed by Tom Therik, an academic from Rote. Words that mention the hereditary story of criteria that the King of Rote discovered Nusa Solok Kaek (Sandy Beach), the name as Ashmore Reef by the Rote people for centuries.See, \textit{The Age}, “Caught in the Net” on November, 26 2003.
\textsuperscript{16}\textit{Ibid}, P. 13.
\textsuperscript{17}Kepulauan Ashmore dan Cartier, \texttt{https://id.wikipedia.org/wiki/Kepulauan_Ashmore_dan_Cartier}, Last visited on 20 June 2018, 22.23 WITA.
\textsuperscript{19}Harian Pos Kupang, \textit{Pulau Pasir Milik Orang Rote}, 20 November 2006, Last visited on 10 November 2017, 14.33 WITA.
In 1983, the Ashmore Reef and Cartier Islet regions officially became a conservation area based on Ashmore Reef National Nature Reserve. The geographical proximity and habits of Indonesian traditional fishing communities visiting and conducting fishing activities at Ashmore Reef raise people’s claims that Indonesia is more entitled to ownership of the island on the basis of geographical proximity and historical right.


These documents related to traditional fisheries which agreed on the recognition of traditional fisheries activities of Indonesian Traditional Fishermen in Australian waters. MoU Box 1974 was an agreement made between The Government of Republic Indonesia and The Government of Australia dated on November 7 1974 in Jakarta. Article 1 MoU Box 1974 stated:

...the fishermen who have taken fish and sedentary organism in Australian waters by methods which have been the tradition over decades.

Hasyim Djalal, interpreting the concept of Traditional Fishing Right arises because in practice a fishing community has carried out its activities for generations and lasts a long time. The qualification of Traditional Fishing Right, is: 20

a. The actual existence of sufficiently long fishing activities must be established;
b. The area visited by the fishermen, that is, the fishing ground visited should be relatively constant;
c. Fishermen themselves, in the sense that the right shall be granted only to the same fishermen who have visited the area traditionally;
d. To equipment and vessel used as well as the amount of catch, in the sense that to qualify under the meaning of “traditional fishing right the vessel use should be relatively traditional.

The term "tradition" in Article 1 of the MoU Box 1974 is intended for the methods used by fishermen to obtain access rights to Australian waters, not the fact that they have been in and carried out fishing activities in the area for a long time. For Indonesian Traditional Fishermen, Traditional Fishermen are interpreted for those who have for generations carried out shipping and fishing activities in the area long ago.

From this phrase, the MoU Box 1974 applies to all Indonesian Traditional Fishermen operating in AFZ and the Australian Continental Shelf. Thus, Fishermen traditional qualifications can be determined through: types of biota that have been passed down for generations by fishermen, in the form of sedentary organisms; area of operation carried out in Australian waters; using traditional fishing methods or methods

(methods which have been the tradition); and the period of fishing activities last (over decades).

The traditional fishing operation area by the MoU Box was given to Indonesian traditional fishermen in the AFZ region and the Australian continental shelf as stated in Article 1:

"...the zone of waters extending twelve miles seaward off the baseline from which the territorial sea of Australia is measured."

The article stipulates that Indonesian traditional fishermen are permitted to carry out traditional fishing activities as far as 12 nm from the Australian coastline as well as the fishing operation areas established by the 1974 MoU Box. Five traditional fishing operations areas namely:

a) **Ashmore Reef** (Pulau Pasir)
   12° 15’ LS – 123° 03’ BT
b) **Cartier Islet** (Pulau Baru)
   12° 32’ LS – 123° 33’ BT
c) **Scott Reef** (Pulau Dato)
   14° 03’ LS – 121° 47’ BT
d) **Seringapatam Reef** (Aftringan)
   11° 03’ LS – 122° 03’ BT
e) **Browse Islet** (Pulau Jelajah)
   14° 06’ LS – 123° 32’ BT

![Map of traditional fishing areas under MoU Box 1974](image)

**Figure 1**

Maps Area Traditional Fishing Based on MoU Box 1974

Source: Natasha Stacey, *Boat to Burn*, Location of permitted areas of access for Indonesian fishermen in the Australian Fishing Zone under the 1974 Memorandum of Understanding.
Both countries intention to accommodate Indonesian Traditional Fishermen who have historically been in these waters for centuries to carry out traditional fishing activities. However, the implementation of the MoU Box 1974 shows the existence of legal irregularities by Australia.

Australia has indeed imposed restrictions on fishermen who carry out fishing activities around Australian waters by expanding AFZ as far as 200 nm from its coastline on November 1, 1979.21 Followed by Indonesia, on March 21, 1980 which also announced Indonesia's 200 nm EEZ. The expansion of the area resulted in an overlapping zone of the two countries related to fisheries issues. The determination of the 200 nm AFZ by Australia includes the Traditional Fishermen’s Catching Areas which have been carried out for generations by Fishermen from Eastern Indonesia as their livelihoods.

Indonesia and Australia again made agreements that regulate restrictions on certain areas along the border line through on **Agreed Minutes between Officials of Australia and Indonesia on Fisheries 1989**. Agreed Minutes 1989 was the third fishery agreement that regulated Indonesian traditional fisherman operations in the Australian Fisheries Zone and the Continental Shelf, held on April 29, 1989 in Canberra. In addition, to noting of confirmation of the amendment to the 1974 MoU Box, this agreement also provided practical guidance on the implementation of the MoU Box 1974 and the changes made in the MoU 1981. Article 2 Agreed Minutes 1989 Australia reaffirmed:

> there were also changes in the status of Ashmore Reef and Cartier Islet as a separate territory of the Commonwealth of Australia and the establishment of the Ashmore Reef National Nature Reserve.

**Figure 2**

Maps Area Traditional Fishing Based on Agreed Minutes 1989

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21 Commonwealth of Australia, Gazette S189 (26 September 1979), Schedule, taking effect on 1 November 1979. The legislative authority for this proclamation was created a year earlier by ss 3 and 6 of the Fisheries Amendment Act 1978 (Cth).
In the practical guidelines for implementing the Mou Box in Agreed Minutes 1989, the Australian side reiterated:

"...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 utilizing motors or engines”.

The reason is that the occurrence of overfishing on five islands (reefs) as stipulated in the Box area, was no longer able to support fishermen who collected sea cucumbers. This resulted in a change in fishing activities which originally collected sedentary organism to catch sharks in the operational areas of the Box and AFZ. Within certain limits, UNCLOS 1982 allows fishing in the EEZ area for countries that are not beached or unlucky to exploit the surplus fishing area; Second, the area of the Box was used as a transit area to conduct operations outside the 1974 MoU Box; Third, Traditional fishermen who have historically caught fish in the Box area have been involved in intense commercial competition in the modern era.

In the context of archipelagic waters, UNCLOS 1982 reinforces the importance to recognizing traditional fishing right in archipelagic waters that must be respected and accommodated by its neighbors:

Article 47 (6), “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.”

UNCLOS 1982, regulates that archipelagic States are given certain rights in terms of archipelagic waters that are directly adjacent to their neighbors. Certain rights are traditional fishing rights and the right to freedom of sailing in its border waters through the agreement of the two countries that continue and are respected.

Article 51 (1), “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 neighboring 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.”

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In connection with Article 51 paragraph (1), First, the Archipelagic states must be respect the agreements between neighboring countries and recognize the Traditional Fishing Right from countries that are directly adjacent to certain areas within the archipelagic waters. Secondly, these fishing activities have been carried out traditionally for a long time, and cannot be given to parties who have never previously caught fish in these waters (traditional). The traditional term refers to the activities and habits carried out, equipment, type of catch, and the area of water that is visited. Third, the concept of immediate adjacent refers to the territorial waters that are geographically adjacent. Fourth, certain areas falling within archipelagic waters mean that fisheries activities cannot be carried out throughout the archipelago, but only to certain areas that have historically become their catchment area. Fifth, the terms and conditions in carrying out these rights and traditional activities must be based on requests and agreements arranged through bilateral agreements.

This article defines traditional fishermen as fishermen whose main source of life directly conducts traditional fishing in the fishery area as stipulated in the agreement. This definition doesn’t explicitly explain who is meant by traditional fishermen and what characteristics fishermen have to be said to be traditional and obtain traditional fishing rights. UNCLOS 1982, gives more authority to the two coastal countries to regulate the recognition of traditional fishing rights through bilateral agreements.

Recognition of traditional fishing rights is not only an obligation for archipelagic states. Traditional fishing rights are also attached to traditional fishermen who have a tradition or fishing activity for generations and last a long time in a particular area. The MoU 1974 between Indonesia and Australia acknowledged the existence of Traditional Fishing Rights Indonesian Fishermen's in Australian waters. Australia itself is not an archipelagic country, so the granting of these rights is based more on the historical reality of some Indonesian Traditional Fishermen's groups that have traditionally captured certain commodities that have become their tradition in Australian waters.

Based on Article 51 Paragraph (1)UNCLOS 1982 and principle of Pacta Sunt Servanda, MoU Box 1974 although it is soft law and the agreement arises before The Law of the Sea regime in relation to traditional fisheries activities, its status remains binding as a law for its parties and its obligatory to honored. In addition, in its implementation, both parties in carrying out the contents of the agreement must be based on the Good Faith principles for implementing the terms of the agreement in accordance with the contents, soul, intent and purpose of the agreement, respecting all rights and obligations and not taking actions that can hinder efforts to achieve the intent and purpose of the agreement.

United Nations on Fisheries and Agriculture Organization (FAO), categorizes Traditional Fishermen as artisanal or small-scale. As well asCode of Conduct Responsible Fisheries

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24Fisheries and Agriculture Organization, Small-Scale and Artisanal Fisheries, Fisheries and Aquaculture Development, Last access on 23 February 2018, 12.11 WITA.
CCRF state that:

State 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."

An Indonesian perspective, the history of Traditional Fishing Right in Indonesia its existence has been recognized since the days of colonialism, Staatblad 1916 Number 157 about Ordonansi Pengambilan Lokan Mutiara, Teripang, and Bunga Karang. Article 2 clearly recognizes the existence of local traditional fishing rights for fishermen, that fishermen are allowed to carry out fishing activities within a distance of no more than 3 nm from the coast of the Dutch East Indies. Similarly, in the 1927 Staatblad Number 145, it contained a prohibition on shark fishing in waters 3 nm from the shoreline, except for fishermen who had been doing it for generations.

Law Number 31 Tahun 2004 on Fisheries, doesn’t clearly define who is meant by Traditional Fishermen. The Act only defines Fishermen as “people whose livelihood is fishing”. While small fishermen as, “people whose livelihood are fishing to fulfill their daily needs”. Subsequently Article 1 number 11 Law Number 45 Tahun 2009 amandmentLaw Number 31 Tahun 2004 on Fisheries, giving understanding to the small fishermen which is narrowed down by including elements of the use of fishing vessels with a maximum size of 5 GT (gross tons), in addition to that the fishermen carry out fishing as a livelihood and necessities. Indonesian Fisheries Act refers to favoring small fishermen and small fish cultivators by suggesting that small fishermen are exempted from the obligation to have a business license (Article 27 paragraph (5) SIPI, and Article 28 paragraph (4) SIKPI), the application of fishing vessel monitoring system provisions (Article 7 paragraph (3)), fisheries fees (Article 48 paragraph (2)), and the imposition of criminal sanctions.

International legal regime regarding the rights of traditional fishermen and agreements between Indonesia and Australia which actually also recognizes traditional fishing activity in certain areas of Australia outlined in MoU Box 1974 above in fact has difficulties in its implementation which cause problems in protracted fishing problems by Indonesian fishermen in Australian waters. First, inconsistency the interpretation of "Traditional Fishermen" understood by Australia and Indonesia in the MoU Box 1974 and Agreed Minutes 1989 agreed by the two countries to accommodate the traditional fishing rights of Indonesian fishermen in Australian waters reaping a biased understanding and detrimental to Indonesian fishermen. Australia interprets traditional vessels as rowing boats or sailing ships with traditional fishing gear. Meanwhile, Indonesia considers traditional fishermen to have been fishing for generations in Australia, for traditional ships in the form of sailboats and outboard

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26Ibid, Article 6.4.
motorboats with a capacity of less than 5 GT. The use of the "traditional" term contained in the MoU Box 1974 has limited the rights of fishermen to develop and the right to access fisheries in their catchment areas. However, both the MoU Box 1974 and Agreed Minutes 1989 as Pacta Sunt Servanda for both countries and their lex specialist nature which are corroborated by Article 51 Paragraph (1) UNCLOS 1982 regarding the Rights of Traditional Fishing Rights, their existence must be respected and carried out as intended.

**THE EFFECT OF CHANGES IN STATUS OF THE ASHMORE REEF CONSERVATION AREA ON TRADITIONAL ACTIVITY**

The use of natural resources that are in line with environmental policies, stipulates that coastal states are obliged to carry out conservation of biological resources and protect their environment. In addition, the coastal state is obliged to accommodate the rights of other countries that are legal under international law.

The Australian Government interprets Indonesian traditional fishermen as individuals who carry out traditional fishing activities in Australian waters. Therefore, traditional fishermen who are given the right will be subject to the provisions of the Australian Fisheries Act regarding traditional fisheries. In Australia Fisheries Act 1952, Australia interpreted:

> Traditional fishing was defined as fishing by indigenous inhabitants of an external territory, if the fish are taken in a manner that, as regard the boat, the equipment and the methods use, is substantially in accordance with the traditions of those inhabitants; and the fish are landed in that territory by the boat from which are taken. \(^{27}\)

Report of the West Australia Fisheries Department in 1949, proving the existence of Indonesian Traditional Fishermen at Ashmore Reef stating:

> The islets of Ashmore Reef showed signs of well established Indonesian occupancy. On East Island, a well contained water, protected by a small corrugated iron tank of about 300 gallons capacity. Nearby was a boiler shell and a porcelain water container. Two graves were not far away. Near the beach was a drying rack on which was a quantity of calm meat. Along side was a neat stack of dried fish ... there were also many heaps of the remains of immature Lesser Frigate birds – the bird had evidently been killed for eating. \(^{28}\)

The reason for the Australian government to restrict and enforce the law at Ashmore Reef is the problem of environmental damage and bad influence for Aboriginal people caused by the presence of Indonesian Traditional Fishermen. Australia thinks Indonesian fishermen carry infectious diseases, smuggle, threaten national security, damage the environment, and are considered to have abused their rights to operate commercially. As a result, the Australian Government issued The Pearl Fisheries Act 1952, which was refined with the Australian Continental Shelf (Living Natural Resources) Act 1968, which regulates the prohibition on taking Pearls, Sea Cucumbers,
Trochus, and Green Snails, sedentary species on the Australian continental shelf. This regulation and prohibition resulted in illegal fishing activities by Indonesian traditional fishermen in Australian waters.

The Australian Government, through the Minister of Primary Industry Adermann in March 1967, announced a desire to increase Australia Fishing Zone (AFZ) from 3 nm to 12 nm. In addition, that type of crayfish and shrimp will be protected by the Government. Adermann states:

*when in accordance in International Law, Australia declared 12 nm Fishing Zone in 1968 under the Fisheries Act 1952, the zone was reserved for the exclusive use of fishermen and vessels licensed under Australia Law.*

The Australian Government also provides conditions for Indonesian Traditional Fishermen that fishing is only limited to daily needs (subsistence) or coastal fishing can only be done up to 12 nautical miles AFZ and territorial sea close to Ashmore Reef, Cartier Islet, Seringapetam Reef, Scott Reef, Browse Islet. This provision was taken in order to carry out the Australian Fisheries Act 1952 and the Australian Continental Shelf Act 1968.

This limitation certainly has a big impact for Indonesian Traditional Fishermen, considering the types of biota that are prohibited from being biota are hereditary as the catch target of Indonesian Traditional Fishermen. north of Australia is a legitimate matter and is not against the law.

The Australian Fisheries Law emphasizes that traditional fisheries are fisheries carried out by indigenous peoples and from external areas when using boats, equipment, methods that are used substantially according to their traditions. It appears that Australia through its national law emphasizes traditional characteristics measured in terms of technical methods and fishing equipment used, and do not provide traditional restrictions in the context of time.

According to the Australia Law Reform Commission, which gives traditional recognition to Aboriginal people:

*In determining whether an activity is traditional, attention should be focus on the purpose of the activity rather than the method. In many cases, hunting and fishing practices have incorporated new materials, for example nylon fishing nets may have replaced those bush fibres ... and aluminium dinghies used instead of duguit. There is no reason why the incorporation of the new material should be considered as such as not traditional.*

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30 Referring to Article 2 of the UN Convention on the Free Sea, there are 4 freedoms on the high seas, for coastal countries or countries without beaches, namely (1) freedom of sailing; (2) freedom against fish; (3) freedom to install cables and pipes on the seabed; (4) freedom to fly over the open sea.
31 See, Campbell Bruce, *The Last Colonial Act: The Expulsion of Indonesian Fishermen from the North West Coast*, in Jan Gothard, *Asian Orientations: Studies in Western Australia History*, Centre for Western Australia History, Department of History, University of Western Australia, 1995, P. 78, Last visited on March, 23 2018, 18.54 PM.
The Australian Government means that a Traditional Activity is more emphasized in terms of the purpose of the activity itself, not the use of certain tools. This is indeed possible for a development rather than the traditional term itself in line with the times. Australia has a different view when interpreting traditional terms for Indonesian fishermen. Article 1 of the MoU Box 1974, states:

...the fishermen who have taken fish and sedentary organism in Australian waters by methods which have been the tradition over decades of time.”

Based on the provisions of the Article, Australia believes Traditional Fishermen are fishermen who use fishing methods and tools that are traditional and used for generations (canoes or small boats without motorized engines), using fishing gear embedded in the sea (nets), as well as fishermen only allowed to catch pelagic fish that appear in the sea by using fishing gear and methods in accordance with their traditions.

The coastal state has an obligation in the EEZ region which in principle is to carry out conservation and make optimum use of biological resources that guarantee maximum sustainable yield. In order to carry out conservation and optimal use of biological resources, the coastal state is obliged to determine the number of allowed catches (TAC) and determine the ability to catch fish in its EEZ (capacity to harvest the living resources). UNCLOS 1982, also provides obligations to the coastal state in the context of granting access rights to fisheries surpluses to other countries, coastal States are obliged to pay attention to the need to reduce economic dislocations in countries whose citizens are used to fishing in the zone.

Article 62 paragraph (3) of UNCLOS 1982:

In giving access to other States to its EEZ under thisarticle, the coastal State shall take into account all relevant factors, including, inter alia, the significance of the living resources of the area to the economy of the coastal State concerned and its other national interests, the provisions of the article 69 and 70, the requirements of developing States in the sub region or region in harvesting part of the surplus and 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.32

These provisions affirm that the convention protects fishermen from a country in utilizing its natural resources by entering or operating in its EEZ, the coastal state must consider all relevant factors, including the interests and economy of the coastal state. It is clearly stated that in order to provide access to other countries to utilize their biological resources, the coastal state must respect the rights of fishermen who have been accustomed to fishing and pay attention to the needs of developing countries which are neighboring countries.

Consideration of Article 62 paragraph (3) can be used as a reference that the economic factors of traditional fishing rights have strong relevance to environmental factors to

conserve natural resources. The economic needs of the traditional fishermen community in coastal areas and the special needs of Indonesia as a developing country by paying attention to fishing patterns. This interdependence on the pattern of fish species should be a middle ground that protects the perpetrators of traditional fishing activities by involving Indonesian traditional fishermen in terms of conservation of marine resources based on their local wisdom to realize sustainable fisheries.

Tracing the practice of fisheries in Australia, Aboriginal fishermen who used to have Traditional Fishing rights are also not strong in their country. Aboriginal fishermen are marginal because of the management of fisheries resources that use the principle of market-based in the form of a quota system, namely Individual Transferable Catch Quota (ITCQ). The market-based principle used by the Australian Government states:

*The Australia Government Policy is that fisheries management regime are designed to facilitate market-based autonomous adjustment to changes in fisheries management arrangement.*

The ITCQ mechanism affects that Aboriginal Fishermen are not considered to be in a position because they cannot meet the minimum quota limit set by Australian authorities. The catch quota stipulated by the Australian Government, namely Fishermen is required to meet the Total Allowed Catch (TAC) 14 tons per year.

Comparison of views between the Australian and Indonesian governments on the Traditional Fishing Rights Fishermen. It can be said, they do not recognize their own Traditional Fishing Right because they are not included in the market logic. This absence of recognition is also reflected in Australia Fisheries Management Act 1991, which only recognizes statutory fishing rights, fishing permits, scientific permits, foreign fishing boats licenses and treaty licenses, and does not raise the term traditional fishing right or aboriginal fishing rights.

Utilization of fisheries resources in border waters and Ashmore Reef should not only focus on fishing activity but also the management of sustainable fisheries resources. The resources management system is very necessary by providing restrictions on the number of catches and certain types of fish that are allowed to be caught by traditional fishermen.

The arrest of Indonesian traditional fishermen, which almost every year occurs, turns out to touch the boundary aspect. Since the beginning of 2000 to 2006, Fisheries crossing national borders in Australian waters totaled 2,500 people and 365 vessels were arrested for being considered Illegal Fishing. In 2007, the number dropped to 979 people and 134 ships, of which 201 people were arrested in Darwin. Followed in 2008, decreased to 557 people, in 2009 there were 124 fishermen and 102 crewmembers, as well as 15 ships seized, in 2010 decreased to 48 people who were arrested and detained because they considered doing illegal fishing in Australian waters, especially in Ashmore Reef.33

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33 Kompas.com, Perjelas Definisi Nelayan Tradisional, www.google.co.id/ams/s/nasionak.compos.com/amp/read/2010/03/16/21250537/about.html Last visited on June 20 2018, 10.13 WITA.
The number of Indonesian traditional fishermen vessels that are considered illegal into the Ashmore Reef is as follows:

**Figure 3**
Diagram of the Alleged Illegal Fishermen’s Entering in Ashmore Reef Area

![Diagram of Alleged Illegal Fishermen's Entering in Ashmore Reef Area]


From these data, Indonesian Traditional Fishermen ships which were considered illegally entered the Ashmore Reef area were mostly carried out in December and carried out by fishermen whose origin is unknown, followed by Fishermen from Southeast Sulawesi and Flores.

Based on the fact, that arrest of Indonesian fishermen as traditional fishermen should not be measured according to the Australian National Policies. International agreements should not be assessed according to their respective national laws if there is an agreement that specifically regulates the rights of fishermen unless there are actions beyond the agreement of the two countries. Under the provisions of the law of the sea UNCLOS 1982, the governments of the two countries should seek the involvement of Traditional Fishermen in the Management and Conservation of Sustainable Marine Resources.

**CONCLUSION**

Legal protection for Indonesian fishermen in the viewpoint of traditional fishing rights according to the international law perspective is guaranteed by United Nations on the Law of the Sea 1982 as well as agreements reached by the Government of Australia and the Government of Republic Indonesia namely *MoU Box 1974, and Agreed Minutes 1989*. The arrest of Indonesian traditional fishermen can only be done if the act goes beyond the conditions specified in the Mou Box 1974 as well as Agreed Minutes 1989 including committing a crime outside the Ashmore Reef area on the side of Australia territory. Under the provisions of the law of the sea, the governments of the two countries should seek the involvement of Traditional Fishermen in the Management and Conservation on Sustainable Marine Resources.
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