



INTERNATIONAL LEGAL PROTECTION OF THE TRADITIONAL FISHING RIGHTS OF INDONESIAN FISHERMEN IN AUSTRALIA'S FISHING ZONE AROUND ASHMORE REEF

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ABSTRACT

Indonesian traditional fishermen have been fishing in the Australian fishing zone since the early 1700s, and in 1974 Australia recognized this fishing right around Ashmore Reef, Cartier Islet, Scott Reef, Seringapatam Reef, and Browse Islet based on the MOU Box 1974, the MOU Concerning the Implementation of a Provisional Fisheries Surveillance and Enforcement Arrangement 1981, and the Agreed Minutes 1989. However, Australia has continued to arrest Indonesian fishermen exercising this right. This study analyzes why Indonesian fishermen fish in the Australian fishing zone, why Australia continues to arrest them despite having granted recognition, and what form of legal protection Indonesia should provide. This is normative legal research based on a study of documents international agreements, books, journals, and prior research as secondary data, analyzed qualitatively. The results show that Indonesian fishermen possess a traditional fishing right because the activity has been carried out from generation to generation and satisfies the elements of Article 51(1) of the 1982 UNCLOS, while Australia arrests them because Australia converted the zone into a national marine

park, Indonesia and Australia define traditional fishing gear in a manner inconsistent with fishermen's needs, and both countries have sought to stop the activity. Indonesia therefore needs to restore this traditional fishing right and establish a clear and appropriate definition of traditional fishing gear that matches fishermen's needs and technological development.

A. INTRODUCTION

The main function of law is to protect human or societal interests, and it aims to create order in society and to regulate relations between individuals, between the state and its citizens, or relations between states¹. The law that governs relations between states is international law,² which generally takes the form of international agreements and aims to provide legal protection for the interests of states as well as their citizens.³

Grammatically, "protection" means a place of shelter or the act of protecting. "To take shelter" carries three meanings: to place oneself so as not to be seen, to hide, or to ask for help, while "to protect" means to cover so as not to be seen or visible, to guard, to care for and maintain, or to save and give help.⁴ According to Satjipto Rahardjo, "legal protection is the provision of shelter for human rights that are being harmed by others, and this protection is given to society so that it may enjoy all the rights granted by law."⁵ Legal protection of a state's traditional fishing rights of its fishermen in the fishing zone of a neighbouring state is governed by Article 51(1) of the 1982 United Nations Convention on the Law of the Sea (UNCLOS), which essentially "requires an archipelagic State to respect existing agreements with other States and to recognize traditional fishing rights and other legitimate activities of immediately adjacent neighbouring States in certain areas falling within archipelagic waters."

Indonesia is an archipelagic state whose territory consists of both ocean and as many as 17,504 large and small islands, with a total area of approximately 7.7 million square kilometres. The maritime area covers 5.8 million square kilometres, while the land area is 1.9 million square kilometres. Indonesia's coastline is the second longest after Canada, at approximately

¹ Sudikno Mertokusumo, *Teori Hukum*, Revised Edition (Yogyakarta: Cahaya Atma Pustaka, 2012), 44.

² David Sloss, "Treaty Enforcement in Domestic Courts: A Comparative Analysis," *Treaty Enforcement in Domestic Courts*, vol. 1, no. 1 (2009): 20. See too, Ian Brownlie, *Principles of Public International Law*, 5th ed. (New York: Oxford University Press, 1998), 54.

³ Mohamad Almohawes, "International Relations and Its Effect on Enforcement of International Law: The Case Studies of Ukraine and Syria," *Access to Justice in Eastern Europe* 8, no. 1 (2025): 10.

⁴ H. Salim HS & Erlies Septiana Nurbani, *Penerapan Teori Hukum Pada Penelitian Tesis dan Disertasi* (Jakarta: PT. Raja Grafindo Persada, 2013), 259.

⁵ Satjipto Rahardjo, *Ilmu Hukum* (Bandung: PT. Citra Aditya Bakti, 2000), 54.

81,000 kilometres.⁶ As an archipelagic state, Indonesia has an extensive territory and the longest coastline, and shares maritime borders with 10 (ten) countries, namely India, Thailand, Malaysia, Singapore, Vietnam, the Philippines, Palau, Papua New Guinea, Australia, and Timor-Leste.⁷ The maritime areas whose boundaries must be established under the international law of the sea are those where sovereignty or sovereign rights overlap, namely the territorial sea, the continental shelf, and the exclusive economic zone.⁸

One of the neighbouring states bordering Indonesia is Australia,⁹ and the two countries have established agreements on the boundaries of their exclusive economic zones and continental shelves. The continental shelf boundary between Indonesia and Australia was established under the Seabed Boundary Agreement 1972, while the exclusive economic zone boundary was established under the Agreement on the Exclusive Economic Zone and Continental Shelf Boundary, dated 14 March 1997. However, since the early 1700s, Indonesian fishermen have consistently fished in the Australian fishing zone, long before these maritime boundaries were established by Indonesia and Australia.¹⁰ Although Australia is not an archipelagic state, it has recognized the traditional fishing right of Indonesian fishermen in the Australian fishing zone, based on the "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 Australian Exclusive Fishing Zone and Continental Shelf," commonly known as the MOU Box 1974. The MOU Box 1974 was subsequently amended by the Agreed Minutes between Officials of Australia and Indonesia on Fisheries 1989.

The Australian fishing zone allocated for the exercise of the traditional fishing right of Indonesian fishermen covers the waters around Ashmore Reef Island, namely Ashmore Reef, Cartier Islet, Scott Reef, Seringapatam Reef, and Browse Islet. However, Indonesian traditional fishermen are frequently arrested and their boats burned by Australian security authorities. In 2020/2021 the arrest and seizure of Indonesian traditional fishermen and their

⁶ Muhammad Rustamaji and Bambang Santoso, "Sumber Daya Laut Indonesia dalam Kancan Masyarakat Ekonomi ASEAN, antara Jebakan Reifikasi dan *Deep Ecology*," *Jurnal Media Hukum* 21, no. 1 (2014): 13.

⁷ Bambang Susanto, "Kajian Yuridis Permasalahan Batas Maritim Wilayah Laut Republik Indonesia (Suatu Pandangan TNI AL Bagi Pengamanan Batas Wilayah Laut RI)," *Indonesian Journal of International Law* 1, No. 1 (2004): 44

⁸ Yoshifuni Tanaka, *Predictability and Flexibility in the Law of Maritime Delimitation* (Oxford: Hart, 2006), 7–8.

⁹ Sian Troath, "Strangers Next Door?: Indonesia and Australia in the Asian Century," edited by Tim Lindsey and Dave McRae (Oxford, UK; Portland, OR: Hart Publishing, 2020), 23.

¹⁰ Hasanuddin Z. Abidin, Sobar Sutisna, T. Padmasari, K. J. Villanueva, and J. Kahar, "Geodetic Datum of Indonesian Maritime Boundaries: Status and Problems," *Marine Geodesy* 28, no. 4 (2005): 293.

boats was recorded at 85 cases, and in 2021/2022 at 337 cases. In 2022/2023 there were 116 arrest and seizure cases involving 6 boats, while in 2023/2024 the number rose to 22 boats, and in 2024/2025 there were arrests and seizures involving 20 Indonesian traditional fishing boats. Most of these arrests and seizures occurred because the fishermen were catching sea cucumber, fish, and shark in the Australian Fishing Zone.¹¹

In addition, on 28 November 2022 the Darwin District Court imposed a fine of AU\$20,000- equivalent to more than IDR 200,000,000 (two hundred million rupiah)-on 4 (four) Indonesian fishermen caught fishing in the Australian fishing zone.¹² Arrests and seizures of Indonesian traditional fishermen and their boats in the Australian fishing zone have in fact occurred since the 1990s and 2000s. In 2006 alone, 1,414 Indonesian traditional fishermen from East Nusa Tenggara were arrested by the Australian Government and deported from Darwin to Kupang. Indeed, from 2000 to 2007 approximately 2,500 Indonesian fishermen with 365 boats were arrested by Australian security authorities, while in 2008, 557 fishermen together with their boats were again arrested by Australia.¹³

Research on fishing in the Australian fishing zone has previously been conducted by McKenna, et al., but that research did not discuss the legal protection of the traditional fishing right of Indonesian fishermen in the Australian fishing zone, and instead focused on the reasons why Indonesian fishermen engage in illegal fishing there. Similarly, Erlis Nurbani focused on the cultural element within the definition of small-scale fishers under the international legal framework in relation to the definition of small-scale fishers in Indonesia.¹⁴ The legal protection of Ashmore Reef Island from the perspective of customary use, but did not analyze the issue through the framework of Article 51(1) of the 1982 UNCLOS nor the legal protection that Indonesia should provide,¹⁵ and this constitutes the research gap that the present study fills.

¹¹ Kylie McKenna, Dedi S. Adhuri, Natasha Stacey, Achmad Zamroni, Ria Fitriana, Jotham SR Ninef, Widya Safitri, Lasmi, and Tegar Nalle, "The Behavioral Drivers of Illegal Indonesian Small-Scale Transboundary Fishing in the Australian Fishing Zone," *Maritime Studies* 24, no. 4 (2025): 62.

¹² Liputan6, "Tangkap Ikan di Wilayah Australia, 4 Nelayan Indonesia Didenda," *Liputan 6*, November 29, 2022, https://www.liputan6.com/global/read/5139528/tangkap-ikan-di-wilayah-australia-4-nelayan-indonesia-didenda-rp-200-juta-lebih#google_vignette, accessed July 11, 2023.

¹³ Ahmad Rifky Nurfebriyansah and Widyawati Boediningsih, "Hak Penangkapan Ikan Tradisional Nelayan Indonesia di Kawasan Ashmore Reef," *Jurnal Kertha Wicaksana* 17, no. 1 (2023): 11.

¹⁴ Erlis Nurbani, "Tracing the 'Cultural Element' of Small Fisher's Definition in International Legal Frameworks and Its Relevance to Small-Fisher Legal Definition in Indonesia Laws," *Journal of Marine and Island Cultures* 13, no. 3 (2024): 68.

¹⁵ Andre Novensa Liunokas, Farida Patittingi, and Tri Fenny Widayanti, "Balancing Tradition and Law: Indigenous Use and Legal Protection of Pulau Pasir-Ashmore Reef," *Petita: Jurnal Kajian Ilmu Hukum dan Syariah* 9, no. 2 (2024): 655.

Based on this problematic situation, the issues examined in this study are, first, why do Indonesian traditional fishermen fish in the Australian fishing zone around Ashmore Reef Island? Second, why does Australia arrest Indonesian traditional fishermen? and third, what form of legal protection should Indonesia provide to protect these fishermen? This study aims to analyze the reasons underlying why Indonesian traditional fishermen fish in the Australian fishing zone around Ashmore Reef Island, to explain why Australia arrests Indonesian traditional fishermen despite having granted recognition under agreements with Indonesia, and to formulate the legal protection that Indonesia should provide in order to restore the traditional fishing right in the Australian fishing zone.

B. RESEARCH METHODS

This study uses normative legal research, aimed at analyzing the reasons why Indonesian traditional fishermen fish in the Australian fishing zone, why Australia continues to arrest them, and the form of legal protection Indonesia should provide, using a statute approach and a conceptual approach. The statute approach is applied by examining Article 51(1) of the 1982 UNCLOS, the MOU Box 1974, the 1981 Provisional Fisheries Surveillance MOU, the 1989 Agreed Minutes on Fisheries, and relevant Indonesian fisheries legislation, while the conceptual approach is applied by examining legal doctrines on traditional fishing rights, State acquisition of territory, and treaty amendment. The research relies entirely on secondary data, consisting of primary, secondary, and tertiary legal materials. Primary legal materials comprise binding international instruments and decisions of international tribunals, namely the 1982 UNCLOS, the MOU Box 1974, the 1981 Provisional Fisheries Surveillance MOU, the 1989 Agreed Minutes on Fisheries, the 1969 Vienna Convention on the Law of Treaties, the Statute of the International Court of Justice, and Indonesian statutes governing fisheries and traditional fishermen (Law Number 7 of 2016, Law Number 1 of 2014, and Law Number 23 of 2014). Secondary legal materials consist of textbooks, journal articles, and prior research relevant to the traditional fishing right and the law of the sea, while tertiary legal materials consist of legal dictionaries and encyclopaedic references used to clarify legal terminology. The data collection technique used is document study, namely the systematic identification and examination of these primary, secondary, and tertiary legal materials. The data obtained were then analyzed qualitatively.¹⁶

¹⁶ Soerjono Soekanto and Sri Mamudji, *Penelitian Hukum Normatif: Suatu Tinjauan Singkat* (Jakarta: Rajawali Pers, 2001), 13.

C. DISCUSSION

1. Activities of Indonesian Traditional Fishermen in the Australian Fishing Zone

The Australian fishing zone around Ashmore Reef Island, where Indonesian fishermen exercise their traditional fishing right, covers the sea area around 5 (five) islands, namely Ashmore Reef, Cartier Islet, Scott Reef, Seringapatam Reef, and Browse Islet.¹⁷ Ashmore Reef is located at 12°15' S – 123°03' E, south of Rote Island at a distance of approximately 78 nautical miles, and approximately 190 nautical miles from mainland Australia.¹⁸ The island consists of 3 (three) island clusters the western, central, and eastern clusters which are generally sandy.¹⁹



Figure 1. Ashmore Reef Island

The island is named "Ashmore Reef" in memory of Captain Samuel Ashmore, who discovered it in 1811, while Cartier Islet, Seringapatam Reef, Scott Reef, and Browse Islet were likewise named after British captains and ships that recorded them between 1800 and 1842.²⁰ Yet these islands were not first discovered by these British sailors, but by Indonesian fishermen from Rote Island since the early 1700s, as evidenced by the presence of coconut trees, wells, and ancestral graves of the Rotenese people at Ashmore Reef, which is named "*Nusa Solokaek*."²¹ Therefore, although the waters around

¹⁷ H. Joko Tribawono, *Hukum Perikanan Indonesia* (Bandung: PT. Citra Aditya Bakti, 2002), 42.

¹⁸ Ruth Balint, *Troubled Waters: Borders, Boundaries and Possession in the Timor Sea*, translated by Mia A. Noach and Yusuf L. Henuk (Kupang: PT. Grafika Timor Idaman, 2005), 110.

¹⁹ Donald R. Rothwell, "Ashmore Reef Re-emerges as a Maritime Issue," *Lowy Institute*, November 3, 2022, <https://www.lowyinstitute.org/the-interpreter/ashmore-reef-resurfaces-maritime-headache>, accessed October 5, 2023.

²⁰ Ruth Balint, *Troubled Waters: Borders, Boundaries and Possession in the Timor Sea*, translated by Mia A. Noach and Yusuf L. Henuk (Kupang: PT. Grafika Timor Idaman, 2005), 110.

²¹ Ruth Balint, *Troubled Waters: Borders, Boundaries and Possession in the Timor Sea*, translated by Mia A. Noach and Yusuf L. Henuk (Kupang: PT. Grafika Timor Idaman, 2005), 119.

Ashmore Reef Island constitute an Australian fishing zone, Indonesian traditional fishermen are entitled to fish there for two reasons.²²

First, fishing has been carried out from generation to generation. Historically, Indonesian traditional fishermen were the first to discover Ashmore Reef Island through continuous fishing activity, carried out from generation to generation, in the surrounding waters since the early 1700s. Indonesian fishermen from Rote Island were drawn to Ashmore Reef Island and its surroundings to catch species such as trochus shell (trochus), sea cucumber (beche de mer), pearl shell, green snail, sponges, and other molluscs.²³ These islands were also used as shelter from storms and for collecting turtle eggs and seabird eggs.²⁴



Figure 2. Seabirds at Ashmore Reef and Its Surroundings

The fact that these islands were first discovered by Indonesian traditional fishermen from Rote Island, together with their proximity to Rote Island, has led a number of community figures to claim Ashmore Reef Island and its surrounding islands as belonging to Indonesia. Under international law, however, discovery and geographical proximity are not recognized means by which a state may acquire land territory, unless the discovery is followed by effective control.²⁵ The means by which a state may acquire land territory such as Ashmore Reef, Cartier Islet, Scott Reef, Seringapatam Reef, and Browse Islet are accretion, cession, occupation, prescription, and annexation.²⁶

²² Andre Novensa Liunokas, Farida Patittingi, and Tri Fenny Widayanti, "Balancing Tradition and Law: Indigenous Use and Legal Protection of Pulau Pasir-Ashmore Reef," *Petita: Jurnal Kajian Ilmu Hukum dan Syariah* 9, no. 2 (2024): 660.

²³ J. E. Pilarczyk and D. C. Barber, "Mollusca," in *Handbook of Sea Level Research* (New Jersey: John Wiley & Sons, 2015), 59.

²⁴ Ronnie Reyes-Arriagada, Roberto P. Schlatter, Peter J. Hodum, and R. Rozzi, "Seabirds and Island Communities: Biodiversity Awareness as a Tool for the Conservation of Insular Species," in *Seabirds and Songbirds: Habitat Preferences, Conservation, and Migratory Behavior* (New York: Nova Science Publisher, 2015), 25.

²⁵ Mochtar Kusumaatmadja and Etty R. Agoes, *Pengantar Hukum Internasional* (Bandung: PT. Alumni, 2003), 167.

²⁶ Mochtar Kusumaatmadja and Etty R. Agoes, *Pengantar Hukum Internasional* (Bandung: PT. Alumni, 2003), 168. See too, Tristan Ferraro, "Determining the Beginning and End of an

The claim of ownership over Ashmore Reef by community groups affiliated with the National Committee for Ashmore Reef and the Timor Gap and Ashmore Reef Working Group is grounded in six arguments. (i) The Ashmore Reef cluster has been managed by the Rotenese community for 400 years, as evidenced by the Register Letter of the Governor-General of the Dutch East Indies dated 1751; (ii) Indonesian fishermen have fished for fish, sea cucumbers, and other marine biota in the waters surrounding Ashmore Reef for hundreds of years; (iii) 161 graves belonging to members of the Rote community are located on Ashmore Reef; (iv) Ashmore Reef was the possession of the Kingdom of Rote and had been under the administration of the Dutch East Indies Government since the fifteenth century, as evidenced by an inscription left by King Thie (Foe Mbura) on Ashmore Reef, made when the king was stranded on the island; (v) the geographical proximity of Ashmore Reef to Rote Island, Indonesia and (vi) the decision of the International Court of Justice concerning the Sipadan and Ligitan Islands dispute, which was won by Malaysia on the grounds that Malaysian nationals were proven to have continuously carried out activities on both islands.²⁷

The bases of the claims of the Rotenese indigenous community set out in points (i) through (iv) satisfy the element of occupation by the Dutch East Indies, in the form of an intent to exercise sovereignty and through concrete acts such as issuing sailing permits and regulating the collection of sea cucumber and other marine biota since the eighteenth century. This evidence, however, does not conclusively prove Indonesian ownership, for two reasons. First, as stated by Yusuf Leonard Henuk in his book *Pulau Pasir: Nusa Impian Orang Rote*, "The British came to control Ashmore Reef in the eighteenth century, at a time when the island was already under the authority of the Dutch East Indies, yet the Dutch East Indies Government took no preventive action and instead allowed the British to take control and exercise sovereignty over Ashmore Reef Island." Second, after independence, Indonesia in fact never exercised governance over, or applied its laws and regulations to, Ashmore Reef and the other surrounding islands. As a result, the Dutch occupation of Ashmore Reef of centuries past lapsed through prescription, and Indonesia even recognized Ashmore Reef and the other surrounding islands as belonging to Australia under the MOU Box 1974 a recognition that constitutes convincing evidence in Australia's favour.

As for the proximity of Ashmore Reef to Rote, Indonesia, as compared with Australia, this cannot serve as a basis for an Indonesian claim of

Occupation under International Humanitarian Law," *International Review of the Red Cross* 94, no. 885 (2012): 135.

²⁷ Yusuf Leonard Henuk, *Pulau Pasir (Pasir Island): Nusa Impian Orang Rote (Dream Island of the Rotenese People)* (Kupang: PT. Grafika Timor Idaman, 2008), 25.

sovereignty over Ashmore Reef and the surrounding islands, because international law does not recognize distance or geographical proximity as a means of acquiring land territory or islands.²⁸ Distance or geographical proximity may only be used to acquire *sovereignty* and *sovereign rights* over maritime areas such as the territorial sea (maximum 12 nautical miles), the contiguous zone (24 nautical miles), the EEZ (200 nautical miles), and the continental shelf (200–350 nautical miles) measured from the baseline.²⁹ The same holds true for the decision of the International Court of Justice in the Sipadan-Ligitan Islands dispute, said to have been won by Malaysia because the Malaysian population was proven to have carried out continuous activity on both islands since 1804, consistently searching for marine biota a situation resembling Ashmore Reef, where Indonesian fishermen have carried out fishing activity for hundreds of years. Nevertheless, the government administering those islands was the Australian government, so that sovereignty rested with Australia, not with Indonesia.

Australia's exercise of sovereignty over Ashmore Reef and the other surrounding islands is based on the instrument of transfer from Britain to Australia, dated 29 July 1931. History records that Britain occupied Ashmore Reef and the other surrounding islands in 1878, continuously mined guano on these islands until 1904, and formally declared them part of British territory in 1906 through a flag-raising ceremony by the crew of the ship *Cambrian*.³⁰

In 1931, Cartier Reef and Ashmore Reef were placed administratively under the authority of the Australian Government, but from 1938 both were placed under the administration of the Northern Territory until 1978. After the Northern Territory obtained self-government as an Australian territory in 1978, Cartier Reef and Ashmore Reef were placed under the direct control of the Australian Federal Government and designated as base points for establishing Australia's maritime boundaries. On 28 July 1983, Ashmore Reef was designated a National Reserve under the National Parks and Wildlife Conservation Act. This Act provides protection for migratory bird and seabird species and turtles, while also controlling the overexploitation of marine resources. The area of this National Park and Nature Reserve is 583 km², covering three islands, coral reefs, and the surrounding waters.³¹ This legal basis for, and Australia's occupation of, Ashmore Reef and the other

²⁸ Anthony Carty, "The Deformation of the Law of Territory between 1880 and 1930—With Implications for Selected Present Day Controversies," *Tsinghua China Law Review* 14, no. 1 (2022): 10.

²⁹ Cornelis Djelfie Massie, "Land Dominates the Sea: ASEAN and Legal Certainty in Maritime Boundary Disputes," *Transactions on Maritime Science* 15, no. 1 (2026): 5.

³⁰ Ruth Balint, *Troubled Waters: Borders, Boundaries and Possession in the Timor Sea*, translated by Mia A. Noach and Yusuf L. Henuk (Kupang: PT. Grafika Timor Idaman, 2005), 112.

³¹ Mita Noveria, Aswatini, Suko Bandiyono, Eniarti Djohan, Alvini Pranoto, Ade Latifa, and Bayu Setiawan, *Dinamika Mobilitas Penduduk di Wilayah Perbatasan* (Jakarta: LIPI Press, 2007), 86.

surrounding islands constitutes strong evidence that these islands belong to Australia, not to Indonesia.

Second, the activities of Indonesian fishermen satisfy the elements of Article 51(1) of the 1982 UNCLOS. The traditional fishing right activities of the fishermen of one state in the fishing zone of a neighbouring state are protected under Article 51 paragraph (1) of the 1982 UNCLOS, and Indonesian traditional fishermen satisfy the elements of this provision of the international law of the sea. Article 51 paragraph (1) of the 1982 UNCLOS provides:

“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.”

Based on Article 51 paragraph (1) of the 1982 UNCLOS, there are two elements that fishermen of a state must satisfy in order to fish in the fishing zone of a neighbouring state: legal protection of the traditional fishing right, and legal protection grounded in a bilateral agreement between the fishermen's state of origin and the state owning the fishing zone. Traditional fishing rights means the right to fish in certain waters arising from a custom carried out from generation to generation over a long period of time. Hasjim Djalal identifies three matters relating to traditional fishing rights: first, to be categorized as possessing a traditional fishing right, 4 (four) conditions must be satisfied, namely (i) the gear used must be traditional in nature, (ii) the fishing must be carried out by the fishermen using traditional methods, (iii) the area used for fishing must be limited to the area agreed under the bilateral agreement, and (iv) the species traditionally caught must be a specific type of fish. Second, the meaning of “the immediately adjacent neighbouring states in certain areas falling within archipelagic waters” cannot be interpreted loosely, but must be given its specific meaning relating to geographical proximity, and third, the existence of traditional fishing rights must be proven by the neighbouring state claiming that right, by showing that the fishing right has been exercised continuously and from generation to generation.³²

³² Hasjim Djalal, *Indonesia and the Law of the Sea* (Jakarta: Center for Strategic and International Studies, 1995), 259.

Indonesian fishermen who fish in the waters around Ashmore Reef and its surroundings, as part of the Australian fishing zone,³³ have satisfied the elements of traditional fishing rights, because fishing in the Australian fishing zone has been carried out since the early 1700s, from generation to generation and continuously; the methods and gear used are traditional in nature; and the activity is limited to the waters around Ashmore Reef, Cartier Islet, Scott Reef, Seringapatam Reef, and Browse Islet. The traditional fishing right of Indonesian fishermen in the Australian fishing zone is also grounded in a bilateral agreement between Indonesia and Australia. This bilateral agreement takes the form of the "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 Australian Exclusive Fishing Zone and Continental Shelf," commonly known as the MOU Box 1974. This MOU Box 1974 was amended by the Agreed Minutes between Officials of Australia and Indonesia on Fisheries 1989, which provides legal protection for the fishing right of Indonesian traditional fishermen in the Australian fishing zone.³⁴

2. Arrest of Indonesian Traditional Fishermen by Australia

Although Indonesia and Australia have established a bilateral agreement recognizing and protecting the traditional fishing right of Indonesian fishermen, Australia nevertheless continued to apprehend them from the 1990s through the 2000s, for three reasons. First, Australia altered the boundaries of its fishing zone by designating it as a national marine park, thereby prohibiting traditional Indonesian fishermen from fishing within that zone. This was despite the fact that the traditional fishing rights of Indonesian fishermen in the fishing zone surrounding Ashmore Reef had been exercised continuously for hundreds of years. Indonesian fishermen who frequently fish in the Australian fishing zone come from Rote, Sulawesi, Madura, and other regions.³⁵ The criteria for a traditional fishing right are determined by the fishing area, the type of catch pursued from generation to generation, and traditional fishing gear criteria that are all satisfied by Indonesian fishermen who have fished continuously and from generation to generation in the waters around Ashmore Reef Island.

Fishing by Indonesian traditional fishermen in the waters around Ashmore Reef has taken place from approximately 1725–1750 to the present,

³³ Joanna Vince, "Policy Responses to IUU Fishing in Northern Australian Waters," *Ocean and Coastal Management* 50, no. 8 (2007): 683.

³⁴ Akhmad Solihin, "Konflik Illegal Fishing di Wilayah Perbatasan Indonesia-Australia [Illegal Fishing Conflict at the Indonesia-Australia Border Area]," *Marine Fisheries* 1, no. 1 (2010): 30.

³⁵ James Prescott, James Riwu, Andhika P. Prasetyo, and Natasha Stacey, "The Money Side of Livelihoods: Economics of an Unregulated Small-Scale Indonesian Sea Cucumber Fishery in the Timor Sea," *Marine Policy* 82 (2017): 200.

as evidenced by cooperation with Aboriginal ethnic groups and by the existence of ancestral graves of Indonesian fishermen from East Nusa Tenggara and Madura on the southern edge of Ashmore Reef.³⁶ Species that form part of the traditional fishing right of Indonesian fishermen from generation to generation include sea cucumber (*beche de mer*), trochus shell/sea oyster (*trochus niloticus*), and shark, as well as visits to Ashmore Reef to collect turtle eggs and bird eggs. The catch obtained by Indonesian traditional fishermen at Ashmore Reef is sold to fisheries traders to meet daily and family needs.³⁷

In 1974, Indonesia and Australia drafted and signed the MOU Box 1974, permitting Indonesian traditional fishermen to fish in the Australian fishing zone within a radius of 12 nautical miles from the Australian coastline,³⁸ covering five sea areas around Ashmore Reef, Cartier Islet, Scott Reef, Seringapatam Reef, and Browse Islet. Species permitted to be caught included trochus shell (*trochus*), sea cucumber (*beche de mer*), abalone, green snail, sponges, and molluscs. Traditional fishermen were also permitted to collect drinking water at Middle Islet and East Islet.



Figure 3. Traditional Fishing Zone According to the MOU Box 1974

The MOU Box 1974 was intended to protect Indonesian traditional fishermen who had fished from generation to generation around Ashmore Reef, Cartier, Scott, Seringapatam, and Browse. However, the expansion of the Australian fishing zone from the original 12 nautical miles to 200 nautical miles in 1979, followed by Indonesia's Declaration of its exclusive economic zone extending 200 nautical miles in 1980, gave rise to an overlap of the two

³⁶ Ratna Indrawasih and Ary Wahyono, "Kerja Sama Bilateral dalam Kerangka Penyelesaian Masalah Nelayan Pelintas Batas Perairan Indonesia-Australia," *Jurnal Kependudukan Indonesia* 5, no. 2 (2010): 54.

³⁷ Wilson M. A. Therik, "Nelayan dalam Bayang Juragan: Potret Kehidupan Nelayan Tradisional Bajo di Tanjung Pasir, Pulau Rote, Nusa Tenggara Timur," *Jurnal Ekonomi Peluang* 2, no. 1 (2008): 33.

³⁸ Noor Fatia Lastika Sari, Linda Sunarti, and Hanafi Hussin, "Between the Traditional and Modern: Ashmore Reef in the Collective Memories of Rotenese Fishermen in Papela," *Australian Journal of Maritime & Ocean Affairs* 16, no. 2 (2024): 230.

EEZs, because the width of the Timor Sea from mainland Timor to Australia does not reach 400 nautical miles, thereby constraining the traditional fishing zone that Indonesian fishermen had used for centuries.³⁹

The overlap between the Australian fishing zone and Indonesia's exclusive economic zone prompted the two countries, on 29 October 1981, to sign the Memorandum of Understanding between the Republic of Indonesia and the Government of Australia Concerning the Implementation of a Provisional Fisheries Surveillance and Enforcement Arrangement. This MOU regulated the provisional EEZ, or Fishing Zone, boundary between Indonesia and Australia. In 1983, however, the Australian Government changed the designated status of Ashmore Reef from an area that had originally permitted the traditional fishing right of Indonesian fishermen into a protected national marine park, thereby prohibiting the taking of species previously permitted to be caught; Indonesian traditional fishermen were thereafter only permitted to land to collect fresh water. This Australian prohibition was established under the National Parks and Wildlife Conservation Act, and the Ashmore Reef National Nature Reserve was declared on 16 August 1983.⁴⁰

On 29 April 1989, the Agreed Minutes of Meeting Between Officials of Indonesia and Australia on Fisheries was drawn up, setting out the rights and obligations of traditional Indonesian fishermen. The rights of Indonesian fishermen in the Australian fishing zone include the following: the extension of Australia's fishing zone and continental shelf as a fishing area for traditional fishermen, as stipulated in the Agreed Minutes, the right to catch all types of fish or marine biota, except those protected under the 1974 MOU Box, the right to land on West Islet for the purpose of obtaining fresh water, and the right to shelter from storms or heavy seas in the vicinity of Ashmore Reef, Cartier Islet, Scott Reef, Seringapatam Reef, and Browse Reef, although landing on those islands themselves is prohibited. Meanwhile, the obligations of traditional Indonesian fishermen under the 1989 Agreed Minutes of Meeting Between Officials of Indonesia and Australia on Fisheries include the following prohibitions: taking fresh water at Middle Islet and East Islet, catching turtles and collecting their eggs, catching or taking migratory fish species as well as sedentary organisms outside the extended fishing zone or within the nature reserve area surrounding Ashmore Reef, engaging in acts that damage the environment, such as burning vegetation and taking birds and their eggs.

³⁹ Treyas Annisa Febri Susanti, Muhamad Muhdar, and Rika Erawaty, "Indonesian Traditional Fishing Rights in Ashmore Reef Area: An International Law Perspective," *Mulawarman Natural Resources and Environmental Law* 1 (2021): 11.

⁴⁰ Akhmad Solihin, "Konflik Illegal Fishing di Wilayah Perbatasan Indonesia-Australia [Illegal Fishing Conflict at the Indonesia-Australia Border Area]," *Marine Fisheries* 1, no. 1 (November 2010): 31.

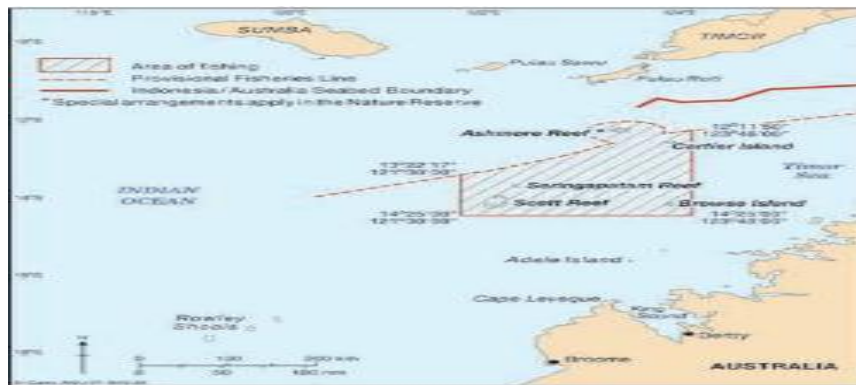


Figure 4. Fishing Zone of Indonesian Traditional Fishermen According to the 1989 Agreed Minutes

This map shows that the fishing zone around Ashmore Reef and its surrounding islands, originally a traditional fishing zone for Indonesian fishermen, was converted into a protected national marine park, thereby prohibiting Indonesian traditional fishermen from fishing in that Australian fishing zone. However, the change in the status of the waters around Ashmore Reef to an Australian national park has not been able to stop Indonesian traditional fishermen from fishing in a zone they have used from generation to generation and continuously. Indeed, the more Indonesian fishermen who are arrested and whose boats are burned, the more Indonesian fishermen come to the waters around Ashmore Reef to fish, since it is very difficult to change or abolish a custom that has persisted for hundreds of years.⁴¹

Second, the definition of traditional fishing gear adopted by Indonesia and Australia was inconsistent with the actual needs of traditional fishermen. One of the conditions for fishermen to possess a traditional fishing right in the fishing zone of another state is that the gear used must be traditional in nature. However, the definition adopted by Indonesia and Australia a boat without an engine no longer matches the needs of Indonesian fishermen, because motorized boats have become essential for fishing activity in the Australian fishing zone.

The meaning of traditional fishing gear under Indonesian law can be found in fisheries legislation. Article 1 number 5 of Law Number 7 of 2016 concerning the Protection and Empowerment of Fishermen, Fish Farmers, and Salt Farmers provides that a "traditional fisherman is a fisherman who fishes in waters that constitute a traditional fishing right that has been exercised from generation to generation in accordance with local culture and wisdom." The Elucidation of Article 17 paragraph (2) of Law Number 1 of 2014 concerning Amendments to Law Number 27 of 2007 concerning the Management of

⁴¹ Robert Kearney, C. D. Buxton, P. Goodsell, and G. Farebrother, "Questionable Interpretation of the Precautionary Principle in Australia's Implementation of 'No-Take' Marine Protected Areas," *Marine Policy* 36, no. 3 (2012): 595.

Coastal Areas and Small Islands states that a “traditional fisherman” is a fisherman who uses a boat without an engine, fishes from generation to generation, has a fixed fishing area, and fishes to meet daily living needs.

This legislation defines traditional fishing gear as a boat without an engine, even though traditional fishermen are classified as small-scale fishermen, and technological development means that fishing no longer depends solely on gear without an engine but may also involve diesel engines or outboard motors to extend the range of fishing.⁴² Traditional fishermen, as small-scale fishermen, are addressed in the Elucidation of Article 27 paragraph (5) of Law Number 23 of 2014 concerning Regional Government, which classifies small-scale fishermen as members of a traditional community who use traditional fishing gear, are exempt from business licences and taxes, and are free to fish throughout Indonesia’s fisheries management areas. Under Article 1 number 4 of Law of the Republic of Indonesia Number 7 of 2016, small-scale fishermen fish to meet daily living needs, with or without a boat of a maximum size of 10 (ten) Gross Tonnage (GT).

Gross Tonnage is a measure indicating a vessel’s volume for holding its catch⁴³. Most fishing vessels of 5-10 GT use diesel engines, including for storing and preserving fish. Traditional fishing gear should therefore be defined based on vessel size rather than the absence of an engine, because the “boat without an engine” definition under Indonesian national law fails to protect Indonesian traditional fishermen fishing in the Australian fishing zone. Likewise, Australia consistently arrests Indonesian traditional fishermen who use motorized boats, because Australia defines a traditional fishing boat as a rowboat or sailboat without an engine.⁴⁴

⁴² Shinta Septiana, “Sistem Sosial Budaya Pantai: Mata Pencarian Nelayan dan Pengolah Ikan di Kelurahan Panggung Kecamatan Tegal Timur, Kota Tegal,” *Jurnal Sabda* 13, no. 1 (2018): 85.

⁴³ Sunardi, Achmad Baidowi, and Eko Sulkhani Yulianto, “Perhitungan GT Kapal Ikan Berdasarkan Peraturan di Indonesia dan Pemodelan Kapal dengan Dibantu Komputer (Studi Kasus Kapal Ikan Muncar dan Prigi),” *Marine Fisheries: Journal of Marine Fisheries Technology and Management* 10, no. 2 (2019): 141.

⁴⁴ Treyas Annisa Febri Susanti, Muhamad Muhdar, and Rika Erawaty, “Indonesian Traditional Fishing Rights in Ashmore Reef Area: An International Law Perspective,” *Mulawarman Natural Resources and Environmental Law* 1 (2021): 10.



Figure 5. Rowboat and Motorized Sailboat

Indonesia's and Australia's shared view of traditional fishing gear as a boat without an engine is not explained in either the MOU Box 1974 or the 1989 Agreed Minutes, resulting in a biased interpretation that is detrimental to Indonesian traditional fishermen. The Indonesian Government should consistently define traditional fishing gear not on the basis of the presence or absence of a motor, but on the basis of vessel size, at 5–10 GT. Restricting traditional fishing gear only to rowboats or boats without engines, as Australia does, is tantamount to refusing to respect the traditional fishing right of Indonesian fishermen, and is thus contrary to Article 51 of the 1982 UNCLOS.

Third, both Australia and Indonesia harbored a desire to put an end to the activities of Indonesian fishermen within Australia's fishing zone. This desire was given effect through the Treaty of Amity and Cooperation in Southeast Asia (TAC) in December 2005. One aspect of cooperation under the TAC relates to transborder fishing, which provided AUD 300,000 for a village extension project, or AUD 10,000,000 as a development fund for Indonesian traditional fishermen in East Nusa Tenggara, so that Indonesian fishermen would no longer fish in the Australian fishing zone.⁴⁵

Outreach and awareness-raising activities have been conducted by the Governments of Indonesia and Australia, including by the Provincial Government of East Java, in order to prevent fishermen from Madura from fishing within Australia's fishing zone. These activities took the form of regular outreach sessions for fishermen regarding the prohibition on fishing within Australia's fishing zone, involving two experts from the Department of Fisheries of Western Australia, who presented maps of Australia's open and closed fishing zones to community leaders, as well as efforts to increase fishermen's per capita income through the sustainable utilization of resources. The increase in fishermen's per capita income was guided by three approaches: a local marine resource-based approach, namely the management of strategic, high-value local fisheries resources caught using environmentally friendly

⁴⁵ Ratna Indrawasih and Ary Wahyono, "Kerja Sama Bilateral dalam Kerangka Penyelesaian Masalah Nelayan Pelintas Batas Perairan Indonesia-Australia," *Jurnal Kependudukan Indonesia* 5, no. 2 (2010): 67.

fishing gear; a community-based approach, namely the optimal utilization of coastal and marine resources through the diversification of fisheries enterprises, in the form of grouper, pearl, and sea cucumber aquaculture; and a market-based approach, directed toward the marketing of coastal resource products to areas outside the region as well as abroad, given the still-underdeveloped state of inter-island maritime transportation infrastructure.⁴⁶

Prevention efforts have also been carried out by the Department of Marine Affairs and Fisheries in Sumenep Regency and Rote Ndao Regency, through the Coastal Communities and Small Islands Economic Empowerment Program (*Program Pemberdayaan Ekonomi Masyarakat Pesisir dan Pulau-pulau Kecil*/PEMP), aimed at improving the welfare of coastal communities through entrepreneurship and microfinance, and at helping communities cope with rising fuel prices through the Productive Economy Fund (*Dana Ekonomi Produktif*/DEP).⁴⁷ These efforts by the Australian and Indonesian Governments have not succeeded, because Indonesian fishermen continue to fish in the Australian fishing zone as an activity that has been carried out continuously and from generation to generation.

3. Legal Protection of Traditional Fishermen by Indonesia

The form of legal protection for Indonesian traditional fishermen, so that they may continue to exercise their traditional fishing right in the Australian fishing zone as required by Article 51(1) of the 1982 UNCLOS, can be achieved through two things. First, restoring the traditional fishing right of Indonesian fishermen in the Australian fishing zone, namely the five fishing areas around Ashmore Reef and the other surrounding islands, together with the species or marine biota that constitute the traditional fishing right passed down from generation to generation, such as sea cucumber (*beche de mer*), trochus shell/sea oyster (*trochus niloticus*), and shark, as well as visits to Ashmore Reef to collect turtle eggs and bird eggs. *Second*, establishing a clear and precise formulation of the meaning of "traditional fishing gear," consistent with fishermen's needs and the development of science and technology.

The traditional fishing gear that is formulated should not be based on the presence or absence of an engine in the fishing boat, but on vessel volume, because if Australia's interpretation that traditional fishing gear must be a boat without an engine or a rowboat is followed, then given the distance that must be travelled, Australia is in fact indirectly failing to respect and recognize the traditional fishing right of Indonesian fishermen in the Australian fishing zone.

⁴⁶ Ratna Indrawasih and Ary Wahyono, "Kerja Sama Bilateral dalam Kerangka Penyelesaian Masalah Nelayan Pelintas Batas Perairan Indonesia-Australia," *Jurnal Kependudukan Indonesia* 5, no. 2 (2010): 68.

⁴⁷ Ratna Indrawasih and Ary Wahyono, "Kerja Sama Bilateral dalam Kerangka Penyelesaian Masalah Nelayan Pelintas Batas Perairan Indonesia-Australia," *Jurnal Kependudukan Indonesia* 5, no. 2 (2010): 69.

Yet the traditional fishing right of Indonesian fishermen has been exercised from generation to generation and continuously, and must therefore be respected under Article 51(1) of the 1982 UNCLOS. Legal protection for Indonesian fishermen, in the form of restoring the traditional fishing right within Australia's fishing zone and the establishment of a definition of the term "traditional fishing gear" that is neither rigid nor overly strict, so as to accord with the actual needs of traditional fishermen, may be achieved through 2 (two) means.

First, the renegotiation of the 1989 Agreed Minutes on Fisheries. Re-negotiating an international agreement, or revising it, is undertaken so that it conforms with changes in society and in international law. Starke argues that the term "revision" carries a meaning that is more political than legal in nature, referring to statements made by states asserting that the provisions of an international agreement are unjust and unbalanced and must therefore be reviewed.⁴⁸

The terms used in the 1969 Vienna Convention on the Law of Treaties are "amendment" and "modification," which denote the process of changing the provisions of an international agreement.⁴⁹ Amendment of a bilateral agreement may be proposed by either of the states party to it, while amendment of a multilateral agreement may be proposed by one or more parties to the agreement or by the competent international organization. A proposed amendment may be accepted where an amendment clause was previously established in the agreement, or, if no such provision exists, on the basis of agreement among the states parties to the agreement.⁵⁰

The Agreed Minutes of Meeting Between Officials of Indonesia and Australia on Fisheries, 1989 is a type of agreement that can be amended through re-negotiation. This Agreed Minutes prohibits Indonesian traditional fishermen from fishing in all five Australian fishing zones, because they have been designated as an Australian National Marine Park. Yet the traditional fishing right of Indonesian fishermen in these five fishing zones to catch sea cucumber (*beche de mer*), trochus shell/sea oyster (*trochus niloticus*), and shark, and to visit Ashmore Reef to collect turtle eggs and bird eggs, has been exercised continuously and from generation to generation. Indonesia and Australia need to re-negotiate the 1989 Agreed Minutes on Fisheries and amend it, because this provision is in fact inconsistent with the traditional fishing right of Indonesian fishermen that has been exercised from generation to generation, and is legally contrary to Article 51(1) of the 1982 UNCLOS.

⁴⁸ J.G. Starke, *An Introduction to International Law*, 2nd ed. (London: Butterworth & Co (Publishers) Ltd, 1950), 265.

⁴⁹ Part IV of the 1969 Vienna Convention on the Law of Treaties.

⁵⁰ Article 39 of the 1969 Vienna Convention on the Law of Treaties.

Article 51(1) of the 1982 UNCLOS indeed applies to archipelagic states, and Australia is not an archipelagic state; nevertheless, Australia remains bound to comply with it in good faith, because one of the obligations set out in Article 51(1) of the 1982 UNCLOS is to respect agreements made with other states prior to the entry into force of the 1982 UNCLOS. The agreement between Indonesia and Australia concerning legal protection for Indonesian traditional fishermen in the Australian fishing zone, made and in force before the 1982 UNCLOS, is the MOU Box 1974. The MOU Box 1974 must therefore continue to be respected and implemented by continuing to permit Indonesian traditional fishermen to exercise their traditional fishing right in the Australian fishing zone around Ashmore Reef, Cartier, Scott, Seringapatam, and Browse.

Re-negotiation of the 1989 Agreed Minutes on Fisheries by Indonesia and Australia could be undertaken on the proposal of the Indonesian Government, with the aim of changing the provision prohibiting the catching of species traditionally caught by Indonesian traditional fishermen such as sea cucumber (*beche de mer*), trochus shell/sea oyster (*trochus niloticus*), and shark in the waters around the five Australian fishing zones, and restoring the collection of turtle eggs and bird eggs at Ashmore Reef as provided for under the MOU Box 1974. If the re-negotiation is carried out and succeeds in amending this prohibition, and continues to permit Indonesian traditional fishermen to catch fish and other marine biota in the five fishing zones established under the MOU Box 1974, then the traditional fishing right of Indonesian fishermen in the Australian fishing zone can be restored and respected in accordance with the mandate of Article 51(1) of the 1982 UNCLOS.

A further amendment to the 1989 Agreed Minutes on Fisheries through re-negotiation by Indonesia and Australia concerns the meaning of the term "traditional fishing gear." As explained above, neither the 1989 Agreed Minutes on Fisheries nor the MOU Box 1974 establishes the meaning of the term "traditional fishing gear," and as a result Australia interprets "traditional fishing gear" used by Indonesian traditional fishermen as a boat without an engine or a rowboat. Consequently, fishermen who use motorized sailboats to fish in the Australian fishing zone are arrested and their boats destroyed.

Australia's interpretation of "traditional fishing gear" as a boat without an engine or a rowboat is an interpretation that runs contrary to the needs of traditional fishermen and to the development of science and technology.⁵¹ The needs of Indonesian traditional fishermen fishing in the Australian fishing zone cannot possibly be met by a rowboat or a boat without an engine over the 78

⁵¹ P. L. Wulf, "Indigenous Commercial Fishing Rights in Queensland: When Is Commercial Traditional?," *Environmental and Planning Law Journal* 23, no. 6 (2006): 433.

nautical miles required to reach Ashmore Reef.⁵² The 1989 *Agreed Minutes on Fisheries* must therefore be amended to expressly define “traditional fishing gear” as a motorized or non-motorized boat of 5–10 GT.

Second, pursuing amendment of the *Agreed Minutes on Fisheries* through the International Court of Justice (ICJ) or the International Tribunal for the Law of the Sea (ITLOS). If re-negotiation of the *Agreed Minutes on Fisheries* is not agreed to by Australia, then, for the sake of legal protection for Indonesian traditional fishermen fishing in the Australian fishing zone, the matter may be brought before the ICJ or the ITLOS. One of the ICJ’s jurisdictions is to resolve disputes between states (*contentious cases*). Under Article 34(1) of the ICJ Statute, only states may bring a legal dispute before the ICJ, and these are grouped into three categories: (i) all UN member states, which under Article 93 paragraph 1 of the UN Charter are *ipso facto* parties to the Statute of the Court; (ii) non-UN member states that declare a wish to establish a permanent relationship with the Court under conditions determined in each case by the General Assembly on the recommendation of the UN Security Council; and (iii) non-UN member states that wish to appear before the Court as parties to a particular dispute without becoming parties to the Statute.⁵³ The ICJ has jurisdiction to examine, adjudicate, and resolve legal disputes⁵⁴ between states on 2 (two) bases: first, a special agreement formed after a dispute has arisen, and second, compulsory acceptance under Article 36 paragraph (2) of the Statute. Legal disputes falling within the ICJ’s jurisdiction under Article 36 paragraph (2) of the Statute include the interpretation of a treaty, any question of international law, and any fact which, if established, would constitute a breach of an international obligation.

Based on the ICJ’s jurisdiction, Australia’s prohibition on Indonesian traditional fishermen catching fish and other marine biota in the waters around Ashmore Reef carried out continuously and from generation to generation falls within the ICJ’s jurisdiction, because it relates to the application and interpretation of Article 51(1) of the 1982 UNCLOS. In resolving the matter through the ICJ, however, Indonesia would face an obstacle, because to date Indonesia has not accepted the ICJ’s compulsory jurisdiction under Article 36 paragraph (2) of the ICJ Statute. Resolution of a legal dispute through the ICJ involving Indonesia must therefore be based on a special agreement. Australia, by contrast, declared its acceptance of the ICJ’s compulsory jurisdiction on 13

⁵² Dawud Shibghotulloh, Samsul Maarif, and Eko Adhi Setiawan, “The Optimum Configuration of Solar PV System from Conventional Fishing Boat towards E-Boat 12 GT,” in *AIP Conference Proceedings*, vol. 2376, no. 1, AIP Publishing LLC, 2021.

⁵³ D.W. Bowett, *Hukum Organisasi Internasional [The Law of International Organizations]* (Jakarta: Sinar Grafika, 1991), 338.

⁵⁴ Michael Potacs, “Does Law Without Force Exist?,” in *The Force of Law Reaffirmed: Frederick Schauer Meets the Critics* (Cham: Springer International Publishing, 2016), 125.

March 1975, except in respect of legal disputes that the states parties have agreed to resolve by other peaceful means.⁵⁵ However, on 22 March 2002, Australia submitted a reservation to its declaration of 13 March 1975, stating that Australia accepted the compulsory jurisdiction of the ICJ except in respect of three categories of legal disputes: legal disputes in respect of which the parties thereto have agreed to have recourse to some other method of peaceful settlement; legal disputes concerning maritime boundaries, such as the territorial sea, exclusive economic zone, or continental shelf, or disputes relating to the exploration of a disputed area or of an area adjacent thereto; and legal disputes with any other state that does not accept the jurisdiction of the ICJ, solely for the purpose of resolving that dispute, or with any other state that does not accept the compulsory jurisdiction of the ICJ.⁵⁶

Likewise, as regards ITLOS's jurisdiction, Article 288 of the 1982 UNCLOS provides that ITLOS has jurisdiction to hear, adjudicate, and decide any legal dispute relating to the international law of the sea. The legal subjects entitled to bring a dispute before ITLOS are states party to the 1982 UNCLOS and other non-state entities from a state party, while the subject matter of disputes that may be brought before ITLOS includes disputes concerning the interpretation or application of the 1982 UNCLOS, and the interpretation or application of an international agreement related to the purposes of UNCLOS. Such states or other entities may bring a dispute before ITLOS on the basis of consent to accept the Tribunal's jurisdiction, whether given before or after the dispute has arisen.

Based on ITLOS's jurisdiction, Australia's prohibition on Indonesian traditional fishermen catching fish and other marine biota in the waters around Ashmore Reef, carried out from generation to generation, likewise falls within ITLOS's jurisdiction, because it relates to the application and interpretation of Article 51(1) of the 1982 UNCLOS. Bringing a dispute before ITLOS, however, may also encounter obstacles, because the procedure for submitting a dispute to ITLOS likewise requires a *special agreement* between the two disputing parties. Nevertheless, whatever the obstacles, for the sake of the interests of Indonesian traditional fishermen, efforts must continue so that the traditional

⁵⁵ Henry Burmester, *Australia and the International Court of Justice* (Australia: Yearbook of International Law, 1996), 30.

⁵⁶ International Court of Justice, "Australian Declaration Under Paragraph 2 of Article 36 of the Statute of the International Court of Justice, 1945," lodged at New York on March 22, 2002, <https://www.icj-cij.org/declarations/au>, accessed May 20, 2026. See also United Nations, "Declarations Recognizing as Compulsory the Jurisdiction of the International Court of Justice Under Article 36, Paragraph 2, of the Statute of the Court," 3, https://treaties.un.org/pages/ViewDetails.aspx?src=treaty&mtdsg_no=i-4&chapter=1&clang=en, accessed May 20, 2026.

fishing right of Indonesian fishermen in the Australian fishing zone may be protected under applicable international law.⁵⁷

D. Conclusion

Based on the results of the research and discussion, three conclusions may be drawn. First, Indonesian fishermen possess a traditional fishing right in the Australian fishing zone around Ashmore Reef Island, because fishing has been carried out from generation to generation and the activity of Indonesian fishermen satisfies the elements of Article 51(1) of the 1982 UNCLOS. Second, Australia arrests Indonesian fishermen exercising their traditional fishing right in the Australian fishing zone around Ashmore Reef Island because Australia converted its fishing zone into a national marine park, the definition of fishing gear adopted by Indonesia and Australia does not match the needs of traditional fishermen, and both countries share a desire to stop the activity of Indonesian fishermen in the Australian Fishing Zone. Third, the legal protection that Indonesia should provide for the traditional fishing right of Indonesian fishermen is to restore the traditional fishing rights of Indonesian fishermen in the Australian fishing zone and to establish a clear and precise formulation of "traditional fishing gear" consistent with fishermen's needs and the development of science and technology. This legal protection can be achieved through 2 (two) means: re-negotiating the 1989 Agreed Minutes on Fisheries, and demanding amendment of the Agreed Minutes on Fisheries before the ICJ or ITLOS.

These findings carry both theoretical and practical implications. Theoretically, the traditional fishing rights of Indonesian fishermen in the waters surrounding Ashmore Reef, under Article 51(1) of UNCLOS 1982, are binding not only upon archipelagic states but also upon non-archipelagic states such as Australia, given that Australia has extended recognition to Indonesia's traditional fishing rights under the 1974 MOU Box. Recognition granted under a bilateral agreement does not automatically lapse merely because Australia subsequently redesignated, under its domestic law, a fishing zone long recognized as the traditional fishing grounds of Indonesian fishermen, passed down through generations, into a protected area. This reinforces the doctrinal position that traditional fishing rights constitute a distinct and self-standing category of use-rights protected under international law, such that a state is not justified in invoking domestic law to negate the application of international law. Practically, the persistence of apprehensions notwithstanding the existence of the 1974 MOU Box and the 1989 Agreed Minutes demonstrates that recognition on paper is insufficient without an updated, mutually agreed

⁵⁷ Neha Yadav, "The International Tribunal for the Law of the Sea (ITLOS): A New Horizon in International Law," *Indian Journal of Law and Justice* 11, no. 1 (2020): 152.

definition of “traditional fishing gear,” and without a functioning mechanism for the periodic review of such agreements in step with the development of fishing technology and the evolving needs of fishermen.

Based on these implications, this study puts forward the following recommendations. First, the Government of Indonesia should formally propose to the Government of Australia a renegotiation of the 1989 Agreed Minutes on Fisheries, adopting a concrete negotiating position comprising: (i) the restoration of access to the five traditional fishing grounds surrounding Ashmore Reef, Cartier Islet, Scott Reef, Seringapatam Reef, and Browse Islet, for the species of marine biota historically caught by Indonesian fishermen; and (ii) the inclusion of a clear definition of “traditional fishing gear” based on vessel size (5–10 Gross Tonnage), rather than on the presence or absence of an engine. Second, should such renegotiation prove unsuccessful, the Government of Indonesia should prepare a special agreement with Australia for the submission of a dispute concerning the interpretation of Article 51(1) of UNCLOS 1982 to the ICJ or ITLOS, supported by documented evidence of continuous traditional utilization dating back to the early 1700s. Third, at the domestic level, Indonesia should harmonize the definitions of “traditional fishermen” and “traditional fishing gear” across Law Number 7 of 2016, Law Number 1 of 2014, and Law Number 23 of 2014, so as to ensure that Indonesia’s own legal position remains consistent when negotiating with Australia. Finally, future research should empirically examine the socio-economic impact of continued apprehensions on fishing communities in Rote, East Nusa Tenggara, and Madura, and should further develop a doctrinal foundation for the periodic review of bilateral fisheries agreements once the technological premises underlying them become obsolete.”

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