

Chapter 8: An Evaluation of Australian Policy

There are a number of reasons why Australian policy is not effective in deterring illegal activity. A key feature of Australian policy has been the definition of 'traditional' fishing encapsulated in the 1974 Memorandum of Understanding (MOU) that regulates access for Indonesian fishermen in the AFZ. This concept of the 'traditional' reflects a simplistic but popular evolutionist view that emphasises the static, timeless, and non-commercial aspects of culture and ignores any process of cultural change and adaptation. While contemporary anthropological and legal opinions in Australia depict tradition and culture as dynamic in the face of changing circumstances, government policy towards Indonesian fishermen and indigenous Australians still tends to oppose the 'traditional' to the 'commercial'. This adherence to a notion of the 'traditional' as something culturally inert is at odds with the understanding and behaviour of Bajo fishermen, and regulation of access to the MOU area by reference to 'traditional' technology has resulted in all sorts of misunderstandings and inconsistencies.

In practice the Bajo have lost their 'traditional' access rights to areas of the AFZ where they previously fished, while the Australian definition of 'traditional' fishing provides the Australian Government with a justification for continuing the policy of apprehension, confiscation and forfeiture of *perahu*. Moreover, it appears that such views have contributed to a lack of will on the part of the Australian Government to consider alternative approaches to managing a traditional Indonesian fishery in the AFZ. The extent to which the MOU has been effective in providing recognition of fishing rights and curbing illegal fishing activity is debatable. Under the terms of the MOU, no specific rights exist for groups who operated in the region prior to Australian maritime expansion. Bajo fishermen are denied normal cultural dynamism in pursuit of their livelihood. There are double standards being applied here: Australians can change, but Bajo cannot — Bajo must operate 'traditionally'.

Over-exploitation of marine resources has occurred within the MOU box area because there are no restrictions on access to it, so it is now regarded as a poor shark fishing ground. Fishermen therefore fish illegally in order to access more abundant shark populations to secure reasonable profits. The basic nature of Bajo navigational methods also means that it is often difficult for the fishermen to determine the location of marine boundaries. Educational campaigns and the policy of deterrence have been largely ineffective. Large numbers of fishing boats continue to be apprehended for illegal incursions in the AFZ. The burning of boats that provide a livelihood for some of the poorest people in eastern

Indonesia while Australia continues to fund aid projects to alleviate poverty in the region represents a seriously inconsistent and counterproductive foreign policy.

A range of complex and competing political, territorial, commercial, environmental and legal factors continue to influence government inaction on the complex problem of illegal fishing in the AFZ. A more inclusive, culturally informed approach should now be taken to devise new agreements for specific groups with a historic interest in the area prior to Australian maritime expansion. The challenge for Australian and Indonesian policy makers is to find a flexible arrangement that incorporates the cultural dynamics of a traditional Indonesian fishery while at the same time maintaining the legal, territorial, commercial and environmental principles and objectives of the nation state.

What is 'Traditional' Activity?

The Eurocentric worldview has been criticised for the 'distorted way that it constructs and presents alien societies' (Carrier 1992a: 195). Debate on this subject was stimulated by anthropological reflections on the 'colonial encounter' (Asad 1973), and then by Said's (1979) study of 'Orientalism', which focused on the way that Oriental or Asian societies have been portrayed in essentialist terms as static and simple, isolated from Western influence (Carrier 1992b: 3). Fabian (1983: 31) calls this the 'denial of coevalness' which positions the 'Other' in another time, or out of time, from the West — a process that developed out of nineteenth century evolutionary schemes which placed all societies in a developmental sequence of progress, 'a temporal slope ... a stream of Time — some upstream and some downstream' (ibid.: 16). This discourse holds that societies passed through stages of development from the 'savage' to the 'civilised'. Terms used in 'temporal distancing' (ibid.: 71), like 'primitive' or 'traditional', came to refer to less technologically developed societies that were untouched, static survivals of the past. From these discourses arose a tendency to discuss 'Other' societies in terms of dichotomies such as progress versus stagnation, development versus underdevelopment, and modernity versus tradition (ibid.: 144). These dichotomies obstructed the realisation that 'Other' societies also have histories (Wolf 1982) and exist in the same time and space as ourselves.

Much early anthropological writing about so-called 'traditional', 'native' or 'indigenous' societies focused on 'traditionalism' (Fabian 1983; Marcus and Fischer 1986; Carrier 1992b; Miller 1994: 59; Merlan 1998: 3). This 'traditionalism' is the process of 'the reproduction of idealized representations of native societies as they allegedly are, in the terms of how they supposedly were' (Merlan 1998: 231). These 'traditionalist' accounts of indigenous peoples 'support a vision of the world in which at least some portions of it, some peoples of it, remain customary, unchanged, and therefore different from 'us', inherent and unreflective in their relation to their "culture"' (ibid.: 4).

Anthropology has since ‘involved itself in a thorough-going critique and rejection of static models of culture’ (Scott 1993: 322). Studies concerning ‘the invention of culture’ (Wagner 1975), the ‘invention of tradition’ (Hobsbawm and Ranger 1983), or the ‘reinvention of traditional culture’ (Keesing and Tonkinson 1982) point to processes whereby people actively formulate and codify their traditions. Anthropologists now generally agree that ‘there is no traditional baseline of unchanging homeostasis’ from which to measure tradition, ‘nor is there any one-sided change caused by colonialism and modernisation’, but ‘in encounters with colonial and other “modern” powers, so called traditional systems tend to generate creative responses to the challenges from afar’ (Hviding 1996: 29). Or as Marcus and Fischer would have it:

Most local cultures worldwide are products of a history of appropriation, resistances, and accommodations. The [present] task ... is ... to revise ethnographic description away from [a] self-contained, homogenous, and largely ahistorical framing of the cultural unit toward a view of cultural situations as always in flux, in a perpetual historically sensitive state of resistance and accommodation to broader processes of influence that are as much inside as outside the local context (Marcus and Fischer 1986: 78).

In an overview of developments in the ‘invention of tradition’ literature since 1982, specifically in regard to Oceania, Tonkinson (1993: 598) explored aspects of tradition ‘that continue to offer useful avenues for further research ... in light of what we know about it as a complex and ramifying domain of meaning, discourse and action’. He concluded that ‘tradition is most effectively conceptualised as a *resource* employed (or not employed) strategically by certain (but not all) of a community’s members’ (ibid.: 599). This approach is particularly useful in places like Australia and North America, where the nation state demands that indigenous minorities ‘present their claims to rights and resources largely in terms of “traditional” validatory criteria, such as kin group affiliation, land tenure principles, religion and language’ (ibid.: 603).

Following the 1992 Australian High Court decision known as the *Mabo* decision, the Commonwealth Government passed the *Native Title Act 1993*. Despite the fundamental changes thus made to the recognition of native title, claimants are required to demonstrate their possession of ‘traditional law and custom’, so the concept of traditionalism is still embedded in Australian law. In a subsequent paper dealing with native title controversies, Tonkinson made the following observation:

Adopting a perspective on tradition that conceptualises it as a resource, strategically deployed by groups of people in the defence or furtherance of their interests, raises larger political issues, particularly in societies like Australia where indigenous cultures coexist with a dominant nation

state. For example, it poses a considerable challenge to law-makers: how to frame and implement heritage and similar legislation so as to take account of the dynamism inherent in indigenous constructions of tradition and the variety of pressures that influence the nature and trajectory of these constructions. The difficulty here is the tension that exists between the need to ensure some degree of flexibility — to allow for the dynamism inherent in these constructions of tradition — and legal requirements for sufficient boundedness or closure to allow legislators to formulate widely applicable criteria for assessing ‘significance’ (Tonkinson 1997: 12).

He then went on to describe the way in which emergent traditions were labelled as ‘suspect’ and ‘inauthentic’, and to note that they are especially vulnerable to attack when they ‘threaten in any significant way the interests of governments or the private sector, and potentially large financial returns are seen as endangered by successful invocation of Aboriginal heritage legislation (ibid.: 18). In Australia, there remains a ‘lack of public awareness’ of the dynamism inherent in Aboriginal culture and a failure to recognise that ‘the inevitable transformations through time are due partly to powerful external forces’ (ibid.: 19). This is also a problem that needs to be addressed in the way that Australian laws and policies have dealt with Indonesian fishermen.

‘Traditional’ Activities in the MOU

The idea that Indonesians were engaged in subsistence fishing influenced the 1968 decision to permit ‘traditional’ Indonesian fishing to continue within the 12 nm territorial sea adjacent to Ashmore Reef, Cartier Island, Seringapatam Reef, Scott Reef, Browse Island, and Adele Island, provided their operations ‘were confined to a subsistence level’ (DFAT 1988: 1). The 1974 Memorandum of Understanding made no direct reference to the mode of production; ‘Indonesian traditional fishermen’ were instead defined as ‘fishermen who have traditionally taken fish and sedentary organisms in Australian waters by methods which have been the tradition over decades of time’ (see Appendix B).

Under the 1989 amendments to the MOU, further qualifications were introduced when access to Australian waters was 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 utilising motors or engines’ (see Appendix C). Since ‘decades’ had to refer to a minimum period of two decades,¹ ‘traditional vessels’ were defined as *perahu* without motors. The direct reference to Indonesian fishermen with a history of activity in the AFZ was dropped, is indirectly present in the inference that ‘traditional fishermen’ have been fishing ‘over decades’. Implicit in the

¹ It is not clear whether the point of reference for this minimum period is 1974 or 1989.

MOU is the notion of traditional societies operating in a static and unchanging fashion over a long period of time. Traditional rights of access are thus determined by continuing use of ‘traditional’ — that is, unchanging — technology.

The notion of the ‘traditional’ in the 1974 MOU reflects the essential elements of a popular and prevailing view of indigenous tradition, common both in Australia and elsewhere, as ancient and unchanging (Handler and Linnekin 1984; Merlan 1991; Hovelsrud-Broda 1997; Ewins 1998; Ritchie 1999). An everyday definition of tradition used in relation to the Pacific is ‘those beliefs and practices that have been handed down from generation to generation’ (Ewins 1998: 3). This view assumes that ‘an unchanging core of ideas and customs is always handed down from the past’ (Handler and Linnekin 1984: 273) — in the case of the MOU ‘over decades of time’. The prevailing view of ‘traditionalism’ (Merlan 1998) is that changes in tradition, such as the adoption of new technologies as a result of adaptation to changing circumstances, are considered to be ‘inauthentic’ and therefore not ‘traditional’. Since ‘modern’ often means ‘commercial’, ‘traditional’ is equated with ‘subsistence’, and this ‘underpins the belief that “traditional” is, and should continue to be associated with primitive technology’ (Campbell and Wilson 1993: 75–6).

While such notions and dichotomies are now rejected in social theory, they still inform the Australian Government’s understanding of Indonesian fishing activity in the AFZ. Australia’s version of the Orientalist discourse is based on a fictionalised cultural inertia ascribed to Indonesian fishermen. The irony is that Australia makes allowance for its own cultural dynamism by expanding its territorial waters, appropriating Indonesian fishing grounds, and continually upgrading and modernising its maritime technology to patrol these waters. Indonesian fishermen, on the other hand, are forced to use simple fishing gear and unmotorised vessels in order to remain traditional, primitive, stagnant, underdeveloped and technologically unsophisticated. And the Bajo suffer a double jeopardy, because they are also subject to pressure from Indonesian authorities who have ‘traditionally’ viewed minority cultural groups in much the same light.

The regulations in the 1974 MOU effectively lock Indonesians and their material culture of fishing into a time-bound past. They are forced to operate outside of their own time (Fabian 1983: 2), in a state of ‘reified timelessness’ (Carrier 1992b: 11), resulting in a technological freeze (Campbell and Wilson 1993: 185). The modernisation of Bajo fishing vessels means that Australian authorities consider they are no longer operating ‘traditionally’, but are commercial operators whose activities fall outside the regulations of the MOU. The following court case illustrates the shifting status of Indonesian fishermen caught in this traditional/commercial dichotomy.

The Case of the Karya Abadi

On 18 May 1997, a Mola Bajo captain, Si Nasir, and four crew of the Karya Abadi were apprehended for illegally fishing outside the MOU box area, exactly 10.7 nm south of the southern MOU boundary, south of Browse Island, and taken to Broome. The crew and captain were charged under Section 100 of the Commonwealth *Fisheries Management Act 1991* with using a foreign fishing vessel in the AFZ without a licence. The captain was also charged under Section 101 with being in charge of a foreign fishing vessel equipped for fishing. The captain and the crew pleaded not guilty to the charges. Although legal aid was not provided, a lawyer from Perth decided to defend the fishermen on a *pro bono* basis. The crew were held at Willie Creek until their case was finally heard five months later in the Broome Court of Petty Sessions on 16 and 17 October.

The case received an unprecedented level of print and television media coverage before and during the trial because the defence lawyer presented a Mabo-style sea claim and asserted that the fishermen had a native title right to fish in areas of the AFZ outside the MOU box area. If the defendants were all traditional fishermen exercising traditional fishing rights recognised under Australian law, then Sections 100 and 101 of the *Fisheries Management Act 1991* would not apply to them (Vincent 1997).

Legal precedents set in previous cases in Australia had outlined the evidence required to prove native title rights for land or sea, and these formed the basis of the defence case. The first traditional fishing rights case in Australia was heard in the New South Wales Supreme Court in March 1993.² It dealt with a man called Mason who was arrested for having more than the allowed limit of abalone in his possession. Mason's defence was that he was 'exercising his native title right to fish and therefore outside the scope of the fisheries regulations' (Peterson and Rigsby 1998: 11). The court 'recognised the existence of a traditional right to fish but questioned whether the defendant was actually practising that right at the time of his arrest', so Mason lost his case (Cane 1998: 66).

Justice Kirby's judgement on appeal found that the right to fish based upon traditional laws and customs is a recognisable form of native title under common law. Justice Kirby also set out the type of evidence required to establish a successful common law claim for native title. The criteria adopted by Nasir's defence to demonstrate the validity of the Bajo claim were informed by this judgement. These were that: (1) the traditional laws and customs covering the right to fish were observed by the communities from which the defendants originated immediately before Australia exercised its sovereignty over the waters in question; (2) the defendants were indigenous people and descendants ('or

² The case is documented as *Mason v Tritton* in 34 *New South Wales Law Reports* 572 (1994).

within the permitted group') of the relevant communities; (3) they had continued, uninterrupted, to observe the relevant traditional laws and customs; and (4) their activities in fishing for shark fin were an exercise of those traditional laws and customs.³

In submissions to the magistrate the defence highlighted two contentious questions about the definition of 'traditional' activities. The first was whether fishing for shark fin for sale or barter could be regarded as a traditional practice and the second was whether the use of longline gear could be regarded as a traditional fishing method. Not only did the defence argue that sale of shark fin is in keeping with the traditional practices of the Bajo; it was also argued that there is in law no requirement for customary practices to be immutable or fixed in time. The second argument was based on judgements by Justice Brennan in the *Mabo* case and by Justice Kirby in the *Mason* case.

The magistrate handed down his decision on 11 November 1997. He ruled that the *Fisheries Management Act 1991* was plainly intended to extinguish foreign traditional fishing rights in Australian waters. Since the MOU set aside areas within the AFZ where traditional fishermen could operate, he said that this indicated a legislative intention to abrogate any such rights that may have existed in other parts of the AFZ (Roberts 1997: 15). He also found that the defendants could establish points (1) and (2) in their main argument, but could not establish points (3) and (4), and could not therefore be properly regarded as 'traditionally fishing' (ibid.: 19). One of his reasons was that evidence presented by a Western Australian fisheries officer showed that longlines cannot be considered as a traditional fishing method because of their recent adoption and size.

Previously shark boats used only handlines and the fishermen kept all of the shark. Now they only keep the fins or a small proportion of the body.... Further, the price of shark fin has increased dramatically whereby Indonesian fishermen may receive up to \$80A per kilo for No 1 grade product.... Even allowing for cultural dynamics, the recent development of relatively sophisticated longlining appears to be as a direct result of the high price paid to Indonesian fishermen for shark fin and the desire to maximise profits. In my view this method of fishing cannot be said to be a traditional fishing practise [sic] — even making allowances for changing fishing equipment technology (ibid.: 21).

³ The International Commission of Jurists, as well as various philanthropists, anthropologists, historians, and members of the Broome based Kimberley–Indonesia Friendship Society provided funding and evidence to support the defence case. Because of my research into the activities of the Mola Bajo in the AFZ, I was asked to submit a report on evidence in defence of Nasir and the crew addressing the four criteria outlined above. I also appeared as an expert witness during the trial.

The magistrate also noted that the *Torres Strait Fisheries Act 1984* 'excludes traditional fishing from the definition of commercial fishing', but no such exclusion is made in the *Fisheries Management Act 1991*, so he concluded that the defendants were engaged in commercial fishing (ibid.: 6).

I have reservations in accepting the proposition that a defence based upon a traditional fishing right extends to fishing for commercial purposes ... the formal written contract entered into by Nasir with the money lender, the sale and/or exchange of shark fin for goods or money and the use of the longline demonstrate that his venture was of a commercial rather than traditional nature (ibid.: 21–2).

The magistrate convicted the fishermen on all charges and placed them on good behaviour bonds of A\$ 3000 for five years. He ordered forfeiture of the fishing gear but not the vessel. His reasons for this decision were that six months in detention awaiting the trial and judgement amounted to fair punishment for the crew, and that the vessel was only 10.7 nm outside the MOU box. However, he added that by using what he called 'imprecise' and 'primitive' navigational equipment (compass and depth lead line), the captain was reckless to be fishing so close to the MOU box boundary. A few days later, the vessel was stocked with food and towed for three days to the outer edge of the AFZ from where the captain and crew returned to Indonesia.

The Broome decision is strangely contradictory. Fishermen using longline gear operating inside the MOU box area are not apprehended for being non-traditional and therefore engaged in illegal activity. The Karya Abadi had been boarded by a senior WA fisheries officer inside the MOU box area northeast of Ashmore Reef ten days before its apprehension. According to the evidence presented in court, the officer stated that he informed the captain where he could and could not fish and also inspected his fishing gear. In doing so, he acknowledged that the men were 'traditional fishermen' since they were carrying out 'traditional fishing' within the terms of the MOU regulations. No Indonesian *perahu* has ever been apprehended and convicted for charges of being 'non-traditional' in the MOU box. However, if the same vessel is found operating outside the MOU box area using the same longline gear, the activities of the crew become 'non-traditional', 'commercial' and 'illegal'.

Commerce and Tradition

There is now widespread academic awareness of the paradoxical fluidity of tradition (Ewins 1998: 12). Culture is shaped by changes in social, economic and historical circumstances although 'it has taken some time for anthropology to come to terms with a humanity that is equal, that is universally dynamic and changing, possibly in different ways within different cultural projects, but which could not simply be sundered into the progressive and the traditional'

(Miller 1994: 59). Legal precedents in Australia, in some instances informed by contemporary anthropological opinion, have come some way towards acknowledging cultural dynamism, and rejecting a definition of 'traditional' activities based on technology, but this is in stark contrast to the approach written into the 1974 MOU and its amendments.

In 1986, the Australian Law Reform Commission rejected such a definition of 'traditional' Aboriginal hunting and fishing activity:

In determining whether an activity is 'traditional' attention should focus on the purpose of the activity rather than the method (LRC 1986: 181).

The Commission also acknowledged the changing nature of Aboriginal traditions:

Aboriginals have had to adapt to change and outside influence ... [and] in many cases hunting and fishing practices have incorporated new materials. Nylon fishing nets may have replaced those made of bush fibre ... guns may very often have replaced spears, aluminium dinghies are used instead of dugouts (ibid.: 121).

The Commission's findings related to Aboriginal subsistence activities, broadly including 'consumption within local family or clan groups ... even though elements of barter or exchange may be present' (ibid.: 181). They do not directly apply to Indonesian fishermen since the latter are not fishing for subsistence and are not Australian citizens. However, as Campbell and Wilson (1993: 78–9) have previously argued, a definition of 'traditional' activity based on the purpose rather than the method has already been applied to foreign fishermen in the *Torres Strait Treaty 1978* between Australia and Papua New Guinea.

According to Article 10(3), the principal aim of this treaty is 'to acknowledge and protect the traditional way of life and livelihood of the traditional inhabitants including their traditional fishing and free movement'. In Article 1(l), the treaty defines traditional fishing as 'the taking, by traditional inhabitants for their own or their dependants' consumption, or for use in the course of other traditional activities, of the living resources of the sea, seabed, estuaries and coastal tidal areas, including dugong and turtle'. In Article 1(k), it defines 'traditional activities' as:

Activities performed by the traditional inhabitants in accordance with local tradition, and includes, when so performed —

- (i) activities on land, including gardening, collection of food and hunting;
- (ii) activities on water, including traditional fishing;
- (iii) religious and secular ceremonies or gatherings for social purposes, for example, marriage celebrations and settlements of disputes; and
- (iv) barter and market trade.

In the application of this definition, except in relation to activities of a commercial nature, 'traditional' shall be interpreted liberally and in light of prevailing custom.

There is no reference to the methods of traditional fishing, only to the purpose, and there is a recognition that customs can change. This last point has been recognised more recently in the Australian High Court's second Mabo decision, where Justice Brennan stated that the 'laws and customs of any people will change'.⁴ The Broome decision contradicted these important findings.

There is still contention in Australia about whether a traditional fishing activity or right can have a commercial purpose. The *Torres Strait Treaty* denies this possibility.

[A]fter a century of commercial fishing by the Strait's indigenous inhabitants it was uncertain what fishing activities could be legitimately regarded as 'traditional'. By adopting a narrow definition of traditional which excludes commercial activities, the Treaty failed to acknowledge the fluidity of tradition as well as the dynamic quality of economic decision making in the face of changing social conditions (Schug 1996: 219).

In Nasir's case the magistrate relied on Section 3 of the *Torres Strait Fisheries Act 1984*, which defines 'commercial fishing' as 'fishing for commercial purposes, but does not include traditional fishing'.

In Australian courts there have been no clear legal determinations on whether Aboriginal native title rights include commercial activities (Sutherland 1996: 28; Peterson and Rigsby 1998: 12). There are indications that the right to native title and traditional practice extends to commercial use (Kilduff and Lofgren 1996) but this has yet to be successfully tested. It would appear that in Australia official perceptions of Indonesian fishermen are consistent with representations of indigenous Australians. The 'traditional' is still largely represented as an inversion of the 'commercial'. But for as long as Indonesian fishermen are known to have been fishing in the north Australian region, this has primarily been for commercial rather than subsistence purposes (Campbell and Wilson 1993). Drawing a distinction between traditional and commercial fishing activity is untenable in the case of the Bajo fishery.

There is, as the Broome case illustrates, a generally held belief on the part of the Australian authorities that fishermen have switched from 'traditional' to 'commercial' fishing because of increases in the price of shark fin in recent years and are now catching more sharks with the adoption of more 'modern' fishing gear (Wallner and McLoughlin 1995b: 120). Campbell and Wilson (1993: 75)

⁴ The quotation is from *Mabo No 2* 1992-175 *Commonwealth Law Reports* 1 at 61.

provide an alternative account of this perception: ‘shark fishermen take shark fin “traditionally” provided the profit is small; once they begin to make significant commercial returns their activities cease to be traditional’. This understanding was reflected in the Broome case, and parallels the point made by Tonkinson (1997: 18) about Aboriginal traditions ceasing to be ‘traditional’ if they change in ways that threaten government or private sector interests. The Australian Government focuses on the high returns Indonesians are making on successful shark fishing trips and the perceived loss of Australian revenues as a result of this activity. As one Darwin magistrate stated in his decision to convict the Mola Bajo captain of the Bintang Nusantara for illegal fishing in the AFZ in March 1999: ‘Clearly fish in the AFZ is an asset which the court jealously guards, and an asset if not properly controlled will be plundered by a people with no legal right’.

This sort of thinking provides a justification for continuing the policy of apprehension and prosecution. The Australian authorities apprehend Bajo and other groups of fishermen operating in sail-powered boats outside the MOU box area using longline gear to fish for shark fin because they are seen to have betrayed their earlier authentic ‘traditional’ status and thus forfeited any ‘traditional’ rights they may have previously had.

How Effective is Australian Policy?

The 1974 MOU recognises some form of traditional fishing rights and attempts to regulate access for traditional Indonesian fishermen in an area now under Australian control. However, in the words of Fox (1998: 114), ‘numerous problems have arisen as a result of this seemingly well-intended endeavour’ and led to a succession of ‘unintended consequences’.

The MOU does not specifically identify who is allowed access into the MOU area. Rather, access is open to any Indonesian ‘traditional’ fishermen as long as they comply with the regulations which narrowly define ‘traditional’ methods and vessels. Access is not determined by historically recognised use rights for specific groups who operated in the region prior to Australian maritime expansion; any group of fishermen using a sail-powered boat is allowed to fish in the region. By failing to identify the specific groups who historically accessed the AFZ, the effectiveness and original intention of the MOU has been undermined and its outcomes severely attenuated.

The original purpose of excluding the use of motorised vessels and methods in the face of increasing motorisation in the small-scale *perahu* sector in Indonesia was to limit the number of boats entering the area. This policy was designed to control the level of resource exploitation and therefore function as a form of resource management. The idea was that if the technology was unsophisticated or ‘primitive’ it could offer some protection for marine resources. But this

technological freeze has failed to achieve the desired outcome. By not restricting the numbers of vessels or the amount of product taken, it opened the area up to an unlimited number of fishermen in sail-powered vessels, of which there is no shortage in eastern Indonesia, and this has resulted in over-exploitation of resources in the MOU box area, particularly sedentary species on reefs and inshore waters.

By not permitting the use of motorised vessels in times of bad weather, the Government has also been accused of enforcing a policy that subjects the fishermen to unnecessary risks (Campbell and Wilson 1993; Fox 1998: 121). Over the last decade, a number of sailing boats and their crews have been lost during cyclones in the MOU area. For example, in April 1994, four Pepela-owned boats and their mostly Bajo crews drowned during a cyclone in the Timor Sea. On the other hand, in periods of little or no wind, or strong currents, when it is impossible to make any headway in a sail-powered vessel, strong currents can easily drag a sail-powered vessel beyond the permitted areas.

Legal fishing in the MOU box area can also be seen as a gateway to illegal fishing (Fox 1998). The 1989 amendments that created this area did not incorporate the most productive Bajo shark fishing grounds. Apart from a few areas around reefs and islands and along the edges of the MOU box, it is a relatively poor shark fishing ground (Wallner and McLoughlin 1995a: 34). No motorised Type 3 *perahu* have been apprehended for illegal shark fishing activity in this area. Butonese and Bajo fishermen from across eastern Indonesia who use motorised boats to target shark prefer to concentrate their activities in the more productive waters to the north and east of the MOU box (*ibid.*). Bajo fishermen often seek access to these waters by passing through the MOU box, but in doing so they run the risk of apprehension. Fishermen are forced to fish illegally outside the MOU box area in an attempt to secure adequate returns. Illegal fishing and boat apprehensions thus occur in direct response to the ineffectiveness of the MOU itself.

Naturally, the borders of the MOU box area cannot be marked or signposted. They only exist as lines on maps, unconnected to any geographical features. Bajo navigation is based on reference to familiar landmarks and sea features. Their sailing and fishing activities have, until recently, never been confined to areas bounded by lines on maps. Even for the most experienced navigators, it is difficult to determine exactly where the boundaries of the MOU box are. The MOU restricts access to fishermen using 'traditional methods' but expects the accuracy of modern navigation. Accurate determination of latitude and longitude requires the use of marine charts and sophisticated navigational equipment such as a Global Positioning System. Prior to the early 1990s, fishermen found within an unspecified reasonable distance of the permitted areas were generally warned but not apprehended. The tougher approach adopted by AFMA in recent years

has seen Bajo and other fishermen apprehended as little as 5–8 nm outside the MOU box. Fishermen who are denied the use of motors and sophisticated equipment under the MOU are treated in the same fashion as an industrial foreign fishing vessel worth millions of dollars caught illegally fishing in the AFZ.

Neither the 1974 MOU nor the Plan of Management for Ashmore Reef National Nature Reserve (ANPWS 1989) makes any mention of this reef's cultural heritage value. At least eight Indonesian graves have been identified on West Island and others on East and Middle islets (ANPWS n.d.), and fishermen are officially prohibited from landing on the islands to visit these sites.⁵ However, formal requests by fishermen are made to the caretaker to obtain permission to visit and maintain the graves, perform ceremonies and present offerings, and the caretaker often accompanies the fishermen on these visits (personal communication, Paul Clark, 1999).

Indonesian fishermen have played no role in shaping the MOU itself. The agreement makes some attempt at recognising their rights but they have not been invited or allowed to participate in its formulation or implementation. They are not alone, for the interests of maritime peoples are often 'ignored, dismissed or marginalised' (Schug 1996: 210) in the formulation of international maritime boundaries and agreements designed to protect *their* livelihood. The case of the indigenous people of the Torres Strait is one example: the boundaries between Papua New Guinea and Australia established under the *Torres Strait Treaty* were developed 'without sufficient consultation with the people who would be affected most directly by the political division', and this has 'created an unstable situation which threatens to undermine intention the Treaty's efforts to provide for the protection of the Strait's marine environment' (ibid.: 222). In the case of the MOU, dialogue may be effective at a government-to-government level but other stakeholders, such as Indonesian fishermen, are unable to participate.

The Australian Aid Program

Included in the minutes of the meeting between Australian and Indonesian government officials in April 1989 is a provision which states that:

Indonesian and Australian officials agreed to make arrangements for cooperation in developing alternative income projects in Eastern Indonesia for traditional fishermen traditionally engaged in fishing under the MOU. The Indonesian side indicated they might include mariculture and nucleus fishing enterprise scheme (Perikanan Inti Rakyat or P.I.R.). Both sides mutually decided to discuss the possibility of channelling Australian aid funds to such projects with appropriate authorities in their respective countries.

⁵ At least one of these graves is that of a Bajo man from Mola Selatan.

The 'nucleus fishing enterprise scheme' is a transmigration program in the fisheries sector which is used to shift the rural and/or fishing population from densely populated areas to those islands where population density is low. No Australian aid was subsequently directed to the Bajo fishermen who operate in the AFZ, and it was not until the late 1990s that any official Australian delegations visited the villages of Mola, Mantigola or Pepela. The idea of direct engagement with fishermen and an understanding of the issues from their point of view appeared to be completely alien to the Australian authorities.

The educational and information tours undertaken by Australian officials to eastern Indonesia in 1995 were in response to high levels of incursion into the AFZ in 1994. During the visits, maps were distributed in an effort to explain the complex maritime jurisdictions existing between Australia and Indonesia in the Timor and Arafura seas and the MOU area. These were accompanied by two handouts in Indonesian entitled *Pesan Permerintah Australia untuk Nelayan* ('Message for Fishermen from the Australian Government') and *Pesan Pemerintah Australia untuk Pemilik Perahu/Kapal dan Otorita Pelabuhan* ('Message for Perahu/Boat Owners and Harbour Authorities from the Australian Government').⁶ The Australian authorities seem to think that their maps are readily understood by Indonesian fishermen and that they can help them to determine where they can and cannot fish. Fishermen with maps certainly have no excuse if found outside of the permitted areas. However, some Bajo captains, especially those who were illiterate, found the maps highly confusing and difficult, if not impossible, to comprehend.

During the course of their awareness-raising tours, officials from the Australian Agency for International Development (AusAID) did explore the opportunities for delivery of aid to poor isolated fishing communities. As a result AusAID has implemented some small projects, but these have not been directed to fishermen whose activities are covered by the MOU, but to people from Sinjai in South Sulawesi who were apprehended in large numbers in 1994–95 following a wave of illegal trepang fishing activity in the northern part of the AFZ. Some support from the Direct Assistance Program of the Australian Ambassador to Indonesia was given to other fishing communities, including Pepela, but the outcome was somewhat ironic. In one instance the money was used to purchase a *perahu lambo* on the understanding that the proceeds from fishing would be distributed among the community, but the *perahu* (the Bintang Pagi) was subsequently apprehended, confiscated and destroyed in Darwin.

⁶ The first maps produced in late 1994 were A4 black-and-white photocopies. These were replaced a few months later with larger A3 plastic colour-coded maps. A second edition was produced in August 1997 and reprinted in February 2000. The third edition was produced in December 2004 and is now available on the AFMA website in both English and Bahasa Indonesian (www.afma.gov.au/management/compliance/illegal/default.htm).

There is a serious inconsistency here. Australia has a policy commitment to deliver aid to eastern Indonesian fishermen operating under the terms of the MOU, yet retains a policy of confiscating and destroying the sources of livelihood of these very same people. In February 1995, an ABC journalist interviewed a representative from the Australian Embassy in Jakarta and a senior officer from the WA Fisheries Department who had just returned from the first educational tour of eastern Indonesia. The embassy representative explained that the Australian Government was exploring opportunities for the delivery of aid for 'isolated poor fishing communities in eastern Indonesia ... who need, for their livelihood, to gain income to support their families and are ready and willing ... to often engage in some risky fishing activities south of the border' (ABC Radio National 1995: 2). In the same interview, the fisheries officer discussed the effectiveness of the deterrence policy:

From our experience ... we've found the only real deterrent is to continue prosecuting them and to take their boats off them and just fly them home.... I think this is the only real way we can deter them is to continually confiscate and burn their boats, so they lose all their boats and *all* their fishing equipment, and fly them home back to Indonesia. And just continually do that (ibid.: 5).

As Fox (1998: 131) noted, it is an 'outright contradiction' for the Australian Government to fund aid projects to alleviate poverty in eastern Indonesia while burning vessels belonging to some of the poorest inhabitants of the region.

The Record of Apprehensions

For over a decade, the policy of apprehension and confiscation of boats, catch and equipment as a form of deterrent to further illegal activity has been in place. Between 1988 and 1993, there was an overall decline in the number of boat apprehensions, which gave the impression that the policy of apprehension and confiscation was working. However, there was a dramatic increase over the course of the next four years, and this included an increase in the apprehension of Type 2 *perahu* using longline gear (see Figure 8-1). Of the total number of Indonesian boats apprehended between 1975 and 1997, approximately 22 per cent or 134 boats were Type 2 vessels.

Boats to Burn

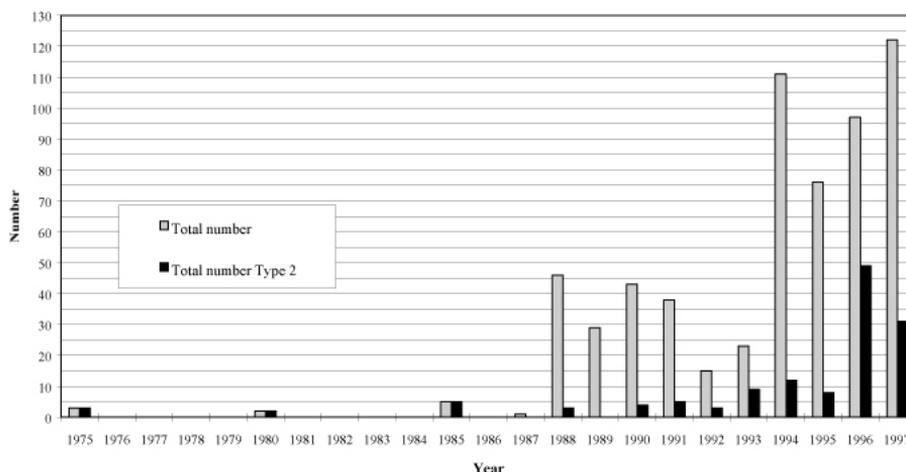


Figure 8-1: Total number of boat apprehensions and total number of Type 2 boat apprehensions, 1975–97.

The educational and information campaigns of the 1990s seem to have introduced the AFZ to coastal peoples who may not have previously been aware of the existence of the MOU and the permitted areas. The campaigns themselves may therefore have contributed to larger numbers of boats from eastern Indonesia beginning to engage in illegal activity. If we look at the proportion of Bajo Type 2 *perahu* among the total number of Type 2 *perahu* apprehended in those years when there were any apprehensions of such vessels, we can see that the proportion declined in those years when the total number of apprehensions suddenly began to increase (Table 8-1). In 1996, when 49 Type 2 *perahu* were apprehended, only 18 of them were Bajo *perahu*.

The present enforcement and prosecution approach costs the Australian taxpayer millions of dollars each year. Expenses include the costs of towing the vessels to Darwin or Broome, carrying out immigration, quarantine and customs checks, maintaining crews and vessels until the completion of court hearings, repatriation of fishermen and destruction of forfeited boats. The costs incurred for each apprehension boat crew depend on the length of time the fishermen are detained, and this in turn depends on the prosecution process.⁷ It is difficult to obtain official government figures on these expenses because there is a reluctance to place such information in the public domain and many different government departments and agencies are involved in the process.

⁷ The average stay for fishermen has been reported to be 27 days (Commonwealth Ombudsman 1998: 30), but some fishermen spend months awaiting court hearings.

Table 8-1: Total number of Type 2 apprehensions and Bajo Type 2 apprehensions, 1975–97.

| Year | Total Type 2 | Bajo Type 2 |
|-------|--------------|-------------|
| 1975 | 3 | 3 |
| 1980 | 2 | 0 |
| 1985 | 5 | 5 |
| 1988 | 3 | 0 |
| 1990 | 4 | 4 |
| 1991 | 5 | 5 |
| 1992 | 3 | 3 |
| 1993 | 9 | 0 |
| 1994 | 12 | 8 |
| 1995 | 8 | 1 |
| 1996 | 49 | 18 |
| 1997 | 31 | 15 |
| Total | 134 | 62 |

Source: AFMA Apprehension lists, Northern Territory and Western Australia.

In its submission to the Joint Standing Committee on Foreign Affairs, Defence and Trade (JSCFDAT) in 1991, AFMA reported that the costs associated with the apprehension of Indonesian vessels in 1989–90 was A\$ 750 499 (Fox 1998: 132). A senior AFMA official has stated that his organisation spent around \$A 3 500 000 dollars on 124 foreign fishing apprehensions, of which 113 were Indonesian, in the financial year 1997/98. This amount included the salaries of 15–20 fisheries officers on AFZ patrolling duties and other fisheries support functions and the costs of caretaking and security operations while fishermen are in detention. In Darwin the contracting caretakers receive about \$A 1000 a day from AFMA for each vessel and crew in their care. This amount covers staff salaries and the cost of providing food, medical treatment, and transport for the fishermen who have been detained. Legal Aid lawyers say that the cost of legal representation for the fishermen is also around \$A 1000 a day. From Darwin, fishermen are normally repatriated to Kupang on a Merpati flight. A one-way ticket costs \$A 244–319 depending on the time of year. Repatriation from Broome is more expensive. For those few fishermen who are able to pay security bonds and return to Indonesia in their boats, the Australian authorities incur several thousand dollars in additional costs by towing the vessels to the international border.

The effectiveness of the policy of apprehension in deterring illegal activity was questioned by the JSCFDAT in 1993. The committee concluded that was a

drop in the price of trochus shell, and not surveillance and enforcement, that had caused a decline in illegal trochus harvesting in the AFZ in the early 1990s. The committee also considered that similar enforcement and prosecution approaches were 'unlikely to be effective' against illegal shark fishing while the price of shark fin remained high (JSCFDAT 1993: 129).

New Policy Approaches

Current Australian policies toward Indonesian fishermen are clearly inappropriate and ineffective. Apprehension and confiscation of Bajo *perahu* should cease. New approaches and new agreements are needed to regulate Indonesian fishing in the AFZ. The MOU is a simple document designed to deal with a complex situation. Despite its failings, it does grant some form of fishing rights to small-scale fishermen from Indonesia. However, an open access fishery system, which determines the right of entry by reference to technology rather than specific user rights, and which then confines fishermen to inappropriate fishing grounds, cannot achieve an equitable allocation of resources or prevent illegal activity. A new agreement should be negotiated in line with the 'spirit of cooperation and good neighbourliness' of the original MOU.

A number of alternative approaches and regulations have been suggested (Russell and Vail 1988: 139–42; Reid 1992: 8; Campbell and Wilson 1993: 186; JSCFDAT 1993: 132–3; Wallner and McLoughlin 1995a: 34, 1995b: 121; Fox 1992, 1996: 174, 1998: 130). Taken in combination, they indicate that Australia should move to: (1) abandon the current definition of traditional fishing that defines access in terms of technology and assumes that traditions cannot change; (2) identify specific groups of fishermen who have historically fished in the AFZ and guarantee specific rights of access for them; (3) introduce some form of management intervention in the form of a quota or licensing system to avoid over-exploitation of existing stocks; and (4) provide access to an area that more closely resembles traditional fishing grounds and takes account of resource availability.

A Licensing System

Some suggestions have already been made about how a licensing system could operate and what benefits it would deliver to Indonesia and Australia once groups with a historical interest in the AFZ have been identified (Reid 1992; Campbell and Wilson 1993; Wallner and McLoughlin 1995a; Fox 1998).⁸ An arrangement of this kind could be operated through the harbour master in Pepela who currently keeps records of arrivals and departures and issues sailing clearances. In one version of the system, the harbour master would be responsible

⁸ Fox (1998: 129–30, 138) notes that the details of any such system would need to be negotiated with the Indonesian authorities.

for issuing seasonal non-transferable licences to *perahu* captains in line with conditions set down by the Australian Government. Decisions about who obtained the licences would be made by local community members and carefully monitored. The Australian authorities would be informed at the beginning of each season of the details of all licensed *perahu*. Any violations would result in the suspension of the licence for three years.

The licensing of boats to fish for shark only inside the existing MOU box area (Fox 1998) would not actually deter illegal fishing outside the box since there are not sufficient stocks available in the box area. Bajo fishermen are prepared to pay relatively large amounts of money for licences as long as they are assured of access to fishing grounds that have reasonable fish stocks. Many fishermen would then have no further incentive to engage in illegal fishing activities and this in turn would save Australia millions of dollars in apprehension and prosecution costs. Fishermen with specific access rights

would be reluctant to commit offences which risked their privileged access; they would have an interest in helping Australian authorities protect “their” resources from illegal voyaging...[and their new rights] would deliver aid to certain communities in the form of guaranteed access to resources (Campbell and Wilson 1993: 194).

Through direct engagement with fishermen in the implementation of new policies and procedures, there could also be education in the appropriate forms of resource management and conservation (ibid.: 195).

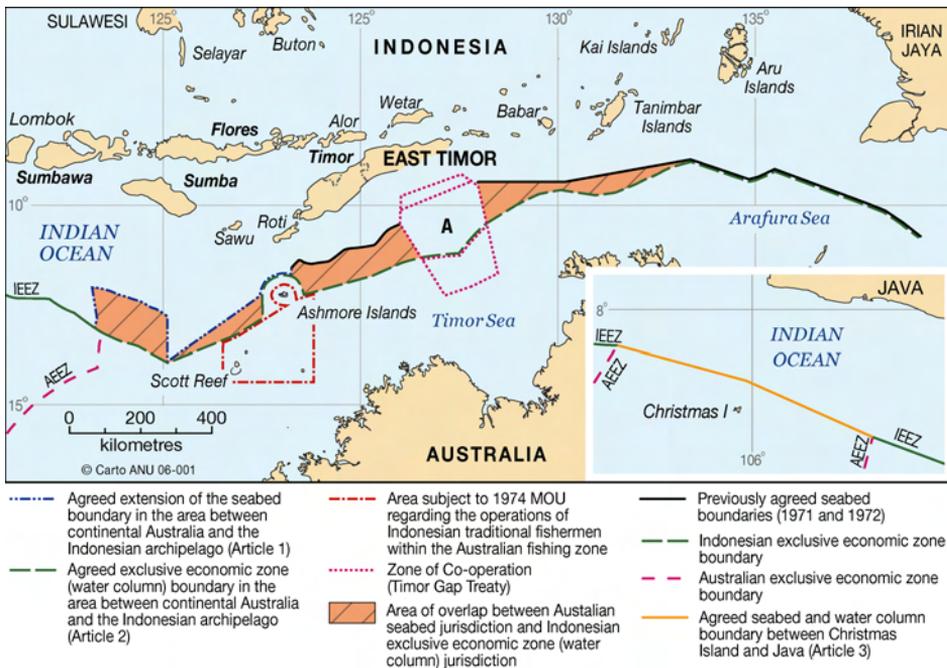
Reasons for Inaction

New policy approaches have not been tried because there is a lack of political will on the part of the Australian and Indonesian governments to instigate or support research on the groups that would qualify for specific user rights. Only when this information is known can consideration be given to developing appropriate conditions under which a traditional fishery could operate in the AFZ.⁹ The Bajo are one group of Indonesian fishermen who historically fished in the AFZ prior to Australian maritime expansion and have continued to do so. However, we need to know much more. A detailed analysis of the other groups operating in the MOU still needs to be undertaken. Groups of fishermen from the villages of Pepela and Oelaba, as well as the Madurese, can also claim to have legitimate rights of access to Australian waters.

There is also lingering uncertainty over seabed and water column boundaries between Indonesia, Australia and Timor Leste. In 1973, a bilateral agreement between Australia and Indonesia established seabed boundaries extending from

⁹ There has also been a lack of reliable data on the actual status of marine resources in the northern AFZ and MOU box area that could be used to assist in designing future levels of access for Indonesian fishermen.

the Papua New Guinea border in the east to waters between Ashmore Reef and Roti Island in the west, but left a gap in the boundary south of the then Portuguese colony of East Timor which became known as the Timor Gap (Kaye 1995: 45). The western extension of the seabed boundary between the two countries from a point north of Ashmore Reef was also undecided. Once the two countries had extended their exclusive economic zones, the Timor Gap Treaty established a Zone of Cooperation between Australia and Indonesia that provided for the sharing of oil revenues under the seabed south of East Timor (ibid.: 53). This was re-negotiated in 2002 as the Timor Sea Treaty between the Government of Australia and the newly independent state of Timor Leste during a period when that state was both politically and economically fragile, so it remains a bone of contention in the area. Map 8-1 shows the current maritime boundaries between the three countries, with the letter 'A' designating the Joint Petroleum Development Area defined by the Timor Sea Treaty between Australia and Timor Leste.



Map 8-1: International maritime boundaries in the Timor and Arafura seas.

The maritime boundaries between Australia and Indonesia should have been further clarified by the Australia–Indonesia Maritime Delimitation Treaty signed in 1997 (DFAT 1997), but a number of problems arose in the process of ratification, and these became the subject of an inquiry by the Commonwealth Joint Standing Committee on Treaties. Under the provisions of this treaty, Ashmore Reef would generate a 24 nm exclusive economic zone in place of the

12 nm zone recognised in the 1974 MOU, and this would place an additional restriction on the rights of Indonesian fishermen as well as raising more enforcement problems. The committee therefore recommended that

the Australian Government in consultation with the relevant State and Territory governments, review the 1974 traditional fisher Memorandum of Understanding with Indonesia in light of the changes to the Exclusive Economic Zone boundary in the vicinity of Ashmore Islands, and ... review the issue of ongoing Indonesian traditional fisher access to Australian waters and its impact on the sustained management of Australian fish resources (JSCT 1997: ix).

Political developments in East Timor since 1999 have entailed a further reassessment of the 1997 treaty which could still have significant implications for Bajo fishing activity in the Timor Sea.

There appears to be a perception by the Australian government that the education, enforcement and prosecution approach is a workable solution to illegal fishing activity. The approach may work for certain groups operating in the AFZ at certain times, but it has been ineffective against other groups by virtue of the ongoing access afforded under the MOU. As one commentator observes:

without serious reconsideration ... [the policy] is difficult to comprehend. One can only speculate on why Australia persists with a policy that is so evidently inappropriate to the problem that it is intended to solve (Fox 1998: 134).

One possible explanation is the belief generated in Australian government circles that the Government of Indonesia is responsible for the activities of its many small-scale fishermen and has the capacity to control the thousands of boats used by villagers (Fox 1998: 134–5; see also JSCFDAT 1993: 129; JSCT 1997: 36). There is also a belief that the situation could be remedied by regulating the activities of those entrepreneurs in Indonesia who control the trade in marine products and the middlemen who are thought to control the activities of the fishermen (Fox 1998: 134).

The antiquated definition of 'tradition' also enters into the equation. According to Fox:

Other, perhaps deeper, attitudes are involved in maintaining present policy — a determination on the part of some Australians to uphold, at whatever cost, the integrity of territorial boundaries and an equal determination to preserve a strict interpretation of the law. Perhaps more pertinent is a perceived difficulty in dealing with what has been defined as 'traditional', as if tradition was something frozen in time and not

amenable to processes of reasonable discussion and negotiation (ibid.: 135).

Another commentator has suggested that the Australian Government's refusal to change its understanding of tradition

is nothing else but a rhetorical device serving the legitimation and execution of its policies. There is obviously no political will to adopt any other definition, as the present one serves the stated objectives of territorial, commercial, and environmental protection quite adequately. It is, therefore, in Australian policy makers' interests to continue to view Indonesian fishing in the AFZ as a largely homogenous phenomenon, with virtually no differentiation made between fisheries and fishermen ... without considerations of time-depth, or a clear understanding of the social complexity which underwrites small-scale commercial fishing (Van der Spek 1995: 21–2).

This logic provides the necessary justification to continue the policy of apprehensions, potentially cancel the MOU with Indonesia, and close access to the AFZ for Indonesian traditional fishermen.

There is also an antiquated but powerful form of conservation thinking that has informed Australian policies; one that considers indigenous peoples as 'enemies' and 'threats' to natural resources, rather than as the key to their sustainability (Stevens 1997: 4). The exclusionary management regime of the Ashmore Reef National Nature Reserve exemplified this kind of consciousness.

The Way Forward

Australia does in fact have some legal obligation to recognise prior activity in the AFZ by people from Indonesia. Under Article 62(2) of UNCLOS III, the nationals of foreign states are technically entitled to the surplus of the total allowable catch in an Exclusive Economic Zone. In allocating this surplus to foreigners, a coastal state is required by Article 62(3) to take account of several factors, including the significance of the living resources of the area to its own economy and the need to minimise economic dislocation in states whose nationals have habitually (that is, traditionally) fished in the zone. However, Article 77(2) says that foreign states and their citizens do not have any direct legal rights to the resources on the continental shelf, which relieves Australia of any obligation to grant Indonesian fishermen access to sedentary species around offshore reefs and islands in the MOU area. Furthermore, UNCLOS III does not specifically protect the rights and interests of indigenous peoples, and the way forward for Australia and Indonesia will depend less on their legal obligations under this convention than on bilateral relations and commitments between the two countries (Campbell and Wilson 1993: 194; Tsamenyi 1995: 10).

Australia has other international obligations with regard to indigenous peoples' rights of access to resources. Multilateral environmental and human rights treaties, to which Australia is a signatory, have recognised that indigenous people retain traditional ecological knowledge and methods of natural and cultural resource management which can contribute to sustainable development.¹⁰ International human rights standards require that governments recognise indigenous people's rights to 'customary use of resources, even in protected areas, rights to participate in decision-making and be included in management regimes which recognise customary resource use, and rights to benefit equitably in the returns generated by resource use' (Sutherland 1996: 5).

The MOU needs to be renegotiated on the basis of contemporary circumstances and fishery management principles and practices, not those of the early 1970s. Future strategies need to excise outdated assumptions and be brought into line with national and international standards. Contemporary approaches to fisheries management are now moving away from biological management, scientific modelling and centralised government responses. They are moving towards partnerships between people, administrative decentralisation, and co-management between government and local communities. It is now clear that fisheries management will not succeed without the involvement of the fishermen themselves (Pomeroy 1994: 2; White et al. 1994; Hviding and Baines 1996: 80; Mace 1997: 2). More specifically, fishermen must have a recognised 'stake' in resource management in the form of rights if they are also to have incentives for resource protection (Bailey and Zerner 1992: 11; White et al. 1994: 14).

Fisheries management also needs to take into account the social, cultural, and economic dimensions of resource use and exploitation (White et al. 1994: 9). These issues were reiterated in a number of presentations at the Second World Fisheries Congress held in Brisbane in 1997 (Hancock et al. 1997). Guidelines developed by the UN Food and Agriculture Organisation on precautionary approaches to fisheries management also emphasise the necessity for cooperation between stakeholders in the development of management plans (Mace 1997: 13). One of the guiding principles of AFMA's management philosophy is to ensure active participation of user groups in the 'development and implementation of fisheries management measures' (McColl and Stevens 1997). It is now an appropriate time for the Australian Government to apply its stated philosophy to Indonesian fishing activity in the AFZ.

¹⁰ The most notable examples are the *International Covenant on Civil and Political Rights* (1991) and the *Convention on Biological Diversity* (1993).