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FAO TECHNICAL COOPERATION PROGRAMME

Indonesia

ASSISTANCE IN MARINE FISHERIES LEGISLATION

Indonesia and International Fisheries Agreements

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Table of Content

Indonesia is a party or signatory to many International Agreements, Treaties and Conventions dealing with marine fisheries. The most important are the Law of the Sea Convention 1982, its subsequent implementing agreements, Indonesian participation in the FAO activities, and certain bilateral arrangements.

I. The Law of the Sea Convention 1982

1. Indonesia signed the Law of the Sea Convention 1982 in December 1982 and ratified it in December 1985 by Law No. 17/1985. As such it is bound to respect the provisions of the Convention, especially since it has entered into force since November 16, 1994.

2. According to the Convention (Article 49), the **sovereignty** of Indonesia as an archipelagic state, extends to the waters enclosed by the straight archipelagic baselines, described as **archipelagic waters**, (**See map 1**) and to the **airspace** over the archipelagic waters, as well as to their **seabed and subsoil**, and to the **resources contained therein**. Therefore, in accordance with this article, the management and conservation of marine fisheries inside the Indonesian archipelagic waters are subjected to the territorial sovereignty of Indonesia. One exception is stipulated in article 51 paragraph 1 which indicates that "an archipelagic state shall respect existing agreements with other states and shall recognize **traditional fishing rights and other legitimate activities** of the immediately adjacent neighboring states in certain areas falling within archipelagic waters. The terms and conditions for the exercise of such rights and activities, including the nature, the extent and the areas to which they apply, shall, at the request of any of the states concerned, **be regulated by bilateral agreements between them"**.

3. So far there has been only one Agreement that has been concluded on this matter namely between Indonesia and Malaysia, dated February 25, 1982, ratified by Indonesia by Law No. 1/1983 of 25 February 1983, which recognizes the Malaysian **"traditional fishing rights"** in **specified archipelagic waters and economic zone of Indonesia** in the Natuna Sea (**See map 2**). So far, there has not been any difficulty or conflict between the two countries in implementing this Agreement (See Part VIII below). With regard to other "traditional fishing rights" of other countries in the Indonesian archipelagic waters, there has not been any agreement or negotiation to that effect.

4. With regard to **Indonesian traditional fishing rights in other waters**, there has been a Memorandum of Understanding (MOU) between Indonesia and Australia since November 7, 1974 to respect the traditional fishing rights of Indonesia in certain areas of the Australian territorial sea and economic zone of Northwest Australia in a clearly defined area (**See map 3**). There have been a lot of problems with the implementation of this Understanding, particularly the limited knowledge of Indonesian traditional fishermen operating in the area and the strict obedience of Australian law enforcement officers to the letters of the MOU (See Part IX below).

5. One of the problems regarding the Indonesian archipelagic waters at this moment is the **uncertainties regarding its outer boundaries**, particularly since the basepoints and straight archipelagic baselines as enacted by the Law No. 4/1960, unfortunately, had not been revived by the Law No. 6/1996, dated August 18, 1996, on Indonesian Waters which "replaced" the Law No. 4/1960. What exists at this moment is only an "illustrative map" of the Indonesian archipelagic waters and territorial sea. Attempts to determine the new Indonesian archipelagic basepoints and straight archipelagic baselines, have not resulted in legislation. There has been, however, a new Government Regulation No. 61/1998, dated June 16, 1998, establishing basepoints and straight archipelagic baselines arround Anambas and Natuna Islands in the South China Sea which is now in force (**See map 2**). It is therefore expected that the new and more complete Indonesian legislation on its archipelagic basepoints and straight archipelagic baselines would be enacted shortly.

6. The Law of the Sea Convention 1982 also recognizes in Article 2 paragraph 1 that " the sovereignty of a coastal state extends, beyond its land territory and internal waters, and in the case of an archipelagic state, its archipelagic waters, to an adjacent belt of sea described as the **territorial sea**", and in accordance with Article 3, such territorial sea can be established up to a limit not exceeding 12 nautical miles from baselines. According to these Articles, the territorial sovereignty of an archipelagic state like Indonesia also extends 12 nautical miles beyond and around its archipelagic waters. The management and conservation of marine fisheries in this territorial sea would therefore also be within the complete sovereignty of Indonesia. There is no provision to recognize traditional fishing rights of neighboring countries within the 12 miles territorial sea.

7. It is therefore interesting to note that the recognition of the Malaysian traditional fishing rights in the Indonesian waters in the South China Sea does not include the waters within 12 nautical miles from the coast lines in the Anambas group of islands, while the recognition of Indonesian traditional fishing rights in the Australian waters in the "box area", does include the waters within the 12 nautical miles from the coasts.

8. According to the Law of the Sea Convention 1982, beyond the territorial sea, including beyond territorial sea of an archipelagic state (see Article 2 paragraph 1 and Article 48) there is an **Exclusive Economic Zone** which, according to article 57 can extend 200 nautical miles from the baselines from which the breadth of the territorial sea is measured. In the EEZ, according to Article 46 paragraph 1a, an archipelagic state like Indonesia also has **"sovereign rights"** for the purpose of exploring and exploiting, conserving and managing the natural resources, whether **living** or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds. It is therefore clear that an archipelagic state does not have territorial sovereignty over its EEZ, but "sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources", including the marine fisheries.

9. With regard to the conservation and management of marine fisheries in the EEZ, Article 61 of the Convention stipulates the obligation ("shall") of the coastal states **to determine the allowable catch** of the fisheries in the EEZ (there is no such obligation for an archipelagic state to determine the TAC in its archipelagic waters and territorial sea). In determining the TAC in the EEZ, a coastal state has other obligations, among others :

(a) to **ensure** that the resources are not endangered by over exploitation,
(b) to cooperate, as appropriate, with competent international organizations,
(c) to take measures to restore population of harvested species
(d) to assure **maximum sustainable yield** (MSY), and;
(e) to take into account the effect of fishing on associated or dependent species.

10. According to Article 62 of UNCLOS, Indonesia is also obliged to promote the objective of **optimum utilization** of the living resources in the EEZ (there is no such obligation in the archipelagic waters and territorial sea). For this purpose Indonesia is obliged to determine **its capacity to harvest** the living resources, and if it can not harvest the entire total allowable catch (TAC), it shall **"through agreements or other arrangements"** give other States access to the **surplus** of the allowable catch, particularly to the **landlocked and geographically disadvantaged developing states around Indonesia.** This provision on **surplus**, is one of the most widely misunderstood in Indonesia, as if other countries have "an automatic right" to exploit the surplus resources of Indonesia. This is very far from the truth, because Article 62 paragraph 2 clearly stipulates that **such an access to the surplus can only be made through agreements or other arrangements and pursuant to the terms, conditions, laws, and regulations of the archipelagic states. Without this agreements or arrangements the access to the surplus resources cannot therefore be exercised. Moreover, there is no provision of "surplus" in archipelagic waters and territorial sea** which would oblige Indonesia to grant access to its "fisheries surplus" in its archipelagic waters and territorial seas to its neighboring land-locked and geographically disadvantaged developing states.

11. With regard to the **stocks in the economic zone which also occurs in an area beyond and adjacent to the EEZ** (UNCLOS article 63), Indonesia and the states fishing for such stocks in the adjacent area have the obligation to seek, directly or through sub-regional or regional organizations, to agree upon measures to ensure conservation and sustainable development of the stocks.

12. Equally, with regard to **highly migratory species** (UNCLOS article 64), particularly **tuna**, Indonesia and other states fishing in the area are obliged to cooperate directly or through appropriate international organizations to ensure conservation and promoting the objective of optimum utilization of such species throughout the region, both **within and beyond the EEZ**. This article clearly does not stipulate the obligation of an archipelagic state to cooperate with others on the conservation and management of tuna within its archipelagic waters as this would fall completely within its sovereignty.

13. It was in the context of implementing these articles (63 and 64) that the United Nations had organized consultations in the past (1990-1995) which led to the adoption of the United Nations Agreement for the Implementation of the Provisions of the UNCLOS 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (UN Fish Stocks Agreement) in 1995. Indonesia has signed this Agreement and the process of ratification is being prepared. It is hoped that Indonesia would be able to ratify the Convention shortly (See Part II below).

14. Beyond the EEZ, in the water column, there are High Seas in which, in accordance with Article 87 paragraph 1e, there is **freedom of fishing**, subject to conservation and management of the living resources of the high seas. Being a party to the Law of the Sea Convention 1982, Indonesia, while having the right to fish on the high seas, also has certain obligations, including to cooperate with other states so that its nationals abide by the conservation and management measures adopted for the high seas fisheries and, as appropriate, to cooperate and to establish sub-regional or regional fisheries organization to this end. Indonesia has substantial fishing interests in the South China Sea, Celebes Sea, Indian Ocean, Arafura Sea and the Pacific Ocean. While the South China Sea, the Celebes Sea and the Arafura Sea are generally covered by the Economic Zones of the coastal countries, there are substantial parts of the Pacific and Indian Oceans which are not within EEZ but high seas proper. Indonesia therefore is obliged under Article 117, 118, 119 to cooperate with other states and to establish appropriate sub-regional and regional fisheries organizations to conserve and manage the fisheries resources on the high seas.

15. Indonesia is taking an active interest in cooperating on the establishment of such a sub-regional organization for the West and Central Pacific Ocean, but has not been showing enough attention with regard to the Indian Ocean and the Celebes Sea.

16. Indonesia has participated in the adoption of the Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean (Honolulu Convention, 2000), but has not yet signed it (See Part III below). While Indonesia is seriously studying the Convention, it is hoped that Indonesia will soon sign it and participate in the works of the Preparatory Conference to establish the Commission for the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean (West and Central Pacific Fisheries Commission=WCPFC)

17. With regard to the Indian Ocean, there is already the Indian Ocean Tuna Commission (IOTC), established under the FAO context and headquartered in Seychelles. The Organization has been actively cooperating on the conservation and management of tuna in the Indian Ocean. It is worthy to note that some of its membership include the non-Indian Ocean countries, such as **Japan, China, South Korea** as well as the European Community, France and the United Kingdom. Some of the Indonesian neighbours, including **Malaysia, Thailand and Australia** are already members of the IOTC. Indonesia is considering to be a member of this organization. It is hoped that Indonesia could become a member of this organization shortly and therefore hopefully

will be able to actively participate in the conservation and management of the Indian Ocean tuna, following its obligation under the Law of the Convention (See below Part IV).

18. There is also the Convention for the Conservation of Southern Bluefin Tuna (CCSBT) between **Australia, Japan and New Zealand**, for the conservation of southern bluefin tuna, including in the area of the Indian Ocean south of Java which include Indonesian EEZ in the area. Indonesia is not yet a member of this regional fisheries organization, although efforts are being made to convince Indonesia and other countries, such as South Korea, to join the organization. Indonesia has been following the activities of this organization and is considering the possibility of joining or cooperating with such an organization for mutual benefit. It is important to note that this organization was not established under the aegis of FAO, although it does note the provisions of the UNCLOS 1982 in its charter of establishment (See Part V below).

19. There is another issue of the marine fisheries management with regard to the "living organisms belonging to **sedentary species**, that is to say, organisms which, at the harvestable stage, either are immobile on or under the sea-bed or are unable to move except in constant physical contact with the sea-bed or the subsoil", (Article 77 paragraph 4) which falls under the regime of **continental shelf**. As such, within 200 miles from the baselines, these resources are not subjected to the provision of **surplus** as stated in article 62 on EEZ.

20. While the precise outer limit of the Indonesian **archipelagic waters, territorial sea, EEZ, and continental shelf** have not been clearly defined in view of the fact that the new Indonesian **basepoints** and **straight archipelagic baselines** have not been clearly legislated, Indonesia through the years have been able to determine some of these maritime boundaries, and therefore have been in the position to implement the application of its marine fisheries legislation. For instance, there have been Territorial Sea Boundary Treaties between **Indonesia and Singapore**, and between **Indonesia and Malaysia**. The two lines of the Territorial Sea Boundaries in the Straits of Malacca and Singapore, however, have not been connected, namely toward the West and East of Singapore, because the territorial seas boundaries in these areas required tripartite arrangements between Indonesia-Malaysia-Singapore. East of Singapore, the existence of the dispute between Malaysia and Singapore regarding ownership of the **Hobsburgh** Rock and Lighthouse at the entrance to the South China Sea from the Straits of Singapore has in fact delayed the solution to the territorial seas boundaries in the area. There is no such or similar territorial dispute in the Strait toward the West of Singapore, and therefore there should be no reason to delay the Tripartite Agreement on territorial sea boundaries in the area. **I hope that these territorial sea boundaries could be completed as soon as possible.**

21. There have been a lot of successful efforts to conclude **continental shelf/seabed boundary** agreements between Indonesia and its neighbours, for instance between **Indonesia and India** for the area between Sumatera and Andaman Islands; between

Indonesia-India-Thailand in the area north of the Strait of Malacca; between **Indonesia and Thailand** in the northern part of the Strait of Malacca; between **Indonesia-Thailand-Malaysia** in the Strait of Malacca; and between **Indonesia and Malaysia** in the Strait of Malacca and the South China Sea. There has been seabed boundary agreements between **Indonesia and PNG** and between **Indonesia and Australia**. Unfortunately, despite years of efforts, there have not been agreements between **Indonesia and Vietnam** in the South China Sea and between **Indonesia and the Philippines** in the Celebes Sea and in the West Pacific Ocean. **I hope that negotiation between Indonesia and the Philippines as well as between Indonesia and Vietnam will continue and will bear fruits as soon as possible for the benefits of the countries concerned.**

22. With regard to the **EEZ boundaries**, so far there have been agreement only between Indonesia and Australia (the Treaty of March 14, 1997), in which the boundaries in some areas are not concomitant with the boundaries of the sea bed areas, in the sense that there are **some recognized continental shelf area of Australia which lies under Indonesian EEZ (See map 4)**. This is completely possible because the regime on EEZ for the water column is determined only by the distance (200 miles) from the baselines, while the extent of the continental shelf depends on the **natural prolongation** of the sea bed area because, in accordance with article 76 paragraph 1 of the UNCLOS, the continental shelf of a coastal state, "extends beyond territorial sea **throughout the natural prolongation of its land territory to the outer edge of the continental margin**". The determination of the continental shelf outer limit is therefore **dependent upon the geological and geo- morphological** features of the sea bed. This criteria does not exist for the EEZ. The absence of EEZ boundaries between Indonesia and Malaysia, between Indonesia and Thailand in the Northern part of the Strait of Malacca, and between Indonesia and the Philippines, have led to fisheries conflicts in certain areas, particularly in the Strait of Malacca and the Celebes Sea.

23. Article 122 and 123 of the UNCLOS also required cooperation between coastal states in **enclosed or semi-enclosed seas** with regard to the coordination of the management, conservation, exploration and exploitation of the **living resources** of the sea. In my mind, there are three semi-enclosed seas around Indonesia, namely the **South China Sea, the Celebes Sea and the Arafura Sea.**

24. With regard to the **South China Sea**, Indonesia for the last eleven years has taken the initiative to promote cooperation in the area on the basis of Article 123 of UNCLOS, namely "obligation" to "coordinate the management, conservation, exploration and exploitation of the living resources of the sea". While there have been some cooperation between some littoral countries in the South China Sea, either directly or through South East Asian Fisheries Development Cooperation (SEAFDC) in which Indonesia participates, attempts to develop such cooperation for the **South China Sea** as a whole have not been very successful, particularly because of the territorial sovereignty disputes in the area. Equally in the **Celebes Sea,** not much attempts have been made between Indonesia, Malaysia and the Philippines to coordinate the management, conservation,

exploration and exploitation of the living resources of the sea, particularly, among others, because of the conflicting territorial claims in the area, such as between **Indonesia and Malaysia** on the ownership of **Sipadan and Ligitan islands**, between **Indonesia and the Philippines** on the legal status of the sea within what the Philippines called its **"treaty limit" boundaries**, and even between **the Philippines and Malaysia** on the status of the **State of Sabah** in view of the Philippines claim to Sabah. In view of the disputes the three friendly neighboring states of ASEAN also have not been able to agree on maritime boundaries delimitation in the Celebes sea. The Indonesian-Malaysian dispute over Sipadan and Ligitan Islands is now before the International Court of Justice in The Hague.

II. UN Fish Stocks Agreement, 1995

1. The United Nations Implementing Agreement on Straddling Fish Stocks and Highly Migratory Fish Stocks on the High Seas (UN Fish Stocks Agreement) was adopted on August 4, 1995 and opened for signature on December 4, 1995. Indonesia participated in the adoption and signed the Agreement on 4 December 1995. As of September 2000, 59 countries have signed the Agreement. Indonesia has not yet ratified the Agreement in accordance with Article 37 of the Agreement. At this moment, Indonesia is studying the Agreement with a view to its ratification as soon as possible thereafter. The delay in translating the Agreement into Indonesian language, however, has also caused some delay in the consideration of the Agreement by the relevant Indonesian authorities. According to Article 40 of the Agreement, it will enter into force **30** days after the 30th ratification. So far, 27 countries have ratified. See for the full English text of the Agreement: (gopher://gopher.un.org:70/00/LOS/CONF164/164_37.TXT).

2. The Agreement was formulated on the basis of the decision of the UN Conference on Environment and Development (UNCED) at Rio de Janeiro in 1992, particularly Agenda 21, Paragraph 17-49, which recognized that the Agreement should be based on UNCLOS 1982, in particular relating to the rights and obligations of coastal states and states fishing on the high seas on conservation and management of straddling stocks (UNCLOS Article 63) and highly migratory fish stocks (UNCLOS Article 64). It should therefore be clearly understood, as stated in Article 4 of the UN Fish Stocks Agreement that "nothing in the Agreement shall prejudice the rights, jurisdiction and duties of States" (under the UNCLOS). The UN Fish Stocks Agreement or any subsequent Conventions or Agreements should not and could not abrogate or derogate rights that have been bestowed by the UNCLOS 1982 to the coastal states in the waters under their sovereignty and jurisdiction.

3. As stated above, Indonesia has ratified UNCLOS 1982 by Law No. 17/1985 on 31 December 1985 and therefore is bound by the Convention. It has therefore participated actively in negotiating the UN Fish Stocks Agreement until its adoption in 1995. **Indonesia therefore should also take measures to ratify the UN Fish Stocks Agreement and to bring it into force as soon as possible.**

4. The **purpose** of the Agreement is to ensure long-term conservation and sustainable use of the straddling stocks and highly migratory species (SSHMS), particularly in the high seas and in the adjoining EEZ with the understanding that developing states should be assisted in applying Article 5 **(on general principles), 6 (application of precautionary measures) and 7 (compatibility of coastal states measures with those of regional or international arrangements).**

a. With regard to the **general principles**, Article 5 of the UN Fish Stocks Agreement obliges the coastal states and the distant water fishing States to cooperate, among others, to ensure the long-term sustainability of the resources and to promote their optimum utilization. The coastal states and the states fishing on the high seas (Distant Water Fishing States=DWFS) are obliged (1) to "apply" precautionary approach; (2) to assess the impact of fishing; (3) to adopt conservation and management measures; (4) to protect associated target stocks; (5) to minimize pollution and waste; (6) to protect bio-diversity; (7) to eliminate over fishing and excess fishing capacity; (8) to take into account the interest of subsistence fishers; (9) to collect and share complete and accurate data on fishing; (10) to promote scientific research; and (11) to enforce conservation and management measures through effective monitoring, control and surveillance (MCS).

b. With regard to the application of **"precautionary measures"** (PM), Article 6 of the UN Fish Stocks Agreement obliges the states (1) to be "more cautious when information is uncertain, unreliable or inadequate"; (2) to improve decision making; (3) to apply the guidelines set in the Agreement with regard to precautionary measures; (4) to take into account uncertainties of knowledge on the stocks; (5) to develop data collection and research program; (6) to take measures not to exceed reference point; (7) to enhance monitoring; (8) to be careful with new or exploratory fisheries and; (9) to take "temporary emergency measures" if there is a natural phenomenon that may endanger the stocks.

c. With regard to the need for the **"compatibility"** between measures taken by coastal states in the waters under their national jurisdiction and the measures taken by regional or international arrangements in the waters of the high seas beyond the national jurisdiction, Article 7 of the UN Fish Stocks Agreement stated that:

- With regard to **straddling fish stocks**, the relevant coastal states and the states fishing in the area (DWFS) should cooperate on conservation measures in the adjacent high sea areas;
- With regard to **highly migratory species**, the states concerned shall cooperate to ensure conservation and promote the objective of optimum utilization of such stocks "throughout the region";
- Measures established for the high seas shall be **compatible** with measures established for the areas under national jurisdiction;

- Compatibility means that high seas measures: (1) shall not undermine the effectiveness of measures taken under national jurisdiction, (2) take into account previously agreed measures, either in bilateral or regional arrangements, (3) take into account the biological unity and other biological characteristics of the stocks, (4) take into account the relatives dependent of the relevant states, and (5) ensure that measures do not result in harmful effects.

5. It should be noted that, as far as Indonesia is concerned, the area under national jurisdiction in this case is its EEZ, and **does not include its archipelagic waters** since the archipelagic waters are within the national sovereignty of Indonesia. The concept of biological unity and the optimum utilization of such stocks throughout the region are therefore limited to the compatibility between the measures in the EEZ and the high seas beyond, and does not include archipelagic waters of Indonesia.

6. The UN Fish Stocks Agreement also stipulates that the relevant States should agree on compatible conservation and management measures within a reasonable period of time. Pending the Agreement the States concerned should enter into **provisional arrangement** of a practical nature.

7. Article 8 of the UN Fish Stocks Agreement deals with **mechanism** for cooperation. Coastal states and states fishing on the high seas in the area shall cooperate directly or through appropriate regional organization to apply the conservation and management measures, **and only those States which are members of such an organization or participants in such an arrangement, or which agree to apply the conservation and management measures established by such organization or arrangement, shall have access to the fishery resources to which those measures apply.** (Article 8 Paragraph 4). And if there is no regional organization for the species, the relevant states shall cooperate to establish such an organization and participate in its works. Paragraph 4 is very significant because it may be applicable to states which are not members of the organization or arrangement, even though traditionally states which are not parties to a regional organization or arrangement are not obliged to follow the measures taken by the organization. This provision is very important for Indonesia because it could be subjected to management and conservation measures taken by an organization in which it is not or not yet a member, such as the Indian Ocean Tuna Commission or the Convention for the Conservation of the Southern Bluefin Tuna.

8. According to Article 9, the regional organizations or arrangements shall agree on the stocks to be managed or conserved, the area of application of the measures, the relationship with other existing organizations and the mechanism to obtain scientific advice.

9. Article 10 further stipulates the **functions** of the regional fisheries organizations, Article 11 regulates the **participatory rights for new members**, Article 12 deals with **transparency** of the decision making process and the activities of the regional

organizations. Article 13 deals with the **obligation of states to cooperate** to strengthen existing regional arrangements, while Article 14 deals with obligation of states **to collect and develop scientific, technical and statistical data** and to strengthen scientific research capability in the field of fisheries.

10. Article 15 take into account the nature of the **enclosed and semi-enclosed seas** and the right of states to act in a manner consistent with the relevant provisions of UNCLOS, namely with Article 122 and 123 of UNCLOS which oblige the states bordering an enclosed or semi-enclosed sea to cooperate with each other and to **coordinate the management, conservation, exploration and exploitation of the living resources the sea**. As far as Indonesia is concerned, there are three semi-enclosed seas around it, namely the **South China Sea, the Celebes Sea and the Arafura Sea.**

11. Article 16 deals with "areas of the high seas surrounded entirely by an area under the national jurisdiction of a single state," the so-called **"peanut area"**, such as the Ochotsk Sea. To my knowledge, there is no such sea around Indonesia. It should also be understood that this article does not deals with the "pockets of the high seas" surrounded by EEZ of the coastal states, such as in the area between **Irian Jaya, PNG, the Federated States of Micronesia and Palau.** Although this problem was not tackled by the UN Fish Stocks Agreement, this matter was later discussed in the Convention for the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean, Honolulu, 4 September 2000, which in its Article 8 Paragraph 4 obliges the Commission to **"pay special attention"** to ensuring compatibility between conservation and management measures for such high seas areas and those established by the surrounding coastal states in areas under their national jurisdictions/EEZ. This provision is very relevant and important for Indonesia for the area north of **Irian Jaya** (See map 5 as attached).

12. Article 17 deals with the **roles of non-members** of the organization, in which it states that **non-members "is not discharged from the obligation to cooperate" and shall not authorized their vessels to fish in the regulated fisheries**, and the members of the organization "**shall deter the activities of those vessels**". This deterrent article is very important for Indonesia because even if Indonesia is not a member of a regional fisheries arrangement it could not ignore the agreement or the arrangement; it is still expected to follow the provisions of the Convention and management measures. While the meaning of "deterrence" by the members of the regional organization may be subject to disagreement and discussion, it may nevertheless create problems for Indonesian fishing vessels to fish on the high seas beyond EEZ if Indonesia is not a member of such a regional organization that deals with the conservation and management measures in that area.

13. Article 18 deals with the duties of the flag states to "ensure that vessels flying its flags comply with the measures" and do not undermine the regional measures, and the states shall **authorize** their vessels to fish on the high seas **only when it can exercise effectively its responsibilities in respect of such vessels**. This is a very important article

for Indonesia because it has now the obligation to authorize, permit and license its vessels to fish on the high seas (such as in the Indian and the Pacific Oceans) and to ensure that such fishing vessels do not conduct unauthorized fishing in the EEZ of other states, and vice-versa. Indonesia also has to establish a **national record** of fishing vessels which it authorizes to fish on the high seas, to use internationally recognizable vessel and marking systems, to fulfill the requirements for recording and timely reporting of vessels positions, catch and other data, requirements for verifications through observers programs and Monitoring, Control and Surveillance (MCS) of such vessels, regulation of transshipment, regulation of fishing activities to ensure compliance and to follow the MCS system in effect. This provision would require Indonesia to draft legislation that would have to be followed by its vessels wishing to fish on the high seas beyond its EEZ.

14. Article 19 also obliges a state to **ensure compliance by vessels flying its flags** with the regional measures and take action to this effect, while Article 20 **obliges states to cooperate** directly or through regional organization to ensure compliance.

15. Article 21 deals with **boarding and inspection**, and authorizes a state party which is a member of the regional arrangement to board and inspect, in accordance with the procedures established by the regional arrangement or organization concerned, fishing vessels of another state party on the high seas covered by the regional arrangement, **"whether or not such state party is also a member of the organization or a participant in the arrangement" (Article 21 Paragraph 1)**, to ensure compliance with the regional conservation measures. This is a very new thing in International Law of the Sea in which the freedom of fishing on the high seas is no longer quite as before. This provision is also important for Indonesia in the sense that Indonesia, if it joins this UN Fish Stocks Agreement, could be subjecting vessels flying its flag to boarding and inspection by another state party even though Indonesia may not be a member of the Regional Fisheries Commission, such as the Indian Ocean Tuna Commission (IOTC) or the West and Central Pacific Fisheries Commission (WCPFC). The vessels used for boarding and inspection shall be clearly marked and identifiable as being on government service. A state, on becoming a state party to the UN Fish Stocks Agreement, shall designate an appropriate authority to deal with these issues. Article 21 and 22 provide various detailed stipulations on the regime of boarding and inspection.

16. It is generally understood that **developing states** may have difficulties in implementing the UN Fish Stocks Agreement because they may not have the financial and technical capacity to do so. Article 24, 25 and 26 therefore oblige States to provide assistance to developing states. Such assistance could be (1) to enhance their ability to conserve and manage the resources; (2) to assist them in participating in the high seas fisheries; (3) to facilitate their participation in sub-regional or regional arrangements or organization. Such assistance shall include financial, human resources development, transfer of technology, and advisory and consultative services. The assistance shall specifically be directed towards: (1) improved conservation and management of the stocks; (2) stock assessment and scientific research; and (3) monitoring, control, surveillance, compliance and enforcement (MCSE), etc. For this purpose, states parties

shall cooperate to establish **"special fund"** to assist developing states to implement the UN Fish Stocks Agreement. Should Indonesia ratify the UN Fish Stocks Agreement and becomes a party to the Agreement and to the regional **organizations or arrangements dealing with these issues, Indonesia could make use of this provision to support its participation in the conservation and management measures** and in the regional organization concerned.

17. The UN Fish Stocks Agreement also contains provisions on **peaceful disputes settlement mechanisms** including the use of dispute settlement mechanisms under UNCLOS 1982. Indonesia, being a party to UNCLOS 1982, is bound to respect the dispute settlement mechanism under UNCLOS 1982.

18. Finally the effectiveness of the Agreement shall be judged after its intro force. The Agreement shall enter into force 30 days after the 30th ratification. So far, more than five years after its adoption, 27 states have ratified. **Indonesia has not yet ratified but is in the process of doing so.** If Indonesia does not ratify and does not become a party to the UN Fish Stocks Agreement, vessels flying its flag could be deterred from fishing in the high seas in the Convention area by the states parties to the UN Fish Stocks Agreement. This could pose a problem for Indonesia in developing its capacities to fish on the high seas beyond its EEZ. **I therefore urge Indonesia to speed-up the process of its ratification of the UN Fish Stocks Agreement 1995.**

III. West and Central Pacific Fisheries Convention (Multilateral High Level Convention), 2000

1. In order to implement the UNCLOS 1982 and later the UN Fish Stocks Agreement 1995 and the FAO Code of Conduct for Responsible Fisheries, the South Pacific Forum Fisheries Agency, took the initiative to convene a Multilateral High Level Conference (MHLC) on the South Pacific Tuna Fisheries in December 1994, with a view to their conservation and management. Indonesia participated in this Conference since 1998 in Tokyo. The Conference was concluded in Honolulu in September 2000 by adopting the Convention for the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean (WCPFC), also known as the MHLC Convention, which also includes the South Pacific area.

2. Indonesia participated in the adoption of the Convention and signed the Final Act of the Conference on September 4, 2000. But so far Indonesia has not yet signed the Convention. Preparation is now being made to enable Indonesia to sign the Convention. **I hope Indonesia can still sign the Convention before the period for signature expires on September 4, 2001.** Otherwise, if Indonesia wants to become a party to the Convention or the Commission after September 4, 2001, it will have to **accede** to the Convention after that day. The Convention itself will enter into force 30 days after the deposit of ratification, acceptance, approval or accession by **three states situated North of 20 degree parallel of North latitude and seven States situated South of 20 degree**

parallel of North latitude. If within three years of its adoption, namely by September 4, 2003, the Convention has not been ratified by three states North of the 20 degree North latitude, the Convention shall enter into force **six months after** the deposit of 13 ratifications, acceptances, approvals or accessions.

3. One of the most difficult issues, as far as Indonesia was concerned, was **the definition of the Convention area**. As far as Indonesia was concerned, the problem was the attempt by some participants in the Conference to include the Eastern parts of the Indonesian archipelagic waters in the Convention area in order to assure the biological unity of the resources or the management of tuna "throughout its migration range". Indonesia objected to this attempt, arguing that under Article 46 paragraph 1 of UNCLOS 1982, **Indonesia has sovereignty over its archipelagic waters and over all the resources contained therein**, including the fisheries resources. As such, there was no obligation of Indonesia under UNCLOS 1982 UN Fish Stocks Agreement 1995 to "co-manage" the resources in its archipelagic waters with other states or regional or international organizations. In Indonesian view, this attempt would be contrary to the provisions of UNLCOS 1982 and UN Fish Stocks Agreement 1995. Moreover, Article 64 of UNCLOS 1982 regarding highly migratory species clearly states that the obligation to cooperate is prescribed for the conservation and management of the area "both within and beyond the EEZ". And, in accordance with Article 4 of UN Fish Stocks Agreement 1995, the Agreement shall be interpreted and applied "in a manner consistent with the Convention" (UNCLOS 1982). The MHLC Convention therefore cannot interfere with the sovereignty of an archipelagic state over its archipelagic waters and resources, unless it agrees thereto, and with the sovereign rights of the coastal states " for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living" of their EEZ, unless in accordance with Article 64 of UNCLOS. Indonesia, however, could accept to include its territorial seas in the Pacific Ocean, north of Irian Jaya and east of North Maluku provinces within the Convention area for the reason that the measurement of EEZ in the area, in accordance with Article 48 of the Convention 1982, shall be measured from straight archipelagic baselines, thus includes the territorial sea as well. After very lengthy discussions on this topic, the Convention finally did not define the western boundaries of the Convention area **with a clear understanding that the Convention area does not include the Indonesian archipelagic waters**. This was clearly stated by the statement of the Indonesian delegation before adopting the Convention and by the closing remarks of the Chairman of the Conference, Ambassador Satya Nandan, on September 5, 2000, in which he stated that: "*It is important, in this regard, to clarify that the Convention applies to the waters of the Pacific Oceans. It is not intended to include waters in South East Asia which are not part of the Pacific Ocean; nor is it intended to include the waters of the South China Sea*". Indonesian archipelagic waters are in South East Asia and are not part of the Pacific Ocean.

4. With regard to the **principles and measures** for conservation and management of the highly migratory species, the Honolulu Convention basically adopts the provisions of UN Fish Stocks Agreement 1995 including the adoption of the **precautionary approach**.

It also basically adopts the principles of **compatibility** of the UN Fish Stocks Agreement 1995.

5. The Honolulu Convention, however, includes a provision (Article 8 Paragrahp 4) regarding **"pocket" of the high seas** in the Convention area which are entirely surrounded by the EEZ of the members of the Commission and obliges the Commission "to pay special attention" in order to ensure that the measures to be taken for such pocket of the high seas will be compatible with the measures taken by the coastal states in their EEZ. This provision is important for Indonesia in view of the fact that there is such pocket of the high seas north of Irian Jaya.

6. In order to implement the provisions of the Convention, the Convention establishes the **Commission** for the conservation and management of highly migratory fish stocks in the Western and Central Pacific Oceans. The functions of the Commission as well as their structures, including the subsidiary bodies of the Commission and their respective functions (the Scientific Committee, the Technical and Compliance Committee, the Secretariat and the Staff of Commission) are enunciated in the Convention.

7. The **fund and the budget** of the Commission are also indicated in the Convention. With regard to the **budget, it will be adopted by consensus** by the Commission while the amount of contribution to the budget shall be determined in accordance with the scheme to be adopted by the Commission **by consensus**, taking into due consideration the "equal basic fee, a fee based upon national wealth, reflecting the state of development of the member concerned and its ability to pay, and a variable fee (Article 18 paragraph 2)", based, inter-alia, on the total catch of tuna taken by a state within its EEZ and in areas beyond national jurisdiction in the Convention area, provided that **"a discount factor"** shall be applied to the **catch taken by a developing member state in its EEZ.**

8. This provision is extremely important for Indonesia in view of the fact that Indonesian statistics, so far, is not specifically designed for the catch of tuna in its EEZ and high seas in the Pacific Ocean. If Indonesia becomes a party to the Convention, thus a member of the Commission, it will have to collect and produce a specific statistical data on its tuna catch in the Pacific Ocean, identify clearly the amount that it catches in its EEZ and those that it catches in the high seas beyond. This is important in order to determine the "discount factor" of the amount of tuna it catches within its EEZ for the purpose of calculating its contribution to the budget of the Commission. Otherwise the amount of tuna caught in its EEZ may be included in the Indonesian catch that in the end may increase its contribution to the budget substantially.

9. Another difficult subject during the MHLC Conferences was **the decision making procedure** of the Commission. Generally speaking, most DWFS of the North would like to make the decision making procedure as difficult as possible so that in the end they could exercise a determining voice; in fact very close to applying **veto power** in

the decision making process. On the other hand, the developing countries South of the 20 degree parallel of North Latitude would like to devise a workable Commission that can make a decision with reasonable and acceptable majority. After very lengthy discussions, the Convention finally adopted various mechanisms of decision making in the Commission:

a. As a **general rule**, the decision making in the Commission shall be by **"consensus"**, meaning the absence of any formal objection made at the time the decision was taken. The Convention indicates **that specific issues would have to be decided by consensus** such as: (1) the adoption and amendment, as required, of the rules of procedures of the Commission (Article 9 paragraph 8); (2) the allocation of the total allowable catch or the total level of fishing effort (Article 10 paragraph 4); (3) the adoption, as far as possible, of the reports of the Committees (Article 11 paragraph 4); (4) the adoption of the recommendations of the Committee to the Commission (Article 11 paragraph 7); (5) the adoption of the budget (Article 18 paragraph 1) ; (6) the adoption of a scheme of contribution.

b. **In other cases**, if all efforts to reach a decision by consensus has been exhausted, **decisions can be taken by voting**: (1) on question of substance the decision shall be taken by ¾ majority of those present and voting, provided that such majority includes a ¾ majority of the members of the South Pacific Forum Fisheries Agency present and voting and a ¾ majority of non-members of the South Pacific Forum Fisheries Agency present and voting, and provided further that in no circumstances shall a proposal be defeated by two or fewer votes in either chamber (the SPF chamber and non-SPF chamber)

10. This very complicated mechanisms for decision making was designed in order to entice the DWFS to accept the decision making process so that they could play very significant roles in the decision making and not being overwhelmed by the majority of the developing countries South of the 20 degrees parallel of North Latitude. As it turned out, this effort proved insufficient to entice certain DWFS countries to participate in the adoption of the Convention. These countries argued that they required an **"opt-out"** formula in the decision making, in the sense that if **they were not willing to accept the decision of the Commission they did not have to implement the decision of the Commission**. This is very close to veto power in the decision making, except that the decision would remain valid but without them (the "opting out-members") being required to implement it.

11. The Convention also enumerates the **obligations of the members** of the Commission, the duties of the flag states, the requirements of developing states, and the roles of non-parties to the Commission. Most of these rules are derived from the UNCLOS 1982 and the UN Fish Stocks Agreement 1995. Among the obligations of members of the Commission are : (1) to ensure that its nationals and fishing vessels owned or controlled by its nationals fishing in the Convention area (including on the high seas beyond the EEZ) comply with the provisions of this Convention, (2) to investigate

any alleged violations by its nationals or fishing vessels owned or controlled by its nationals of the measures adopted by the Commission, and (3) to report the progress of such investigation to the members making the request and to the Commission **not later than within two months** of such request.

12. With regard to **the duties of the flag states**, each member of the Commission is obliged to **ensure that its vessel do not undermine the effectiveness of measures** taken by the Commission in the Convention area and **does not conduct unauthorized fishing** in the EEZ of any contracting party. The member of the Commission must ensure that its vessels fishing on the Convention area are authorized to do so by its appropriate authority and must exercise effectively its responsibilities in respect of such vessels.

13. Another important provision in the Convention is the obligation of each member of the Commission to require its fishing vessels that fish in the Convention area "to use near real-time satellite position-fixing transmitter while in the Convention area" (**transponder**) in accordance with the specifications as established by the Commission. The Commission shall operate a **vessel monitoring system** (VMS) for all vessels that fish for highly migratory fish stocks on the high seas in the Convention area. The members of the Commission shall cooperate to ensure **compatibility** between national and high seas vessel monitoring system. The provisions regarding the obligation to use transponder for fishing on the high seas in the Convention area is very important for Indonesia. Otherwise Indonesian fishing vessels operating in the Convention area may be accused of violating or undermining the provisions of the Convention which may bring difficulties to the vessels as well as the Indonesian Government.

14. With regard to **compliance and enforcement**, the Convention relies heavily on the UN Fish Stocks Agreement 1995. Each member of the Commission is obliged: (1) to enforce the Convention and measures issued by the Commission, (2) to investigate fully any alleged violation by its fishing vessels, (3) to institute proceedings against the violating fishing vessels without delay in accordance with its laws, (4) where appropriate, detain the vessels to ensure that its fishing vessels complies with rules and regulations for fishing in the EEZ of other members, (5) to deter fishing vessels to undermine the effectiveness of the measures adopted by the Commission, and (6) to develop procedure for non-discriminatory trade measures to be taken against any state or entity whose fishing vessels undermine the effectiveness of the conservation and management measures adopted by the Commission.

15. In order to **ensure compliance** with conservation and management measures, the Commission shall establish the procedure for **boarding and inspection** of fishing vessels on the **high seas** in the Convention area. The stipulation regarding boarding and inspection was another difficult issue during the Conference, particularly the difficulties by the DWFS to accept the procedures and the need for boarding and inspection of fishing vessels on the high seas which in their mind were not warranted by International Law. The general view, however, was that the principle had been adopted in the UN Fish Stocks Agreement (Article 21 and 22) and therefore each member of the Commission

must ensure that its fishing vessels accept "boarding by duly authorized inspector" on the high seas (Article 26 paragraph 3 of the WCPFC).

16. Another important provision in the Convention was the need to develop a **regional observer program** to collect data and monitor the implementation of the conservation and management measures adopted by the Commission. The observer program shall be coordinated by the Secretariat and shall consist of independent and impartial observers authorized by the Secretariat. Fishing vessels operated in the Convention area must accept the presence of an observer on board and each member of the Commission shall be entitled to have its nationals included in the program as observers. The provisions regarding observer program was also **very controversial**, not only because the argument that it could interfere with the fishing activities, but also because it was regarded as expensive by the DWFS, especially because the cost of the observer program shall be determined by the Commission to be included in the budget of the Commission. On the other hand, most coastal states of the South considered observer program as necessary in order to ensure compliance. **Indonesia**, if it joins the Commission, not only would have to admit the presence of observer on board its fishing vessels operating on the high seas in the Convention area, but also has opportunities to select and submit its nationals to be included in the observer program.

17. The Convention also obliges the members of the Commission to encourage their fishing vessels to conduct **transshipment** in port in order to ensure compliance. A member of the Commission "may designate one or more of its ports as transshipment ports" and the Commission shall circulate periodically to all members a list of such **designated ports**. **Transshipment on the high seas can only take place in the presence of an observer under the regional observer program**. And the operator of the fishing vessel is obliged to comply with the procedures of verification adopted by the Commission. Article 29 paragraph 5 specifically prohibit transshipment at sea by purse-seine vessels operating within the Convention area. The provision of transshipment is important for **Indonesia**, particularly because it opens up an opportunity for Indonesia to designate one or more of its ports bordering on the Pacific Ocean as transshipment ports.

18. Another important provision of the Convention deals with **requirements of developing states**. The developing states must be helped to be able to participate in implementing and in taking advantages of the provisions of the Convention. For this purpose the Commission shall establish a **Fund** to facilitate the effective participation of developing states in the work of the Commission, including in its meetings and those of its subsidiary bodies. **Indonesia**, as a developing coastal state, should make every efforts to take advantage of this provision.

19. Another difficult issue of the Convention was how to deal with **non-parties** to the Convention. The Convention relies heavily on the UN Fish Stocks Agreement 1995 regarding the obligation of each member of the Commission: (1) **to deter the activities of fishing vessels of non-parties** which undermine the effectiveness of conservation and management measures adopted by the Commission, (2) to exchange information on such

activities, (3) to draw the attention of non-parties to those activities, and (4) to request non-parties to cooperate in the implementation of the measures.

IV. Indian Ocean Tuna Commission (IOTC), 1995

1. The Agreement on the Establishment of the Indian Ocean Tuna Commission (IOTC) was approved by FAO in November 1993 and its membership is opened, among others, to members and associate members of FAO which are coastal states or associate members of FAO situated fully or partly within the area. The area of competent of the Commission is the FAO statistical areas 51 and 57. The area 57 includes the Indonesian Economic Zone in the Indian Ocean. By this definition, Indonesia is entitled to become a member of the IOTC. The Agreement has entered into force since 27 March 1996, after the deposit of the tenth instrument of acceptance. The Agreement had been registered with the Secretariat of the UN. As of October 2000, 18 countries had become members of the IOTC, including the non-littoral countries of Asia such as **China, Japan and the Republic of Korea**, as well as some **European countries** such as **European Community, France and The United Kingdom**. Indonesia, having one of the longest coast lines in the Indian Ocean is not yet a member of the Commission, although is now seriously considering to become a party. **I would hope that Indonesia would join the Commission as soon as possible.**

2. Although Indonesia is not yet a member of the IOTC, it does send observers to attend the meeting of the IOTC from time-to-time. One of the difficulties of Indonesia to join the Commission, so far, is financial, in the sense that, so far, Indonesia has not been successful in obtaining the necessary budget for its membership in the Commission.

V. Convention for the Conservation of Southern Bluefin Tuna (CCSBT) 1993

1. The Convention for the Conservation of Southern Bluefin Tuna (CCSBT) was adopted in Canberra on 10 May 1993 by **Australia, Japan and New Zealand** for the purpose of conservation and management of southern bluefin tuna. Although the Convention was adopted outside the context of FAO, the Convention did note the adoption of UNCLOS 1982. The Convention established the Commission for the conservation of southern bluefin tuna and each party of the Convention shall be represented in the Commission. The Commission shall consider, among others, regulatory measures for conservation, management and optimum utilization of southern bluefin tuna and **shall decide "upon a total allowable catch and its allocation among the parties"** and if necessary decide upon other additional measures (Article 8 paragraph 3). The Commission shall also develop systems to monitor all fishing activities related to southern bluefin tuna in order to enhance scientific knowledge for conservation and management of southern bluefin tuna and in order to achieve effective implementation of the Convention and measures adopted pursuant to it (Article 8 paragraph 9). The Commission also established a Secretariat and decide upon an **annual budget, 30% of**

which shall be divided equally among the parties and 70% shall be divided in proportion to the nominal catches of southern bluefin tuna among all the parties (Article 11). Parties to the Commission shall also cooperate with each other to encourage accession by any states to the Convention.

2. Indonesia has a specific interest in the southern bluefin tuna, particularly because **they spawn largely in the Indonesian EEZ South of Java**. Yet, so far, Indonesia is not one of the major catcher of the resources.

3. **Indonesia is not a signatory and is not a party to this Convention** although it has specific interests in the conservation and management of southern bluefin tuna. So far, it has difficulties in joining the Convention and the Commission for budgetary reason, particularly because there are only three members of the Commission and its budget is perceived to be significantly high. The Commission, however, has invited Indonesia to participate in the work of the Commission and has invited Indonesia from time-to-time to send observers to its meetings. At the same time, the Commission has taken certain decisions that may affect the interest of Indonesia, particularly the export of Indonesian catches regarding southern bluefin tuna to the members of the CCSBT. **I do hope, however, that Indonesia will join the CCSBT in due time and that the CCSBT will take into consideration the specific Indonesian budgetary difficulties** and therefore will find the way to exonerate Indonesia from this difficulty. In the mean time, **I continue to encourage Indonesia to cooperate with the CCSBT and its Secretariat.**

VI. FAO Compliance Agreement, 1993

1. In November 1993, the FAO Conference approved "the Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas" for submission to Governments for acceptance, which should be effected by the deposit of an Instrument of Acceptance with the Director General of FAO. 25 Acceptances are required to bring the Agreement into force. So far, 18 countries have deposited their Instrument of Acceptance. **Indonesia** has not yet submitted its Instrument of Acceptance as required by the Agreement. Withdrawal from the Agreement is allowed after two years of the date of the entry into force of the Agreement for the withdrawing Party. The Agreement is an integral part of the International Code of Conduct for Responsible Fisheries which has been adopted by FAO in October 1995.

2. The Agreement was actually a response by the international community to prevent reflagging of fishing vessels as a means of avoiding compliance with international conservation and management measures for living marine resources.

3. The Agreement applies to all fishing vessels that are used or are intended for **fishing on the high seas**, except, under certain stipulations, fishing vessels of less than 24 meters.

4. Under the Agreement, each State Party shall take measures to ensure that its fishing vessels do not undermine the effectiveness of international conservation measures (Article III paragraph 1a), and therefore has to **properly authorize such vessels for fishing on the high seas,** taking into account the numerous provisions of the Agreement regarding the issuance of the authorization. It shall also take **enforcement measures** to redress violations of such international conservation and management measures and the violation of stipulations in the authorization.

5. The party to the Agreement also has the obligation **to maintain a record of fishing vessels that it has authorized to fish on the high seas** and make the record available to FAO, which would be entitled to use the information according to the stipulations in the Agreement.

6. The Agreement also obliges the State Parties to cooperate to provide **assistance to developing countries** in fulfilling their obligations under the Agreement. It also obliges States Parties to encourage **non-parties** to accept the Agreement and to exchange information on the activities of fishing vessels of non-parties that undermine the effectiveness of the international conservation and management measures.

VII. FAO Code of Conduct for Responsible Fisheries, 1995

1. The Code was adopted by the FAO Conference in October 1995 after the adoption of the UN Fish Stocks Agreement on High Seas Fisheries by the UN in August 1995.

2. The Code is **voluntary** (Article I.1), although the FAO Agreement to Promote Compliance, 1993, which is an integral part of the Code, is binding upon its States Parties. Under the Code, the term "fisheries" applies equally to **capture fisheries** and **aquaculture**.

3. The main **objective** of the Code is to establish principles for responsible fisheries. The Code is to be interpreted in accordance with the relevant International Law, including the UNCLOS 1982 and the UN Fish Stocks Agreement 1995. The Code, like the UN Fish Stocks Agreement 1995, therefore, cannot abrogate or derogate from the rights and obligations of states under UNCLOS 1982 and UN Fish Stocks Agreement 1995.

4. It also takes into account the capacity of **developing countries** to implement the code. The capacity of developing countries to implement the recommendations of the Code should be duly taken into account (art.5). This is one of the most important provisions of the Code because it invites countries, international organizations and development banks to assist developing countries in the implementation and adherence of the Code.

5. Some of the main **principles** of the Code are the following:

(1) States and users of living aquatic resources should conserve aquatic ecosystem;
(2) Fisheries management system should ensure the availability of the resources for the present and the future generations and protect the target as well as associated or dependent species;
(3) States should prevent over fishing and excess fishing capacity, and rehabilitate fishing populations ;
(4) Conservation and management measures should be based on the best scientific evidence available, and States should encourage bilateral and multilateral cooperation in research;
(5) States should apply a **precautionary approach**;
(6) Environmentally-safe fishing gear and practices should be applied, and waste should be minimized;
(7) Nutritional value of the fish products should be maintained;
(8) Critical fisheries habitats should be protected and rehabilitated;
(9) Fisheries interest should be taken into account in the integrated coastal zone management, planning and development;
(10)States should ensure compliance with and enforcement of conservation and management measures;
(11) States should exercise effective control over vessels they authorize to fish on the High Seas;
(12) States should cooperate at sub-regional, regional, or global levels to promote conservation and management of fisheries;
(13) States should ensure that decision making process are transparent and facilitate consultation with fisheries stake-holders;
(14) International trade in fish and fishery products should be conducted in accordance with WTO rules;
(15) States should cooperate to prevent dispute, and settle all fisheries disputes through peaceful means;
(16) States should promote responsible fisheries through education and training;
(17) States should ensure that fishing facility and equipment allowed for safe, healthy and fair working and living conditions;
(18) States should protect the rights of small-scale and artisanal fisheries and, where appropriate, give them preferential access;
(19) States should consider aqua culture as a means to promote diversification of income and diet.

VIII. Indonesia-Malaysia Agreement on Malaysian Traditional Fishing Rights in the Indonesian Archipelagic Waters and EEZ, 1982

1. The Agreement defined "traditional fishing" as " fishing by Malaysian traditional **fishermen** using traditional **methods** in the traditional **areas**" within the archipelagic waters. Point 7 of the Record of Discussion dated February 25, 1982, between the two countries also stated that the fishing area "**shall not include maritime belts of 12**

nautical miles, measures from the law water mark, around Indonesian Islands", while point 9 of the Record stated that the Malaysian traditional fishing rights shall also be exercised "**in the designated area in the EEZ**" of Indonesia in the South China Sea (See map 2 as attached)

2. Moreover, the Agreement defined "traditional fishermen" as Malaysian fishermen who, as their **basic means of livelihood**, are engaged directly in traditional fishing in the designated area, while "traditional fishing boat" are defined as " any boat owned and used by Malaysian traditional fishermen **specifically for traditional fishing in the designated fishing area"** , and " fishing vessels" are defined as any vessel other than traditional fishing boats.

3. The Agreement stated further in Article 2 paragraph 2 and Article 13 paragraph 1 that Indonesia "shall continue to respect" the traditional fishing rights of Malaysian traditional fishermen in the designated area, while Malaysia "shall take the necessary measures to ensure that the traditional fishing activities shall not be detrimental to the existing fishing activities of the Indonesian fishermen in the fishing area" (Article 13 paragraph 2a) and does not interfere with the exploration and exploitation of the mineral resources of the seabed in the area (Article 13 paragraph 2b)

4. It is therefore clear that the notion of "traditional fishing rights" involves several criteria of being "traditional", namely; (1) the **fishermen**, (2) the **methods** or **boats** they are using (3) the **area** they visit, and (4) their **catch** must be to meet their "basic means of livelihood".

IX. Indonesia-Australia MOU on Indonesian Traditional Fishing Rights in Australian Waters, 1974 and 1986 and EEZ Delimitation Treaty, 1997

1. The Agreed Minutes of the Meeting between Officials of Indonesia and Australia dated April 29, 1986, reviewing the MOU of 1974 indicated that the two countries also have problems of fishing in the area outside of the "box area" (Northwest Coast of Australia, Arafura Sea, and in the waters between Christmas Island and Java and in other waters), but regarded the problems as not within the meaning of traditional fishing rights. The two countries are cooperating in seeking solutions to those "non-traditional fishing rights" issues as well as issues relating to the wildlife conservation.

2. The practical guidelines for implementing the 1974 Understanding limited traditional fishing rights to " traditional **fishermen** using traditional **methods** and traditional **vessels** consistent with the **tradition over decades of time, which does not include fishing methods or vessels utilizing motors or engines**". The activities of the traditional fishing rights would continue to be respected in the "box area" (thus include territorial sea and economic zone of Australia), while the taking of sedentary species, particularly **trochus niloticus** in the reserve area in the Ashmore Reef National Nature Reserve would be prohibited for certain period to allow stocks to recover. Also any taking

of wildlife, including turtles and clams would continue to be prohibited in accordance with CITES rules.

3. For the management of fisheries in the EEZ of the two countries, as indicated above, Indonesia and Australia has been able to conclude an EEZ delimitation Treaty of March 14, 1997 between the two countries, which in some cases they are not concomitant with the seabed boundaries (See map 4 attached). The Treaty stipulates in Article 7 that in such cases:

(1) Indonesia exercises its sovereign rights and jurisdiction over the EEZ in relation to the water column, while Australia exercises its sovereign rights and jurisdiction in relation to the seabed;
(2) The construction of "artificial islands " shall be subject to the agreement of both patties;
(3) Australia will notify Indonesia 3 months before granting exploration and exploitation rights over the seabed;
(4) The construction of installations and structures shall be the subject of due notice;
(5) Any abandoned or disused installations shall be removed;
(6) The construction of a fish aggregating device shall be the subject of due notice;
(7) The party constructing the artificial islands, installations, structures or fish aggregating device shall have exclusive jurisdiction over it;
(8) Marine scientific research shall be carried out or authorized by a party in accordance with the 1982 UNCLOS and subject to notification to the other party;
(9) Each party shall be liable for pollution caused by activities under its jurisdiction; and
(10) The obligation of both parties to "consult" and cooperate with each other in relation to the exercise of their respective rights and jurisdiction.

X. Legal System

1. When Indonesia proclaimed its Independence on August 17, 1945, the marine space of Indonesia was limited to 3 miles from the coastlines of the respective islands. This was in accordance with the prevailing International Law of the sea at that time and in conformity with the 1939 Law on Territorial Sea of the Dutch East Indies. This legal maritime space was adopted by Indonesia at that time by virtue of Article II of the Transitional Provisions of the 1945 Constitution. On the basis of this, the Indonesia of 1945 was basically land-oriented since its maritime zone was very small. The national territory of Indonesia at that time, including land and waters, was approximately 2 million square kilometers. The large body of waters between the Indonesian islands, such as the Java Sea, the Flores Sea, the Banda and the Mollucas Seas as well as the Karimata and the Natuna Seas were then regarded as part of the high seas.

2. As such, the existence of large bodies of waters as high seas between Indonesian islands had created enormous problems for Indonesia, particularly at the moment when Indonesia was still facing a lot of domestic problems. The notion of Indonesia as a Unitary State was not yet that strong in view of the long history of colonialism which antagonized one part of Indonesia against another. Even after the recognition of Indonesian Independence by the Dutch in December 1949 and the transfer of authority to Indonesia after a long and bloody war for Independence, Indonesia still faced a lot of problems as a result of disturbances created by the remnants of colonialist forces, such as by the group of Captain Westerling in West Java and Andi Azis in South Sulawesi.

3. The need to promote National Unity and National Security was further felt strongly when Indonesia also faced internal conflicts, either on the basis of (1) **religion** such as in the case of Darul Islam (DI-TII) of Daud Beureuh in Aceh, Kartosuwiryo in West Java, and Kahar Muzakar in South Sulawesi; (2)or because of **ideological** conflicts such as in the case of Amir/Muso communist rebellion in East Java; (3) or due to strong **provincial** sentiments against what was perceived as the injustice by the central government, such as in the case of PRRI/Permesta in West Sumatra and North Sulawesi; (4) or due to the efforts of several region to **separate** from Indonesia as the result of the loyalty to the former colonial power such as in the case of the so-called Republic of the South Mollucas (Republik Maluku Selatan); (5) or because of the reluctant of the Dutch colonial power to **return Irian Jaya** into the Republic of Indonesia. The maritime regime at that time was not at all conducive to the need of maintaining national unity and national entity of the Republic of Indonesia which consists of thousands of islands. At the same time the national security and safety was very much endangered by the maritime regime prevailing at that time. Time and again the internal division of Indonesia had opened-up the possibility for external interference which endangered Indonesian national unity and cohesion.

4. In the field of **resources**, the maritime regime at that time was also not helpful to promote Indonesian economic development. Under the traditional regime of the freedom of the sea, in which the waters between and around Indonesian islands beyond 3 miles from the coastlines were regarded as parts of the high seas and their resources, particularly fisheries, were also regarded as resources of the high seas, free for all to take advantage of. The resources were actually taken more by non-Indonesians than by Indonesians, particularly from the far distant countries. This was highly regarded as injustice by Indonesians; yet they could not do much at that time because of their very limited resources, technologies, and capacities to exploit the resources close to their coastlines, which in effect, are closely related to their coastal population and resources.

5. This situation became so serious by 1957. At that time Indonesia was looking for a way that would ensure that the waters between and around Indonesian islands would be more beneficial to the Indonesian people than to far distant nations. Several theories were then advanced, including the suggestion to extend Indonesian territorial sea from 3 to 12 miles, particularly because by that time increasingly more countries were beginning to adopt the 12 miles territorial sea limit. But, while this method would have been able to

meet the need of continental countries, such as the Soviet Union and China, it would not satisfy the need of island and archipelagic countries like Indonesia, because the 12 miles territorial sea would still permit a large body of waters as high seas in many parts of the waterways between Indonesian islands.

6. For this reason, a new theory was developed for Indonesia by Indonesians, namely the **"point to point theory"** in the sense that Indonesia would draw straight baselines joining the outermost points of the outermost islands of Indonesia, thus encompassing the whole Indonesian islands in one continuing baselines that may consist of tens or hundreds of segments. The 12 miles territorial sea and other maritime jurisdictions of Indonesia would then the measured from those baselines outward to the open sea.

7. The Government of Indonesia adopted this theory and on December 13, 1957 the First Minister/Prime Minister at that time, Ir. Djuanda, declared the above principle. By this Declaration, the National Territory of Indonesia, including land and waters, became about five millions square kilometers. By virtue of this Declaration all airspace above those land and water territories and all the resources contained therein are declared to be within Indonesian sovereignty.

8. This Declaration was immediately protested by many maritime powers who declared that the Indonesian Declaration was not in conformity with International Law at that time. Yet the Government of Indonesia persisted and submitted the proposal to the First United Nations Conference on the Law of the Sea in Geneva in February 1958. The proposal did not gain sufficient support at that Conference and therefore it was withdrawn. In facing the second UN Conference on the Law of the Sea in Geneva in April 1960, the Government of Indonesia enacted the 1957 Declaration into Law No. 4/1960 in February 1960. This was one of the most important legislation of Indonesia with regard to its maritime zone.

9. The Second UN Conference on the Law of the Sea in April 1960 no longer discussed the archipelagic issues since it was dedicated to concentrate on the limit of the territorial sea. As it turned-out, the Conference failed to agree on the limit of the territorial sea under the new Law of the Sea at that time.

10. For several years during the 1960's there was not much initiative to settle the unfinished business in the Law of the Sea, namely on the limit of the territorial sea (TS). By late 1960's, however, several new developments in the law of the sea had emerged that drew again the attention to the need to solve law of the sea issues.

First, more and more countries claimed and declared the 12 miles TS limit. This development alarmed the maritime powers, particularly the United States (and the Soviet Union which was becoming a global maritime power) which feared that such development would close more than 100 straits, which so far had been used for international navigation, to become territorial seas of the coastal states with the consequences of applying the regime of innocent passage, as opposed to the previous

regime of freedom of navigation , thus would restrict the naval movement of those global maritime powers.

Second, the development in science and technology had enabled exploration and exploitation of the seabed resources deeper and deeper and further and further to the bottom of the ocean , which raised the question of the limit of the legal continental shelf as well as the nature of ownership over those resources beyond the limit of national jurisdiction.

Third, the fisheries resources were depleting worldwide, especially in the northern hemisphere , which required more and more efforts and needs for conservation and management of the resources in sustainable way.

Fourth, the marine environment was increasingly polluted, especially after the grounding of the oil tanker Torrey Canyon in Dover Strait in 1967 which drew the global attention to the need to protect and preserve the marine environment.

Fifth, there were more and more new independent States in Africa, like Indonesia, which claimed that they were not participating in making the Law of the Sea rules at that time and therefore would like to review the law so that their interests would be taken into more account.

11. In the meantime, Indonesia persisted in its efforts to consolidate its views on archipelagic principles. Domestically, in July 1962 it promulgated the Government Regulation No. 8/1962 on **the right of passage of foreign ships** through the Indonesian archipelagic waters, and in 1963 issued a Presidential Decision No. 103/ 1963, declaring that the whole Indonesian archipelagic waters would be treated as one "circle" as understood in the Law of 1939 and therefore authorized the Indonesian Navy to protect and defend the whole Indonesian archipelagic waters and their territorial seas.

12. Following the development in International Law of the Sea later on, Indonesia also developed its legislation. When the exploration and exploitation of the seabed/continental shelf gained momentum in 1960s, particularly after the adoption of the Geneva Convention on Continental Shelf in 1958, Indonesia ratified the Convention in 1961 by Law No. 19/1961, and later declared its **continental shelf regime** in the Government Declaration of 17 February 1969. The Declaration, which was largely based on the 1958 Geneva Convention on the Continental Shelf, was enacted into Law No. 1/1973. By the adoption of the new limits of continental shelf under the Law of the Sea Convention 1982 and ratified by Indonesia by Law No. 17/1985, the Law No. 1/1973 would have to be amended in order to take into account the new outer limit of the continental shelf. In the 1958 Convention the outer-limit of the continental shelf was the 200 meters isobath or to where the exploitability of its natural resources was till possible. At this moment no new legislation has been enacted on this matter.

13. With the increasing attention given by the world community towards the dangers of pollution of the sea, which later on became a major subject in the Law of the Sea Conference, Indonesia had also enacted various legislation on **environmental protection** particularly the Law No. 4/1982. In fact, by its ratification of the 1982 Law of the Sea Convention, Indonesia also assumed obligation to protect marine environment and to

cooperate in this direction as provided for in the 1982 Law of the Sea Convention. Now, the Law No. 23/1997 of September 9, 1997 has replaced the Law No. 4/1982.

14. With regard to the struggle to control **living resources** of the sea and in order to assure its sustainable development and utilization, the UNCLOS 1982 also agreed on the establishment of the Exclusive Economic Zone (EEZ) beyond the baselines. The UNCLOS 1982 also empowered an archipelagic State to have EEZ of 200 miles measured from their archipelagic baselines. On the basis of this, Indonesia had also declared its EEZ regime in 1983 which was later enacted into Law No. 5/1985. The EEZ regime was later followed by Law No. 19/1985 on fisheries. The law had later on been developed by further Government Regulations and Ministerial Decisions.

15. With regard to the **defense and security** of the Indonesian territory, including its maritime zone, the Law No. 22/1982 had been enacted, which again had later on been developed into various Government Regulations and Presidential Decisions.

16. By the adoption of the EEZ and Continental Shelf regime under the UNCLOS 1982, which were later adopted into Indonesian National Legislation, the natural resources base of Indonesia also grew substantially by about another three million square kilometers, thus extending the whole natural resources base for the development of Indonesia to about 8 million-kilometers square.

17. One of the most striking development was the enactment of Law No. 6/1996 which "replaced" the Law No. 4/1960. As indicated above, the 1996 Law had been "controversial" because it has not yet established the new Indonesian straight archipelagic baselines. This lacunae was partially repaired by the publication of "indicative baselines" attached to the 1996 law and by the Government Regulation No. 61/1998 which established Indonesian baselines in the Natuna Sea. At this moment, efforts are being made to enact the new Indonesian base-points and straight archipelagic baselines after several years of survey on the spot.

18. In addition to the various national legislation as the results of the UNCLOS 1982, Indonesia has also adopted **various other Conventions** and Agreements formulated by various UN Agencies, such as by IMO, FAO, UNEP, ICAO, and others, and adopted them in various Indonesian legislation.

19. Other important parts of Indonesian legislation dealing with maritime issues are those treaties and **agreements with the neighboring countries**, either for territorial sea, continental shelf, or EEZ boundaries. Those treaties and agreements had also been incorporated into Indonesian legislation through ratification process. It is therefore clear that the Indonesian maritime zones have extended substantially, either in terms of national territory (archipelagic waters and territorial sea) in which Indonesia exercises territorial sovereignty, or in terms of resources (EEZ and continental shelf) in which Indonesia exercises sovereign rights for the purpose of exploring and exploiting the natural resources, protection of their environment, the conduct of marine scientific

research, and the establishment of installations, structures, and artificial islands. Indonesia therefore had gained substantially, territorially or resources-wise, in the last several decades from the development in the Law of the Sea.

XI. Institutional Mechanisms

1. In view of these achievements, several efforts to establish commensurate institutions had been made since mid 1950s. First, there were committees that would study the situation at that time in order to find out the best solution for Indonesian maritime problems. The result of those committees was the declaration on Indonesian archipelagic waters in 1957. By 1960 Indonesia already established the Indonesian Maritime Council, headed by the President of the Republic and consisted of several committees headed by the respective Ministers. There was, for instance, a Committee for Transportation which was chaired by the Minister of Sea Communication. There was also a Legal Committee on the Law of the Sea which was chaired by the Naval Chief of Staff. Not long after, the Government of Indonesia even established a new Department, called the Department of Maritime Affairs.

2. By the changing political condition in Indonesia after 1965, the institutional mechanism to deal with the maritime issues also underwent several mishaps. In 1967, by a general decision of the People's Consultative Assembly (MPR) to abolish all Councils that were not mentioned in the 1945 Consitituon, the National Maritime Council of Indonesia was eliminated "by accident". There was again a lacunae by the time the world community decided in 1969 to convene the Third Law of the Sea Conference from 1973 and for that purpose the UN General Assembly decided to establish the UN Seabed Committee which later on became the Preparatory Committee for the Third UN Law of the Sea Conference (1973-1982).

3. By 1969, Indonesia began to establish again various inter-departmental committees in various government Departments to deal with specific and sectoral issues. There was then a Committee for the Safety of Navigation in the Straits of Malacca and Singapore in the Department of Communication, a Technical Committee on Continental Shelf in the Department of Mines and Energy, a Committee on Fisheries in the Department of Agriculture, a Committee on National Territory in the Department of Defense, a Committee to Prepare for the Law of the Sea Conference in the Department of Foreign Affairs, a Committee of Maritime Education in the Department of Education and Culture, etc. By 1971 it was felt that the activities of all those Committees should be coordinated and therefore by virtue of Presidential Decision No. 36/1971 the activities of all these Committees were brought under the umbrella of the Coordinating Committee for National Territory (PANKORWILNAS) under the Department of Defense.

4. The Pankorwilnas had been instrumental in coordinating various Indonesian positions on various subjects in the Law of the Sea Conference. Yet, after the adoption of the Convention in 1982, after which the stage for the implementation of the provisions of

the Convention came into the picture, the Pankorwilnas seemed not to have been very effective in inducing the various Departments to prepare for the implementation of the various provisions of the Convention. Already since 1982 a need was felt to have an Agency or Department that would have an executive power, rather than simply coordinating power, to implement and to make use of the provisions of the Convention for the benefits of Indonesia as a whole. Various Departments again began to implement the Convention according to their sectoral needs, resulting in difficulties in implementing the Convention in a systematic, effective and efficient way. The Government Coordinating Agency for Security and Law Enforcement at Sea (BAKORKAMLA) has been having substantial problem in maintaining and coordinating security and law enforcement activities at sea and numerous efforts to make the Agency more efficient and effective proved to have been difficult, primarily due to conflicting jurisdiction between and among the Departments, especially between the Navy and the Police.

5. By 1996 and after several sectoral legislation had been passed, the need for a much more effective mechanism was increasingly felt. There was already even a talk on the re-establishment of an executive Department for maritime issues, especially since many countries have already established such a Department as, for example, in the case of India and Canada. At the same time the Government of Indonesia in 1994 established a new post of Ambassador-at-Large for the Law of the Sea and Maritime Affairs in order to deal with the myriad of problems of ocean affairs domestically, regionally, and internationally, in order to comply with the provisions of the UNCLOS 1982 that all problems of ocean affairs should be treated in a coordinated way .

6. Therefore in 1996, after a long study and discussions, the Government established again a new Indonesian Maritime Council (DKN), replacing the function of Pankorwilnas, and placed it under the jurisdiction of the Coordinating Minister for Political Affairs and National Security. The Council began its activities and concentrated on the need to promote fisheries, sea communication, environmental protection, and marine tourism. Attempts to revise Bakorkamla, however, have not produced expected results.

7. But, there was again change of Government in Indonesia, and under the new Government of President Abdurrahman Wahid, the National Maritime Council was disbanded and replaced by the new Indonesian Maritime Council (DMI) and was placed under day-to-day care of the new Minister of Sea Exploration and Fisheries, although the Council itself is chaired by the President of the Republic. At the same time, the new Government mysteriously abolished the position of Ambassador-at-Large for the Law of the Sea/Maritime Affairs in February, 2000. At the same time, Bakorkamla remains as before, although the Police has now been separated from the Armed Forces.