

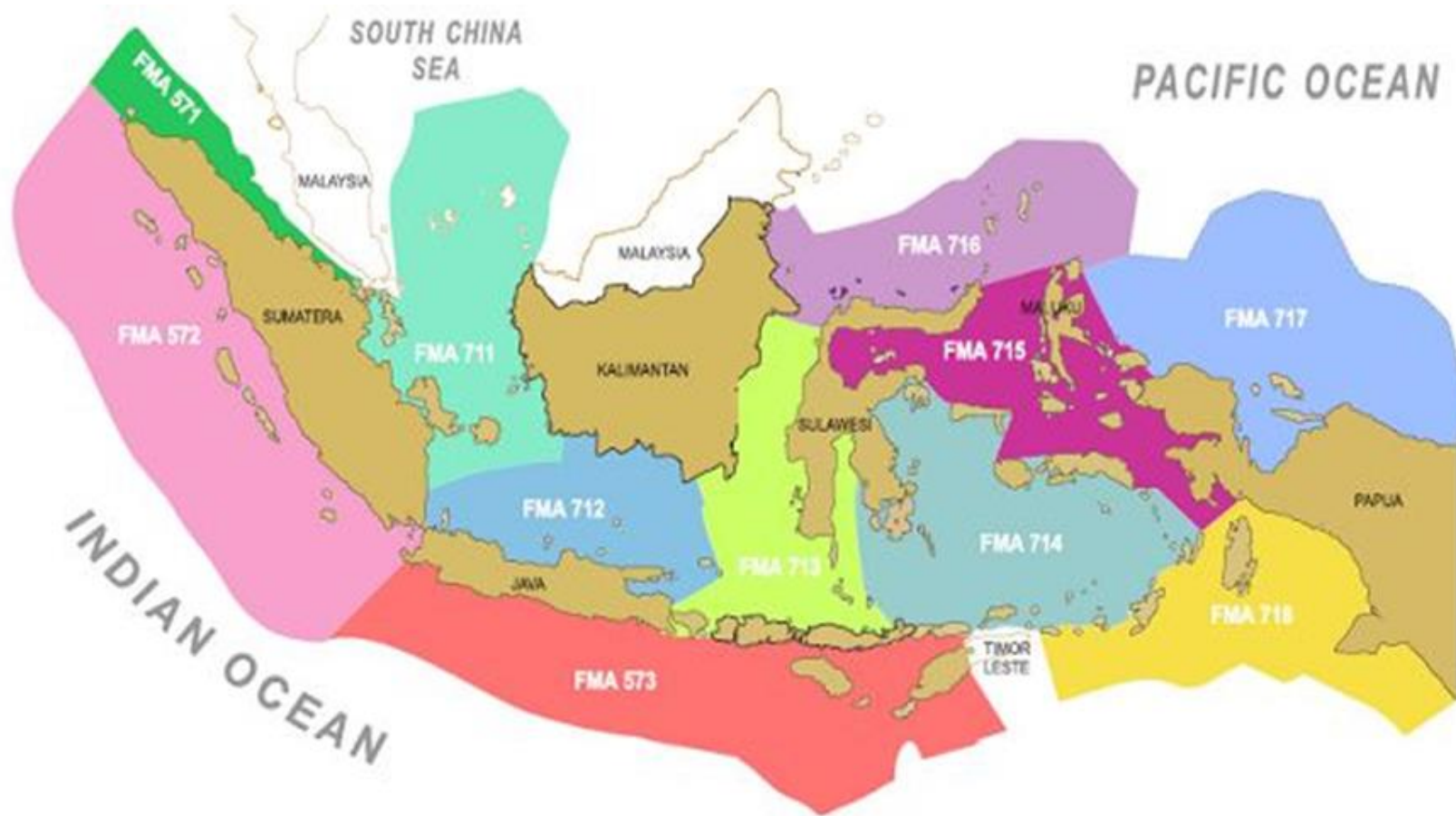
Responding to Illegal Foreign Fishing in Indonesian and Australian waters – a comparative analysis

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Topographical map of ARCHIPELAGIC STATE of Indonesia



Indonesian Exclusive Economic Zone area 6,025,110 sq km



Indonesia and US join forces to police the seas

3 February 2016

President Joko Widodo's plan to establish Indonesia as a 'global maritime axis' took a step forward last week as US ambassador Robert Blake announced a partnership programme to help improve marine law enforcement and sustainable fisheries management in the world's largest archipelagic nation.

The results of the Indonesia/US partnership



Is Indonesia Confident Enough on Law Enforcement in the Exclusive Economic Zone? – A Recent Incident with Chinese Fishing Boat 25 June 2016

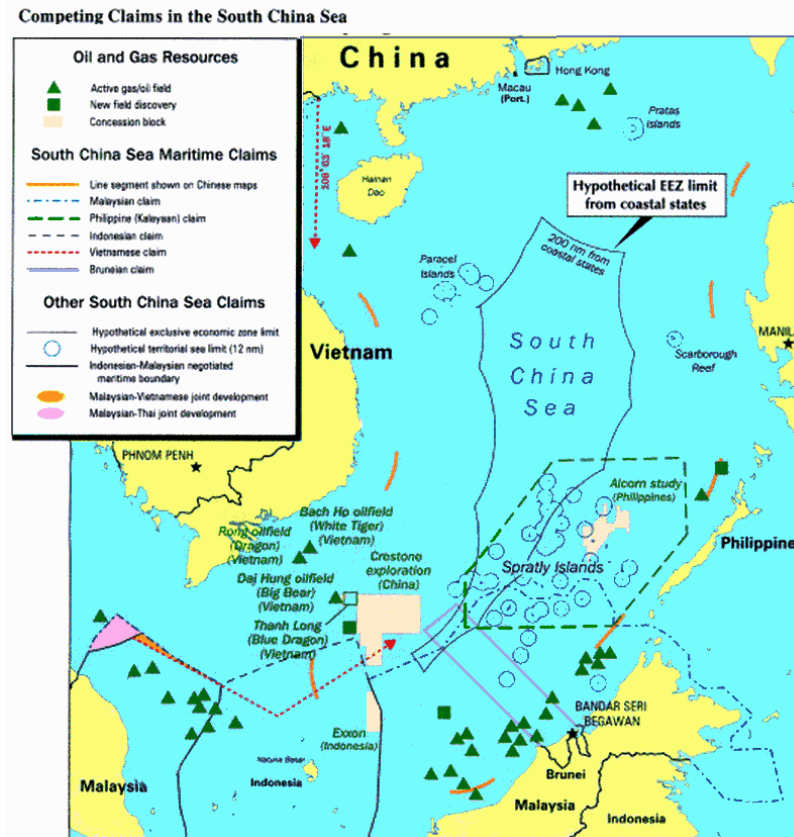


“Indonesia sinks 23 foreign fishing vessels caught poaching, bringing the total to 170”

7 August 2016



Maritime Boundary Disputes – north of Indonesia



**STOP
ILLEGAL
FISHING**



69% Fully Overexploited

Illegal fishing: national and foreign
(Vietnam, Thailand, Philippines)



Indonesia, Loss : \$20 miliar/tahun

Indonesian Efforts

1. Establishing task force (Ministerial TF and 115 Task Force)
2. Sinking foreign vessel
3. Banning the operation of ex foreign vessel (moratorium)
4. Revoking fraudulent licenses
5. Combating Illegal Fishing as TOC → fisheries crime →
→ *the 2nd Regional Conference IUU Fishing & Its Related Crimes*
in Yogyakarta (12-13 Oct 2016)
6. Regional and international collaboration



APPLICABLE LAW

INTERNATIONAL LAW

- Hard laws : UNCLOS 1982, UNFSA 1995, PSM 2009
- Soft law : CCRF, IPOA IUU, RPOA

NATIONAL LAW

- Law NO 31/2004 and Law No. 45/2009

Indonesia is adopting most of treaties by monism schools

ENFORCEMENT OF FISHERIES LAW

Article 69 Law No 45/2009 → sinking the vessels with sufficient preliminary evidences

Article 73 Law No. 31/2004 juncto Article 102 Law No 31/2004 as amended Law No. 45/2009 → foreign vessel could be apprehended and brought to the court but the penalty cannot be included imprisonment → as stipulated by UNCLOS 1982

Law enforcer of fisheries law → TNI AL, fisheries officers, sea police, BAKAMLA (Agency of maritime security)

SINKING ILLEGAL FOREIGN FISHING VESSELS

Based on national law (article 69 of Law No 45/2009)

Article 73 UNCLOS 1982 does not mention about the treatment to the vessel

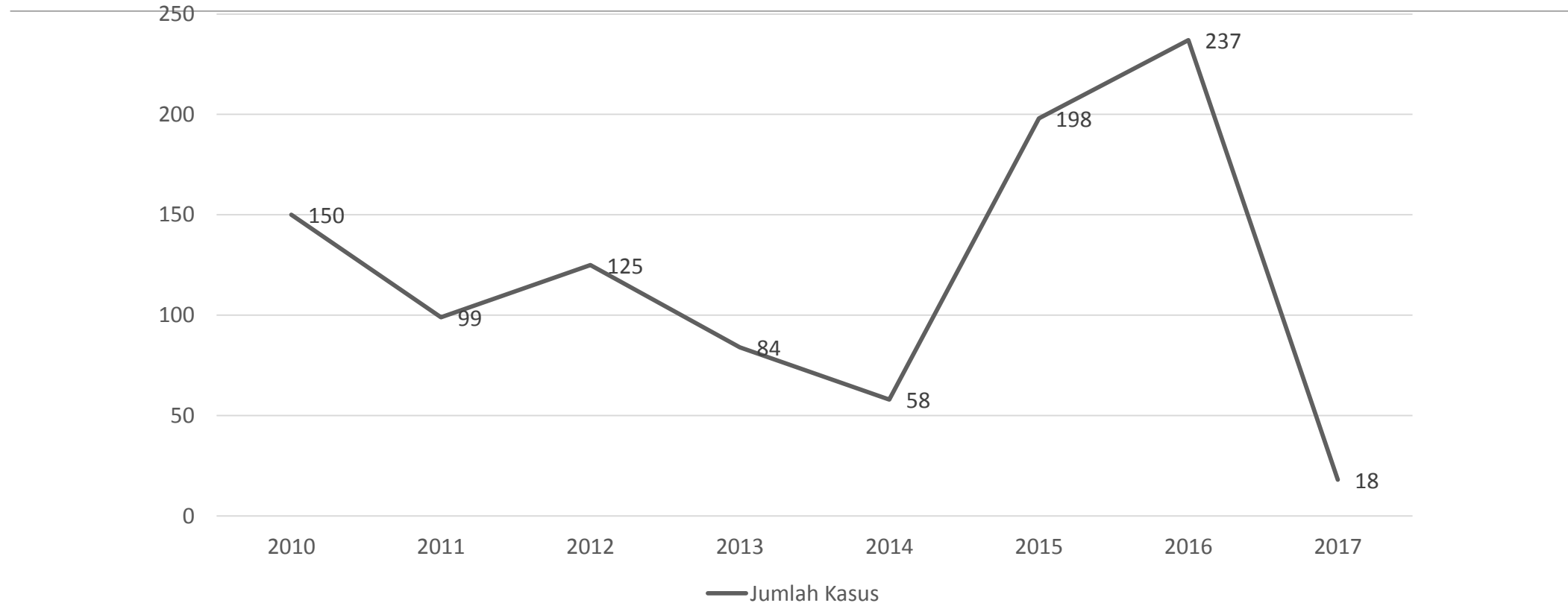
To create deterrent effect



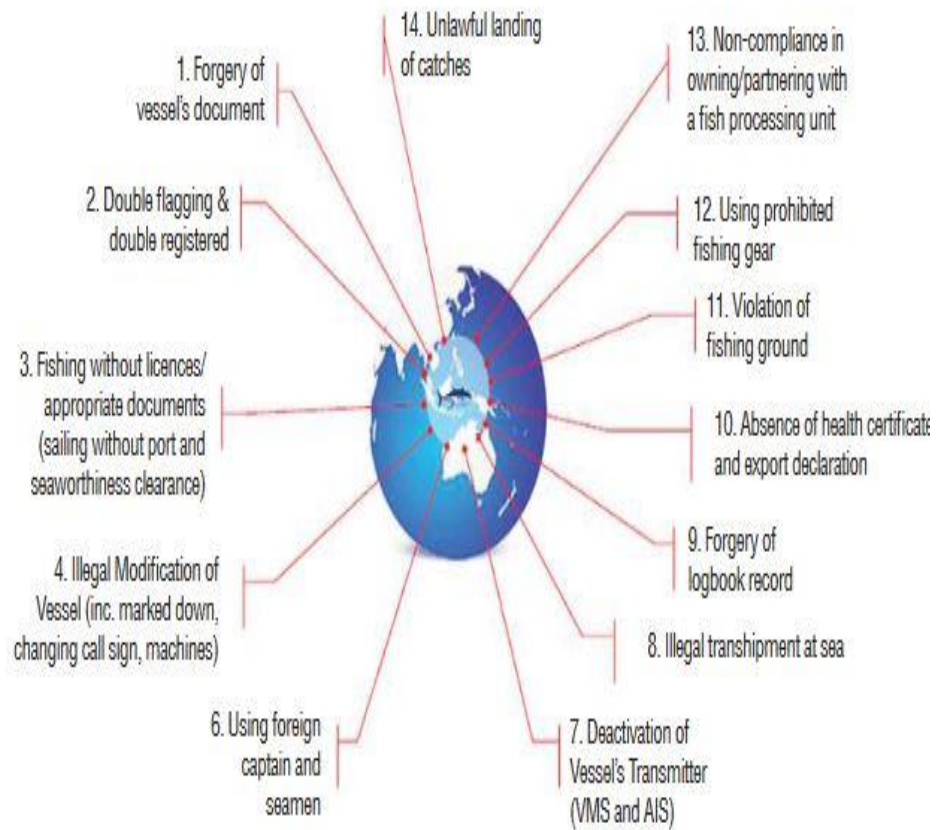
GRAFIK PENANGANAN KASUS TINDAK PIDANA KELAUTAN DAN PERIKANAN TAHUN 2010 – 2017*



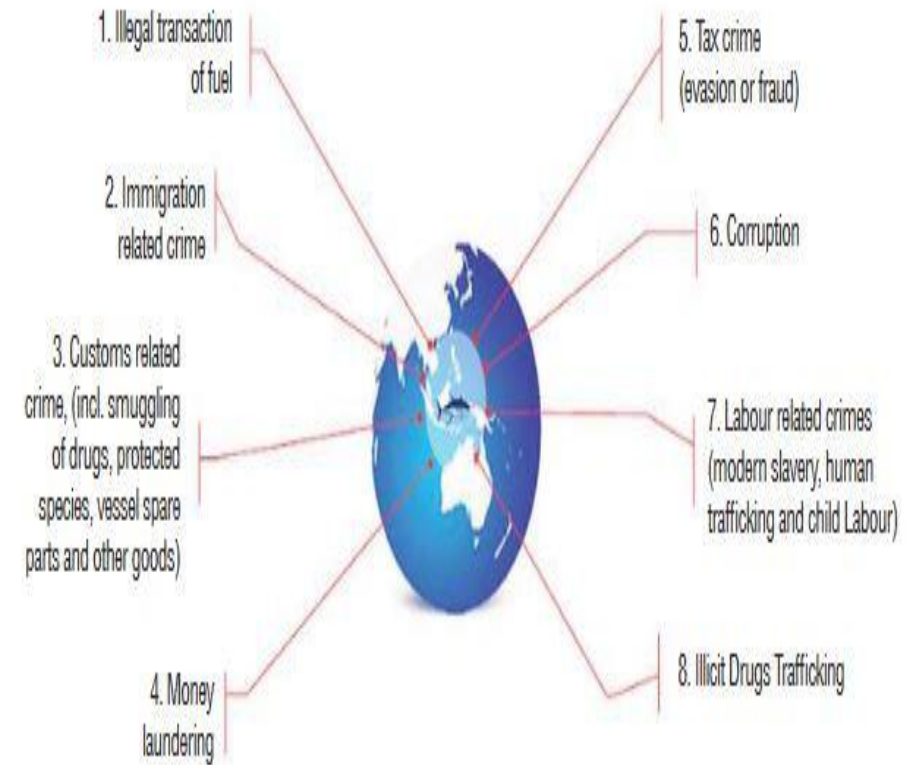
*Update s.d 3 Maret 2017



TYPES OF FISHERIES CRIME (IUU FISHING)



TYPES OF OTHER CRIMES (FISHERIES RELATED CRIMES)



IUU F as TOC

FISHERIES CRIME

CHARACTERISTIC

Preparation of fishing vessels for operation:

- Obtaining fishing licenses through forgery, extortion, bribery or other illegal means; and the use of flags of convenience or non-compliance;

Catching fish:

- Deploying illegal equipment such as driftnets or dynamite, fishing in areas with little to no governance, or fishing just outside of protected areas;

Landing and reporting a catch:

- Forging or falsifying catch records, keeping multiple log books for the purpose of concealing actual catches or the correct locations of catches;

Processing the catch:

- High-grading, the practice of discarding fish which have a lower market value (due to size or quality) or discarding species with no or very low commercial value, or which are caught alongside a targeted catch is an incredibly wasteful practice and one which often contravenes laws and regulations;

Transporting and exporting fish and fish products:

- Fish laundering, transshipment, offloading at ports of convenience, false labeling and export permits, and the use of bribery to facilitate the movement of illegal fish products are all used;

Selling fish and fish products to consumers:

- Falsely labeling products and direct sales as a means of avoiding taxation;

Accounting for earnings for tax purposes:

- Hiding profits or otherwise dodging taxes, operating under a flag of convenience and employing shell companies to avoid regulations and paying a fair share of taxes on profits.

ILLEGAL FISHING → CORPORATE CRIME → TRANSBOUNDARY ORGANIZED CRIME → UNTOC/PALERMO CONVENTION

OTHER CRIMINAL ACTS IN MARITIME BOUNDARIES

people smuggling → Indonesia- Australia, Indonesia-Malaysia

Illegal drug trafficking → Malaysia-Indonesia

Human trafficking → Indonesia-Malaysia

Marine pollution → Singapore-Indonesia, Australia-Indonesia

URGENT STEPS

Stronger law enforcement

Revision of fisheries law to include the changing of penalty to fisheries law infringement and legal evidence for fisheries law

Stronger regional cooperation

TERIMA KASIH

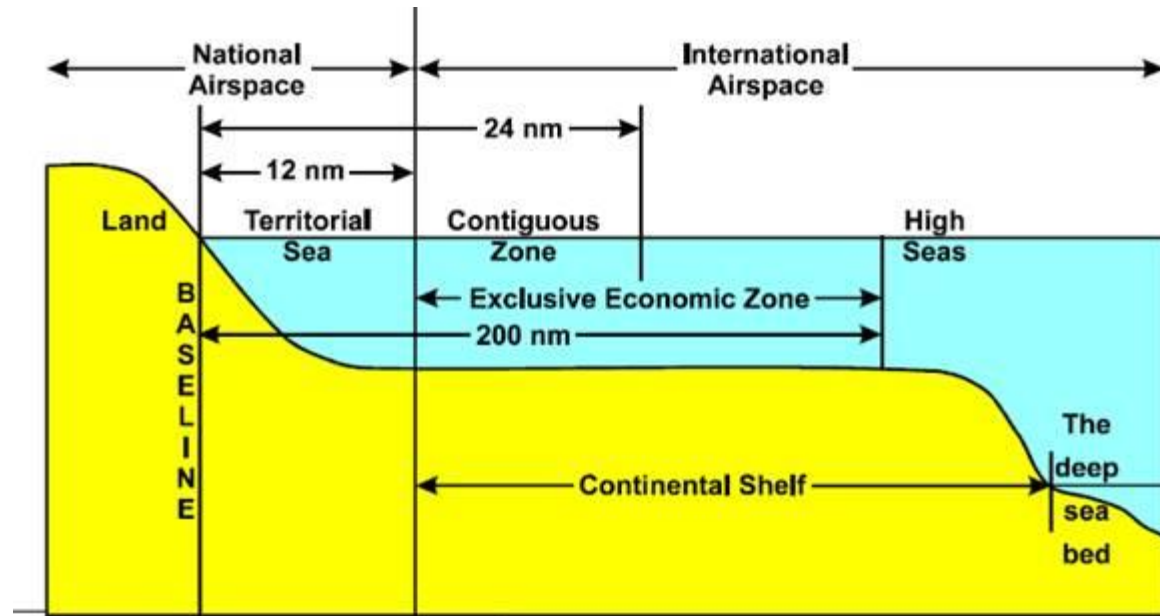
Outline – Alistair Wyvill SC

- ❑ International law and the regulation of foreign fishing – UNCLOS and International criminal law
- ❑ Boundary issues between Indonesia, Australia and Timor Leste (Alistair)
- ❑ Australian fisheries enforcement law

Australian Exclusive Economic Zone area 10,200,000 sq km



Off-shore sovereignty under UNCLOS



Freedom of the navigation in EEZs – article 57

In the exclusive economic zone, all States, whether coastal or land-locked, enjoy, subject to the relevant provisions of this Convention, the freedoms referred to in article 87 of navigation and overflight and of the laying of submarine cables and pipelines, and other internationally lawful uses of the sea related to these freedoms, such as those associated with the operation of ships, aircraft and submarine cables and pipelines, and compatible with the other provisions of this Convention.

Article 56(1) of UNCLOS

1. In the exclusive economic zone, the coastal State has:

- (a) 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...
- (b) jurisdiction as provided for in the relevant provisions of this Convention with regard to...
 - (iii) the protection and preservation of the marine environment

Article 56(2) of UNCLOS

2. In exercising its rights and performing its duties under this Convention in the exclusive economic zone, the coastal State shall have due regard to the rights and duties of other States and shall act in a manner compatible with the provisions of this Convention.

Article 62 of UNCLOS

Laws and regulations may relate to...

- (a) licensing of fishermen, fishing vessels and equipment, including payment of fees and other forms of remuneration...
- (b) determining the species which may be caught, and fixing quotas of catch, whether in relation to particular stocks or groups of stocks or catch per vessel...
- (c) regulating seasons and areas of fishing, the types, sizes and amount of gear, and the types, sizes and number of fishing vessels that may be used...

...

- (k) Enforcement procedures.

Article 73 of UNCLOS

1. The coastal State may... take such measures, including boarding, inspection, arrest and judicial proceedings, as may be necessary to ensure compliance with the laws and regulations adopted by it in conformity with this Convention.

Article 73 (cont.)

2. Arrested vessels and their crews shall be promptly released upon the posting of reasonable bond or other security.

3. Coastal State penalties for violations of fisheries laws and regulations in the exclusive economic zone may not include imprisonment, in the absence of agreements to the contrary by the States concerned, or any other form of corporal punishment.

The right of “hot pursuit” – article 111 of UNCLOS

(1) The hot pursuit of a foreign ship may be undertaken when the competent authorities of the coastal State have good reason to believe that the ship has violated the laws and regulations of that State. Such pursuit must be commenced when the foreign ship or one of its boats is within (the EEZ) of the pursuing State, and may only be continued outside the territorial sea or the contiguous zone if the pursuit has not been interrupted

(4)... The pursuit may only be commenced after a visual or auditory signal to stop has been given at a distance which enables it to be seen or heard by the foreign ship.

Extra-territorial criminal jurisdiction under international law

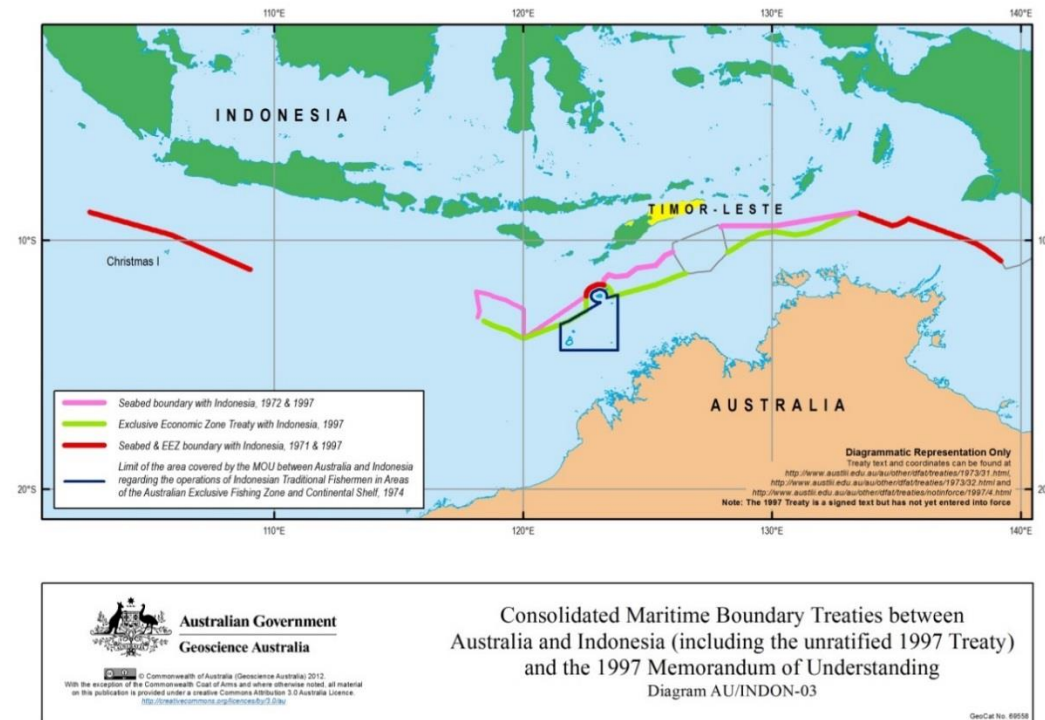
Different types of extra-territorial criminal jurisdiction:

- Prescriptive
- Enforcement
- Adjudicative

Different bases for jurisdiction:

- Territorial/personality
- Treaty
- Protective
- Universal

Regional boundary issues – Australia, Indonesia and Timor Leste



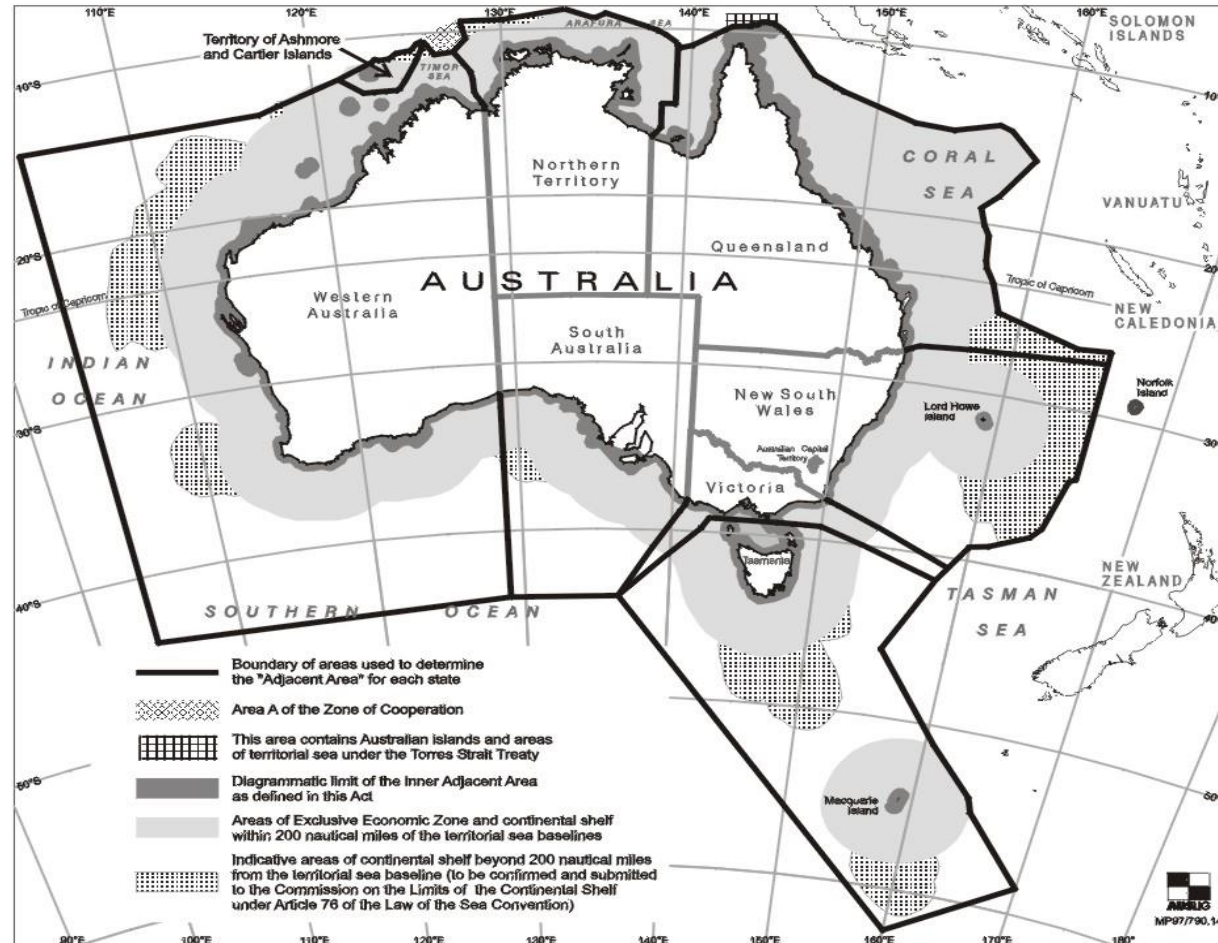
Operation of Australian Criminal law extra-territorially - sources

Michael White, Australian Offshore Laws, 2009,
Federation Press

Offshore constitutional settlement – criminal law

- ❑ the Territory to have the same powers for its Territorial Sea and intra-Territory shipping as if it formed part of the Territory
- ❑ generally in relation to criminal law, the Commonwealth would legislate to apply Territory criminal law beyond the Territorial Sea and in relation to other matters
- ❑ in relation to fisheries, and subject to specific arrangement between the Commonwealth and the Territory, the Territory has legislative responsibility only out to 3 nautical miles. The Commonwealth has legislative responsibility beyond 3 nautical miles
- ❑ An example of such an arrangement between the Commonwealth and New South Wales is found in *Babington v Commonwealth* (2016) 240 FCR 495

Off-shore Constitutional Settlement, Crimes at Seas Act 2000 (Cth) and the Crimes at Seas Act 2000 (NT).



What is the Australian EEZ in domestic law?

By s10B of the *Seas and Submerged Lands Act 1973 (Cth)* the Governor-General may declare “the limits of the whole or of any part of the exclusive economic zone of Australia”.

By *Proclamation made on 29 July 1994*, the Governor-General declared the Australian EEZ to be either 200nm from the relevant “baseline” or a scheduled position whichever is closer

Australia’s baselines are specified in the *Seas and Submerged Lands (Territorial Sea Baseline) Proclamation 2006 (Cth)*.

“Australian fishing zone” is defined in s.4 of the Fisheries Management Act 1991 (Cth) as the Australian exclusive economic zone

Fisheries Management Act 1991 (Cth)

Offence provisions – AFZ - The Volga litigation:

Olbers Co Ltd v Commonwealth (2014) 136 FCR 67

Olbers Co Ltd v Commonwealth (2014) 143 FCR 449

“Volga” (Russian Federation v. Australia), Prompt Release, Judgment, ITLOS Reports 2002, p. 10

Fisheries Management Act 1991 (Cth) (cont.)

Offence provisions – outer continental shelf (sedentary species)

Muslimin v The Queen (2010) 240 CLR 470

Sahring v the Commonwealth (2014) 220 FCR 85

Fisheries Management Act 1991 (Cth) (cont.)

Offence provisions – foreign EEZs

R v Potter [2015] TASSC 44

Fisheries Management Act 1991 (Cth) (cont.)

Forfeiture provisions –

Olbers Co Ltd v Commonwealth (2014) 136 FCR 67

Olbers Co Ltd v Commonwealth (2014) 143 FCR 449

Sahring v the Commonwealth (2014) 220 FCR 85

Maritime Powers Act 2013 (Cth)

CPCF v Minister for Immigration and Border
Protection (2015) 255 CLR 514

Does Australian Law comply with UNCLOS?

Forfeiture provisions in the FMA and UNCLOS
Maritime Powers Act 2013 (Cth) and UNCLOS

Conclusion
