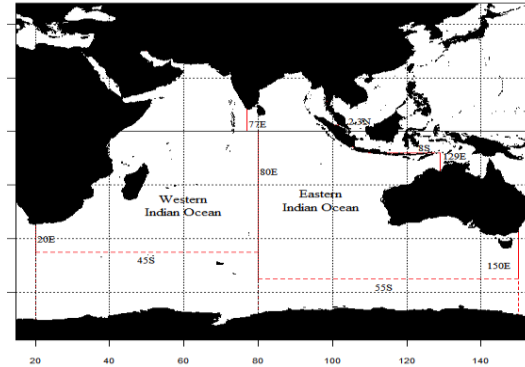


# Prospects for Regional Cooperation on Fisheries in the ASEAN Region



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**6 August 2018**

38<sup>th</sup> Mtg ASEAN Ministers on Agriculture & Forestry (Oct 2016): ASEAN to develop ASEAN Common Fisheries Policy (ACFP); Roadmap by the end of 2019

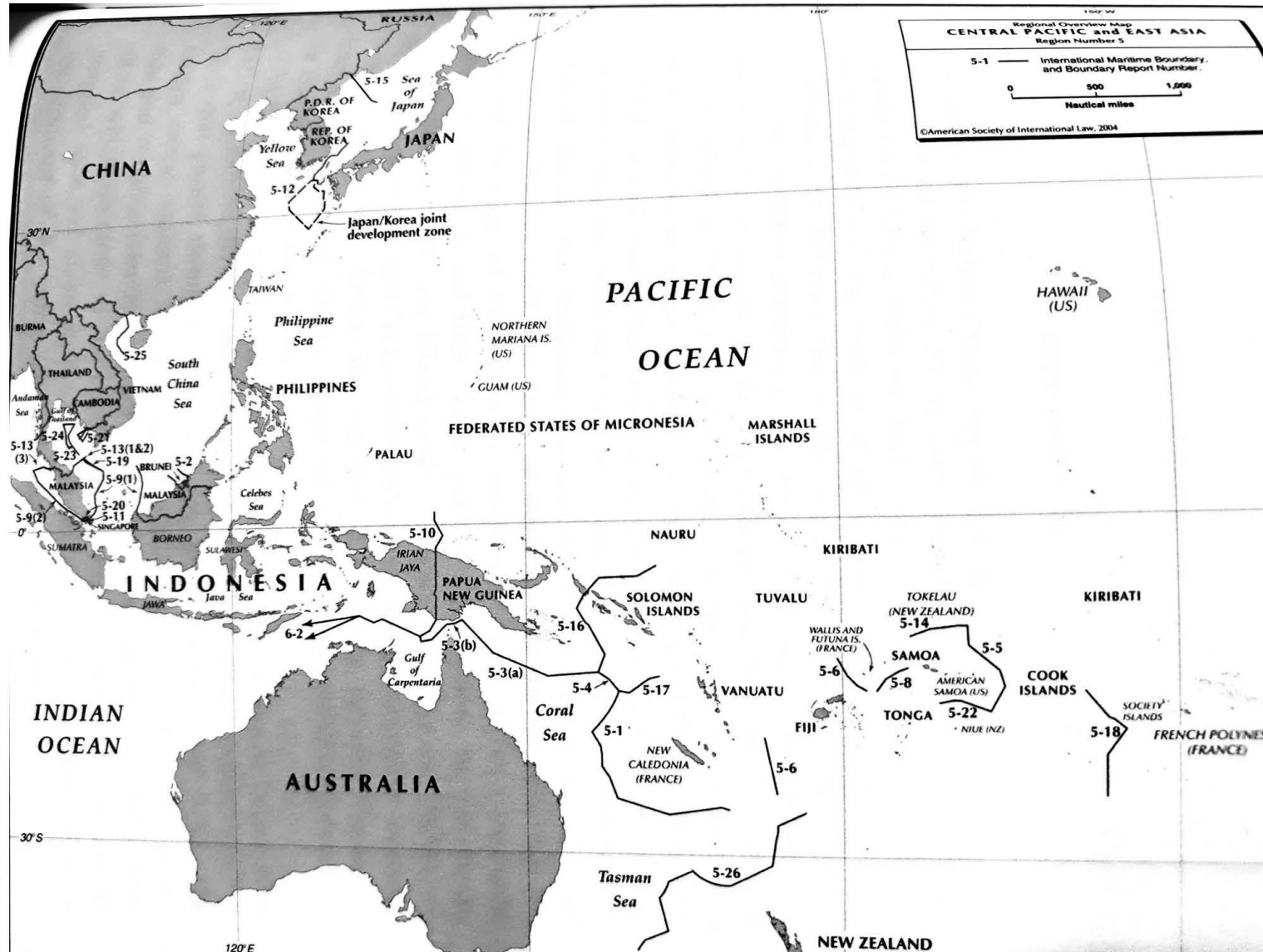
Possible elements for ACFP:

- sustainable marine fishery resources management
- combating illegal, unreported, and unregulated (IUU) fishing as defined by FAO, with prominent roles to RFMOs.

Partnership with SE Asian Fisheries Dev Center (SEAFDEC):

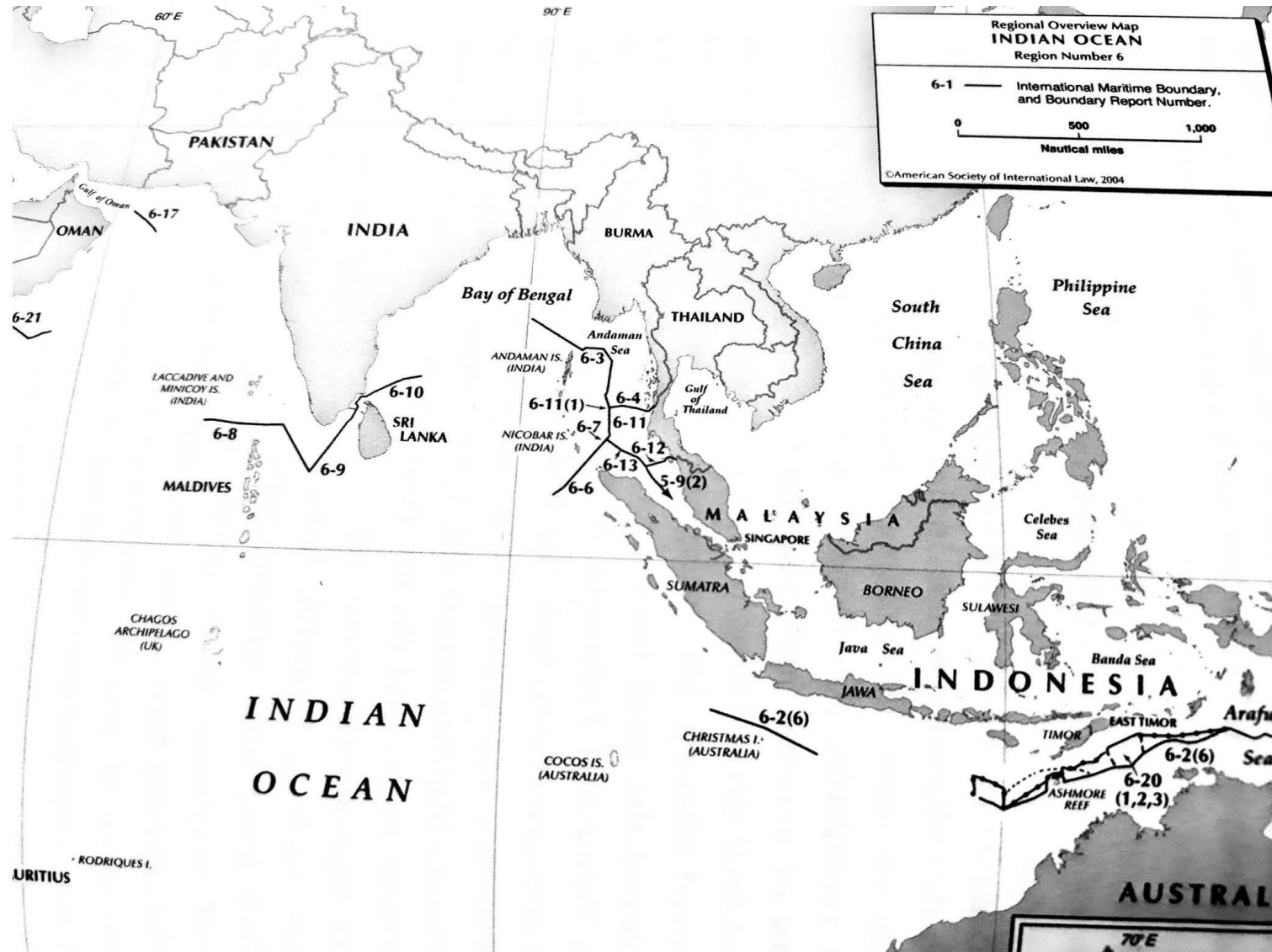
- autonomous IO comprising ASEAN Member States + Japan
- Mission: promoting & facilitating concerted actions to ensure the sustainability of fisheries & aquaculture in SE Asia

# Marine Geography



(Sources: *International Maritime Boundaries*, vol V (2005) pp. 3451, 3553)

# Marine Geography (cont.)



(Sources: *International Maritime Boundaries*, vol V (2005) pp. 3451, 3553)

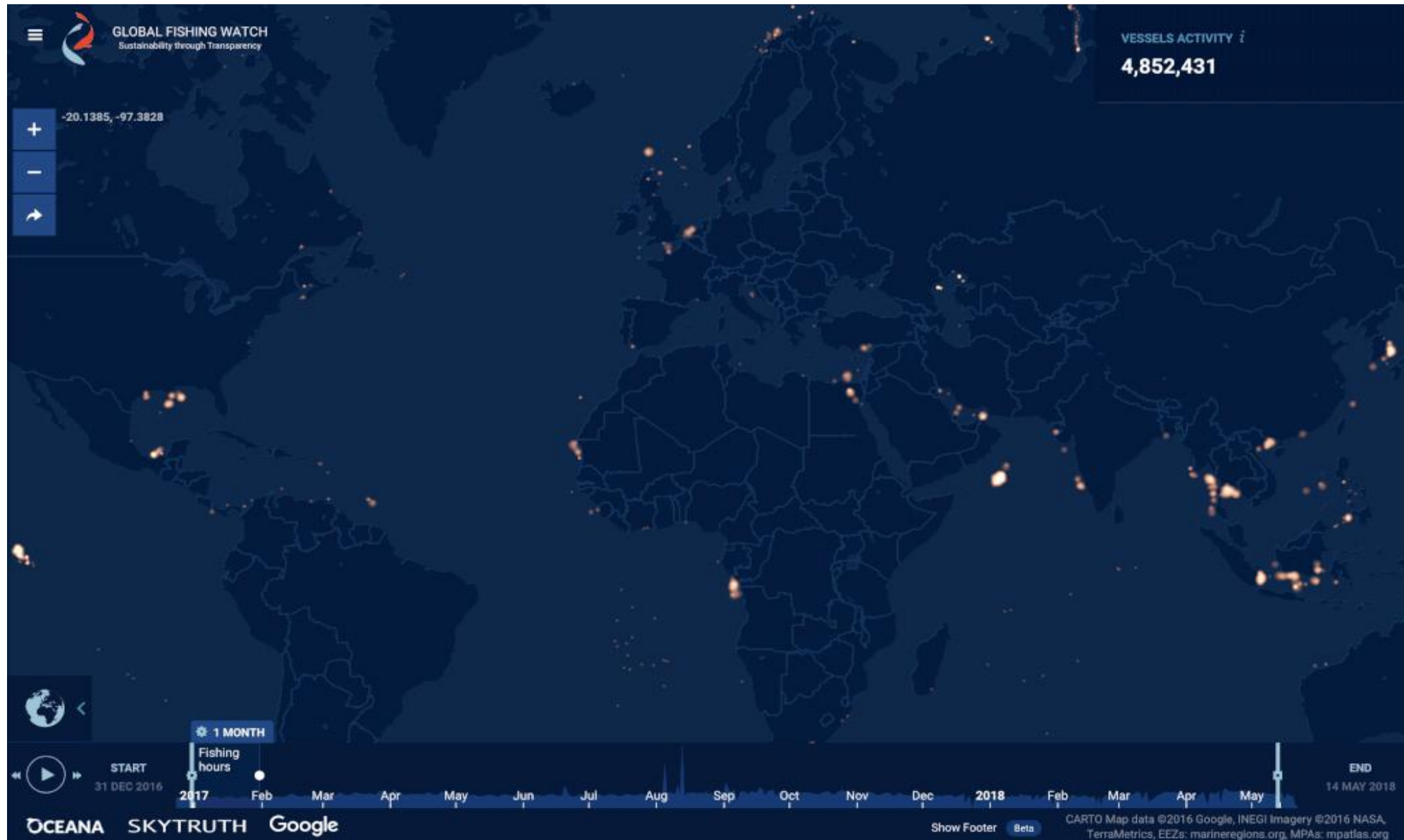
## Fishing Activities in ASEAN Seas

Among the most intensive in the world

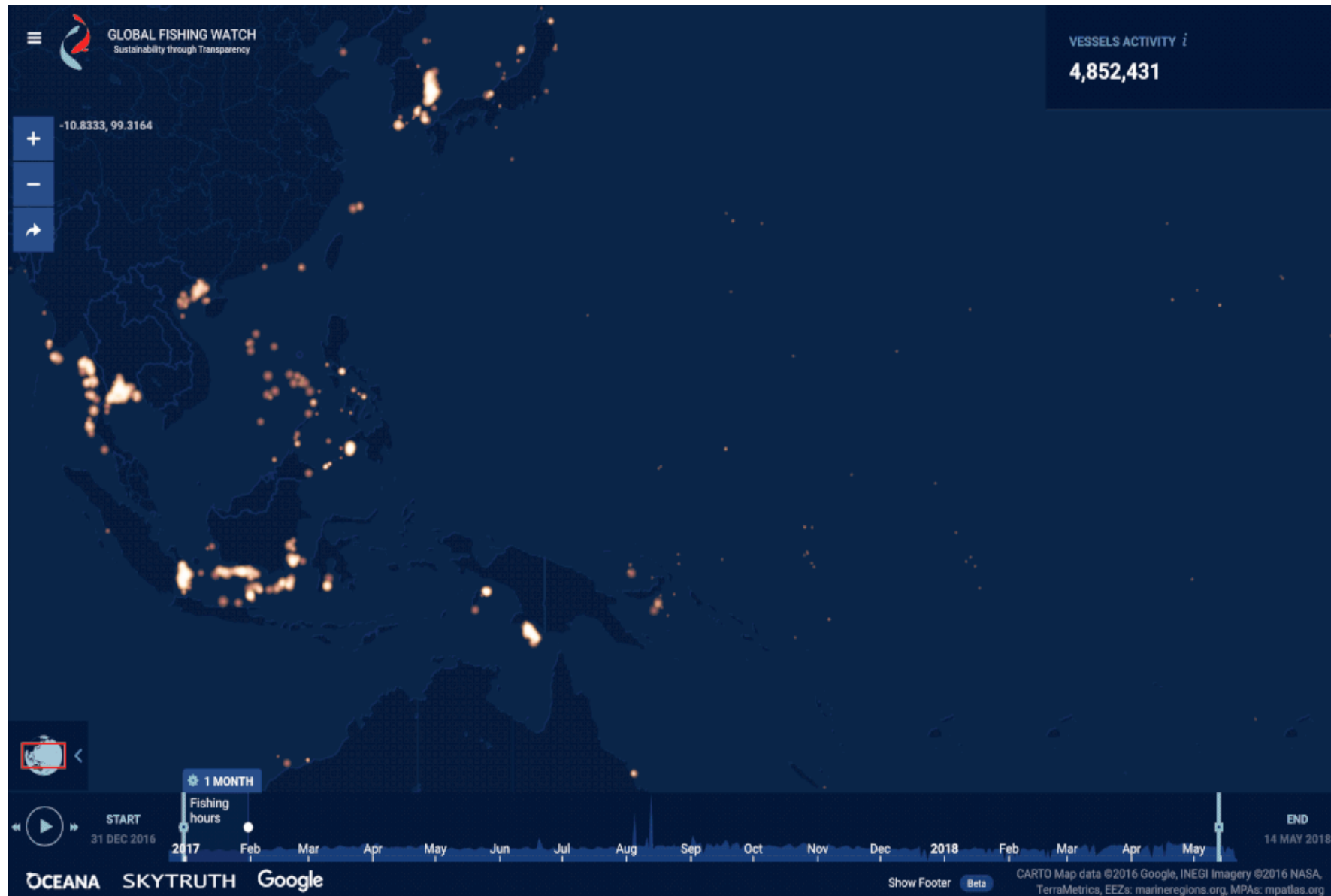
See: imaging data collected by NASA/NOAA of the USA's Visible Infrared Imaging Radiometer Suite (VIIRS)

- Accessible by website of Global Fishing Watch

# Fishing Activities in ASEAN Seas



# Fishing Activities in ASEAN Seas



# Applicable International Legal Regimes

No single relevant int'l convention binding on all ASEAN States.

Cambodia/Malaysia/Thailand = party to 1958 Geneva Conv on Fishing & Conservation of Living Resources of the High Seas.

Cambodia = the only ASEAN State *not* party to UNCLOS 1982.

Indonesia/Philippines/Thailand = party to the 1995 UN Fish Stocks Agreement (FSA)

Enforcement  $\neq$  IUU fishing: Indonesia/Myanmar/Philippines/Thailand = party to 2009 FAO Port State Measures Agreement to Prevent/Deter/Eliminate IUU Fishing



# Important Roles of RFMO/As in Marine Fisheries

## *UNCLOS:*

**Art 61** (conservation of living resources):

- coastal States to determine allowable catch of EEZ living resources, taking into account the *best scientific evidence available*.
- As appropriate, cooperate with RFMO/As, to ensure the maximum sustainable yield (MSY), as qualified by relevant environmental and economic factors

# Important Roles of RFMO/As in Marine Fisheries

## *UNCLOS:*

- Art 63** [Stocks: (1) within EEZs of 2+ coastal States; or (2) both within EEZ and area beyond and adjacent to EEZ]
- States concerned to seek, directly or through RFMO, to agree on measures necessary to coordinate and ensure the conservation & development of stocks in (1).
  - Coastal State & States fishing for stocks in (2) are to seek, either directly or through appropriate RFMO, to agree on necessary measures for conservation of these stocks in the adjacent area.
  - This cooperation is crucial to enclosed/semi-enclosed seas, esp. in the middle of ASEAN maritime region.

# Q: Coastal States or high-seas fishing States have priority interest in the stocks in Art 63(2)?

## *1995 FSA*

- tries to close this 'gap'; and
- amplifies Art 64/UNCLOS: coastal States & States fishing for highly migratory species to cooperate directly/through RFMOs to ensure conservation & promoting optimum utilization of such species throughout the region.

# Existing RFMO/As of Relevance to ASEAN States

- Indian Ocean Rim Association (IORA)***: several maritime issues, incl. fisheries
- Indonesia/Malaysia/Singapore/Thailand = members of the IORA
  - These ASEAN Members to ensure IORA's fisheries management measures and policies are not in conflict with ACFP

## ***Bay of Bengal Large Marine Ecosystem Project (BOMLME)***

- Indonesia/Malaysia/Myanmar/Thailand + Bangladesh/India/Maldives/Sri Lanka
- Fisheries management & conservation, collaborative regional fishery assessments & management plans
- To improve regional collaboration thru effective partnerships with other regional and global environmental assessment & monitoring programmes.

# *2006 Southern Indian Ocean Fisheries Agreement (SIOFA)*

- Thailand = the only ASEAN State party to SIOFA
- The other parties: Australia, Cook Islands, EU, France for its Indian Ocean Territories, Japan, Rep Korea, Mauritius, & Seychelles.
- Aims to ensure long-term conservation & sustainable use of the fishery resources in the maritime areas covered by it

# Species-based: *Indian Ocean Tuna Commission (IOTC)*

- RFMO/A envisaged by Art 64 (highly migratory species) UNCLOS
- Set up in 1993 to manage tuna & tuna-like species in Indian Ocean + adjacent seas to promote their conservation & optimal utilization.
- 32 Member States (incl. Indonesia/Malaysia/Philippines/Thailand from ASEAN).
- ITLOS Case No. 21: RFMA Member States have the right, under Art 64(1) UNCLOS to require cooperation from non-Members whose nationals fish for tuna in the region, directly or thru IOs.
  - o Q: What if non-Members of the IOTC do not cooperate with the members?
  - o 1995 FSA tries to clarify the consequences of non-cooperation. But Malaysia (an IOTC member) is *not* party to the FSA.

# Challenges for the ACFP

Lack of unity a/m ASEAN States re: obligations under LOS instruments; membership/participation in RFMAs.

To be practical while avoiding duplication of efforts, ACFP to agree on:

- stock assessment (by SEAFDEC)
- management of fishing efforts
- allocation of fishing quotas/opportunities
- enforcement measures (incl. 'negative lists' of IUU fishing vessels for collective sanction + 'positive lists' of fishing vessels)

**Decision making: blocked by ASEAN non-Parties to FSA?**

# General Rights & Duties of States + RFMO/As

## (a) *In the EEZs*

ITLOS Case No. 21: advisory opinion to Sub-Regional Fisheries Com'n (SRFC) of 7 West African States which lacks unity re:

- obligations under LOS
- Issuance of fishing licences on their shared resources.

**Q4: Coastal States' rights and obligations re shared stocks and stocks of common interest, especially the small pelagic species and tuna =?**



# *ITLOS' Answer*

- ‘Sustainable management’ = ‘conservation & development’
- Re: same stocks or stocks of associated species, SRFC Member States have the *right to seek to agree*, either directly or through appropriate RFMOs, with other SRFC Member States in whose EEZs these stocks occur re the measures necessary to coordinate and ensure conservation & development of such stocks.
- + **obligation to cooperate**, as appropriate, with the competent IOs, based on the best scientific evidence available and, when such evidence is insufficient, they must apply the *precautionary approach*.

## *ITLOS' Answer (cont.)*

- Also to maintain/restore stocks at levels which can produce the maximum sustainable yield (MSY), as qualified by relevant environmental and economic factors.
- These obligations = 'due diligence' obligations on the States to consult in good faith and make substantial effort to adopt effective measures necessary to coordinate and ensure the conservation & development of shared stocks.
- Such management measures are also required in respect of fishing for those stocks by vessels flying the flag of *non*-Member States in the EEZs of Member States.
- All States must have *due regard* to the rights and duties of one another.
- NB: Cambodia is not party to UNCLOS. But the above principles bind Cambodia as a matter of customary international law and/or rules of common sense.

# General Rights & Duties of States + RFMO/As

## *(b) Beyond the EEZs*

Fish stocks occurring within the EEZs & in an area beyond and adjacent to these zones: SRFC States & States fishing for such stocks in the adjacent area shall *seek to agree* on the measures necessary for the conservation of those stocks in the adjacent area.

Highly migratory tuna species: SRFC States have the *right to require cooperation from non-Member States* whose nationals fish for tuna in the region, ‘directly or through appropriate IOs to ensure conservation & promoting the objective of optimum utilization of such species’.

## These UNCLOS provisions re fisheries beyond EEZs are vague; supplemented by 1995 FSA:

- Detailed general principles + *precautionary approach*
- *Compatible* measures in high seas and EEZs
- Cooperation through RFMOs
- New members/participants in RFMO/A: in practice, their share is only possible when a large surplus of the stock exists and an adequate share of the allowable resources is given to States already participating in the RFMO/A

**Q for ACFP:** legal position & policy of ASEAN States not party to FSA and those party to FSA?

## *(a) In the EEZs*

ITLOS' Case No. 21:

- The flag State's obligation = to take necessary measures, including those of enforcement, to ensure compliance by vessels flying its flag with the laws and regulations enacted by the coastal State.
- + 'due regard' to the rights and duties of the coastal State + general obligation to protect and preserve the marine environment
- Incl. obligation to adopt the necessary *administrative measures* to ensure compliance
- The flag State is *not* liable if it has taken all necessary and appropriate measures to meet its aforesaid 'due diligence' obligations.

## *(b) Beyond the EEZs*

Multiple tiers of obligations assumed by States.

- A State party *only* to UNCLOS
- A State is party to *both* UNCLOS *and* the FSA *but not* to the relevant RFMO/As
- A State is party to the relevant RFMO/A and UNCLOS *or* where it is party to the relevant RFMO/A and UNCLOS *but not* the FSA

Treaty law: a treaty only binds States Parties to it.

High seas: exclusive jurisdiction of the flag State over vessels flying its flag.

***Conclusion:*** Enforcement by non-flag States in the high seas only OK between States Parties to FSA, or against Stateless vessels in the high seas, or where a flag State not party to FSA and/or an RFMO/A gives ad hoc consent to the boarding by a non-flag State.

## *(c) Port States*

Ports are subject to the sovereignty of the coastal State

- The coastal State's right to permit or deny entry of foreign vessels into its ports
- Not a right to prosecute/penalize violations on the high seas of conservation and management measures adopted by RFMO/As which still belongs to the flag State.

Enforcement by the port State against IUU fishing is a most effective tool:

- Against transshipment at sea/off-load in ports of States not party to RFMO/A
- Practical where interdiction at sea is not effective/necessary due to the vastness of high seas management areas and/or because the fish species being highly migratory
- Detailed regime under FAO Port State Measures Agreement (Indonesia/Myanmar/Philippines/Thailand = parties), with a key role to RFMOs

# Complications where not all States concerned are party to the PSMA, e.g. *EU-Chile Swordfish* dispute.

UNCLOS: Arts. 64 (cooperation in ensuring conservation of highly migratory species), 116—119 (conservation of the living resources of the high seas), 297 (dispute settlement), 300 (good faith and non-abuse of right), 87 (freedom of the high seas including freedom of fishing, subject to conservation obligations), and 89 (prohibiting any State from subjecting any part of the high seas to its sovereignty).

GATT 1994: Articles V (freedom of transit for goods through the territory of each contracting party on their way to or from other contracting parties) and XI (prohibiting quantitative restrictions on imports or exports, subject to some exceptions for imports of agricultural or fishery products)



## *(d) Market State of Fishery Products*

*EU's Council Regulation (EC) 1005/2008*, in force Jan. 2010

- Sources = UNCLOS, FSA, FAO Compliance Agreement
- Prohibits trade with EU in fishery products stemming from IUU fishing that are not harvested 'in compliance with international conservation and management measures and, where appropriate, other relevant rules applying to the fishing vessel concerned'.
- A certificate as a precondition for the import, with info verifying the legality of the products and validated by the flag State of the fishing vessels
- Also applies to marine fishery products transported or processed in a country other than the flag State
- Cambodia = 1<sup>st</sup> ASEAN State sanctioned under this Regulation. But Cambodia is not party to any of the instruments cited by EU.

# If the WTO has to decide trade disputes arising from the EU's IUU Regulation?

- Paragraphs b and g of Art. XX of GATT:
- *United States — Import Prohibition of Certain Shrimp and Shrimp Products*
- *United States—Measures Concerning the Importation and Marketing and Sale of Tuna and Tuna Products*
- Technical barriers to trade, ≠ Agreement on Technical Barriers to Trade of the WTO?
- Exceeding the flag State's obligation re IUU fishing (ITLOS's Case No. 21)?
- EU's extra demand re working conditions/welfare of fishermen on board fishing vessels of the States subject to the yellow card

## *(e) IUU Fishing and Criminal Sanction?*

Some efforts to treat IUU fishing as part of ‘transnational organized crime’:

- Organized criminal syndicates may engage in IUU fishing, and they may also involve the fishing vessels in trafficking of weapons, drugs, and people smuggling.
- Illegal fishing is an ‘environmental crime’  $\neq$  natural resource of the environment
- 5 Dec 2017, UNGA resolution on Sustainable Fisheries: ‘[e]ncourages States, individually and through relevant international bodies, to improve the understanding of the causes and impacts of forced labour and human trafficking in the fishing and aquaculture industries, including processing and related industries, and to further consider actions to combat these practices, including raising awareness of the issue’.

## Efforts *not* well received in the UN

- It is against the principle of legality in criminal law: non-retroactivity; the prohibition against analogy; principle of certainty; etc. Also, criminal statutes are to be narrowly construed.
- Elements of crimes under 2000 UN Conv  $\neq$  Transn'l Organized Crime may not be satisfied re IUU fishing. E.g. 'serious crime' = 'conduct constituting an offence punishable by a maximum deprivation of liberty of at least 4 years or a more serious penalty'.
- Cf also Art/ 73(3) of UNCLOS: 'Coastal State penalties for violations of fisheries laws and regulations in the EEZ may not include imprisonment, in the absence of agreements to the contrary by the States concerned, or any other form of corporal punishment'.

# Disputed Maritime Areas: *Modus Vivendi*

Applicable rules of international law favours cooperation in disputed maritime areas.

- Critical date, after which the international legal status of the claim is frozen pending its final dispute settlement by peaceful means.
- Any cooperation re fisheries in the disputed area may not in any way be construed as a waiver or an admission of any of the claims of another party to the dispute (ICJ in *Aegean Sea Continental Shelf (Greece v Turkey)*).
- Art. 74(3) UNCLOS: States Parties to unsettled overlapping EEZ claims to make every effort to enter into provisional arrangements of a practical nature.

- *Guyana and Suriname Arbitration Award*: unilateral acts causing a physical change to the marine environment generally comprised in a class of activities that could be undertaken *only jointly or by agreement* between the parties.

# BBNJ and Its Implications

1<sup>st</sup> Sess UN conference on BBNJ: 4—17 September 2018: the topics include conservation and sustainable use of BBNJ, in particular marine genetic resources (MGRs), including questions on the sharing of benefits.

Distinction between fish used as a commodity and fish valued for their genetic properties? Roles of RFMO/As?

Highly migratory fish stocks and straddling fish stocks occurring in the ASEAN EEZs as well as the adjacent high seas could be affected by the new agreement on BBNJ.

NB: ASEAN Member States are members of the Group of 77 + China: MGRs are common heritage of mankind.

## Dispute Settlement Mechanisms: *Inter Se* and vis-à-vis Non-ASEAN Member States

- (1) 1976 Treaty of Amity & Cooperation in Southeast Asia binding on all ASEAN Member States + several distant water fishing States, e.g. Japan, Rep Korea, China
- (2) 1958 Optional Protocol concerning the Compulsory Settlement of Disputes under the four Geneva Conventions of 1958
- (3) UNCLOS, but Article 297(3) allows any State Party to 'opt out' of the compulsory dispute settlement re fisheries
- (4) 1995 FSA applies to its Parties the dispute settlement regime under UNCLOS
- (5) International Court of Justice

## *Compliance Mechanisms instead of Dispute Settlement?*

1991 Conv. on EIA in a Transboundary Context (ESPOO Convention)

- Implementation committee of 8 Parties, operating on the basis of national reports.
- Not a judicial body.
- When it becomes aware of possible non-compliance, to ask the Party to furnish necessary info, so that the committee may report + make recommendations to the Meeting of States Parties.
- Thereafter, the committee is to decide by consensus, failing that by three-fourths majority of the Parties present and voting, on the steps to be taken to ensure compliance.



## *Compliance Mechanisms instead of Dispute Settlement?*

*(cont.)*

1998 Conv. on Access to Info, Public Participation in Decision-Making and Access to Justice in Environ'l Matters (Aarhus Convention)

- Compliance Review Mechanism, triggered by a Party itself, by another Party, by the Secretariat, or by a member of the public.
- May only submit non-binding recommendations to the Meeting of the Parties (which infrequently meet).

## *Compliance Mechanisms instead of Dispute Settlement?*

*(cont.)*

2011 South Pacific Regional Fisheries Management Organization (SPRFMO) Convention

- Art. 34 (Settlement of Disputes): Contracting Parties shall cooperate to prevent disputes, using best endeavours to resolve any disputes by amicable means, including referring technical disputes to an ad hoc expert panel
- Failing which, Part VIII of the 1995 FSA shall apply *mutantis mutandis* but without prejudice to the status of any Contracting Party in relation to the 1995 FSA or UNCLOS.

NB: Trade-related disputes can be subject to the dispute settlement procedure of the WTO whose membership includes all ASEAN Member States.

# Conclusions

Possible for all *ASEAN* States to be party to all treaties applicable to maritime fisheries?

How to harmonize *ACFP* with other *RFMAs* in which some *ASEAN* States participate?

Appropriate managing body to implement the *ACFP*, national measures to be adopted, decision-making process for effective implementation of *ACFP* (e.g. combined consensus/majority vote mechanism)?

Allocation of catch quotas; new entrants; enforcement  $\neq$  *IUU* fishing?

Dispute settlement mechanism =?

Other related issues, e.g. fisheries subsidies.

Joint decision on how best to apply the rules of the international law, which are at times ambiguous or conflicting.

# Thank you

