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# Malaysia and the Law of the Sea

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ABSTRACT

The new legal regime of the oceans has brought many changes in the Malacca Strait. The most recent one in the enactment of the Malaysian Exclusive Economic Zone Act 1984 as corollary to its proclamation on the Exclusive Economic Zone in 1980. A year later, the Fisheries Act 1985 was enacted by Malaysia as a result of increasing needs to address new issues in fisheries protection and management in the Malaysian fisheries waters.

The conclusion of the 1982 United Nations Convention on the Law of the Sea, among other things, has improvised the concept of transit passage in the straits used for international navigation between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone. From the geographical and legal criteria, the Malacca Strait falls under such regime but the relevant legislations enacted by Malaysia at certain points seem to exceed the Convention with regard to marine pollution control, the rights of foreign fishing vessels navigating in the Strait and enforcement measures.

The conflicting provisions contained in both the Exclusive Economic Zone Act 1984 and the Fisheries Act 1985 in comparison with the object and intent of the UNCLOS III are to be amended where necessary and its applicability rectified in the Strait. Such actions are shown not only to result in conformity with the UNCLOS III, but to benefit Malaysia in its effort to protect the resources in the Strait.

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The 1982 United Nations Convention on the Law of the Sea has further changed the legal regime of the Malacca Strait[1]. Beside introducing the new concept of resource zone, the Exclusive Economic Zone[2], it has also introduced the concept of transit passage in the straits used for international navigation between one part of the high seas or an Exclusive Economic Zone and another part of the high seas or an Exclusive Economic Zone[3]. This concept, an entirely new one and separated from the regime of innocent passage, allows less coastal State control over passing vessels than does innocent passage, but falls far short of granting the same freedom of navigation as would have existed had the waters of the straits constituted high seas[4].

When Malaysia proclaimed its 200-nautical mile Exclusive Economic Zone in 1980, nothing was mentioned about the freedoms of navigation and overflight of other States. When it enacted a legislation called the Exclusive Economic Zone in 1984, there is an indication that the freedoms of navigation could be

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[1] For the purpose of this study, Malacca Strait refers to a strait lying between Peninsular Malaysia and Sumatra Island of Indonesia. For further study on the legal regime of the Malacca Strait, see Chapter 2 on page 81 .

[2] Article 55 through Article 75 of the 1982 UN Convention on the Law of the Sea deal with the regime of Exclusive Economic Zone.

[3] Ibid.,Article 37.

[4] R.R. Churchill and A.V. Lowe,The Law of the Sea(UK:Manchester UP,1988), p.90.

jeopardized by some of its provisions pertaining to marine pollution control and enforcement. A year later, another legislation was enacted to deal with the protection and management of fisheries resources. The Fisheries Act 1985, among other things, has introduced provisions on foreign fishing vessels but is being criticized in the aspects of navigation and enforcement.

It is of the great importance to study the relationship of Malaysian Exclusive Economic Zone Act 1984 and the Fisheries Act 1985 with the 1982 United Nations Convention on the Law of the Sea particularly pertaining to the marine pollution control and, the protection and management of the fisheries resources . Chapter One of this study deals with that relationship. Chapter Two is a study of the legal status of the Malacca Strait from the geographical and legal point of view. Finally, Chapter Three will address some problems and restrictions that are presently faced or will be encountered by the foreign vessels passing through the Malacca Strait. On the whole, the purpose of the study is to envisage whether both Acts will be able to achieve their objectives in protecting the resources in the Malacca Strait.[5]

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[5] It is for the purpose to protect its fisheries resources that Malaysia had enacted the Exclusive Economic Zone Act 1984 in the first place.The Fisheries Act 1985 was enacted to replace the old Act as the latter was no longer capable of dealing with many new issues introduced by the 1982 United Nations Convention on the Law of the Sea relating to the protection and management of the fisheries resources. For further reading in early Malaysian roles in the new regime of the oceans, see B.A. Hamzah,"Malaysia and the Law of the Sea:Post-UNCLOS III Issues," in Choo-ho Park and Jae Kyu Park,eds.,The Law of the Sea: Problems From the East Asian Perspective(Honolulu: The Law of the Sea Institute,University of Hawaii,1987),pp.356-364.For a study on the Malacca Strait with respect to pollution problems and the concern of Indonesia and Malaysia as to their fisheries resources, read Bhabani Sen Gupta,T.T.Poulose and Hemlata Bhatia,The Malacca Straits and the Indian Ocean(New Delhi: S.G. Wasani for the Macmillan Co.,1974).

CHAPTER ONE

# MALAYSIA AND THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA

## INTRODUCTION

The Third United Nations Law of the Sea Convention(hereinafter UNCLOS III) was opened for signature in Montego Bay, Jamaica, on the 10 th of December , 1982[1]. On the same very day, Malaysia along with four other members of the Association of South-East Asian Nations(hereinafter ASEAN) signed the treaty[2]. To date, all ASEAN countries have claimed the 12-nautical mile territorial sea except Singapore, only claiming three nautical miles[3]. Between 1977 and 1981, except Singapore and Brunei, all other ASEAN countries have claimed the 200-nautical mile Exclusive Economic Zone(hereinafter EEZ)[4]. In 1982,Brunei claimed the 200-nautical mile Exclusive Fisheries Zone[5].

The emergence of a new international legal order for the sea, UNCLOS III, is to resolve renowned legal disorder of the sea[6]. After the First World War, an attempt by League of Nations to settle the extent of territorial sea

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[1] Tommy T.B. Koh, " The Origins of the 1982 Convention on the Law of the Sea," 29 Malaysian Law Review,(1987),p.1

[2] The members of ASEAN are Brunei,Indonesia,Malaysia,Philippines,Singapore and Thailand.Brunei was the last to join the Association in 1984. See Kriangsak Kittichaisaree,The Law of the Sea and Maritime Boundary Delimitation In South-East Asia(Singapore:Oxford University Press,1987),p.6

[3] Ibid.,p.11

[4] Hanns J. Buchholz,Law of the Sea Zones In the Pacific Oceans(Singapore: Institute of South-East Asia Studies,1987),pp. 30-37

[5] Kittichaisaree,supra note 2,p.11

[6] Koh,supra note 1,pp. 1-17

had ended in failure. The members of the sub-Committee of Experts for the Progressive Codification of International Law of the subject each favoured three-nautical mile, six-nautical mile and twelve-nautical mile territorial seas, therefore ending in disagreement[7].The first conference to discuss the subject of territorial seas was held at the Hague in 1930[8]. The conference,attended by the representatives of forty-eight governments,had failed to reach any conclusion.At the end of the Second World War, a new international organization, the United Nations replaced the League of Nations and initiated the First United Nation Conference on the Law of the Sea held in Geneva in 1958(hereinafter UNCLOS I)[9]. Even though UNCLOS I did not contain an agreement on the breadth of the territorial sea, it successfully adopted four conventions: the Convention on the Territorial Sea and the Contiguous Zone, the Convention on Fishing and Conservation of the Living Resources of the High Seas, the Convention on the High Seas and the Convention on the Continental Shelf[10]. The question left unresolved,that is the limits of territorial sea was the basis for the Second United Nations Conference on the Law of the Sea(hereinafter UNCLOS II).The conference that was held in Geneva in 1960 again had been unable to agree on the maximum permissible breadth of the territorial sea[11].

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[7] Ibid.,p.6

[8] Ibid.,p.7

[9] Ibid.,p.12

[10] The 1958 United Nations Conference on the Law of the Sea

[11] Koh,supra note 1,p.14

UNCLOS III successfully resolved the question on the breadth of the territorial sea. Article 3 of the Convention recognized every State's right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles, measured from baselines determined in accordance with the Convention[12].Most of the provisions contained in the 1958 Conventions have been repeated in UNCLOS III,and regarding resources , a new concept of economic zones, the EEZ,has been introduced. The coastal State proclaiming such a zone enjoys sovereign rights in that zone for the purpose of exploring and also exploiting, conserving, or managing the living or non-living resources of the zone, including the zone's seabed, subsoil, and superjacent waters[13].The coastal State also has jurisdiction as provided for in the relevant provisions of the Convention with regard to the establishment and use of artificial islands, installation and structures; marine scientific research; and the protection and preservation of the marine environment[14].

To most countries the UNCLOS III provides an opening to expand their sovereignty over vast areas, thus shrinking the customary freedom of the high seas. The excitement of the expansionists was in fact activated by the United States President , Harry Truman, who in 1945 proclaimed the jurisdiction of the United States over the seabed resources of the continental shelf.Three years later Chile and Peru, followed by Ecuador , outdid President Truman by claiming maritime zones extending 200 nautical miles from their coasts[15]. Even before the signing of UNCLOS III, some countries have already contradicted the law of the sea with the intention of securing national interests in economic and security matters.

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[12] Article 3 of UNCLOS III

[13] Article 56(1)(a) of UNCLOS III

[14] Article 56(1)(b) of UNCLOS III

[15] Elliot Richardson,"Power,Mobility and the Law of the Sea,"Foreign Affairs, 902(Spring 1980),904

To date, about 23 countries claim jurisdiction over territorial sea beyond a 12-nautical mile limit[16].

The phenomenon of extended maritime jurisdictional zones has created to some degree, discontent among the neighboring countries in the South-East Asian region.For instance, Thailand is a zone-locked State bordering on both the Andaman Sea and the gulf of Thailand[17]. There was an attempt by Thailand to pronounce itself as geographically disadvantaged State and sought to join the group at UNCLOS III[18]. The attempt was forbearing as its fishing grounds were suddenly denied by other neighboring countries especially Malaysia with its newly enacted legislation designed to keep abreast with provisions in UNCLOS III. It is estimated that the creation of the EEZ by neighboring countries would result in Thailand's loss of access to about 300,000 square nautical miles of fishing grounds, with the implication that about 40 percent of the present total annual catch would dwindle[19]. On the other hand, Indonesia and Philippines are the most prominent beneficiaries of the UNCLOS III[20].The concept of the archipelagic State alone has resulted an enclosure of 666,000 square nautical miles as internal waters by Indonesia [21].

As it evolved at UNCLOS III, the EEZ is zone sui generis, being neither part of the territorial sea nor the high seas and extending no more than 200

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[16] Lewis M. Alexander,Navigational Restrictions Within the New LOS Context: Geographical Implications For the United States (Peace Dale, RI:Offshore Consultants Inc.,1986),p.86

[17] Ted L. McDorman,"Thailand and the Law of the Sea Convention," Marine Policy (1985),292

[18] Ibid.,p.292

[19] Choon-ho Park and Jae Kyu Park,eds.,The Law of the Sea:Problems From East Asian Perspective(Honolulu: Law of the Sea Institute,University of Hawaii, 1987),p.418

[20] Kittichaisaree,supra note 2,p.11

[21] Ibid.,p.159

nautical miles from the baselines used to measure the territorial sea[22]. Article 55 through Article 75 of UNCLOS III deal with EEZ and Professor Juda pointed out that Article 56 grants the coastal State "sovereign rights" for designated purposes and not "sovereignty" [23].Professor Fleischer further described "sovereign rights" as follows:

> "Sovereign rights" are related to one or more specific purposes. The term conveys, on the other hand, the idea of the functional approach: The coastal State does not have full sovereignty as on its land territory or in the territorial sea, but has a right of jurisdiction which is related to certain purposes. Beyond the scope of jurisdiction so defined there is no special basis for coastal State rights, and the traditional rules which have been developed on the high seas will continue to apply. On the other hand, insofar as the specific purposes are concerned, the coastal State is "sovereign" : It has the exclusive right of decision in regard to the rules which are to apply within the extended zone, the exclusive right to enforce the measure decided upon[24].

While the coastal State has the exclusive rights to enact and enforce the legislations in its effort to preserve and manage the resources, be they living or non-living, it shall have due regard to the rights and duties of other States and shall act in a manner compatible with the provisions of the Convention[25]. On the other hand, the other States have the responsibilities to comply with the laws and regulations adopted by the coastal States while exercising their rights and duties in the EEZ[26]. "Sovereign rights" do not hamper the freedom of

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[22] Lawrence Juda,"The Exclusive Economic Zone: Compatibility of National Claims and the UN Convention on the Law of the Sea," Ocean Development and International Law, Vol.16,No.1, 1(1986),5

[23] Ibid.,p.5

[24] Thomas A. Clingan Jr.,ed.,Law of the Sea: State Practice in Zones of Special Jurisdiction(Honolulu:Law of the Sea Institute,University of Hawaii, 1982),p.97

[25] Article 56(2) of UNCLOS III

[26] Article 58(3) of UNCLOS III

navigation and overflight and of the lying of submarine cables and pipelines, and other internationally lawful uses of the sea related to these freedom[27].

The eagerness and the excitement of some States in attempting to assert control over their resources , particularly in fisheries, has led them to resort to certain measures that are inconsistent with the provisions stipulated by UNCLOS III. According to Churchill and Lowe, Maldives and Portugal accord to foreign shipping the right, not of freedom of navigation, but of innocent passage[28].Meanwhile, Smith listed twenty States that include in their EEZ laws provisions for possible imprisonment of offenders of the law[29]. Article 73(3) of UNCLOS III expressly prohibits penalties that led to imprisonment of offenders under fisheries laws and regulations in the absence of agreement by the offenders' States[30].

Malaysian interest in asserting its sovereignty rights over the EEZ lies mainly in protecting the living resources within the zones from over-exploitation and possible destruction by pollution . The status of fisheries resources in the Malacca Strait (hereinafter the Strait[31]) has not been very encouraging.

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[27] Article 58(1) of UNCLOS III

[28] R.R. Churchill and A.V. Lowe,The Law of the Sea(UK: Manchester University Press,1988),p.145

[29] Robert W.Smith, Exclusive Economic zone Claims: An Analysis and Primary Documents(Netherlands: Martinus Nijhoff Publishers,1986),p.39

[30] Article 73(3) of UNCLOS III

[31] See page 56 for the geographical definition.

Mydin reported that in 1978, the landings of demersal fish in Strait had risen up to 256,000 metric tonnes compared to the potential yield of only 213,000 metric tons , indicating over-fishing had occurred[32]. There was a decrease in annual total landings for the whole Malaysian fisheries waters [33]from 664,967 metric tonnes in 1984 to 632,185 metric tonnes in 1985[34]. Malaysia is perturbed by the depletion of fisheries resources caused also by marine pollution, mostly generated by oil tankers passing by the Strait . Jaafar commented that vessels continue to pollute in the Strait , particularly on the Malaysian side, although they should comply the provision in Article 39(2)(b) of UNCLOS III[35]. The acute circumstances that have been prevailing in the Malaysian fisheries waters demand serious emphasis from the government that intense measures should be constructed from the provisions of UNCLOS III.

The Strait is one of the busiest and dirtiest waterways in the world[36]. Traffic statistics in 1980 for vessels passing through the One Fathom Bank in the Strait indicate that the monthly average was 1,956 vessels, with oil tankers of different sizes accounting for about a quarter of this total[37].

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[32] Abdul Jamal Maydin,"Fisheries Resources in Peninsular Malaysia," A major paper for MMA,University of Rhode Island,1986,pp.8-9

[33] Including Sabah and Sarawak(which are collectively known as East Malaysia)

[34] FAO Yearbook of Fisheries Statistics:Catchings and Landings 1985, Vol.60 (Italy,1987),pp. 88-89

[35] Jon M. Van Dyke,ed.,Consensus and Confrontation: The United States and the Law of the Sea Convention(Honolulu: The Law of the Sea Institute, University of Hawaii,1985),p.290

[36] Chia Lin Sien,ed.,Environmental Management in South-East Asia(Singapore: National University of Singapore,1987),p.27

[37] Ibid.,p.27

In fact, the Strait , in term of the number of vessels passing through,is ranked second among the busiest straits in the world after the Strait of Dover[38]. It is also the shortest possible route connecting the Indian Ocean and Pacific Ocean. Indeed the Strait is highly congested. In 1976, a tanker, "Diego Silang" spilled about 6,000 tons of crude oil in the southern part of the Straits due to a collision with another ship[39]. In 1982, the vessel "M.V. King Bird" was prosecuted and fined to a total amount of M$5,000 for the offence of deliberate discharge of oil into the State of Malacca's waters. It was the first such case where a vessel prosecuted in Malaysia under the legislation of the Environmental Quality Act 1974[40]. A series of marine accidents has been reported by Leifer[41].

A considerable number of States explicitly recognize freedom of navigation and overflight within their EEZ. Venezuela's 1978 EEZ Act categorically states that: [O]ther States, whether coastal or land-locked, shall enjoy, subject to the relevant provisions of the present Act, the freedom of navigation and overflight... and other internationally lawful uses of the sea associated with navigation and communication[42]. Alexander listed Malaysia as one of the twenty

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[38] Alexander, supra note 16, p.127

[39] Sien, supra note 36, p.27

[40] Ibid., p.45

[41] In 1972, a Shell tanker "Myrtea" of 210,000 d.w.t. hit a rock. On 6 January 1975, the Japanese oil tanker "Showa Maru" of 244,000 d.w.t. ran aground in Indonesian waters in the vicinity of Buffalo Rock approximately three miles south of Singapore.For further readings see Michael Leifer, International Straits of the World:Malacca,Singapore and Indonesia(The Netherlands:Sijthoff & Noordhoff, 1978),p.65

[42] David Joseph Attard, The Exclusive Economic Zone in International Law (New York:Clarendon Press-Oxford,1978),p.81

States whose EEZ proclamation and/or national laws are silent on foreign rights to navigation and overflight in their EEZ[43]. In May 1980, Malaysia proclaimed the EEZ[44] and shortly after that enacted legislation called the the Exclusive Economic Zone Act 1984 (hereinafter the EEZ Act) in December 1984. In May 1985, the Malaysian Parliament passed another legislation called the Fisheries Act 1985 (hereinafter the Fisheries Act) after receiving the Royal Assent. The law only came into force in January 1986, thus replacing the old Act which was thought incapable of accommodating the new regime of the oceans, particularly relating to fisheries management and protection. Special emphasis pertaining to foreign fishing is given in the new Act which was non-existent in the old Act[45]. Both the EEZ Act and the Fisheries Act are enacted with the main objective of protecting the natural resources, living or non-living. Though no mention of foreign rights to navigation and overflight are included in the EEZ Act, the Fisheries Act does assert certain limitation to foreign fishing vessels navigating in its fisheries waters.[46] The impact of the EEZ proclamations by other ASEAN countries on navigation will draw attention from many authors. As the entire South China Sea comes under the 200 nautical mile claims of the South-East Asian coastal States; Brunei, Cambodia, Malaysia, Singapore, Thailand and Vietnam could be "zone-locked" as they will not be able to gain access to the high seas except through the EEZ of one or more of their neighboring States[47].

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[43] Alexander, supra note 16, p.91

[44] U.S. Maritime Claims, Dept. of Defence, Vol.11(DOD 2005.1-M)

[45] Part V, section 15 through 24 of the Fisheries Act 1985 concern foreign fishing vessels. In the Fisheries Act 1963(the old Act), foreign fishing vessels have equal status as local fishing vessels thus subjected to similar offences and penalties.

[46] Section 16 and Section 56 of the Fisheries Act 1985 concern the right of innocent passage for foreign fishing vessels navigating in Malaysian fisheries waters.

[47] Kittichaisaree, supra note 2, p.169

The general acceptance of the new regime of the oceans by the South-East Asian countries is an encouraging development. For the members of the ASEAN, there existed a platform for each member country to discuss and explain their objectives and goals in implementing the regulations in their jurisdictions. The UNCLOS III should be treated as a model for each country in the effort to create a harmonizing atmosphere in the region.

## THE EXCLUSIVE ECONOMIC ZONE ACT 1984

### Preliminary

The idea of an economic zone was born in the struggle of developing countries, above all those who were comparatively recently liberated from the colonial yoke, to establish a new economic order in international relations. Many developing countries proceeded not only from the interests of protecting their coastal resources, but also counted on obtaining certain economic advantages from exploiting or trading in such resources themselves alone or jointly with other States [48]. The emergence of dozens of new States as a result of decolonization in the 1960's added a new dimension to the development of the EEZ concept[49]. The concept of the EEZ, as it is known today was formed through a series of meetings of African and other G-77 States just prior to the beginning of UNCLOS III and was formally introduced to the Conference by the Kenyan delegation in 1974[50]. However, the actual appropriation of the ocean areas was initiated by the United States President, Harry Truman, when he proclaimed that the United States had

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[48] W.E. Butler,ed.,The Law of the Sea and International Shipping:Anglo-Soviet Post-UNCLOS Perspectives(U.S.A.:Oceana Publications,Inc.,1985),p.118

[49] John G. Catena,"The Exclusive Economic Zone - Considerations for Management With Special Reference to Developing Nations,"A thesis submitted in partial fulfillment of the requirements for the degree of MAMA,URI,1987, p.4

[50] See "Report of the African States Regional Seminar on the Law of the Sea," held at Yaounde,Cameroon,June 20-3-,1972,A/AC.138/79,Reprinted in 12 International Legal Materials,201(January 1973).

exclusive rights to explore and exploit the resources of its continental shelf[51]. Shortly thereafter, Chile, Peru and Ecuador followed suit but claiming 200 nautical miles zones to protect their commercial fishing operations from foreign fishing interests.Thus their primary reason for asserting jurisdiction over this expansive area was to protect their rich offshore fishing grounds from the distant water fishing nations[52].In 1967, Ambassador Pardo of Malta made a memorable speech before the United Nations General Assembly in which he warned against the possible appropriation of vast ocean areas by those States with the technical competence to exploit them. The speech was the catalyst which set into motion the process leading to the convening of the Third United Nations Conference on the Law of the Sea in 1973[53].The newly emerged States, mostly developing countries, paid special interest in the Conference so as not to be left out from the most important and historic making of legal regime of the oceans; especially their inabilities to explore and exploit them enhance the need to have a regime of equitable division of the oceans' wealth

Malaysian involvement in the arena of the international law of the sea is a recent phenomenon. The first maritime laws in Malaysia were probably codified sometime between A.D. 1488 - 1511 in Malacca[54] at the height of its sultanate sovereignty. In 1511, Malacca was conquered by the Portuguese[55] in their

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[51] Presidential Proclamation No.2667, Concerning the Policy of the United states with Respect to the Natural Resources of the Subsoil and Seabed of the Continental Shelf. 59 Stat. 884(1945). Reprinted in United Nations Legislative Series, Laws and Regulations on the Regime of High Seas,38(ST/LEG/SER.B/1,1951) .

[52] Ann L. Hollick,"The Origins of 200-mile Offshore Zones," 71 The American Journal of International Law,494(1977)500

[53] Lawrence Juda,ed.,Quaker United Nations Reports on UNCLOS III ,p.2

[54] John Bastin and R.W. Winks,eds.,Malaysia:Selected Historical Readings(Kuala Lumpur:Oxford University Press,1966),p.26

[55] Ibid.,p.34

effort to control the spice-trade[56] through the dominion of the sea routes[57]. Probably the Portugal dominion over the South-East Asian seas coincided with the 1493 Pope Alexander VI's Papal Bull, Inter Caetera, that led to a reference of the sea as Mare Clausum, capable of being subjected to dominion and sovereignty[58]. Malaysia continued to be dominated by the Dutch[59], British[60], Japanese[61], and finally gained its independence from the British in 1957[62]. At the UNCLOS I, the Malaysian delegation had not been committed to a general extension of the breadth of territorial waters to twelve nautical miles[63]. Being new to the United Nations Assembly, Malaysia resorted to the Anglo-Saxon concept of a three-nautical mile limit as adopted by its former government. On December 21, 1960, Malaysia signed and ratified the four Conventions of the UNCLOS I[64] (see

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[56] Ibid., p.33

[57] It was largely the search for the spices that led the Portuguese and the Spaniards directly into the Malaysian world, for only in the islands of eastern Indonesia, the Moluccas, were nutmegs and cloves grown. Malacca was the most important SEA trading center that connects between Western Asia and Far East.

[58] Koh, supra note 1, p.2

[59] The Dutch captured Malacca from the hands of Portuguese in 1641 and surrendered Malacca to the British in 1795. See Bastin and Winks, supra note 7, p.73

[60] Malacca fell to British arms in 1795 and gradually ruled the entire Peninsular Malaysia until in 1941 when Japan invaded Malaysia and ruled until 1945. Ibid., p.119

[61] Ibid., p.119

[62] Malaysia gained its independence from the British on August 31, 1957. Ibid., p.384

[63] Michael Leifer, International Straits of the World: Malacca, Singapore and Indonesia (Netherlands: Sijthoff & Noordhoff, 1978), pp.29-30

[64] Kittichaisaree, supra note 2, p.7

Table 1-1).On August 2,1969, Malaysia extended the limit of its territorial sea from three to twelve nautical miles[65](see Table 1-2). At this juncture, according to B.A. Hamzah, the Malaysian move to extend its territorial sea boundary was an effort to minimize further uncertainty and to create positive conditions for regional order[66]. Both UNCLOS I and II had not been successful in resolving the question of the breadth of the territorial sea. However, many States had preferred to adopt the 12-nautical mile limit even before the signing of UNCLOS III(see Table 1-3).Following the Malaysian proclamation of the 12-nautical mile territorial sea, a series of treaties were signed and ratified with its neighbors(see Table 1-4).With this new legal order developing in the South-East Asian region,Malaysia found itself in need of adjusting some of its existing legislations to suit the changes.Its oldest maritime law, the Merchant Shipping Ordinance 1952,is unable to cope with the increasing problems of marine pollution,while the Fisheries Act 1963 does not address the status of foreign fishing vessels. Both the EEZ Act and the Fisheries Act which have been implemented in 1985 and 1986 respectively are anticipated to deal with such problems.

The EEZ Act at this point has answered some of the issues pertaining to existing marine-related legislations.Firstly, the EEZ Act is applicable to the exclusive economic zone and continental shelf of Malaysia[67] and its provisions pertaining to the shelf are additional to, and not in derogation of, the provisions of the Continental Shelf Act 1966 [68].In the event of any conflict

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[65] Ibid.,p.11

[66] Park and Jae Kyu Park,supra note 19,p. 356

[67] Section 1(1) of EEZ Act

[68] Section 1(2) of EEZ Act

TABLE 1 - 1

South-East Asian States and Ratification of the Geneva Conventions of 29 April 1958, and the Position of Each of these States in Relation to the Law of the Sea Convention of 10 December 1982

| State | 1958 Convention on the Territorial Sea and Contiguous Zone(in force 19 Sept. 1964) | 1958 Convention on the High Seas(in force 30 Sept. 1962) | 1958 Convention on the Fishing and Conservation of the Living Resources of the High Seas(in force 20 Mar. 1966) | 1958 Convention on the Continental Shelf (in force 30 Sept. 1962) | 1982 Law of the Sea | |
|---|---|---|---|---|---|---|
| | | | | | Signing | Ratification |
| Brunei | 14 Mar. 1960* | 14 Mar. 1960* | 14 Mar. 1960* | 11 May 1964* | 5 Dec. 1984 | - |
| Burma | - | - | - | - | 10 Dec. 1982 | - |
| Cambodia | 18 Mar. 1960 | 18 Mar. 1960 | 18 Mar. 1960 | 18 Mar. 1960 | 1 Jul. 1983 | - |
| Indonesia | - | 10 Aug. 1961 | - | - | 10 Dec. 1982 | 3 Feb. 1986 |
| Laos | X | X | X | X | 10 Dec. 1982 | - |
| Malaysia | 21 Dec. 1960 | 21 Dec. 1960 | 21 Dec. 1960 | 21 Dec. 1960 | 10 Dec. 1982 | - |
| Philippines | - | - | - | - | 10 Dec. 1982 | 8 May 1984 |
| Singapore | - | - | - | - | 10 Dec. 1982 | - |
| Thailand | 2 July 1968 | 2 Julai 1968 | 2 Julai 1968 | 2 Julai 1968 | 10 Dec. 1982 | - |
| Vietnam | - | - | - | - | 10 Dec. 1982 | - |

* = Through the United Kingdom, Brunei's then Protecting State
X = Land-locked State

Source: Kriangsak Kittichaisaree, The Law of the Sea and Maritime Boundary Delimitation In South-East Asia (Singapore: Oxford University Press, 1987), p.7

TABLE 1 - 2

Relevant Maritime Jurisdictional zones
Declared by the South-East Asian Coastal States
( in Nautical Miles )

| State | Territorial Sea | Continental Shelf | Exclusive Economic Zone | Exclusive Fisheries Zone |
|---|---|---|---|---|
| Brunei | 12(1982) | a(1954)* | - | 200(1982) |
| Burma | 12(1968) | 200(1977) | 200(1977) | - |
| Cambodia | 12(1969) | 200(1978) | 200(1978) | - |
| Indonesia | 12(1957) | * | 200(1980) | - |
| Malaysia | 12(1969) | * | 200(1980) | - |
| Philippines | b | * | 200(1978) | - |
| Singapore | 3(1878)c | * | d | - |
| Thailand | 12(1966) | * | 200(1981) | - |
| Vietnam | 12(1964) | 200(1977) | 200(1977) | - |

a=" as established by State practice "
b= "Treaty Limits"
c= Declared in 1980 that it would exercise its rights to extend its territorial sea limit up to 12 nautical miles.
d= Declared in 1980 that it would establish such zone " at an appropriate time."
*= Although these states have not declared a continental shelf of up to 200 nautical miles from the baselines, they are entitled to it ab initio , ipso facto, and ipso jure under customary international law, and the UNCLOS III to which they are signatories(see the Libya/Malta Continental Shelf Case,ICJ Reports 1985,p.13 at p.33).

Source : Kriangsak Kittichaisaree,The Law of the sea and Maritime Boundary Delimitation In South-East Asia(Singapore:Oxford University Press,1987),p.11

TABLE 1 - 3

The Expansion of Territorial Sea Claims

| National | 1945 | | 1958 | | 1979 | |
|---|---|---|---|---|---|---|
| | No. | Percent of Total | No. | Percent of Total | No. | Percent of Total |
| 3 miles | 46 | .77 | 45 | .60 | 23 | .18 |
| 3-12 miles | 12 | .20 | 19 | .24 | 7 | .05 |
| 12 miles | 2 | .03 | 9 | .12 | 76 | .58 |
| Above 12 miles | 0 | 0 | 2 | .04 | 25 | .19 |

Source : Lewis M. Alexander, Navigational Restrictions Within the New LOS Context: Geographical Implications for the United states (Peace Dale, Rhode Island: Offshore Consultants, Inc., 1986), p.12

TABLE 1 - 4

Agreed Maritime Boundaries in South-East Asia

| Countries | Boundaries | Signature | Ratification |
|---|---|---|---|
| Indonesia-Malaysia | Continental Shelf | 27 Oct 1969 | 7 Nov 1969 |
| Indonesia Malaysia | Territorial Sea | 17 Mar 1970 | 10 Mar 1971 |
| Australia-Indonesia | Continental Shelf | 18 Apr 1971 | 8 Nov 1973 |
| Indonesia-Thailand | Continental Shelf | 17 Dec 1971 | 18 Feb 1973 |
| Indonesia-Malaysia-Thailand | Continental Shelf | 21 Dec 1971 | 16 Jul 1973 |
| Australia-Indonesia | Continental Shelf | 9 Oct 1972 | 8 Nov 1973 |
| Australia-Indonesia | Continental Shelf | 26 Jan 1973 | 8 Nov 1973 |
| Indonesia-Singapore | Territorial Sea | 25 May 1973 | 3 Dec 1973 (Indonesia) 29 Aug 1974 (Singapore) |
| India-Indonesia | Continental Shelf | 8 Aug 1974 | 17 Dec 1974 |
| Indonesia-Thailand | Continental Shelf | 11 Dec 1975 | 18 Feb 1978 |
| India-Indonesia | Continental Shelf | 14 Jan 1977 | 15 Aug 1977 |
| India-Thailand | Continental Shelf | 22 Jun 1978 | 15 Dec 1978 |
| India-Indonesia-Thailand | Continental Shelf | 22 Jun 1978 | 2 Mar 1979 |
| Australia-Papua New Guinea | Continental Shelf, Territorial Sea, Fishing Zone | 18 Dec 1978 | 15 Feb 1985 |
| Malaysia-Thailand | Joint Zone | 21 Feb 1979 | 24 Oct 1979 |
| Australia-Indonesia | fishing Zone | 29 Oct 1981 | - |

Source : Limits in the Seas - National Claims to Maritime Jurisdiction, no.36,5th revision(1985) and McDorman,et al.,Maritime Boundary Delimitation(Lexington Books,Lexington.Mass.,1983).

or inconsistency between its provisions and of any applicable written law,it supersedes the conflicting or inconsistent provisions of that applicable written law [69]. Section 2 of the EEZ Act interpreted " applicable written law " as follows :

> (a) provided to be applicable in respect of the exclusive economic zone, continental shelf or both, as the case may be, by an order made under section 42 or otherwise specifically provided to be so applicable; or
>
> (b) applicable in respect of the continental shelf under the provisions of the Continental Shelf Act 1966,
>
> and includes the Continental Shelf Act 1966.

As the EEZ Act covers an area beyond and adjacent to the territorial sea of Malaysia and extends to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured[70], all matters pertaining to exclusive economic zone[71]; fisheries[72]; protection and preservation of the marine environment[73]; marine scientific research[74]; artificial islands, installations and structures[75]; and submarine cables and pipelines;[76]in the area are subjected under the Act .Two previous Acts; namely the Environmental Quality Act 1974 and the Fisheries Act 1963 cease to be effective in the EEZ as both

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[69] Section 1(3) of EEZ Act

[70] Section 3(1) of EEZ Act

[71] Part II of EEZ Act

[72] Part III of EEZ Act

[73] Part IV of EEZ Act

[74] Part V of EEZ Act

[75] Part VI of EEZ Act

[76] Part VII of EEZ Act

do not address waters beyond the territorial sea. Though Malaysia does not seem to fuse the EEZ regime and the Continental Shelf regime into one entity,[77] the role of the Continental Shelf Act 1966 has since been dominated by the EEZ Act and the Fisheries Act with respect to living and non-living resources.

Exclusive Economic Zone

For Malaysia,that has claimed the 200-nautical mile limit, its EEZ will be 188 nautical miles since it has a 12-nautical mile territorial sea. However, since most of the South-East Asian countries have proclaimed an EEZ, the overlapping of zones is expected and for members of ASEAN, the settlement of differences or disputes between the states are to be resolved in accordance with the spirit of brotherhood embedded in The Treaty of Amity and Cooperation in South-East Asia[78].

The EEZ of Malaysia as proclaimed by the Yang di-Pertuan Agong vide P.U. (A) 115/80 was made without specifically defining the co-ordinate points of the outer limits of the zone or its approach to the settlement of potential delimitation disputes[79]. However, when the EEZ Act was enacted, a section has

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[77] As far as can be ascertained, the very large majority of EEZ claimants have not fused the two institutions(the EEZ regime and the Shelf regime).Indeed, a number of states explicitly declare that their EEZ claims do not affect the Shelf regime.United States' EEZ Proclamation,for example, clearly states that the Proclamation " does not change existing United States policies concerning the continental shelf..." Attard listed 16 States that retained the autonomy of the EEZ and the Shelf regimes in their legislation.See David Joseph Attard, The Exclusive Economic Zone in International Law(New York:Oxford University Press, 1987 ),p.140. The Malaysian position on this matter can be observed in section 1(2) of the EEZ Act where the provisions of the Act are additional to,and not in derogation of , the provisions of the Continental Shelf Act 1966.

[78] Treaty of Amity and Cooperation in SEA was done at the first ASEAN summit in Denpasar,Bali,Indonesia,24 February 1976. Article 2 of the Treaty,inter alia, stipulated that in their relations with one another,the High Contracting Parties shall be guided by the following principles,inter alia, the settlement of differences or disputes by peaceful means and effective cooperation among themselves.

[79] HM Govt. Gazette,P.U.(A)115,25 April 1980,pp.827-829

been devoted to deals with such problems. Section 3(2) of the EEZ Act reads:

> Where there is an agreement in force on the matter between Malaysia and a State with an opposite or adjacent coast, questions relating to the delimitation of the exclusive economic zone shall be determined in accordance with the provisions of that agreement.

A similar acknowledgment was also made by Indonesia in its EEZ Declaration in Mac 1980.[80] Paragraph 5 of the Declaration stipulates that:

> Where the boundary line of the EEZ of Indonesia poses a problem of delimitation with an adjacent or opposite State, the Indonesian Government is prepared, at an appropriate time, to enter into negotiations with the State concerned with a view to reaching agreement.

The delimitation of the EEZ boundary is guided by Article 74 of UNCLOS III, which stipulates, inter alia:

> The delimitation of the EEZ between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution.

The delimitation of the EEZ in the Straits is less complex. Although Indonesia, Malaysia and Thailand preferred to retain the distinct legal regimes between the continental shelf and the EEZ[81], the concept of the delimitation of the EEZ in the Straits is parallel to that of the existing delimitation of the continental shelf. Thailand regarded the continental shelf boundaries as agreed to under the treaties with its neighbors as the EEZ boundaries[82]. The Indonesian position on the provisions of the UNCLOS III concerning the delimitation of the EEZ in Article 74 is the same as that on the continental shelf delimitation[83]. A detailed

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80 Declaration Concerning the EEZ of Indonesia, 21 Mac. 1980(Permanent Mission of Indonesia to the UN;Dept., of Foreign Affs.,Indonesia)

81 Kriangsak,supra note 2 ,p.74

82 Capt. Thanom Chareonlaph,RTN, lecture on "The Maritime Boundary Problems of Thailand," given at the Naval War College,Thailand,1985.

83 Park and Jae Kyu Park,supra note 19,p.402

account of the delimitation of the continental shelf and the EEZ in the Straits will be addressed in Chapter Two.

Section 4 of the EEZ Act reproduced verbatim the EEZ rights mentioned in Article 56(1) of UNCLOS III :

> In the exclusive economic zone Malaysia has -
>
> (a) sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the sea-bed and subsoil and the superjacent waters, 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;
>
> (b) jurisdiction with regard to -
>
> (i) the establishment and use of artificial islands, installations and structures;
> (ii) marine scientific research;
> (iii) the protection and preservation of the marine environment; and
>
> (c) such other rights and duties as are provided for by international law.

Corollary to section 4, section 5 prohibits certain activities in the EEZ :

> Except where authorized in accordance with the provisions of this Act or any applicable written law, no person shall in the exclusive economic zone or on the continental shelf -
>
> (a) explore or exploit any natural resources, whether living or non-living;
>
> (b) carry out any research, excavation or drilling operations;
>
> (c) conduct any marine scientific research; or
>
> (d) construct or authorize and regulate the construction, operation and use of -
>
> (i) any artificial island;
> (ii) any installation or structure for any of the purposes provided for in section 4 or for any other economic purpose; or
> (iii) any installation or structure which may interfere with the exercise of the rights of Malaysia in the zone or on the continental shelf.

While exercising its rights and performing its duties in the EEZ, Malaysia must

have due regard to the rights and duties of other States[84]. Article 58(1) of UNCLOS III stipulated that all States, whether coastal or land-locked, enjoy, subject to the relevant provisions of the Convention, the freedom 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 freedom, such as those associated with the operation of ships, aircraft and submarine cables and pipelines. On the other hand, the other States must comply with the laws and regulations adopted by the coastal state in accordance with the provisions of the Convention and other rules of international law[85].

Fisheries

At the time Malaysia proclaimed its EEZ in 1980, its fisheries resources were already deteriorating. The Fisheries Act 1963 was suddenly regarded as archaic and had unable to accommodate the new issues such as EEZ and foreign fishings. When the EEZ Act was enacted by the Malaysian Parliament in 1984, it had not incorporated the fisheries issues in details but provided provisions that allow fisheries legislation to be applicable in the EEZ and the continental shelf[86].

The seas comprised in the EEZ are part of Malaysian fisheries waters[87], whereas, " Malaysian fisheries waters " means all waters comprising the internal waters, the territorial sea and the EEZ of Malaysia in which it exercises sovereign and exclusive rights over fisheries[88]. This interpretation has

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[84] Article 56(2) of UNCLOS III

[85] Article 58(3) of UNCLOS III

[86] Section 8 to be read with section 42 of EEZ Act

[87] Section 6 of EEZ Act

[88] Section 2 of EEZ Act

assimilated the internal waters, the territorial sea and the EEZ into a single zone of Malaysian fisheries waters. Internal waters and the territorial sea form part of a State's territory and the only right which other States enjoy under general international law in these waters is a right of innocent passage in the territorial sea and, in very limited circumstances, in internal waters . It therefore follows that a state enjoys exclusive excess to the fish stocks in its internal waters and territorial sea[89]. However, within the EEZ, apart from exercising its fishing rights, the coastal State is responsible for carrying out certain duties and obligations. There is an obligation for the coastal State to set up sound management plans so as not to over-exploit the resources[90]. The coastal State also has to determine the allowable catch of the living resources in the EEZ[91] and where there is a surplus, as a result of its inability to harvest the entire allowable catch, the coastal State shall give other States access to such surplus[92].

Several countries that have enacted the national legislations pertaining to EEZ expressed explicitly the obligation to determine the total allowable catch and allow other States to harvest the surplus.[93] Article 5(3) of the Indonesian Exclusive Economic Zone Act (Act No.5 of 1983), stated any person, a corporate body or government of a foreign State, may be permitted to explore and/or exploit the living resources in a certain area within the

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89 Churchill and A.V. Lowe, supra note 28, p.227

90 Article 61 of UNCLOS III

91 Article 61(1) of UNCLOS III

92 Article 62(2) of UNCLOS III

93 For further readings on this matter, see Attard, supra note 42, pp.146-190

Indonesian Exclusive Economic Zone, provided that the catch as allowed by the Government of the Republic of Indonesia of the species in question, is in excess of Indonesia's capacity to harvest the allowable catch.[94] The meaning of this Article is further expressed under Article 5 of the Elucidation of Act No.5 of 1983 on Indonesian Exclusive Economic Zone, which reads:

> [S]uppose the allowable catch is fixed at 1,000 (one thousand) tons, while Indonesia's harvest capacity has but reached as many as 600 (six hundred) tons, so, another state may participate in utilising the remainder of 400 (four hundred) tons, with the permission of the Government of the Republic of Indonesia on the basis of an international agreement.

Attard pointed out that, an evaluation of State practice on the matter faces the principal difficulty that whether access is given or not is often decided administratively[95]. Unlike Indonesia, Malaysia has made no reference to access in its EEZ Act . Instead, it can be found under Malaysian fisheries legislation[96](see discussion on page 48 -55).

Other provisions that are not included, but are important with regard to living resources in the Strait are related to stocks occurring within the EEZs of the littoral States .[97]The EEZ claims of Indonesia, Malaysia and Thailand are overlapped. Article 63(1)of the UNCLOS III stated that "[T]hese States shall seek, either directly or through appropriate subregional or regional organizations, to agree upon the measures necessary to co-ordinate and ensure the conservation and development of such stocks without prejudice to the other provisions of this Part". However, prior to the enactment of the EEZ Act, in

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[94] Indonesian EEZ Act reprinted in Smith,supra note 29,pp. 227-239

[95] Attard,supra note 42,p.161

[96] Part III,Section 18, Section 19 of the Fisheries Act

[97] The EEZ claims of Indonesia, Malaysia and Thailand overlapped at the northern entrance of the Strait. As yet, there is no agreement on the delimitation of the EEZ but in 1971 the three countries reached an agreement on the continental shelf.

1983, the ASEAN Agriculture and Fisheries ministers reached an agreement called the ASEAN Memorandum of Understanding on Fisheries[98]. This agreement called for cooperation between the member States on fisheries management.

Protection and Preservation of the Marine Environment

There are four main sources of marine pollution: shipping, dumping, sea-bed activities and land activities[99]. Another source of pollution, that has received less attention, is from aircraft. Malaysia had objected to the flight of the supersonic civil aircraft Concorde between London and Singapore based on its character as supersonic aircraft and its likely effect on the environment[100].

Marine pollution is always associated with oil. But oil is not the only serious marine pollutant[101]. From time to time the United Kingdom and some other Western European States have disposed of some of the radioactive waste matter from their nuclear power stations by putting it into special containers and dumping the containers in the Atlantic; whether these containers will last as long as their contents remain radioactive is still to be seen. Another pollutant is DDT , a pesticide used by farmers, that finally finds its way into the sea , either via river or rainfall. DDT can be absorbed by marine life such as shellfish, fish and seabirds. The most recent development in the prevention of marine pollution is the convening of the 1973 London Conference on Marine Pollution which produced the world's first "Comprehensive" treaty on marine pollution, with technical regulations covering not only oil pollution but other marine pollution problems as well[102].

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[98] G.Kent,"Regional Approaches to Meeting National Marine Interests," 5 Contemprary Southeast Asia. 80(1983)94.

[99] Churchill and A.V. Lowe,supra note 28,p.242

[100] Leifer,supra note 63,p.157

[101] Churchill and A.V. Lowe,supra note 28,p.241

[102] S.Z.Pritchard,Oil Pollution Control(Kent:Croom Helm,1987), p.174

Prior to UNCLOS III, there already existed multilateral treaties concerned with pollution from ships adopted under the auspices of the Inter-Governmental Maritime Consultative Organization ( from May 22,1982, the organization became the International Maritime Organization, IMO[103]).The 1954 Oil Pollution Convention(for which the IMO became depositary in 1959) was the first attempt by maritime nations to deal with the impact of oil pollution[104]. In March 1967 the tanker "Torrey Canyon" grounded off the southwest coast of England causing the largest single oil spill in maritime history up to that time[105]. Some 80,000 tonnes of crude oil spread along British and French coasts, causing pollution in a 200-mile arc. The oil was released subsequent to the initial grounding and after the vessel had been bombed on orders of the British government after the decision that no other way was left to deal with the unsalvageable wreck. After the "Torrey Canyon" incident, the IMO paid great attention to oil pollution and the following conventions were adopted:

1. The Intervention Convention 1969;
2. The Civil Liability Convention 1969;
3. The 1969 and the 1971 Amendments to the 1954 Oil Pollution Convention;
4. The Fund Convention 1971;
5. The International Convention for the Prevention of Pollution from Ships 1973 (MARPOL);
6. The Safety of Life at Sea 1974 (SOLAS); and
7. The two Protocols to amend SOLAS and MARPOL 1978.

At the regional level there are a number of treaties dealing with

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103 Samir Mankabady,ed.,The International Maritime Organization(Great Britain: Croom Helm,1984),pp.2-3

104 Ibid.,p.277

105 Thomas A.Clingan,Jr.,ed.,The Law of the Sea:What Lies Ahead?(Honolulu: The Law of the Sea Institute,Univ.of Hawaii,1988),p.277

all the sources of marine pollution within a single framework treaty. Such treaties have been adopted for the Baltic,Mediterranean, Arabian/Persian Gulf and Gulf of Oman, West Africa, South-East Pacific, Red Sea and Gulf of Aden, Caribbean, East Africe and South Pacific: many of these areas are suffering particularly badly from the effects of marine pollution[106]. With the exception of the Baltic Convention, the initiative for these agreements has largely come from, and much of the preparatory work has been done by, the United Nations Environment Programme (hereinafter the UNEP), as part of its Regional Seas Programme, and to a rather more limited extent the IMO[107]. Certain sea areas have been designated as "special areas" under Regulation 10 of Annex I of MARPOL[108]. They include the Baltic Sea, the Mediterranean Sea, the Black Sea and some areas in the Middle East, where the discharge of oil is completely forbidden .

It can be observed, in the first place, that the UNCLOS III recognizes the competences of the coastal State for the protection and preservation of the marine environment in all matters related to the EEZ and the continental shelf resources.[108] In this regard, for example, Article 208 of UNCLOS III provides for the coastal State's powers to prevent, reduce, and control the pollution associated with seabed activities under its jurisdiction and with artificial islands, installations and structures .

Section 9 of the EEZ Act repeats Article 193 of UNCLOS III concerning the sovereign right of coastal State to exploit the natural resources in the EEZ

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106 Churchill and A.V. Lowe,supra note 28,p.246

107 Ibid.,p.246

108 Francisco Orrego Vicuna,The Exclusive Economic Zone(Great Britain: Cambridge UP,1989),p.84

pursuant to its environmental policies and in accordance with its duty to protect and preserve the marine environment in the zone. Corollary to Section 9 , Section 10 of the EEZ Act deals with prohibition of deliberate discharge of oil, mixture containing oil or pollutant into the EEZ. It is stipulated as follows:

> (1) If any oil, mixture containing oil or pollutant is discharged into the EEZ from any vessel, land-based source, installation, device or aircraft, from or through the atmosphere or by dumping -
>
> (a) the owner or master of the vessel, if the discharge or escape is from a vessel;
> (b) the owner or occupier of the place on land, if the discharge or escape is from land;
> (c) the owner or person in charge of the installation or device, if the discharge or escape is from an installation or a device; or
> (d) the owner or pilot of the aircraft, if the discharge or escape is from an aircraft,
>
> shall be guilty of an offence and shall be liable to a fine not exceeding one million ringgit.

Under Article 211(5) of the UNCLOS III, the coastal States may in respect of their EEZs adopt laws and regulations for the prevention, reduction and control of pollution from vessels conforming to and giving effect to generally accepted international rules and standards established through the competent international organization or general diplomatic conference.There is no definition of "generally accepted international rules" [109], although Article 211(7) stipulated that they should include inter alia those relating to prompt notification to coastal States, whose coastline or related interests may be affected by incidents, including maritime casualties, which involve discharges or probability of discharges. The "generally accepted international rules" may include the 1954 Oil Pollution Convention but it is not clear whether they

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[109] Churchill and A.V. Lowe, supra note 28, p.255. See also Attard, supra note 42, p.97

include the MARPOL which is not widely ratified[110]. "The competent international organization" is usually taken as meaning the IMO, which is the twelfth specialized agency of the United Nations and is solely concerned with maritime affairs[111].

To examine in which direction Section 10(1) of the EEZ Act is heading, is necessary to look at some definitions relating to marine pollution that are being adopted. Pertaining to "oil", Section 2 of the EEZ Act interprets it as crude oil, diesel oil, fuel oil, lubricating oil or any other oil which is prescribed by the Minister charged with responsibility for the environment by order in the Gazette to be oil for the purposes of the Act. This interpretation can also be found under the 1954 Oil Pollution Convention[112] but MARPOL extended the term to include crude oil, fuel oil, sludge, oil refuse and refined products and other substances listed in Appendix 1 of the Annex 1[113]. The EEZ Act also has empowered the Minister to prescribe any other oil to be oil for the purposes of the Act. Unless the Minister will refer to the generally accepted international rules in prescribing certain oils, the power can be considered broad and subject to the prerogative of the Ministry. The 1954 Oil Pollution Convention does not specifically define "oily mixture" but under its Article III, the discharge of oil or oily mixture is permitted from a ship, other than a tanker, if inter alia the oil content of the discharge is less than 100 parts per 1,000,000 parts of the mixture[114]. The EEZ Act interprets the "mixture containing oil" as a

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110 Attard, supra note 42, p.97

111 Mankabady, supra note 103, p.2

112 Article I(1) of 1954 Oil Pollution Convention

113 Annex I of Regulation (1) of MARPOL. See also Appendix 1 of the Annex I for the list of oils.

114 Article III(a)(iii) of 1954 Oil Pollution Convention

mixture with an oil content of one hundred parts or more in one million parts of the mixture or a mixture with such oil content as is prescribed by the Minister charged with responsibility for the environment by order in the Gazette to be a mixture for the purposes of the Act[115]. Again, the Minister concerned is empowered with the broad and authoritative provision. Under MARPOL, there is a similar provision as stipulated by the 1954 Oil Pollution Convention with regard to the oily mixture[116]. Both the 1954 Oil Pollution Convention and MARPOL do not define "pollutant" but under Article 2(2) of MARPOL, it is stipulated that "harmful substance" as :

> [A]ny substance, if introduced into the sea, is liable to create hazards to human health, to harm living resources and marine life, to damage amenities or to interfere with other legitimate uses of the sea, and includes any substance subject to control by the present Convention.

The EEZ Act adopted the word "pollutant" and provides a similar definition to that contained in the MARPOL but gives certain powers to the Minister in prescribing any other substance to be a pollutant for the purposes of the Act[117].

Section 10(1) of the EEZ Act also prohibits dumping which is defined as follows:

> (a) Any deliberate disposal of wastes or other matter from vessels, aircraft, platforms or other man-made structures at sea; or
>
> (b) any deliberate disposal of vessels, aircraft or other man-made structures at sea,
>
> but "dumping" does not include -
>
> (i) the disposal of wastes or other matter incidental to, or derived from, the normal operations of vessels, aircraft, platforms or

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115 Section 2 of EEZ Act

116 Regulation 9(1)(b)(iv) of Annex I of MARPOL

117 Section 2 of EEZ Act

other man-made structures at sea and their equipment, other than wastes or other matter transported by or to vessels, aircraft, platforms or other man-made structures at sea, operating for the purpose of disposal of such matter or derived from the treatment of such wastes or other matter on such vessels, aircraft, platforms or structures; or

(ii) placement of matter for a purpose other than the mere disposal thereof, provided that such placement is not contrary to the aims of this Act, any applicable written law or international law.[118]

The aforementioned definition actually repeats the definition contained in Article 1 of the UNCLOS III . However, it further defines "waste" as follows:

(a) Any matter, whether liquid, solid, gaseous or radioactive, which is discharged, emitted, deposited or dumped in the marine environment in such volume, composition or manner as to cause an alteration of the environment; or

(b) any matter which is prescribed by the Minister charged with responsibility for the environment by order in the Gazette to be waste for the purposes of this Act.[119]

Coming back to Section 10(1) of the EEZ Act, the Act prohibits any discharges or escapes of oil, mixture containing oil, pollutant or deliberate disposal of wastes; from vessels, aircraft, platforms or other man-made structures at sea and in the case of oil, mixture containing oil or pollutant, including land-based source into the EEZ except a person charged with an offence under the said Section in his/her defence has proven that the discharge or escape of the substance was caused for the purpose of securing the safety of the vessel, the place of the land, the installation, device or aircraft concerned, or for the purpose of saving life[120]. While the exemption provision in this regard is in conformity with the provisions contained under the 1954 Oil Pollution

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118 Ibid.

119 Ibid.

120 Section 11 of EEZ Act

Convention [121] and the MARPOL[122], the Act can be considered stricter in the sense that it does not provide certain exemptions for the control of operational pollution. Under MARPOL, any discharge into the sea of oil or oily mixtures from ships is prohibited except when all the following conditions are satisfied:

(a) for an oil tanker, except as provided for in sub-paragraph (b) of this paragraph:

(i) the tanker is not within a special area;

(ii) the tanker is more than 50 nautical miles from the nearest land;

(iii) the tanker is proceeding en route;

(iv) the instantaneous rate of discharge of oil content does not exceed 60 litres per nautical mile;

(v) the total quantity of oil discharged into the sea does not exceed for existing tankers 1/15,000 of the total quantity of the particular cargo of which the residue formed a part, and for a new tankers 1/30,000 of the total quantity of the particular cargo of which the residue formed a part; and

(vi) the tanker has in operation, except as provided for in Regulation 15(3) of Annex I , an oil discharge monitoring and control system and a slop tank arrangement as required by Regulation 15 of Annex I;

(b) from a ship of 400 tons gross tonnage and above other than an oil tanker and from machinery space bilges excluding cargo pump room bilges of an oil tanker unless mixed with oil cargo residue:

(i) the ship is not within the special area;

(ii) the ship is more than 12 nautical miles from the nearest land;

(iii) the ship is proceeding en route;

(iv) the oil content of the effluent is less than 100 parts per million; and

(v) the ship has in operation an oil discharge monitoring and

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[121] Article IV of 1954 Oil Pollution Convention

[122] Regulation 11 of Annex I of MARPOL

control system, oily-water separating equipment, oil filtering system or other installation as required by Regulation 16 of Annex I.[123]

Section 10(1) of the EEZ Act does not classify ships into tankers and non-tankers. Close examination of the provisions has shown that the EEZ Act is in conformity with the aforementioned paragraph (b), that is with regard to ships other than oil tankers, but it provides no special exemption to tankers.

It can be seen that there is a conflicting interest between the EEZ Act and both the 1954 Oil Pollution Convention and the MARPOL with regard to control of operational pollution. Aside from a possible collision between ships, and grounding due to human negligence or unforseen circumstances, oil can be discharged deliberately by ships washing tanks with sea water, discharging sludges, lubrication oil leakages and disposal of oily ballast[124]. The EEZ Act prohibits any oil or mixture containing oil to be discharged into the EEZ howsoever caused while the MARPOL and to some extent, the 1954 Oil Pollution Convention, permit oil and oily mixtures discharges into the sea[125] given certain requirements. However, all of them are agreed that the discharge is permitted if it is for the purpose of securing the safety of the vessel or for saving life.

The EEZ Act cannot be said to be a complete legislation in combating the marine pollution.In practicality, there arise the problems of enforcement and the Act's relationship with other maritime nations particularly with regard to navigation in the EEZ. Because of its wide latitude,the EEZ Act has provided the authorities concerned with broad powers of enforcement that could result in undue interference with the freedoms of navigation and overflight.

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[123] Regulation 9(1) of Annex I of MARPOL

[124] David W. Abecassis,The Law and Practice Relating to Oil Pollution From Ships(London:Butterworths,1978),pp.8-9

[125] Close examination revealed that the exemptions given are related to EEZ.

Artificial Islands, Installations and Structures

According to Article 56 of UNCLOS III with respect to the establishment and use of artificial islands, installations and structures, the coastal State only has "jurisdiction", a concept that legally is more limited[126]. The provision accorded the coastal State jurisdiction as provided for in the relevant provisions with regard to inter alia the establishment and use of artificial islands, installations and structures[127]. The "relevant provisions" can be found under the Article 60 of the UNCLOS III, which reads:

> 1. In the exclusive economic zone, the coastal State shall have the exclusive right to construct and to authorize and regulate the construction, operation and use of:
>
> (a) artificial islands;
>
> (b) installations and structures for the purposes provided for in Article 56 and other economic purposes;
>
> (c) installations and structures which may interfere with the exercise of the rights of the coastal State in the zone.

On the other hand, the coastal State also has exclusive jurisdiction over such artificial islands, installations and structures, including jurisdiction with regard to customs, fiscal, health, safety and immigration laws and regulations[128]. Thus, whilst the coastal State has the "exclusive right" to construct artificial islands and is given "exclusive jurisdiction" over them, they may not be established where interference may be caused to the use of recognized sea-lanes essential to international navigation[129]. This situation demonstrates how in the framework of complex negotiations, such as the

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[126] Vicuna, supra note 108, p.73

[127] Article 56(1)(b)(i) of UNCLOS III

[128] Article 60(2) of UNCLOS III

[129] Attard, supra note 42, p.48. See also Article 60(7) of UNCLOS III

negotiations over the EEZ, discussions over terminology, which frequently acquire great intensity, can have less influence than it is often thought vis-a-vis the specific mechanisms that deal with the rights and duties of the States in these matters[130].

There is no definition provided by the UNCLOS III of what constitutes artificial islands, installations and structures. In the absence of relevant definitions, there could be the possibility of installations and structures being regarded as artificial islands as the latter can be constructed for any purpose while the former are for more limited purposes.According to Churchill and Lowe, it is paradoxical that "artificial islands" can be constructed for any purpose, unlike "installations and structures", when "artificial islands" are presumably larger and thus create a greater impediment to other uses of the EEZ[131].

Article 21(1) of the EEZ Act prohibits the construction, operation and usage of any artificial island, installation or structure in the EEZ or on the continental shelf except with the authorization and subject to conditions as imposed by the Government. Malaysia also claims the right to establish reasonable safety zones[132]around such artificial islands, installations and structures and requires all vessels to respect the zones and comply with any directions as it may impose [133]. In the establishment of the safety zones, Malaysia will take appropriate measures to ensure the safety both of navigation and of the artificial islands, installations and structures[134]and the

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[130] Vicuna,supra note 108,p.73

[131] Churchill and A.V. Lowe,supra note 28,p.139

[132] Section 21(3) of EEZ Act

[133] Section 21(5) of EEZ Act

[134] Section 21(3) of EEZ Act

determination of the breadth of such zones will be in accordance with the applicable international standards[135].

The recognition of the "exclusive right" to construct, for example, artificial islands in the EEZ may involve the curtailing of the freedom of navigation[136]. The EEZ Act claims the right to establish "reasonable safety zones" without committing the extent of the breadth but recognizing the obligation to refer the matter to applicable international standards.The standard under UNCLOS III , in this respect, is that the distance of the safety zones must not exceed 500 meters around such artificial islands, installations and structures except as authorized by generally accepted international standards or as recommended by the competent international organization[137]. As future planners are looking to the oceans as a source of space, the restrictions on navigation will be increased as ships are forced to divert their courses and thus increasing the operational costs. Since specifity is lacking in the definition of "generally accepted international standards", some States might establish safety zones that extend beyond the 500-meter limit. The Indonesian EEZ Act, for example, may permit the construction of the artificial islands, installations or structures but nothing is mentioned on its obligations pertaining to the establishment of the safety zones as stipulated under the UNCLOS III[138].

Marine Scientific Research

In the Malaysian EEZ and on its continental shelf, no marine scientific research may be conducted without the express consent of the Government [139].

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[135] Section 21(4) of EEZ Act

[136] Attard, supra note 42, p.87

[137] Article 60(3) of UNCLOS III

[138] Indonesian EEZ Act, Act No.5 of 1983. See also Article 6 of the said Act.

[139] Section 22(1) of EEZ Act

However, where the marine scientific research is for peaceful purposes and to increase scientific knowledge of the marine environment, Malaysia is obligated to give its consent[140] but the State or the competent international organization must comply with the conditions imposed [141]. Malaysia may withhold its consent to the conduct of a marine scientific research that is other than for peaceful purposes,which include a research which is of "direct significant for the exploration and exploitation of natural resources", or which involves drilling into the continental shelf, the use of explosives or the introduction of pollutants into the marine environment, or which involves the construction, operation and use of artificial islands, installations and structures[142]. Consent also may not be granted if the State or the competent international organization has provided inaccurate information regarding the nature and the objectives of the research which is required under Section 18 of the EEZ Act[143]. Section 18 requires any State or competent international organization which intends to undertake marine scientific research in the EEZ or on the continental shelf to provide information regarding the research not less than six months in advance of the expected starting date. Any marine scientific research which would interfere with activities undertaken by Malaysia in exercise of its sovereign rights and jurisdiction [144], and where the researching State or competent international organization has outstanding obligations to Malaysia from a prior research project[145], may also not be permitted.The suspension or

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[140] Section 16(2) of EEZ Act

[141] Section 19 of EEZ Act

[142] Section 17(a),(b) and (c) of EEZ Act

[143] Section 17(d) Of EEZ Act

[144] Section 17(e) of EEZ Act

[145] Section 17(d) of EEZ Act

cessation of marine scientific research activities is stipulated under Section 20 of the EEZ Act which reads:

> (1) The Government may order the suspension of any marine scientific research activities in progress within the EEZ or on the continental shelf if -
>
> (a) the research activities are not being conducted in accordance with the information provided under Section 18 upon which the consent of the Government was based; or
>
> (b) the State or competent international organization conducting the research activities fails to comply with the provisions of Section 19.
>
> (2) The Government may order the cessation of any marine scientific research activities -
>
> (a) which in deviating from the information provided under Section 18 have amounted to a major change in the research project or the research activities; or
>
> (b) if any of the situations contemplated in sub-section 1 are not rectified within a reasonable period of time, as determined by the Government[146].

The impact of marine scientific research in the EEZ or on the continental shelf, on international shipping, can be observed under the provisions of Article 258 through Article 262 of the UNCLOS III. Marine research often involves the emplacement of fixed structures, buoys and other floating objects in the sea but Churchill and Lowe pointed out that no States appear to have exercised enforcement jurisdiction over the objects[147]. Article 260 of the UNCLOS III stipulated that safety zones of a reasonable breadth not exceeding a distance of 500 meters may be created around scientific research installations and all States shall ensure that such safety zones are respected by their vessels . The deployment and use of any type of scientific research installation or equipment

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[146] Section 20(1) and (2) of EEZ Act

[147] Churchill and A.V. Lowe, supra note 28, p.299 . Objects here mean scientific research installations and equipment.

must not constitute an obstacle to established international shipping routes[148] and the researching State or competent international organization must ensure the safety at sea by providing adequate internationally agreed warning signals, taking into account rules and standards established by the competent international organization[149].

As discussed in the preceding section on artificial islands, installations and structures, the safety zones established in the EEZ are capable of restricting the freedom of navigation as should be enjoyed by the other States. Under the provisions on marine scientific research, the establishment of such zones, with respect to the EEZ Act will be as follows: marine scientific research for peaceful purposes and making use the scientific research installations and equipment, will be subject to Section 16(2) of the EEZ Act where Malaysia is obligated to give its consent. But if the safety zones established by the project would interfere with activities undertaken by Malaysia in the exercise of its sovereign rights and jurisdiction, the consent may be withheld under Section 17(e) of the EEZ Act. While the interest of Malaysia is safeguarded in this respect, the right of navigation of other States in the EEZ will be affected as they do not have jurisdiction over such matters.Moreover, if Malaysia itself is conducting the marine scientific research in its EEZ, the establishment of the safety zones is under its jurisdiction though it has to comply with the provisions stipulated under Article 260, Article 261 and Article 262 of the UNCLOS III. Indeed, if States chose to conduct marine scientific research that is inconsistent with UNCLOS III, we will expect more navigational restrictions in the future.

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[148] Article 261 of UNCLOS III

[149] Article 262 of UNCLOS III

Enforcement

Article 73(1) of the UNCLOS III permits a coastal State to 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. Where a coastal State arrests and proceeds against a vessel for an alleged violation in its EEZ, its actions are subject to a number of safeguards. These provide inter alia arrested vessels and their crews are to be released promptly upon the posting of reasonable bond or other security [150] and in cases of arrest or detention of foreign vessels, the flag State is to be notified promptly through appropriate channels of the action taken and of any penalties subsequently imposed[151]. There should be no imprisonment or any other form of corporal punishment as penalties for violations under the fisheries laws and regulations unless agreed to by the flag State concerned[152] (see discussion on page 53 - 55).

Oda pointed out that the general terms, "reasonable bond and other security" are liable to be interpreted differently by States, resulting in varying post-arrest procedures[153].The Indonesian EEZ Act requires "a reasonable amount of bail as fixed by the competent court" as a condition for the release of the ship and/or person arrested prior to the verdict of the competent court[154]. The fixing of the amount of bail is based on the value of the ship, its equipment and proceeds of its activities increased by the maximum amount of fine[155]. The EEZ Act requires "a bond or other security to the satisfaction of the authorized

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[150] Article 73(2) of UNCLOS III

[151] Article 73(4) of UNCLOS III

[152] Article 73(3) of UNCLOS III

[153] Shigeru Oda,"Fisheries Under the United Nations Convention on the Law of the Sea,"American Journal of International Law.(1983),pp.747-748.

[154] Article 15 of Indonesian EEZ Act (Act No.5 of 1983)

[155] Article 15 of Elucidation of Act No.5 of 1983, Indonesian EEZ Act.

officer or the court" for the release of the article, vessel or thing [156] but with regard to the arrested person, the only clue is stipulated under Section 38(1) of the EEZ Act, where "any person so arrested may be remanded in custody or released on bail" [157]. The EEZ Act does not clearly define the amount of bond or other type of security to be imposed on the release of vessels and/or persons except where an offence of marine pollution has been committed. An arrested vessel may be released if the owner deposits with the Government such sum of money or furnishing such security as, in the opinion of the Director-General, would be adequate to meet all costs and expenses incurred in carrying out the work required to remove, disperse, destroy or mitigate the damage caused by such escape or discharge[158]. The position of the arrested person is not very clear is this respect . There is no provision under the EEZ Act that relates to the procedures and conditions of releasing the offender on bail.

To accommodate the requirement of prompt release of a person, Section 26 of the EEZ Act assures that an arrested person is to be brought before a court as soon as possible. No arrested person is to be kept under the custody of the authorized officer for more than twenty-four hours[159]. To avoid further unnecessary delay in judicial preceedings, Section 27 of the EEZ Act requires that any vessel detained and its crew are to be taken to the nearest or most convenient port and dealt with in accordance with the provisions of the Act. Actually, what is meant by "prompt release" is unclear, therefore, no doubt there will be

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[156] Section 32(1) of EEZ Act

[157] Section 38(1) of EEZ Act requires that the consent to prosecute a person must be obtained from the Public Prosecutor. However, an arrested person may be remanded in custody or released on bail without such consent but the case shall not be further prosecuted until that consent has been obtained.

[158] Section 15(2) of EEZ Act

[159] Section 26(2) of EEZ Act

some divergence in interpretation of the matter. For instance, the Indonesian EEZ Act allows for the detention of a ship and/or persons to be taken for not more than seven days ,except in case of a force majeure[160].

The notification to the flag State of the vessels arrested must also be carried out promptly. To accommodate this requirement, Section 32(2) of the EEZ Act stipulated inter alia that the authorized officer who detains the vessel, as soon as may be, must contact the diplomatic representative in Malaysia of the flag State of the vessel concerned through the Ministry responsible for foreign affairs.

The powers of an authorized officer to enforce the laws and legislations are stipulated under Section 24 of the EEZ Act which reads:

> (1) For the purpose of ensuring compliance with the provisions of this Act or any applicable written law, any authorized officer may, where he has reason to believe that an offence has been committed under this Act or such written law, without a warrant -
>
> (a) stop, board and search any vessel within the EEZ and inspect any licence, permit, record, certificate or any other document required to be carried on board such vessel under this Act, such written law or any generally accepted international rules and standards, and make copies of the same;
>
> (b) make such further enquiries and physical inspection of the vessel, its crew, equipment, gear, furniture, appurtenances, stores and cargo as may be necessary to ascertain whether or not a suspected violation of the provisions of this Act or such written law has been committed;
>
> (c) enter and search any place in which he has reason to believe that an offence under this Act or such written law is about to be or has been committed;
>
> (d) arrest any person who he has reason to believe has committed any offence under this Act or such written law;
>
> (e) detain any article which he has reason to believe has been used in the commission of any offence under this Act or such written law;

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[160] Article 13(b) of Indonesian EEZ Act(Act No.5 of 1983).In the case of force majeure, the detention could last more than seven days.

(f) detain any vessel, including its equipment, gear, furniture. appurtenances, stores and cargo, which he has reason to believe has been used in the commission of any offence or in relation to which any offence has been committed under this Act or such written law.

In many respects, the powers can be said to be extensive and broad in nature, especially since an authorized officer is empowered to stop, board and search a vessel if he has reason to believe that an offence has been committed. Moreover, a warrant is exempted to initiate the search[161].

There is no general right of a coastal State to arrest foreign vessels in its EEZ for breach of anti-pollution laws and regulations. According to Article 220 of the UNCLOS III, the nature of an enforcement action that a coastal State may take depends on three things: the location of the ship at the time of enforcement, the location of the ship when it committed the violation, and the relative degree or evidence of the violation[162]. Thus, if the ship navigating in the EEZ or the territorial sea has, in the EEZ, committed a violation

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[161] Because of the special character of enforcement at sea, courts usually allow a lower standard of what constitutes as "articulable suspicion" before enforcement personnel can board and search vessel. At sea, the investigatory stops are viewed as a reasonable intrusion into an individual's privacy. See R.L. Miller,"Constitutional Law-Search and Seizure-19 U.S.C. Sec.1581(a)-Random and Suspicionless Boarding of Vessel by Custom Officers does not violate The Fourth Amendment's Prohibition Against Unreasonable Search and Seizure.United States Vs Villamonte-Marquez, 103 S.Ct. 2573 (1983)," 14 University of Baltimore Law Review(1984),pp.160-166. J.C. Klick,"The Constitutionality of Boardings at Sea Without Cause-United States Vs Piner," 5 Maritime Lawyer(1980),pp.104-111. Author's note: Section 24(1) of EEZ Act provides broader powers since it also covers enforcement on land(see paragraph c).

[162] David C. Slade,Vessel-Source Pollution Control Vs Freedom of Navigation, EEZ Papers. OCEAN 84,p.103.

resulting in substantial discharge causing or threatening significant pollution, the coastal State may require the ship to give information regarding its identity and other relevant information required to establish whether a violation has occurred[163]. If the ship refuses to give this information, or if the given information is manifestly at variance with the evident factual situation the coastal State may undertake physical inspection of the ship for matters relating to the violation[164]. If the violation results in a discharge causing major damage or threat of major damage to the coastline or related interests, the coastal State may then detain the ship[165].

Where a coastal State arrests and proceeds against a foreign vessel for alleged violation of pollution laws, its actions are subject to a number of safeguards. These provide inter alia that any physical inspection of a foreign vessel only be limited to an examination of certificates, records or other documents as the vessel is required to carry by generally accepted international rules and standards unless the condition of the vessel or its equipment does not correspond substantially with the particulars of those documents; the contents of such documents are not sufficient to confirm or verify a suspected violation; or the vessel is not carrying valid certificates and records[166]. Only monetary penalties may be imposed for violations committed in the EEZ and the territorial sea except in the case of a wilful and serious act of pollution in the territorial sea[167]. Legal proceedings must normally be suspended when the flag State takes proceedings in respect of the same incident for a violation committed in the EEZ[168].

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[163] Article 220(3) of UNCLOS III

[164] Article 220(5) of UNCLOS III

[165] Article 220(6) of UNCLOS III

[166] Article 226(a) of UNCLOS III

[167] Article 230 of UNCLOS III

[168] Article 228 of UNCLOS III

Clearly, at certain points, the EEZ Act is not in conformity with the provisions stipulated by UNCLOS III regarding matters in the EEZ. The enforcement powers bestowed upon an authorized officer can be considered extensive and authoritative, especially since the interpretations of marine pollution contained in the EEZ Act are so broad that left to the good judgement of the authorized officer, "where he has reason to believe" that an offence has been committed, he may stop, board and search the vessel and detain such vessel if he is satisfied that the offence has been committed. Since the modus operandi of enforcement pertaining to Article 220 of the UNCLOS III has not been clearly laid out, the EEZ Act has taken imperative steps such as stopping the vessel as a primary step in carrying out further provisions as stipulated by the Act. In other words, an authorized officer when confronted with evidence of any violation, will immediately takes appropriate measures to stop the vessel for further investigation instead of asking for information from the vessel regarding its identity and other relevant information to establish whether a violation has actually taken place. Moreover, the EEZ Act regards the act of physical inspection as a mean of ascertaining whether or not a suspected violation has been committed regardless of the requirement stipulated under Article 226(a) of the UNCLOS III. Finally, nothing in the EEZ Act allows legal proceedings to be suspended if the flag State has taken appropriate proceedings in respect of the same incident for violations committed in the EEZ.

On the other hand, the UNCLOS III does not deal adequately with the provisions pertaining to penalties. While requiring only monetary penalties to be imposed for a violation committed in the EEZ and the territorial sea, nothing is mentioned about other possibilities such as in the case where the offender has failed to pay the fines. In this regard, the EEZ Act has attempted to resolve the problem by including a provision that allows the sale of the vessel towards

the payment of the fine and the costs and expenses incurred[169]. And the EEZ Act has gone further by providing a mandatory clause, where in addition to a monetary penalty , the article, vessel or thing which was the subject-matter of, or was used in the commission of , the offence be forfeited[170].It should be noted that UNCLOS III is silent on the forfeiture of vessels and its appurtenances.

THE FISHERIES ACT 1985

Preliminary

As has been mentioned earlier, the internal waters and the territorial sea are subject to the coastal State's sovereignty where the only right that other States have is the right of innocent passage in the territorial sea and in very limited circumstances in the internal waters. However, in the EEZ, while the coastal State is exercising its rights and performing its duties, it shall have due regard to the rights and duties of other States. With regard to living resources, there is an obligation for the coastal State to determine its capacity to harvest the living resources and where it does not have the capacity to harvest the entire allowable catch, give other States access to the surplus of the allowable catch. The coastal State also must observe the right of land-locked States and geographically disadvantaged States to participate in the exploitation of an appropriate part of the surplus[171]. Other rights that other States enjoy are the freedoms of navigation and overflight, laying of submarine cables and pipelines and other internationally lawful uses of the sea related to these freedoms.

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169 Section 15(4) of EEZ Act

170 Section 33 of EEZ Act

171 Article 62 of UNCLOS III. See also Article 69 and Article 70 of UNCLOS III.

The Fisheries Act does not explicitly express a Malaysian obligation to determine the allowable catch and its capacity to harvest them . However, there is the possibility for foreign fishing vessels to fish in Malaysian fisheries waters with permits issued by Malaysia[172],taking into account the provisions stipulated under Section 18(1) of the Fisheries Act inter alia the provisions of the fisheries plans referred to in Part III of the Fisheries Act. Part III of the Fisheries Act concerns the preparation of fisheries plans designed to ensure optimum utilization of fisheries resources, consistent with sound conservation and management principles and with the avoidance of overfishing.

The Fisheries Act is to replace the 1963 Act that was thought to be no longer capable of dealing with new issues such as Fisheries Plans[173], Foreign Fishing Vessels[174], Turtles and Inland Fisheries[175], Aquaculture[176], and Marine Parks and Marine Reserve[177].It is also specially designed to intimidate illegal foreign fishing with the increase of monetary penalties from a maximum fine of M$1,000 (the 1963 Act) to M$100,000 in case of a crew and M$1,000,000 in case of the owner or master of the vessel[178].

Section 15 through Section 24 of the Fisheries Act deals with foreign fishing vessels. Under the Fisheries Act,"foreign fishing vessel" is defined as any fishing vessel other than a local fishing vessel[179]. "Local fishing vessel" means any fishing vessel which is not registered outside Malaysia and which is wholly owned by:

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[172] Section 19 of Fisheries Act

[173] Part III of Fisheries Act

[174] Part V of Fisheries Act

[175] Part VII of Fisheries Act

[176] Part VIII of Fisheries Act

[177] Part IX of Fisheries Act

[178] Section 25(a) of Fisheries Act

[179] Section 2 of Fisheries Act

(a) a natural person who is a citizen, or natural persons who are citizens, of Malaysia;

(b) a statutory corporation established under any law of the laws of Malaysia;

(c) the Government of Malaysia or the Government of a State in Malaysia; or

(d) a body corporate or unincorporate established in Malaysia and wholly owned by any of the persons described in paragraph (a), (b) or (c) of this definition, or another body corporate or unincorporate wholly owned by any of the persons described in paragraph (a), (b) or (c) of this definition[180].

The aforementioned conditions are to establish a genuine link between Malaysia and the vessel so as to prevent foreigners from owning the local fishing vessels.

The most crucial point stipulated by the Fisheries Act is embodied in its definition of Malaysian fisheries waters. "Malaysian fisheries waters" means maritime waters under the jurisdiction of Malaysia over which exclusive fishing rights or fisheries management rights are claimed by law and includes the internal waters of Malaysia, the territorial sea of Malaysia and the maritime waters comprising the EEZ of Malaysia[181]. Thus, as far as fisheries are concerned, the Fisheries Act does not recognize the EEZ as a zone sui generis, instead it has lumped together the legal demarcations of internal waters, the territorial sea and the EEZ under the definition of Malaysian fisheries waters. The effect of this definition is so detrimental, as we will observe later, that Malaysia might have been excessive in its exercise of sovereign rights over the EEZ.

Foreign Fishing Vessels

The country most affected by the introduction of the Fisheries Act is

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[180] Ibid

[181] Ibid. Note that there is slight difference between the definition given by the EEZ Act (see page 24-25) and the Fisheries Act. In the latter example, Malaysia claimed exclusive fishing rights or fisheries management rights over its waters.

Thailand; a "zone-locked" State that is concerned with the ability of its fishermen to transit through the Malaysian waters on their way to other fishing grounds. From the Malaysian perspective the biggest encroachment problem is from the Thais[182]. This is the case pricipally from three reasons:

1. Malaysian waters are easily accessible to Thai fishermen who are concentrated along the southern coasts of Thailand.
2. Malaysian waters have not been so greatly exploited as the Thai waters.
3. Lack of a maritime boundary between the two countries in the Gulf of Thailand.

Attard pointed out that Malaysia is among 17 countries that do not refer to the freedoms of movement and communication in their EEZ claims[183]. In formulating the Fisheries Act, the intrinsic intention was revealed with regard to the freedom of navigation of foreign fishing vessels.The dismissal of such freedom is observed in Section 16(1) of the Fisheries Act which reads:

> Subject to subsections (2) and (3), a foreign fishing vessel may enter Malaysian fisheries waters for the purpose of exercising its right of innocent passage through such waters in the course of a voyage to a destination outside such waters.

Subsection (2) designates passage to include stopping and anchoring only: (a) if the vessel is in distress; (b) for the purpose of obtaining emergency medical assistance for a member of its crew; or (c) to render assistance to persons, ships or aircraft in danger or distress. However, the passage will not be considered innocent if the vessel fails to comply with subsection (3) laid out as follows:

> The master of a foreign fishing vessel entering Malaysian fisheries waters for the purpose mentioned in subsection (1) shall notify by radio an authorized officer of the name, the flag State, location, route and destination of the vessel, the types and amount of fish it is carrying and of the circumstances under which it is entering Malaysian fisheries waters.

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[182] Ted L. McDorman and Panat Tasneeyanond,"Increasing Problems for Thailand's Fisheries,"Marine Policy,205(1987)207.

[183] Attard,supra note 42,pp.81-82

The requirement of foreign fishing vessels to notify Malaysian authorities prior transitting the economic zone, is according to Burke, a unique provision in State practice[184]. Note that the notification must be made by radio so that the authorities will be able to assert constant monitoring over the transitting vessels. From time to time, the authorized officer will perform random inspection to ascertain that no fishing has been done along the route by computing in situ the types and amount of fish found on board the vessel with the given informations prior to entering Malaysian fisheries waters.

If a foreign fishing vessel has failed to notify the Malaysian authorities upon entering its waters, the vessel is subjected under Section 56 of the Fisheries Act which reads:

> (1) Subject to subsection (2), where,
>
> (a) any fish; or
> (b) fishing appliance or other equipment for fishing,
>
> is found on board a foreign fishing vessel in Malaysian fisheries waters, such fish, fishing appliance or equipment, as the case may be, shall be presumed, unless the contrary is proved -
>
> (i) to have been caught in Malaysian fisheries waters; or
> (ii) to have been used for fishing in Malaysian fisheries waters,
>
> respectively without a permit issued under this Act.

The aforementioned clause is presumptive in nature in that it can be set aside if a foreign fishing vessel is in compliance with Section 16(3) of the Fisheries Act and shows proof as stipulated by subsection (2), inter alia that the fish is held in a sealed hold, all fishing appliance and equipment are properly stowed and secured on board the vessel[185]. Failure to comply with both Section 16(3) and Section 56(2) of the Fisheries Act,means the foreign fishing vessel is liable to be charged under Section 15(1)(a) of the Fisheries Act which stipulated

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[184] William T.Burke,"Exclusive Fisheries Zones and Freedom of Navigation," San Diego Law Review,Vol.20(1983),p.618

[185] Section 56(2) of Fisheries Act

that no foreign fishing vessel shall fish or attempt to fish in Malaysian fisheries waters without an authorization from the Government of Malaysia. If a person is found guilty, and the vessel concerned is a foreign fishing vessel, such person shall be liable to a fine not exceeding M$1,000,000 in the case of the owner or master, or M$100,000 in the case of a crew[186]. In addition to monetary penalties, the vessel (including its equipment, furniture, appurtenances, stores, cargo and fishing appliance) and fish which are used and caught respectively, in the commission of such offence or in relation to which such offence has been committed shall be forfeited[187].

Enforcement

Within the contiguous zone or the EEZ, the powers of enforcement are limited strictly to the purpose for which such jurisdictional zones are established, and they are inherently ambiguous because they do not derive from sovereignty but from a concessive rule of international law[188]. In its EEZ, a 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 the Convention[189]. Article 73(3) of UNCLOS III stated that coastal State penalties for violation 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.

Section 46 of the Fisheries Act provides powers to an authorized officer to stop, board and search any vessel within the Malaysian fisheries waters where

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[186] Section 25(a) of Fisheries Act

[187] Section 52(1) of Fisheries Act

[188] D.P. O'Connell, The International Law of the Sea (UK: Clarendon Press-Oxford, 1984), Vol. II, p.1071

[189] Article 73(1) of UNCLOS III

he has reason to believe that an offence has been committed. The authorized officer does not require a warrant to perform inspections and other duties relating to enforcement. Where necessary, the authorized officer may use such force as may be reasonable in his effort to carry out the duties provided under the Act[190]. The Fisheries Act does not elaborate on the degree of force that is applicable but, in exercising force during arrest, Galid pointed out that the enforcing authorities must weigh the seriousness of the offence against the value of human life[191]. O'Connel suggested:

> (A)t the least there must be adequate warning and instruction, which includes internationally recognized visual signals and sound signals. Only when these are clearly ineffective may gunfire be used, and then it must be in the form of blank shots, or shots deflected across the bow; and only when these measures are also clearly ineffective may a ship be fired into. But in that case solid shot with a minimal effect and of the lowest feasible calibre must be used. Unless arrest is resisted by return of fire, explosive shot should be used.[192]

The maximum degree of force is only applied when there is sufficient evidence that the ship has returned the fire, otherwise, no action should be taken leading to injuries or death to human beings.

The implementation of the laws and regulations pertaining to the right of innocent passage is not without difficulties; both on the Malaysian side and that of the other States. Since Thailand is most affected by the new legislation, our main concern is to look into their aggrieved situation. According to McDorman and Tasneeyanond, there are two provisions that Thailand could not agree on; firstly, the harsher penalties that are imposed on its fishermen and secondly, the provision for the innocent passage of fishing vessels through the Malaysian fisheries waters [193]. Harsher penalties imposed on Thailand's fishermen

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[190] Section 47(2) of Fisheries Act

[191] Rayner S. Galid,"Enforcement in the EEZ of ASEAN States," A Major Paper for MMA,University of Rhode Island,1989,p.45

[192] O'Connell,supra note 188,p.1072

[193] McDorman and P.Tasneeyanond, supra note 182,pp.208-209

have resulted in imprisonment since some of them were unable to pay the fines[194]. Innocent passage is usually associated only with the territorial sea, but Malaysia has used the term respecting the navigational rights for fishing vessels in the Malaysian 200-nautical mile economic zone.

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[194] Ibid.,p.210

# CHAPTER TWO

# THE LEGAL STATUS OF THE MALACCA STRAIT

## INTRODUCTION

Although the Straits of Malacca and Singapore are two different straits, they have been referred to as the " Malacca Straits " or the " Straits of Malacca " [1]. There seem to be an inconsistency in the usage of the terms and in the determination of the straits entrances. Koh, for instance, regarded the terms " Malacca Straits " and " Straits of Malacca " as not only including the Strait of Malacca and the Strait of Singapore, but also other straits , for example the Johore Strait[2]. Gupta, Poulose and Bhatia used the term " Malacca Straits " to include straits between the Indonesian island of Sumatra and Malaysia to the east and between the Riouw Archipelago and Singapore to the south[3]. In the text of agreement between Indonesia and Malaysia relating to the delimitation of the continental shelves between the two countries, the term " Straits of Malacca " had been used[4] but at closer look, the coordinates agreed to do not include the straits between south of Singapore and the Riouw Archipelago (see Map 2-1). The tenth, and the last coordinates agreed between the two

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[1] K.L. Koh, Straits in International Navigation (USA: Oceana Publications, Inc., 1982), p.49.

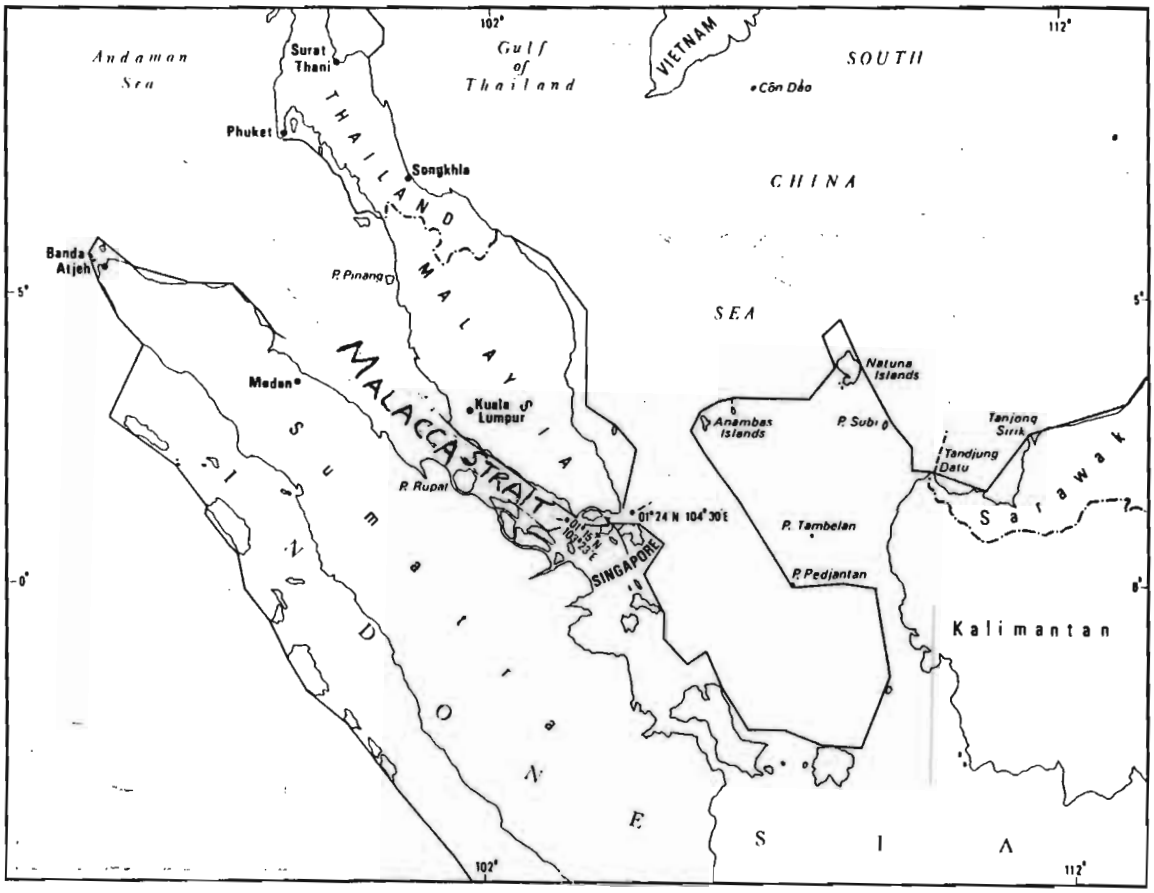
[2] Ibid., p.49

[3] Bhabani Sen Gupta, T.T. Poulose and Hemlate Bhatia, The Malacca Straits and the Indian Ocean (New Delhi: S.G. Wasani fot the Macmillan Co. of India Ltd., 1974), p.11

[4] Agreement Between Indonesia and Malaysia Relating to the Delimitation of the Continental Shelves Between the Two Countries.

## MAP 2 - 1

### The Malacca Strait



countries lay between Pulau Kukub of Malaysia and Karimon islands of Indonesia. However, the most widely used and acceptable terms[5], the Straits of Malacca as constituted by the Malacca Strait and the Singapore Strait, will be adopted throughout this study. The entrances of the Strait will be discussed under the geography of the Strait.

The Strait is bordered by Indonesia and Malaysia, and to some extent Thailand which borders the northeastern entrance of the Strait. According to Tangsubkul, the northern entrance of the Malacca Straits begins between Diamond Point ( at Latitude $5^{o}$ 15'N ,Longitude $97^{o}$ 30'E ) of Indonesia, and Ko Lawi and Ko Ladang ( Batong Group, at Latitude $6^{o}$ 50'N, Longitude $99^{o}$ 20' E ) of Thailand[6]. However, Thailand's role in the political arena of the Strait had been insignificant . Unlike Indonesia and Malaysia, Thailand's dependence of the Strait is more as a user State than a Strait State. Being situated at the widest part of the Strait, and almost completely exposed to the Andaman Sea, Thailand would not be affected by heavy traffic in the Strait, but as a distant-fishing nation[7], the Strait provides the shortest possible routes for its fishing

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[5] Many authors used the term " Malacca Strait " to refer a strait between northeastern of Sumatra,Indonesia and northwestern of Malaysia at the northern entrance, and Pulau Kukub/Tg Bulus, Malaysia and Karimon islands, Indonesia at the southern entrance. See Robert W. Smith,"An Analysis of the Concept "Strategic Quality of International Straits" : A Geographical Perspective With Focus on Petroleum Tanker Transit and on the Malacca Strait," Unpublished thesis for MA in Geography,URI,1973,p.83. See also Lewis M. Alexander,Navigational Restrictions Within the New LOS Context: Geographical Implications for the United States (Peace Dale,RI: Offshore Consultants,Inc.,1986),p.193.

[6] P. Tangsubkul,"An Asian Viewpoint on the Status of Straits in East Asia", paper presented at the External Section of the Hague Academy of International Law,Bangkok,1974,p.4

[7] Choo-ho Park and Jae Kyu Park,eds.,The Law of the Sea:Problems from the East Asian Perspective(Honolulu: The Law of the Sea Institute,University of Hawaii,1987),p.414 . See also Ted L. McDorman and Panat Tasneeyanond," Increasing Problems for Thailand's Fisheries," Marine Policy,205(1987)215.

fleet to sail to other fishing grounds.In 1971, Indonesia, Malaysia and Singapore made a joint statement adopting a common position on matters relating to the Straits of Malacca and Singapore.[8] Paragraph 4(v) of the Joint Statement reads :

> The Governments of the Republic of Indonesia and of Malaysia agreed that the Straits of Malacca and Singapore are not international straits while fully recognizing their use for international shipping in accordance with the principle of innocent passage. The Government of Singapore takes note of the position of the Governments of the Republic of Indonesia and of Malaysia on this point.

Since the Straits of Malacca provide the only maritime means of access between Thailand;west and east coasts,the Thai Government has not been conspicuous in its support of the joint position taken by Indonesia and Malaysia on the status of the waterway[9]. Although Singapore does share common interests with Indonesia and Malaysia over the safety of navigation and control of oil pollution, it reserved its position on the view expressed by both Indonesia and Malaysia " that the Straits of Malacca and Singapore are not international straits " by pointedly only taking note[10]. Singapore has a far stronger interest in freedom of navigation through the straits, given the nature of its economy and its vulnerability to geo-political conditions.

The freedom of navigation in the Strait had never been contended prior to the UNCLOS I. There existed the freedom of high seas in waters beyond the territorial seas of Indonesia and Malaysia, and the fact was that the Strait

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[8] Joint Statement of the Governments of Indonesia, Malaysia and Singapore, 16 November 1971 .

[9] Michael Leifer,International Straits of the World: Malacca, Singapore and Indonesia(The Netherlands: Sijthoff & Noordhoff,1978),p.35

[10] See also Koh,supra note 1,p.76

had been used internationally since time immemorial[11]. In 1960, the legal scenario of the Strait began to metamorphose initiated by the promulgation of the Indonesian legislation concerning its territorial waters[12]. Article 1(2) of the Act Concerning Indonesian Waters, inter alia , stipulated that the Indonesian territorial sea is a maritime belt of a width of 12 nautical miles measured from the baselines which consist of straight lines connecting the outermost points on the low water mark of the outermost islands. In 1969, when Malaysia proclaimed its 12-nautical mile territorial sea through the emergency ordinance, the Strait could no longer hold its high seas characteristics.The Malaysian claim had overlapped the Indonesian claim and starting from One Fathom Bank to the southern entrance of the Strait, a ship would be sailing in the territorial seas of both countries. In the same year,. Indonesia and Malaysia signed an egreement relating to the delimitation of the continental shelf in the Strait and in 1971, together with Thailand, the three States signed an agreement relating to the delimitation of the continental shelves in the northern part of the Straits of Malacca. The legal developments in the strait had perturbed some great maritime powers especially since the UNCLOS I itself had failed to accommodate their interests.If straits fell under the category of high seas, then the interests of the maritime powers would be safeguarded automatically; but if straits fell under the category of territorial seas, then the constraints of the doctrine of innocent passage would apply. This was made abundantly clear in the provisions of the

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[11] For further readings relating to the roles of the Strait in international navigation ,See Joginder Singh Jessy,History of Malaya(1400-1959)(Penang: United Publishers and Peninsular Publications,1965) and John Bastin and Robin W. Winks, ed.,Malaysia:Selected Historical Readings(Kuala Lumpur:Oxford UP,1966).

[12] Act Concerning Indonesian Waters,18 February 1960. The enactment of the Act was a result of Indonesian proclamation on the archipelagic concept. See also Lewis M. Alexander,ed.,Law of the Sea: Needs and Interests of Developing Countries.Proceedings of the Seventh Annual Conference of the Law of the Sea Institute,June 26-29, 1972, at URI,Kingston,Rhode Island. pp. 166-177.

1958 Convention on the Territorial Sea and Contiguous Zone that precluded the suspension of the right of innocent passage in straits used for international navigation[13].

The UNCLOS III has attempted to accommodate the interests of maritime powers by introducing a concept of transit passage which was in fact proposed by the British delegation at the Third UN Law of the Sea Conference in Caracas in July 1974[14]. In 1982, when UNCLOS III was opened for signature in Montego Bay; Indonesia and Malaysia , along with 117 other countries signed the treaty thus endorsing the concept of transit passage in straits used for international navigation.

It is the intention of this chapter to study the boundary agreements made by the States bordering the Strait relating to the delimitation of the territorial seas and the continental shelves and their relationships with the regime of straits used for international navigation. Emphasis will be devoted to the effects of such a regime on the municipal laws enacted by Malaysia in its effort to protect and manage the resources in the Strait.

## GEOGRAPHY

The shortest distant connecting the Indian Ocean and the South China Sea is through the Malacca Strait and the Singapore Strait. In fact both straits are so interdependent with regard to navigation that many writers are comfortable in referring them as a single navigational entity. However, with respect to the study of the legal regime of the straits, it is possible to differentiate them

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[13] Leifer, supra note 9, p.96

[14] Ibid., p.96

geographically into two components as the Malacca Strait is bordered by Indonesia, Malaysia and Thailand whereas the Singapore Strait is bordered by Indonesia, Malaysia and Singapore. This study only concerns the Malacca Strait and the States bordering it.

The length of the Strait varies, but Smith quoted the length to be approximately 500 nautical miles measured from abreast Acheh Head, the northwestern extremity of Sumatra Island, and Ko Phuket (Salang Island), to Bukus Point and the Karimon Islands, where the Strait joins the Singapore Strait[15] (see Map 2-2). Gupta, Poulose and Bhatia when estimating the length of the Straits of Malacca proposed two northern entrances; the first one is at the Ujong Massam Muka of Indonesia and the other is at Telok Anson(Telok Intan) of Malaysia[16]. Alexander stated that the Strait is between Pulau Iyu-Kecil off Sumatra and Pulau Kukup off Malaysia, giving the length as 250 nautical miles[17].

There seem to be a controversy as to where should the Strait ends and where should the Singapore Strait begin . According to Koh, the Straits of Malacca not only include the Malacca Strait and the Singapore Strait, but also other straits. He then grouped the straits into 4[18] ; (1) the Strait of Singapore, which joins the Strait of Malacca, the entrance to which is Singapore's Tg. Gul, and Indonesia's Pulau Nipa and Singapore's Bedok and Indonesia's Tanjong Sikwang; (2) the Johore Strait between Malaysia and Indonesia; (3) the straits between Malaysia's Tahan Datok and Indonesia's Tg. Pergam and the straits between Malaysia's Tg. Stapa and Indonesia's Tg. Babi and (4) the straits lying between

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[15] Smith, supra note 5, p.83

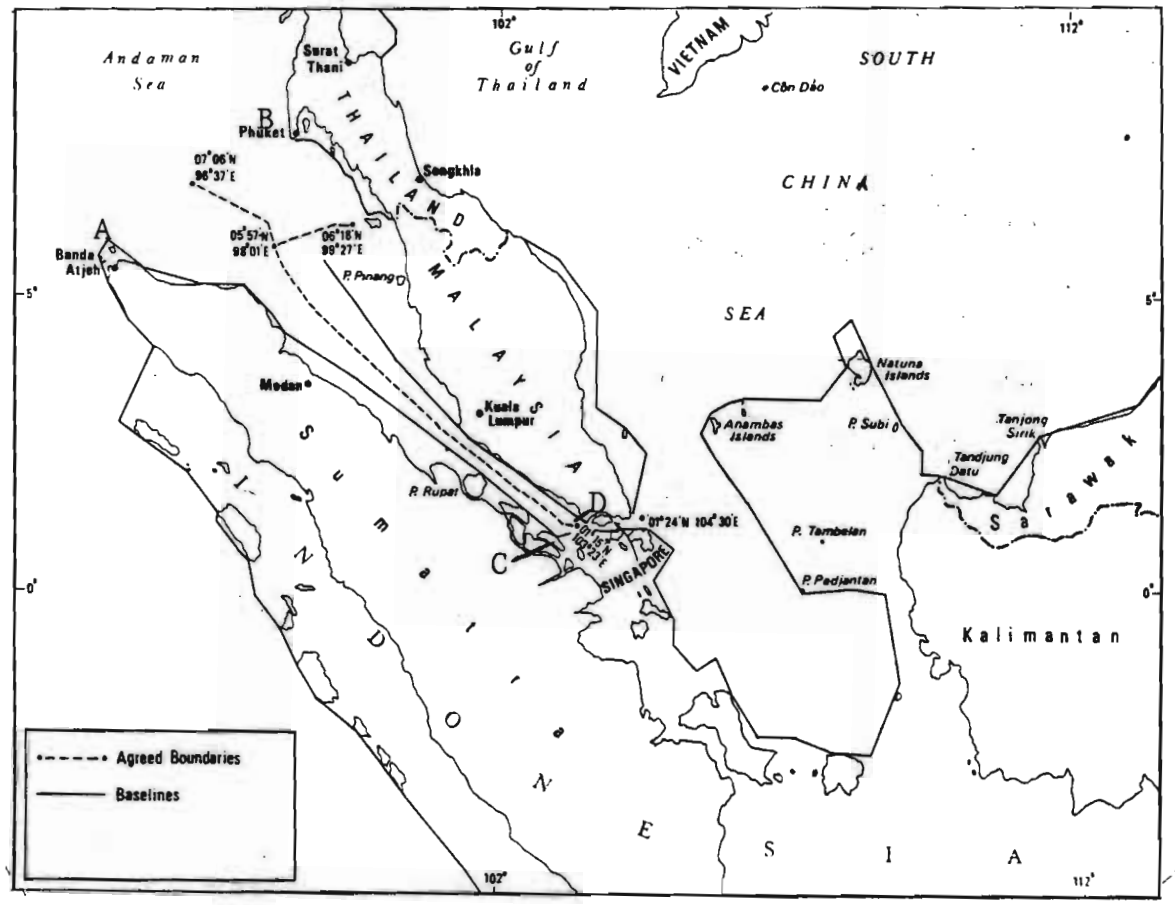
[16] Gupta, T.T. Poulose and Hemlata Bhatia, supra note 3, p.11

[17] Alexander, supra note 5, p.193

[18] Koh, supra note 1, p.54

MAP 2 - 2

The Length of the Malacca Strait




A = Acheh Head
B = Ko Phuket
C = Karimon Islands
D = Bukus Point

P.Penang - Ug. Thamiang entrance and between P. Kukub and Little Karimun (see Map 2-3). As proposed by Koh, the southern entrance of the Strait will be between Tg. Gul of Singapore and Pulau Nipa of Indonesia. However, this is not widely accepted as most writers seem to refer the beginning of the Singapore Strait at P.Kukub/Tg. Piai of Malaysia and Little Karimon Island of Indonesia[19].

For the purpose of this study, the length of the Strait is measured from a point at Latitude 5° 57'.0 N, Longitude 98° 01'5 E (hereinafter the Common Point) at the northern entrance to a point at Latitude 01° 15'.0 N, Longitude 103° 22'.8 E at the southern entrance (see Map 2-4). The former is a Common Point agreed to between Indonesia, Malaysia and Thailand as a starting point of their continental shelves boundary, while the latter is a tenth point as agreed by Indonesia and Malaysia in their agreement of the delimitation of the continental shelf. Therefore, the distance between these points is approximately 433 nautical miles.

The breadth of the Strait varies from 126 nautical miles to a narrow 7.8 nautical miles near Pulau Kukub in the south[20]. However, at the northern entrance of the Strait, several measurements can be constructed depending on the purposes. Koh pointed out that there are two main entrances of significance; the entrance from the Indian Ocean via the Andaman Sea - from Malaysia's Pulau Perak and Indonesia's Diamond Point or Malaysia's Pulau Penang and Indonesia's Ug. Thamiang[21], the former being 91 nautical miles apart , the latter about 126 nautical miles apart. Smith estimated the width of the Strait to vary from

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[19] Gupta, T.T. Poulose and Hemlata Bhatia, supra note 3, p.17. See also Smith, supra note 5, pp. 86-87. Note that Tanjung/Tg.=Point, Ug.=Ujung and Pulau/P.= Island. Bukus Point and Tanjung Bulus are the same Tanjung. See Chart issued by Office of the Geographer, Dept. of State, revised 10/27/69. In Koh, supra note 1, p.53, the same location has been named Tanjung Piai.

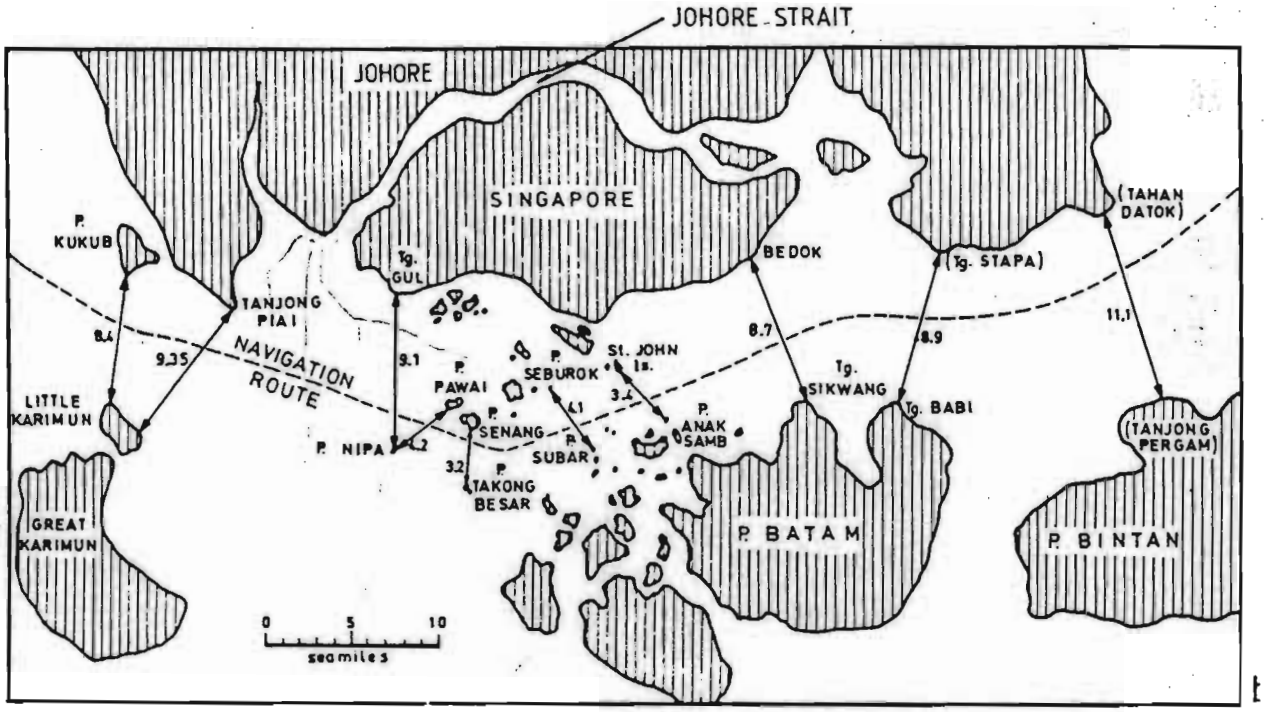
[20] Koh, supra note 1, p.54

[21] Ibid., p.54

MAP 2 - 3

The Malacca Strait and the Singapore Strait

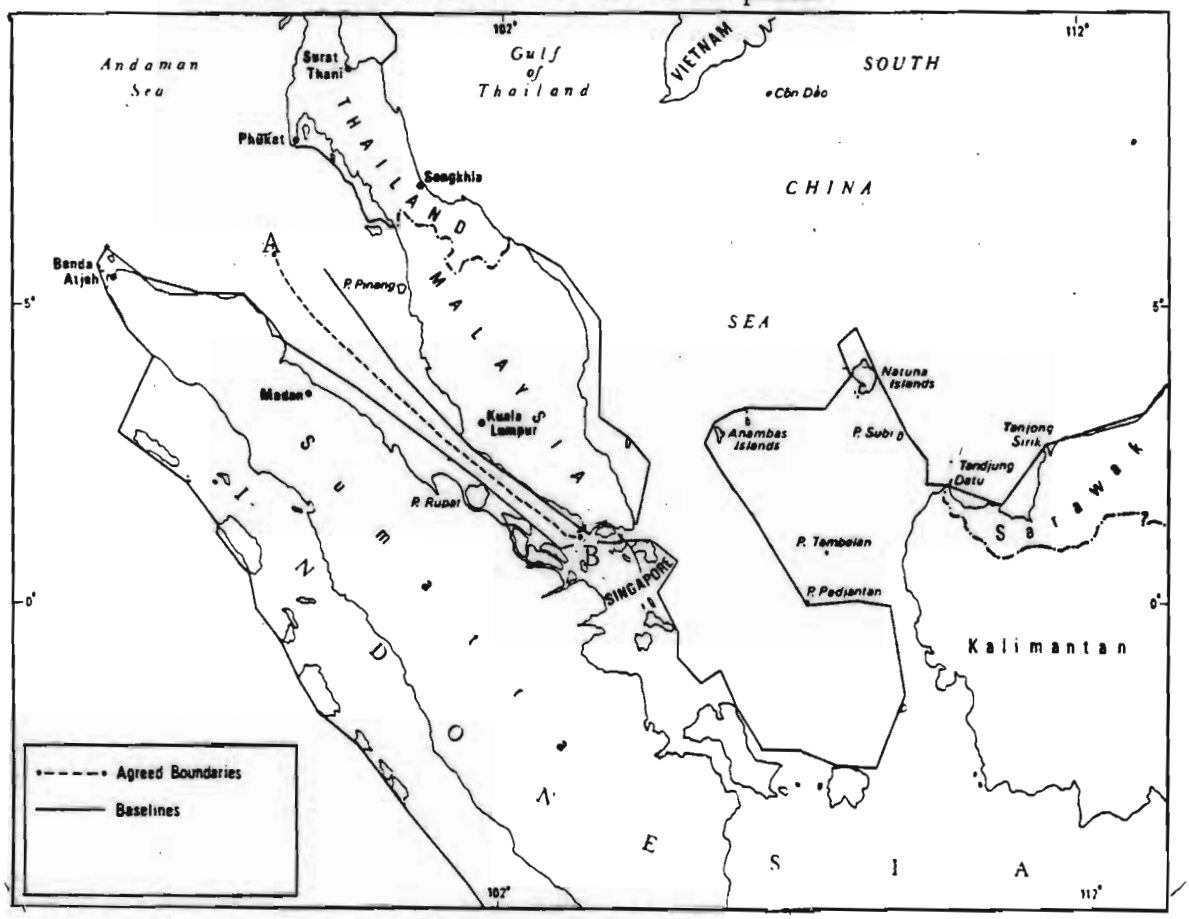
(NB: Tg. = tanjong = point; P. = pulau = island.)



MAP 2 - 4

The Length of the Malacca Strait as measured

from the Common Point to the tenth point




A =Common Point= Lat. $05^0$ 57'.0 N, Long. $98^0$ 01'.5 E

B =The tenth point= Lat. $01^0$ 15'.0 N, Long. $103^0$ 22'.8 E

approximately 220 nautical miles, at the northern entrance, to 7.8 nautical miles at the Karimon Islands[22]. The Strait reduces to a breadth of about 165 nautical miles between Jambu Ayer of Indonesia and Pulau Penang of Malaysia. Since this study has adopted the Common Point as a point from where the length of the Strait is measured, it seem appropriate and practical to measure the breadth of the Strait from such point. If a straight line is drawn from Pulau Langkawi of Malaysia, passing through the Common Point to Pediri of Indonesia, then the approximate breadth will be 240 nautical miles. At the southern entrance of the Strait, the narrowest breadth is 7.8 nautical miles but if measured from Pulau Kukub to Little Karimon Island, the distance will be 8.4 nautical miles[23].

The range of depth is approximately 69-318 feet[24]. The relatively shallow waters of the Strait, which has governing depths of less than twenty-three meters ( 75 feet ) in the greater part of the funnel area, are made even more uncertain by the dune like character of the seabed whose topography is influenced by ocean currents[25].

## MARITIME BOUNDARIES IN THE STRAIT

### Baselines

The starting point of the delimitation of maritime zones is the drawing of baselines along a coast to close off internal waters of the coastal State concerned[26]. Under Article 3 of the 1958 UN Convention on the Territorial

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[22] Smith, supra note 5, p.84

[23] Koh, supra note 1, p.53

[24] Smith, supra note 5, p.84

[25] Leifer, supra note 9, pp.55-56

[26] Kriangsak Kittichaisaree, The Law of the Sea and the Maritime Boundary Delimitation In South-East Asia (Singapore: Oxford UP, 1987), p.13

Sea and Contiguous Zone (hereinafter the 1958 CTSCZ), the normal baseline for measuring the breadth of the territorial sea is the low-water line along the coast as marked on large-scale charts officially recognized by the coastal State. Article 4(1) of the 1958 CTSCZ allowed the coastal State to apply the straight baseline system if the coast line is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity. Such straight baselines must not depart to any appreciable extent from the general direction of the coast and the sea areas lying within the lines must be sufficiently closely linked to the land domain [27]. In determining particular baselines, the economic interests peculiar to the region concerned, the reality and importance of which are clearly evidenced by long usage may be taken into account[28]. Low-tide elevations must not be used to draw the baselines unless lighthouses or similar installations which are permanently above sea level have been built on them[29].The system of straight baselines may not be applied by a State in such a manner as to cut off from the high seas the territorial sea of another State[30]. The coastal States that adopt the straight baselines system must indicate them on charts and give publicity[31]. Waters on the landward side of the baseline of the territorial sea form part of the internal waters of the State[32]; however, there exist the right of innocent passage in internal waters that are established under Article 4 if such waters were previously considered as part of the territorial sea or of the high seas[33].

The provisions of Article 7 of UNCLOS III virtually duplicate the 1958 CTSCZ, except for the addition of Article 7(2), which covers the problem of unstable coastlines such as may be found in a delta. However,

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[27] Article 4(2) of 1958 CTSCZ

[28] Article 4(4) of 1958 CTSCZ

[29] Article 4(3) of 1958 CTSCZ

[30] Article 4(5) of 1958 CTSCZ

[31] Article 4(6) of 1958 CTSCZ

[32] Article 5(1) of 1958 CTSCZ

[33] Article 5(2) of 1958 CTSCZ

as pointed out by Churchill and Lowe, the rules governing the use of straight baselines laid down in customary and conventional law are relatively imprecise, and thus allow States a considerable latitude in the way they draw straight baselines[34]. The States practices that can be considered have departed from the rules of international law in one way or another are as follows:[35]

(1) Drawing straight baselines along coasts which are not deeply indented (e.g. Albania, Cuba, Italy, Senegal and Spain).

(2) Drawing straight baselines along coasts which possess some offshore islands but which do not form a fringe in the immediate vicinity of the coast (e.g. Ecuador, Iceland, Iran, Italy, Malta and Thailand).

(3) Drawing straight baselines which depart to a considerable extent from the general direction of the coast (e.g. Burma and Ecuador).

(4) Drawing straight baselines so that the sea areas inside the lines are insufficiently closely linked to the land to be subject to the regime of internal waters (e.g. Burma ).

(5) Using low-tide elevations as basepoints, regardless of whether lighthouses or similar installations have been built on them (e.g. Egypt, Saudi Arabia and Syria).

(6) Drawing straight baselines in such a way as to cut off the territorial sea of another State from the high seas or EEZ (e.g. Morocco).

(7) Not publicizing the straight baselines drawn (e.g. Haiti, North Korea and Malaysia ).

(8) Utilizing basepoints in the sea for straight baselines (e.g. Bangladesh ).

Another problem relating to the usage of the straight baselines is the limit of the length of individual baselines. Alexander pointed out that neither the 1958 CTSCZ nor the UNCLOS III suggest a maximum limit, and the only potential yardstick is the 1951 Norwegian delimitation method approved by the International Court of Justice[36]. The longest line utilized by the Norwegians

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[34] R.R. Churchill and A.V. Lowe, The Law of the Sea (Great Britain: Manchester UP, 1988), p.32

[35] Ibid., pp.32-33

[36] Alexander, supra note 5, p.37

was 44-mile line across Lopphavet. By a declaration of 15 November 1968, Burma proclaimed the use of straight baselines thus utilizing the longest baseline of 223.3 nautical miles in length across the Gulf of Martaban[37]. In the South China Sea, Vietnam adopted the straight baseline system with nine turning points along its coast. Each baseline is between 50 nautical miles - 162 nautical miles. In the Andaman Sea, Thailand uses the straight baseline system with 18 turning points; each between 0.7 nautical miles - 16.3 nautical miles.

Malaysia has never proclaimed a straight baseline system[38] but it has been used in the agreement on the delimitation of the continental shelf with Indonesia in 1969. The baselines have seven turning points ranging between 5 nautical miles - 120 nautical miles each.The baselines link the two remote islands of Pulau Perak and Pulau Jarak where the former is about 59 nautical miles from the nearest fragment of Malaysian land territory while the latter is about 33 nautical miles (see Map 2-5). The breadth of 12-nautical mile territorial sea is the established from such straight baselines and according to Article 8 of the UNCLOS III, which repeats the Article 5 of the 1958 CTSCZ, the waters on the landward side of the baseline of the territorial sea form part of the internal waters of the State.

The legitimacy of the Malaysian adoption of the straight baseline system in the Strait is still an open question though Kittichasaree suggested that the straight baselines declared in the early 1970s might have already been consolidated or legitimized through long duration of acquiescence or estoppel concerning the practice in issue, but independent of conventional law[39]. He further

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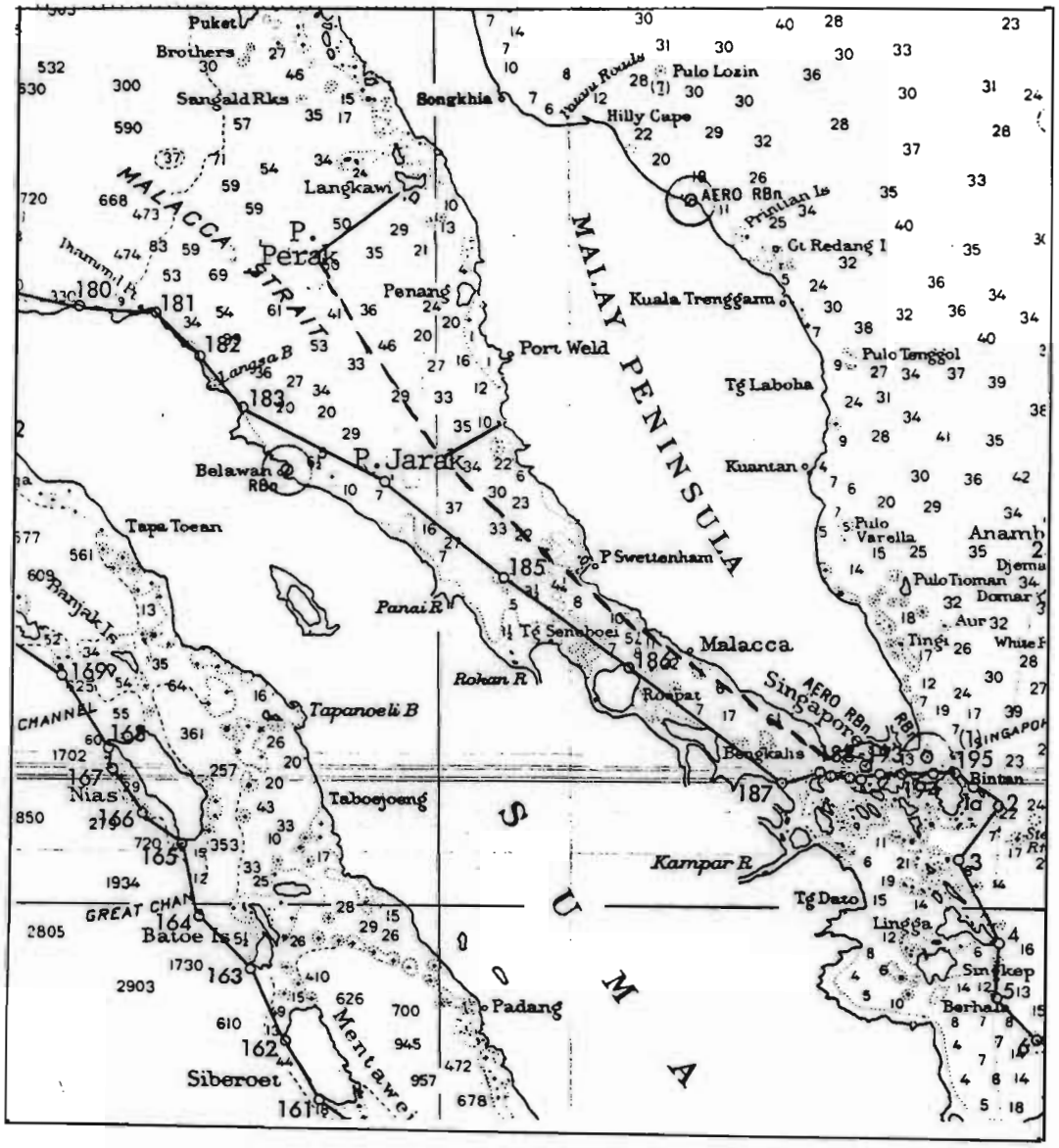
[37] Kittichasaree, supra note 26, p.14

[38] Ibid., p.27

[39] Ibid., p.28

MAP 2 - 5

The Malaysian Straight Baseline Joining
Pulau Perak and Pulau Jarak




The distance between P.Perak and P.Langkawi is about 59 nautical miles. The distance between P.Jarak and the nearest land fragment of Malaysia is about 33 nautical miles.

– – – – – Malaysian straight baseline

postulated that after many years without protest from other States, the straight baseline system adopted by Burma and Thailand seems to have already been legitimized. Malaysia, as it has been mentioned earlier, has not made a proclamation on any straight baseline, and that such a baseline exists has to be inferred from its official maps. It is doubtful, therefore, whether this is an adequate form of notice to the international community.[40] However, at this point, no protest has been recorded on the Malaysian straight baseline system in the Straight.

Delimitation of the Continental Shelves

The agreement between Indonesia and Malaysia relating to the delimitation of the continental shelf was signed at Kuala Lumpur on October 27, 1969. The agreement came into force on November 7,1969 and consisted of three segments; the first segment was delimited through the Strait for a distace of 399 nautical miles in accordance with the equidistance method, the second segment of 310 nautical miles is located between the Malaysian peninsula and the Indonesian islands extending out between Western Borneo and the Malaysian peninsula , and the third segment runs from the terminus of the land boundary between eastern Malaysia and the northwestern tip of the Indonesian territory of Borneo .

While Malaysia has adopted the straight baseline system in the Strait, Indonesia, on the other hand, has used the archipelagic baseline system. Indonesia's archipelagic claim was first formally advanced in the Declaration Concerning the Water Areas of Indonesia dated December 13, 1957 which claimed that Indonesia is an archipelago and all islands and seas in between must be

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[40] Article 4(6) of 1958 CTSCZ requires the Coastal State to indicate straight baselines on chart, to which due publicity must be given.Article 16 of UNCLOS III,in addition, requires such chart or list to be deposited with the Secretary-General of the United Nations.

regarded as one total unit. The claim was reinforced by two further enactments: the Act Concerning Indonesian Waters (February 1960), which confirmed that Indonesia is an archipelagic State; and the Decree Concerning Innocent Passage (June 1962), which stipulated the conditions under which foreign vessels could pass through Indonesia's internal waters.

The delimitation of the continental shelf in the Strait adopted the equidistance method after taking into account both the straight baseline systems of Indonesia and Malaysia. There are ten points agreed to by both countries starting at Point 1( Latitude 05° 27'.0 N,Longitude 98° 17'.5 E) at the northern entrance of the Strait and ending at Point 10(Latitude 01° 15'.0 N,Longitude 103° 22'.8 E) at its southern entrance. The purpose of the agreement was to resolve the possible conflict pertaining to oil resources. This is evidenced by Article iv of the 1969 Agreement Between Indonesia and Malaysia Relating to the Delimitation of the Continental Shelves, which reads:

> If any single geological petroleum or natural gas structure extends across the straight lines referred to in Article I and the part of such structure which is situated on one side of the said lines is exploitable, wholly or in part, from the other side of the said lines, the two Governments will seek to reach agreement as to the manner in which the structure shall be most effectively exploited.

Both countries also have agreed to settle any dispute arising out of the interpretation or implementation of the Agreement by consultation or negotiation[41].

At the northern part of the strait, the agreement relating to the delimitation of the continental shelf was signed by Indonesia, Malaysia and Thailand on December 21, 1971. The three countries agreed to a Common Point at Latitude 5° 57'.0 N,Longitude 98° 01'.5 E, where their continental shelf boundaries will start. The boundary of the continental shelves of Indonesia and Malaysia is thus formed by the straight line drawn from the Common Point in a

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[41] Article v of the Agreement Between Indonesia and Malaysia Relating to the Delimitation of the Continental Shelves, October 27,1969.

south-ward direction to Point 1 specified in the Agreement signed at Kuala Lumpur on October 27, 1969 between Indonesia and Malaysia relating to the delimitation of the continental shelves[42]. Between Malaysia and Thailand, their continental shelf boundary is formed by the straight lines drawn from the Common Point in a north-easterly direction to a point whose co-ordinates are Latitude 6° 18'.0 N,Longitude 99° 06'.7 E and from there in a south-easterly direction to a point whose co-ordinates are Latitude 6° 16'.3 N,Longitude 99° 19'.3 E and from there in a north-easterly direction to a point whose co-ordinates are Latitude 6° 18'.4 N,Longitude 99° 27'.5 E[43]( see Map 2-6 ).

The two aforementioned agreements have lessened the possibility of conflict and made it possible for the three countries to undertake off-shore oil exploration without encroaching into each other's territory[44].If there is a shared oil resources, the three countries have agreed that they will "seek to reach agreement as to the manner" the resources "will be most effectively exploited"[45].

Delimitation of the Territorial Sea

On March 17, 1970 a treaty delimiting the territorial sea boundary between Indonesia and Malaysia was signed and later came into force on March 10, 1971[46]. The Malaysian proclamation of its 12-nautical mile territorial sea has

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[42] Article 1(3) of the Agreement Between Indonesia,Malaysia and Thailand Relating to the Delimitation of the Continental Shelves Boundaries in the Northern Part of the Strait of Malacca,December 21,1971.

[43] Ibid.,Article 1(4).

[44] Lee Yong Leng,"Some Geopolitical Implications of UNCLOS III : Continental Shelf Problems," Singapore Journal of Tropical Geography,32( 1981 )36

[45] Supra note 42,Article III.

[46] See U.S. Dept. of State,Limits in the Seas no.50,Washington D.C.,1973

overlapped with the Indonesian territorial sea at One Fathom Bank and going south-ward to the Point 10. In the Agreement, both countries have agreed to adopt an equidistance method, where a line was drawn in the middle of the Strait. The adoption of the median line was also in accordance with Article 1(2) of the Act Concerning Indonesian Waters(February 1960) which stipulated that inter alia "in the case of straits of a width of not more than 24 nautical miles and Indonesia is not the only coastal State the outer limit of the Indonesian territorial sea shall be drawn at the middle of the strait."

Malaysia also has settled its territorial sea boundaries with Thailand where a line of equidistance was drawn from the point situated in mid-channel between Terutau Island of Thailand and Langkawi Island of Malaysia referred to in the Boundary Protocol annexed to the Treaty dated March 10,1909 respecting the boundaries of the Kingdom of Thailand and Malaysia[47].The co-ordinates agreed by both countries are at Latitude 6° 28'.5 N,Longitude 99° 39'.2 E, in a north-westerly direction to a point whose co-ordinates are Latitude 6° 30'.2 N, Longitude 99° 33'.4 E and from there in a south-westerly direction to a point whose co-ordinates are Latitude 6° 28'.9 N,Longitude 99° 30'.7 E and from there in a south-westerly direction again to the point whose co-ordinates are Latitude 6° 18'.4 N,Longitude 99° 27'.5 E[48].

Delimitation of the Exclusive Economic Zone

Although it is generally desirable that EEZ and continental shelf boundaries should coincide, the fact that Article 74 of the UNCLOS III stipulates

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[47] Treaty Series,no.19(1909);British and Foreign State Papers,vol.102, pp.128-129.

[48] Article 1(1) of The Treaty Between the Kingdom of Thailand and Malaysia Relating to the Delimitation of the Territorial Seas of the Two Countries, October 24,1979.

that such boundaries should represent an "equitable solution" will in many cases make it more difficult to agree on a common boundary: a boundary that might be equitable for EEZ purposes may not be equitable for continental shelf purposes because of the different considerations that are relevant to achieving an equitable solution in each case - for example, the location of fish stocks in the case of the EEZ, the geological characteristics of the seabed and the location of seabed mineral deposits in the case of continental shelf[49]. It follows that the priority accorded by the parties to either the resources of the seabed or those of the superjacent water will determine the "criteria" which are equitable and appropriate for the single multi-purpose boundary line[50].

When Malaysia proclaimed its EEZ, it merely stated that the area concerned extends to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured. A similar provision can also be found in the Indonesian and Thailand proclamations[51]. Though the delimitation of the continental shelf boundaries in the Strait have been completed prior 1982, up till now, the three countries have not reached any agreement on the delimitation of the EEZ boundaries. However, Indonesia, Malaysia and Thailand have made their positions clear in this respect ; that the delimitation of the EEZ is to be concluded between the opposite or adjacent States through agreements .

Meanwhile, there seems to be a general consensus among the three

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[49] Churchill and A.V. Lowe, supra note 34, p.160

[50] Kittichasaree, supra note 26, p.133

[51] Para. 1 of the Declaration By the Government of the Republic of Indonesia Concerning the EEZ of Indonesia and Para. 1 of Thailand's Royal Proclamation concerning the EEZ of Thailand.

countries to regard the agreed continental shelf boundaries as the EEZ boundaries (see page 22). Hamzah pointed out that a unitary line representing both the boundaries is much preferable as multiple boundary lines are bound to create a lot of problems[52]. It is impractical to have different boundaries for the seabed and for the waters above, since this would confuse the jurisdictions being exercised. If State A possessed sovereign rights over the seabed and State B those over the superjacent waters, State A could not control environmental threats to sedentary fishes, or sufficiently control security threats to installations, while State B could not control environmental threats to fisheries from the conduct of exploitation of the seabed[53].

But the fact that the boundaries of continental shelf and the EEZ under certain circumstances are not identical cannot be discarded. It might be that State A is logically entitled, by virtue of the concept of apportionment, to a particular area of continental shelf, yet the inhabitants of that State do not fish there, or do not fish at all; whereas in the waters above that area the inhabitants of State B do fish, have done so for a long time, and are dependent upon the resource[54]. This could be the basis for an argument brought by State B to achieve an equitable solution. If no agreement can be reached within a reasonable period of time, the States concerned should resort to dispute settlement procedures as stipulated under Part XV of the UNCLOS III[55]. However, being members of ASEAN, Indonesia, Malaysia and Thailand are also obligated to resolve their differences by "rational, effective and sufficiently flexible procedures, avoiding negative attitudes which might endanger or hinder

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[52] Park and Jae Kyu Park, supra note 7, p.365

[53] D.P. O'Connell, The International Law of the Sea (Great Britain: Clarendon Press-Oxford, 1984), p.729

[54] Ibid

[55] Article 74(2) of UNCLOS III

co-operation"[56].

LEGAL STRAIT

Geography

Straits can be defined geographically and legally[57]. According to Bruel, a strait can be defined as a contraction of the sea between two territories, being of a certain limited width and connecting two seas otherwise separated by the territories in question[58]. The geographical definition contemplates a natural and not an artificially constructed waterway such as Suez Canal or the Panama Canal[59]. This implies that minimum maintenance, other than the provision of navigational aids, is required to keep the passage open[60].

Altogether, there are four basic criteria in the geographical definition of a strait:

1. a strait must not be artificially created. A canal can perform similar functions of a strait, but because it is not a natural arm of the sea, it is not a strait;

2. a strait must have a certain limited width.Thus, a strait is also referred to as a contraction of the sea, implying a degree of narrowness(relative to the two water bodies it connects).However, it is not possible to state any definite measure.The minimum width of major straits varies between 1.2 Km( Dardenelles) to 311.1 Km(Davis Strait).Likewise, the length and depth of Straits vary considerably;

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[56] Treaty of Amity and Cooperation in South-East Asia,24 February 1976.

[57] Alan Chia and Lee Yong Leng,"The Strategic Strait With Special Reference to the Malacca Straits".Singapore Journal of Tropical Geography,Vol.8,No.2,(1987),p.97

[58] Erik Bruel,International Straits: A Treatise on International Law,2 Vols. (London:Sweet & Maxwell,1947),p.19

[59] Koh,supra note 1,p.12

[60] Smith,supra note 5,p.3

3. a strait must separate two areas of land. It is irrelevant whether the land masses are two continents, one continent and an island, or two islands; and

4. a strait must connect two areas of sea. The sizes of the bodies of water the strait connects are also immaterial(although following from the second criterion, they should be larger than the strait itself)[61].

The Strait can easily satisfy the aforementioned criteria; it is a naturally formed waterway, the widest width is about 240 nautical miles and the narrowest is about 8.4 nautical miles,it is between Peninsula Malaysia and Sumatra Island and it connects Indian Ocean with the South China Sea via Singapore Strait.

Instead of by dimensional consideration, a strait may be defined by function[62].Functionally, a strait is a place of tranfer(which consists of the traffic that travels between the two territories on each side of the strait) or it may connect two larger bodies of water.If the strait is used entirely for tranfer between territories of a single nation, then the strait is national. Likewise, if the tranfer occurs between two countries bordering the strait, then the strait is international.

Legal Strait

It is the legal status of the waters constituting the strait and their use by international shipping, rather than any definition of "strait" as such, that determines the rights of coastal and flag States[63]. If the strait is wide enough to allow a belt of EEZ or high seas, then there exist the freedom of navigation and the right of innocent passage through the bands of territorial

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[61] Chia and Lee Yong Leng,supra note 57,p.97

[62] Smith,supra note 5,p.3

[63] Churchill and A.V. Lowe,supra note 34,p.87

seas which lie on either side it.Such a strait is no more a legal strait since it has the characteristics similar to EEZ and high seas with respect to navigation. Smith defines legal strait as a strait having minimum breadth equal to, or less than, the combined territorial sea claim of the bordering State or States[64]. He further said that, if the passage were wider than the combined territorial sea claims, the feature would not be a legal strait because passage would be accomplished without entering the territorial sea of the littoral States.

Though UNCLOS I does not define the maximum breadth of the territorial sea, it recognizes the right of innocent passage for foreign ships in the waters but this right can be suspended by the coastal State if that is essential for the protection of its security[65].However, a different treatment was given to the straits which are used for international navigation between one part of the high seas and another part of the high seas or the territorial sea of a foreign State. Article 16(4) of the 1958 CTSCZ stipulates that there should be no suspension of the innocent passage of foreign ship through such straits. This concept of non-suspended innocent passage in the straits used for international navigation was later changed to the concept of transit passage which applies to straits used for international navigation between one part of the high seas or an EEZ and another part of the high seas or an EEZ. Article 38(1) of the UNCLOS III stipulates that inter alia all ships and aircraft enjoy the right of transit passage which shall not be impeded. However, for a strait connecting the high seas or the EEZ with the territorial sea of a foreign State, the right of non-suspended innocent passage is retained[66].

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[64] Smith, supra note 5, p.2

[65] Article 16(3) of 1958 CTSCZ

[66] Article 45(1)(b) and (2) of UNCLOS III

Since there is no definition of "straits used for international navigation" offered by both the 1958 CTSCZ and the UNCLOS III, the only other source of international law on straits ,that is, The Corfu Channel Case(1949) will be referred to. The International Court of Justice, in holding that the Corfu Channel should be classed as an international strait, stated that the decisive factor in categorizing a strait as an international waterway through which the right of passage exists is "in its geographical situation as connecting two parts of the high seas and the fact that it is being used for international navigation", and noted its "special importance to Greece by reason of the traffic to and from the port of Corfu" [67].Its secondary importance as a sea route, and the actual volume of traffic through the Channel, were irrelevant to its legal status[68]. Koh pointed out that, from The Corfu Channel Case(1949), emerged the fact that placing a strait in an international category does not require as a condition that the strait must attract global interest - an interest in passage on a regional basis will suffice.[69] He further said that the traffic through straits must generally be destined for ports other than those along the coastlines of the straits. This will emphasize their utility.

Legal Regime of the Strait

According to legal criteria, the Strait would begin at the One Fathom Bank and going down south-ward to Point 10 (the tenth point of the 1970 Treaty of the Delimitation of the Territorial Sea between Indonesia and Malaysia) where it ended. From there on, the Strait meets the Singapore Strait which leads to

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[67] International Court of Justice,Corfu Channel Case(Merits),ICJ Rep.(1949)4.

[68] Churchill and A.V. Lowe,supra note 34,p.88

[69] Koh,supra note 1,p.22

the South China Sea. If a ship enters the Strait from the northern entrance, it will first approach the EEZ where the freedom of navigation can be exercised until it reaches the One Fathom Bank. From this point to a point between Karimon Island and Pulau Kukub, the ship is navigating in the territorial seas of Malaysia and Indonesia where it is subject to the regime of transit passage. If the ship happened to be a deep draught vessel or a Very Large Crude Carrier, then its maneuvrability is subject to the regime of Traffic Separation Scheme ( for discussion see page 95 ).

CHAPTER THREE

# N A V I G A T I O N

# I N

# T H E  M A L A C C A  S T R A I T

## INTRODUCTION

When the concept of "free transit" was introduced by the great maritime powers at Colombo and Lagos, many small countries objected including Indonesia and Malaysia[1]. This concept would deny the traditional rights of coastal States and was designed to serve the interests of the big maritime powers. At the Colombo session of the Asian-African Legal Consultative Committee, the Malaysian delegate, Christopher Pinto said:

> (I)t is submitted that any attempt to replace the right of innocent passage with the "free transit" or the "high seas" corridor concept with its necessary incident of overflight in the corresponding superjacent area is an attempt to erode the traditional rights of coastal States and to subordinate them to the interest of the big maritime powers[2].

At the same session, the Indonesian delegate remarked:

> (I)ndonesia is not a party to the Geneva Convention on the Territorial Sea and the Contiguous Zone of 1958. Nevertheless, the Indonesian LAw No. 4, 1960 recognizes the principle of innocent passage for foreign ships through our waters. I must stress here, the words "innocent passage" and not the words "free transit" as seem to have been used by some delegates[3].

The concept of free passage was championed by maritime powers such as the United States and Japan. At the Lagos session, the U.S. delegation said:

> (W)hat is being sought therefore is a right of free passage, as on the high seas, in such a way to take into appropriate account the needs of the coastal States to control coastal resources, to maintain safety

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[1] Bhabani Sen Gupta, T.T. Poulose and Hemlata Bhatia, The Malacca Straits and the Indian Ocean (New Delhi: S.G. Wasani for Macmillan Co., 1974), pp.34-35

[2] Brief Document on the Law of the Sea, Vol.II (Prepared by the Secretariat Asian-African Legal Consultative Committee, Colombo Session), 18 to 27 January 1971.

[3] Ibid.

> of life at sea, to prevent pollution, and to assure safe and unimpeded navigation... The preservation of the right of free transit does not take away the rights of the littoral State to the exclusive use of the resources of its littoral territorial sea within the straits... it does not diminish in the slightest a coastal State's inherent right of individual or collective self-defence under Article 51 of the United Nation's Charter [4].

Similar views about the free transit were expressed by Japan at the Colombo session:

> (I)t would not be unreasonable to provide ships in international straits with a limited but unambiguous right of transit, which would protect them from highly restrictive or arbitrary control by coastal States [5].

At the tenth session of the IMCO's Sub-Committee on Safety of Navigation in October 1970, the Japanese delegation suggested that an international co-operative system be set up which includes the three littoral countries and major shipping countries[6]. The reaction of the Indonesian government was to make absolutely clear its adamant opposition to any "internationalization" of the Straits of Malacca and to reiterate its position on the matter of innocent passage[7]. The Indonesian viewpoint received unequivocal support from the Malaysian delegation . Its representative expressed the view that the statement by the Indonesian delegate "essentially conforms to the Malaysian Government's policy on this issue" [8]. Meanwhile, Singapore took a much more cautious view of the disturbing situation with regard to the Straits of Malacca than did Indonesia and Malaysia. Singapore's Minister for External Affairs said that Singapore's

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[4] Report of the Thirteenth Session(prepared by the Secretariat Asian-African Legal Consultative Committee,Lagos Session),19 to 26 January 1972.

[5] Supra note 2.

[6] Michael Leifer,International Straits of the World:Malacca,Singapore and Indonesia(The Netherlands:Sijthoff & Noordhoff,1978),pp.44-45.

[7] Ibid.,p.45

[8] Ibid.,p.47

view was that the Straits, as a vital lane for sea communication, should be freely accessible to all nations without discrimination and to do anything contrary to this is to distrupt international communication and trade seriously[9].

On November 16, 1971, Indonesia, Malaysia and Singapore concluded a Joint Statement that was announced simultaneously in Jakarta, Kuala Lumpur and Singapore[10]. Although Singapore does share common interests with Indonesia and Malaysia over the safety of navigation and control of oil pollution, it reserved its position on the view expressed by both Indonesia and Malaysia "that the Straits of Malacca are not international straits" by pointedly only taking notes[11]. Singapore has far stronger interest in freedom of navigation through the straits, given the nature of its economy and its vulnerability to geo-political conditions. However, Thailand's role in the political arena of the Straits had been insignificant. Unlike Indonesia and Malaysia, Thailand's dependence on the Straits is more that of a user State rather than the Strait State. Being situated at the widest part of the Straits, and almost completely exposed to the Andaman Sea, Thailand would not be affected by heavy traffic in the Straits but since it is a distant-fishing nation[12],the Straits provide the shortest possible routes for its fishing fleet to sail to other fishing grounds. Since the Straits of Malacca provide the only maritime means of access between Thailand's west and east coasts,the Thai Government has not been conspicuous in its support of the joint position taken by Indonesia and Malaysia on the status of the waterway[13].

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9 Gupta,T.T. Poulose and Hemlata Bhatia,supra note 1,p.90

10 The Joint Statement of the Governments of Indonesia,Malaysia and Singapore, 16 November 1971.

11 Ibid.,Paragraph 4(v).

12 Ted L. McDorman and Panat Tasneeyanond,"Increasing Problems for Thailand's Fisheries,"Marine Policy,205(1987)215.

13 Leifer,supra note 6,p.35

Shortly after the 1971 Joint Statement, the Malaysian Prime Minister, Tun Abdul Razak, said in Parliament on May 12,1972,"All foreign warships would have to inform the Malaysian government before going through the Straits of Malacca. All warships must give an assurance that their passage through the Straits is with good and peaceful intention" [14]. At the political meeting of the United Malay National Organization, he further said,"We do not intend to restrict innocent passage of ships but because the Straits is shallow in some places, big ships of over 200,000 tons will not be allowed to pass through as this will bring dangerous consequences" [15]. Earlier, the same stance also had been made known by Indonesia with regard to warships passing through the Straits. Admiral R. Sudomo,the Indonesian Navy Chief-of-Staff, stated that foreign warships wanting to pass through the Straits of Malacca should give notification to either Indonesia or Malaysia[16].

Despite warnings from Indonesia and Malaysia about the passage of warships, the United States and the Soviet Union from time to time did send their task forces through the Straits as a demonstration of the international character of the Straits[17]. On October 31, 1973, it was reported that a U.S. naval task force was ordered to use the Straits to demonstrate a right of passage through it, after both Indonesia and Malaysia had issued warnings that they would fire on any vessel that passed without giving prior notification and without obtaining authorization[18]. The Soviet Union also had ignored the Indonesian and Malaysian warnings and on November 17, 1973, sent two of its warships to pass through the Straits without notifying Indonesia[19]. Fortunately, both incidents did not

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[14] Asia Research Bulletin,Vol.1 No.12,April 1972,pp.931A,931B

[15] Guardian(Rangoon),26 June 1972. [16] Straits Times,6 April 1972

[17] K.L. Koh,Straits in International Navigation(USA:Oceana Publications,Inc., 1982),p.61

[18] Straits Times,31 October 1973 [19] Straits Times,17 November 1973

create any physical confrontations between the Strait States and the maritime powers.

Apart from security interests, Indonesia and Malaysia are also concerned with the threats of marine pollution generated by ships passing through the Straits. In recent years, Indonesia and Malaysia have expounded their fear of marine pollution catastrophes caused by tankers passing by the Straits. On May 1972, Admiral Sudomo of Indonesia made a statement in which he said:

> (E)very nation has the right to protect its territorial waters from use by other countries which could endanger the interest of its people, as by causing water pollution and damaging offshore exploration and fishing industries.This will surely happen if heavy ships above 200,000 tons pass through the waterway which is shallow in several parts[20].

Similar sentiments were also expressed by the Malaysian Prime Minister at the opening of 23rd United Malay National Organization:

> (I)ndonesia and Malaysia have the right to control the Straits of Malacca so that it will not be polluted by oil spills from tankers which can and will destroy the fish and shores of both countries. If this happens, the means of livelihood of thousands of Malaysian and Indonesian fishermen will be jeopardized[21].

A series of marine accidents had induced Indonesia, Malaysia and Singapore to adopt the Traffic Separation Scheme (hereinafter the TSS)(see Table 3-1). On February 24, 1977, the three States signed an agreement on safety of navigation in the Straits of Malacca and adopted twelve recommendations[22] that were later brought before the IMCO's twentieth session of the Sub-Committee on Safety of Navigation[23]. The TSS for the Straits of Malacca received its final

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[20] Working People's Daily, 21 May 1972.

[21] Asia Research Bulletin,Vol.2, No.2,June 1972,p.1004B.

[22] Joint Statement on Safety of Navigation in the Straits of Malacca, 24 February 1977.

[23] Leifer,supra note 6,p.74

TABLE 3 - 1

Maritime Casualties In The Straits of Malacca

| Date | Name of Vessel | Tonnage (dwt) |
|---|---|---|
| 1972 | Myrtea | 210,000 |
| 6 Jan. 1975 | Showa Maru | 244,000 |
| 6 Jan. 1975 | Isuzugawa Maru | 122,000 |
| 6 Jan. 1975 | Silver Palace | 30,000 |
| Mar. 1975 | Asiatic | NA |
| Apr. 1975 | Cactus Queen | 78,000 |
| Apr. 1975 | Tosa Maru | NA |
| Sept. 1975 | Izumikawa Maru | 120,000 |
| Sept. 1975 | Jatimulia | 6,000 |
| Apr. 1976 | Mysella | 212,000 |
| Jul. 1976 | Diego Silang | 52,440 |

Source: Michael Leifer, International Straits of the World:Malacca, Singapore, and Indonesia (The Netherlands:Sijthoff & Noordhoff, 1978), pp.65-68.

endorsement by the IMCO Assembly on November 14,1977 . However, the scheme only came into force in 1981[24].

As pointed out by Jaafar, the only clear-cut concurrence between the UNCLOS III and the current State practice in the Straits region relates to Article 41 of UNCLOS III on sea lanes and TSS[25]. For Malaysia, its fisheries rules and regulations stipulate certain restrictions on foreign fishing vessels passing through its fisheries waters. Section 16 of the Fisheries Act stated that a foreign fishing vessels may exercise its right of innocent passage upon entering the Malaysian fisheries waters. However, the provisions contained in UNCLOS III relating to right of transit passage apply to all vessels including aircraft .

INNOCENT PASSAGE

In the Corfu Channel Case(Merits) 1949, the issue of whether the British warships had a right of passage through the Corfu Channel off the Albanian coast was brought before the ICJ. The Court ruled that "States in times of peace have a right to send their warships through straits used for international navigation between two parts of the high seas without the previous authorization of a coastal State..." [26]. It then proceeded to give the Corfu

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[24] Jon M. Van Dyke,ed.,Consescus and Confrontation:The United States and the Law of the Sea Convention(Honolulu:University of Hawaii,1985),p.286

[25] Ibid.

[26] The Corfu Channel Case(Merits),ICJ Reports 4(1949),p.28

channel international status, stating, inter alia that "the decisive criterion is rather its geographical situation as connecting two parts of the high seas and the fact of its being used for international navigation". This decision by the Court was later incorporated into Article 16(4) of the 1958 CTSCZ, the only article dealing with the navigation through the straits in UNCLOS I. It reads:

> There shall be no suspension of the innocent passage of foreign ships through straits which are used for international navigation between one part of the high seas and another part of the high seas or the territorial sea of a foreign State.

Article 16(4) of the 1958 CTSCZ applied the regime of innocent passage, as defined in Article 14 through Article 20 of the 1958 CTSCZ, to straits "used for international navigation",subject only to the restriction that "there shall be no suspension" of such innocent passage[27].

Prior to 1969, the legal regime of the Strait was that of the high seas since Malaysia only adhered to the Anglo-Saxon three-nautical mile teeritorial sea limit. When Malaysia finally proclaimed a twelve-nautical mile territorial sea, the claim overlapped with the Indonesian territorial sea at the One Fathom Bank and further south between Karimon Islands and Pulau Kukub. Until the convening of UNCLOS III, Malaysia and Indonesia held that the Straits was not an international strait but recognized the right of innocent passage through it.

The only Malaysian legislation that relates to the right of innocent passage is contained in Section 16 of the Fisheries Act. However, the restriction is only imposed on foreign fishing vessels navigating through Malaysian fisheries waters, which also include the internal waters, the territorial sea and the EEZ. Beside being deprived of the freedom of navigation in the Malaysian EEZ, a foreign fishing vessel is also required to notify the Malaysian authorities upon entering its waters.

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[27] Luc Cuyvers,The Strait of Dover(The Netherlands:Martinus Nijhoff,1986),p.48

The existence of right of innocent passage in the EEZ seems to be unacceptable under the UNCLOS III. Attard pointed out that Article 56(2) and Article 58(3) of the UNCLOS III on the exercise of EEZ rights forms the basis of the Convention's formula for balancing the said freedoms and the coastal State's rights[28]. In effect the Convention's approach ensures that whilst, for example, the coastal State has sovereign rights for the purpose of inter alia exploiting fisheries, this does not necessarily deprive a fishing vessel of its freedom to navigate within the zone[29].

On the other hand, Malaysian infrastructures to accommodate the implementation of such rules are lacking. The formation of the Maritime Enforcement Coordinating Center in 1983[30] under the aegis of the National Security Council does not extend in terms of manpower and logistics to other maritime agencies. Being the only agency capable of communicating[31] with foreign fishing vessels, the surveillance and monitoring tasks are made difficult since the agency is located on the west coast, while the waters of the South China Sea are left almost unguarded. For the implementation of the regulations to be efficient, the existing stations under the Department of Fisheries must be equipped with proper communication instruments and additional manpower to man the monitoring tasks on the 24-hour basis. Above all, steps must be taken by Malaysian government to negotiate under the spirit of goodwill with Thailand to straighten out the alleged encroachments presumably made by Thai fishermen.

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[28] David Joseph Attard, The Exclusive Economic Zone in International Law (New York: Clarendon Press-Oxford, 1987), p.80

[29] Ibid.

[30] Choon-ho Park and Jae Kyu Park, eds., The Law of the Sea: Problems From East Asian Perspective (Honolulu: University of Hawaii, 1987), p.357

[31] For example, the radio equipments in the Department of Fisheries are limited to local usage only since the Department is allocated to three frequencies by law.

TRANSIT PASSAGE

Transit passage is an entirely new concept contained in the new international law of the sea. It is the regime that came to be accepted in UNCLOS III through hard bargaining and as a concession to the maritime powers for their agreement to accept wider coastal State jurisdiction in the EEZ and continental shelf, and an international machinery for the exploration and exploitation of deep seabed resources[32]. According to Oda, the new regime concerning straits used for international navigation was apparently offered as a compromise in exchange for the recognition of the twelve-nautical mile territorial sea in the late 1960s and early 1970s[33]. As finally adopted, UNCLOS III provides for a guaranteed non-suspendable transit passage through straits and archipelagic waters, subject only to the power of the coastal State to make certain rules related to navigational safety[34], pollution[35] and fishing[36].

As pointed out by Reisman, "transit passage" is a neologism; it lies somewhere between "freedom of navigation" on one hand, and "innocent passage" on the other[37]. Under the 1958 CTSCZ, there was no right of innocent passage for overflight and submarines must navigate on the surface and show their flag[38]. The regime of transit passage, however, in order to accommodate the needs of the maritime powers regarding their naval mobility, provides the rights of submerged

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[32] Jon M. Van Dyke, Lewis M. Alexander and Joseph R. Morgan, eds., International Navigation: Rocks and Shoals Ahead? (Honolulu: University of Hawaii, 1988), p.147

[33] Ibid., p.155

[34] Article 42(1)(a) of UNCLOS III

[35] Article 41(1)(b) of UNCLOS III

[36] Article 41(1)(c) of UNCLOS III

[37] Michael Reisman, "The Regime of Straits and National Security: An Appraisal of International Law Making," 74 American Journal of International Law. 48(1980)

[38] For submarines, see Article 14(6) of 1958 CTSCZ

passage and overflight[39].

Transit passage may not be impeded[40], it may not be denied, hampered, or impaired[41], and it may not be suspended[42]. It includes the right to carry out activities consistent with the normal mode of continuous and expeditious passage[43]. Transit passage through the territorial sea of a State bordering a strait is not fully equivalent to the freedom of navigation and overflight of the high seas. During such passages, transitting ships and aircraft have certain obligation and duties. They are obligated to make passages continuous and expeditious[44], proceed without delay[45], and to refrain from any activities inconsistent with the continuous and expeditious passage in the normal mode, including any activities that might threaten the sovereignty, territorial integrity, or political independence of States bordering straits[46]. They may

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[39] Serious criticism has been made of these provisions and some have questioned whether "transit passage" as defined in Article 38 of the UNCLOS III includes a right of submerged transit for submarines.According to Reisman, the term "normal" might or might not mean submerged transit, because the significance of "normal" depends upon a great many variables in a given instance. See Reisman,supra note 33.But this view is rebutted by Burke and Moore. See William T. Burke,"Submerged Passage Through Straits:Interpretations of the Proposed Law of the Sea Treaty,"52 Washington Law Review.193(1977)215. See also John Norton Moore,"The Regime of the Straits and the Third UNCLOS,"74 American Journal of International Law.89(1980).

[40] Article 38(1) of UNCLOS III

[41] Article 42(2) of UNCLOS III

[42] Article 44 of UNCLOS III

[43] Article 39(1)(c) of UNCLOS III

[44] Article 38(2) of UNCLOS III

[45] Article 39(1)(a) of UNCLOS III

[46] Article 39(1)(b) and (c) of UNCLOS III

not conduct research and survey activities without the consent of the coastal State[47]. Transitting ships must comply with regulations lawfully promulgated by States bordering straits with respect to sea lanes, TSS, fiscal, immigration, and sanitary matters[48]. Aircraft must observe the International Civil Aviation Organization rules of the air and operate with due regard to safety of navigation[49].

On the other hand, to promote safety of navigation in the strait, the coastal State may adopt sea lanes and TSS after consulting with and obtaining agreement to such schemes from the competent international body[50]. To protect other legitimate interests, they may adopt regulations concerning the prevention, reduction, and control of pollution[51], the prevention of fishing by fishing vessels[52], and taking on board or putting overboard of any commodity, currency, or persons in contravention of customs, fiscal, immigration, or sanitary regulations[53].

The regime of transit passage in the Strait begins at One Fathom Bank and ends at a point between Karimon Islands and Pulau Kukub. So far, Malaysia together with Indonesia and Singapore ,has adopted and implemented the TSS in its effort to prevent and reduce marine accidents that could cause marine pollution. Augustine et al noted that with the implementation of TSS in the Straits of Malacca, the frequency of accidents and hence the incidence of oil spills,have been reduced significantly[54]. With regard to marine pollution control, the Department of Environment(Malaysia) is in the process of formulating regulations for the control of oil discharges and disposal of wastes from ships,

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[47] Article 40 of UNCLOS III

[48] Article 39(1)(d),41(7) and 42(4) of UNCLOS III

[49] Article 39(3) of UNCLOS III

[50] Article 41 and 42(1)(a) of UNCLOS III

[51] Article 42(1)(a) of UNCLOS III

[52] Article 42(1)(c) of UNCLOS III

[53] Article 42(1)(d) of UNCLOS III

[54] Chia Lin Sien,ed.,Environmental Management in South-East Asia(Singapore: University of Singapore,1987),p.45

in line with the Environmental Quality Act 1974, and the applicable international conventions[55].

TRAFFIC SEPARATION SCHEME

In 1968, the Japanese Ministry of Transport set up the Malacca Straits Joint Council as well as a Malacca Navigation Facilities Improvement Board together with private oil and shipping interests. The survey done by the Board and the Council was able to locate points which are too shallow for tankers of 200,000 tons[56]. The survey team suggested a TSS to steer clear of the shallow points. A second and more detailed hydrographic survey was supposed to be conducted by Japan in January 1970 in co-operation with Indonesia, Malaysia and Singapore but was held up almost a year by the Japanese government's reluctance to endorse the Malaysian proclamation of a twelve-nautical mile limit of its territorial sea[57]. Nevertheless, the survey was finally carried out in October 1970 in the Main Singapore Strait and in the Phillip Channel. Meanwhile, the British Royal Navy's hydrographic vessel "Hydra"had been engaging in survey work south of One Fathom Bank to the point of confluence between the waters of Malacca Strait and those of the Singapore Strait[58]. The British hydrographer located some seventy possible hazardous shoal soundings and five wrecks were fixed and swept for depth.

The 1977 agreement on safety of navigation in the Straits of Malacca signed by Indonesia, Malaysia and Singapore adopted twelve recommendations

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[55] Ibid.,pp.45-46

[56] Gupta,T.T.Poulose and Hemlata Bhatia,supra note 1,p.58

[57] Leifer,supra note 6,p.43

[58] Ibid.,p.44

including under keel clearance (hereinafter the UKC) of at least 3.5 metres, and the delineation of the TSS in three specified critical areas of the Straits of Malacca, namely in the One Fathom Bank area, the Main Strait and Phillip Channel, and off Horsburgh Lighthouse. Most of the twelve recommendations put forward by the three coastal States have been adopted by the IMCO assembly resolution on navigation through the Straits of Malacca dated November 14, 1977.

Some definitions pertaining to ships are given by the IMCO; a vessel having a draught of 15 metres or more shall be deemed to be a deep draught vessel[59] and a tanker of 150,000 dead weight tons(dwt) and above shall be deemed to be a Very Large Crude Carrier (hereinafter the VLCC)[60]. Both the deep draught vessel and the VLCC should allow an UKC of at least 3.5 metres at all times during the entire passage through the Straits of Malacca[61] and their speeds must not be more than 12 knots[62]. The voluntary reporting procedure and mechanism for large vessels is clarified under Rule 8 of the IMCO's resolution.

The most difficult task that is presently faced by the Malaysian authorities is to enforce the TSS especially pertaining to UKC, unless Rule 8 is made mandatory. But Japan has pointed out that the rule concerning recommended practice of broadcasting by deep draught vessels and VLCC of navigational warnings giving names, dwt, tonnage, draught, speed and times of passing certain points of the Straits comes up against provisions of the Informal Composite

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59 Annex V (I)(1) of IMCO Assembly Resolution on Navigation Through the Straits of Malacca and Singapore,14 November 1977.

60 Ibid., Annex V (I)(2).

61 Ibid.,Annex V(II)(1).

62 Ibid., Annex V (III),Rule 6.

Negotiating Text of the Third Law of the Sea Conference[63]. Jaafar noted that about one-quarter of tankers larger than 150,000 dwt going east through the Straits of Malacca do not respect the rule requiring a minimum clearance of 3.5 metres[64]. Moreover, the TSS itself is of self-policing nature, without provision for ensuring adherence to its rules[65].

On the other hand, UNCLOS III provides certain enforcement rights for strait States particularly in protection and preservation of the marine environment. Article 233 of the UNCLOS III stated that the States bordering the straits may take appropriate enforcement measures if a foreign ship has committed a violation of the laws and regulations referred to in Article 42, paragraph 1(a) and (b), causing or threatening major damage to the marine environment of the straits. Moreover, there is an obligation for other States to comply with the rules and regulations pertaining to sea lanes and TSS in the straits used for international navigation. Article 41(7) of the UNCLOS III reads:

> Ships in transit passage shall respect applicable sea lanes and TSS established in accordance with this article.

ALTERNATIVE ROUTES

The distance between Japan and the Middle East via the Straits of Malacca is about 6,500 nautical miles whereas via the Lombok Strait it is about 7,600 nautical miles[66]( see Map 3-1). Alexander proposes five major routes that

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[63] IMCO, Sub-Committee on Safety of Navigation,20 th Session, 5-9 September 1977, NAV XX/wp.12,p.7

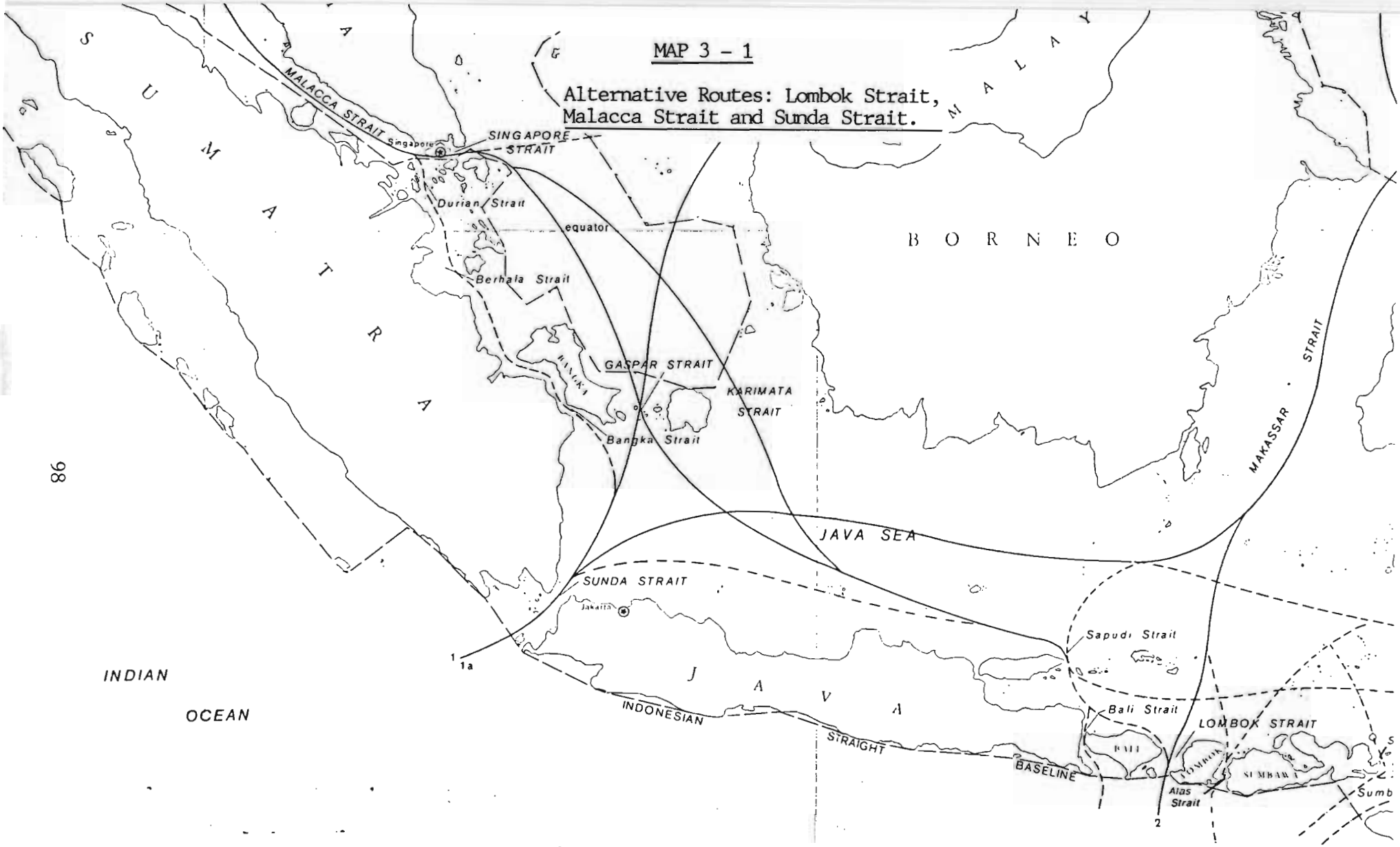
[64] Van Dyke,supra note 24,p.288

[65] Leifer,supra note 6,p.76

[66] Gupta,T.T.Poulose and Hemlata Bhatia,supra note 1,p.64

## MAP 3 - 1

Alternative Routes: Lombok Strait, Malacca Strait and Sunda Strait.




Source: Lewis M. Alexander, Navigational Restrictions Within the New LOS Context: Geographical Implications for the United States (Peace Dale, RI: Offshore Consultants, Inc., 1986)

are possible in Indonesian waters[67]. However, only two seem to suit the needs of Japan if an alternative is inevitable. They are as follows:

Route 1 : For traffic moving east from the Indian Ocean, an alternative to the Malacca Strait is Sunda Strait, between Sumatra and Java. From Sunda,vessels may proceed north through Gaspar Strait either directly into and through the South China Sea to more northerly ports, or northeast through Serasan Passage. After transitting Sunda Strait, vessels heading northeasterly may also turn east through the Java Sea passing through Makassar Strait, then northeast via Balut Channel into the Pacific Ocean.

Route 2 : Another north-south route, utilized by deep-draft tankers coming from the Persian Gulf, is through Lombok Strait (or nearby straits), through Makassar Strait, and then northeast through Balut Channel to Japan or North America. Some traffic proceeds north through Sibutu Passage to the Philippines or beyond.

With the implementation of the TSS in the Strait, Japan, as well as other user States are obliged to comply with the resolution adopted by the IMCO. UKC of at least 3.5 metres at all times during the entire passage through the Strait must be maintained. In 1967, the "Tokyo Maru" of 151,288 dwt scraped its bottom while passing through the Straits of Malacca[68]. It is hard to imagine how any ship larger than "Tokyo Maru" would be able to navigate within the safe UKC requirement . Beside safety, the Strait is already crowded. Traffic statistics in 1980 for vessels passing through the One Fathom Bank in the Strait, as noted by Sien, is on the monthly average of 1,956 vessels. According to Alexander, the average number of ships per day transitting the Straits of Malacca is 150[69].

If the long journey home is inevitable, Japan should direct its interest at looking for better alternatives. In February 1971, a joint Japan-Thailand survey team carried out an inspection to determine the feasibility of

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[67] Lewis M. Alexander,Navigational Restriction Within the New LOS Context: Geographical Implication for the United States(Peacedale,RI:Offshore Consultant Inc.,1986),pp.165-166

[68] Gupta,T.T.Poulose and Hemlata Bhatia,supra note 1,p.37

[69] Alexander,supra note 67,p.127

connecting the Gulf of Thailand and the Bay of Bengal with pipelines to pump 150 million to 200 million tons of oil annually. According to the survey team, the project is technically feasible and should be profitable[70]. Ships building in the future also will have to look for energy-efficient characteristics. Oil will continue to be the major source of fuel for ships, but reduced average speeds, bigger propellers, hull cleaning technology, improved paints, heat conversion, and use of exhaust gases will all be featured in the new ships[71].For VLCCs and the deep draught vessels that cannot meet the UKC requirement in the TSS of the Strait, the Lombok Strait and the Sunda Strait alternatives seem to be the next best.

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[70] Gupta,T.T.Poulose and Hemlata Bhatia,supra note 1,p.65

[71] A.D. Couper," Future International Maritime Transport Developments and the Law of the Sea," 6 Ocean Yearbook. 97(1986)101.

# C O N C L U S I O N

Malaysian perception of the UNCLOS III is a unique one. In its effort to protect the newly gained EEZ waters, the understanding between "sovereign right" and "sovereignty" has been dissolved to create ambiguities in Malaysian legislation. One can find the exercise of sovereign right on one end and the exercise of sovereignty on the other end. The distinguishable legal regimes of internal waters, territorial sea and the EEZ waters have been lumped together under the interpretation of the "Malaysian fisheries waters". The concept of innocent passage embodied in the Fisheries Act that is designed to prohibit the freedom of navigation of the foreign fishing vessels is unacceptable under international law.

The cloud that has been hovering over the legal status of the Strait is still there and the bordering States are struggling to produce a regime that best suit their needs while as little as possible not hurting other user States. Indonesia and Malaysia, both advancing developing States, feel that the Strait must be cogently protected from the possible oil pollution generated by tankers that abuse their right of transit passage.

The conclusion of the UNCLOS III introduces a new concept of transit passage in straits used for international navigation between one part of the high seas or an EEZ and another part of the high seas or an EEZ. Under the new regime of straits, Malaysia still feels that its sovereignty rights to control the Strait are limited, and thus has introduced the EEZ Act 1984 with the hope that the Strait can be better managed and protected especially from the oil pollution threats. It is not surprising that Malaysia will enforce the innocent passage

rights if the problems still persist, as Malaysia has done to protect its fisheries resources.

From the Malaysian perspective, other States too have due regard to the rights and duties of the coastal States while exercising their rights in the EEZ. While trying not to be discriminating, clearly points its finger at the Thai fishermen that for obvious reasons find the Malaysian fisheries waters are easily accessible. However, the conflict should not be permitted to be prolonged forever since it will accumulate problems and hatred among the fishermen, be it locals or foreigners. The conflict should be resolved in the spirit of the brotherhood of ASEAN, where both Malaysia and Thailand are members.With such obligations in mind, the author would like to propose two primary steps that should be considered by both countries:

1. Section 16 of the Fisheries Act should be amended, to be only subject to internal waters and territorial sea. Thus Section 56 of the Fisheries Act is repealed.

2. In accordance with Article 73(3) of the UNCLOS III, Thailand should agree to imprisonment as a penalty against its fishermen (in lieu of fines) so as to legitimize Malaysian actions.

The restoration of the freedom of the navigation in the EEZ will once again permit Thai fishing fleets to move freely to other destinations outside the Malaysian fisheries waters. On the other hand, Malaysia will have to upgrade its enforcement measures to deter possible illegal fishing by the Thais. Therefore, stringent penalties such as imprisonment have to be adopted and supported by Thailand. Without such measures, it is doubtful Malaysia will succeed in keeping its resources to a manageable level.

The problems of marine pollution in the Strait have been discussed quite extensively by many authors. At present, as far as protection and preservation of the marine environment is concerned, the Strait is managed and protected by two different national legislations,i.e., as implemented by Indonesia and Malaysia. There is however, the possibility of both legislations merging in the

form of regional co-operation. The Strait is a very narrow waterway and fragile with respect to marine pollution. Moreover, any maritime pollution catastrophe in one country's waters will affect the other country. Issues pertaining to the Strait that need to be resolved before any move toward regional co-operation are as follows:

1. Boundary delimitations: Malaysia has adopted the straight baseline system without proper proclamation as required under Article 16 of UNCLOS III. The straight baselines in the vicinity of the Langkawi Island in the Andaman Sea have adversely affected the maritime claims of Thailand.

2. According to Smith, the length of Malacca Strait according to legal criteria is approximately 175 nautical miles beginning at One Fathom Bank at the northern entrance and ending at Karimon Islands at the southern entrance. Indonesia and Malaysia should come to an agreement at this point.

3. Though both countries have proclaimed the EEZs, no agreement on the boundary delimitation has been concluded.

The future conflicts that may arise from the aforementioned issues will create legal chaos in the Strait. There is still a legal question on the Malaysian adoption of the straight baseline system, especially the outermost point at Pulau Perak, about 59 nautical miles from the nearest fragment of Malaysian land territory. The legal length of the Strait is important as it will indicate where the regime of the straits used for international navigation should begin and end.

From a military point of view, the concept of transit passage offers better provisions than that of the innocent passage. There is the right of overflight, and submarines may navigate submerged during the passage. However, there are also duties and obligations of the user States. It is supposed to be a balanced provision that intends to satisfy both the strait States and the user States.

The implementation of the TSS in the Malacca Strait is not without difficulties. For one thing, the scheme itself lacks regulatory powers

and the existing national legislation is inadequate to cope with the environmental problems. There is also the right of transit passage in the TSS which makes the enforcement measures even more difficult. Article 233 of the UNCLOS III can be utilized but with precaution so as not to impede,deny or hamper ships exercising their rights of transit passage.

It is suggested that Malaysia should adopt the following measures regarding the flow of navigations in the Strait :

1. to enact national laws and regulations pertaining to the protection and conservation of marine environment in the strait.
2. to co-operate with its neighbors in formulating certain measures regarding the enforcement of TSS.
3. to look into the possibilities of acquiring high technology in marine surveillance.
4. to co-operate with more user States in hydrographic surveys - that is in financing and providing technologies in the survey.
5. to reconstruct and to reorganize the local maritime laws pertaining to navigation of local fishing boats . The competency of the navigators in large fishing boats should be reviewed.
6. to reorganize the enforcement machineries - making use of all existing agencies that are capable of carrying out maritime duties.

The Malacca Strait will continue to attract attention from big maritime powers and any attempt to restrict their naval mobility will meet with strong objection. Malaysia should take all necessary precautions in these matters if it wishes to preserve the peace and integrity of the region.

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