

# A New Maritime Legal Regime for Malaysia Within the Context of Ocean Governance<sup>1</sup>

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## Abstract

The *United Nations Convention on the Law of the Sea*, 1982 (LOSC or the 1982 Convention) came into force on 16 November 1994. Malaysia signed the LOSC on 10 December 1982 and ratified it fourteen years later on 14 October 1996. Upon its ratification, the Malaysian Ministry of Foreign Affairs issued a Declaration concerning Malaysia's position with regard to certain provisions in the LOSC and the Alternate Permanent Representative of Malaysia to the United Nations, H.E. Ambassador Agam, further elaborated on Malaysia's views in a Statement at the 51<sup>st</sup>. Assembly of the United Nations General Assembly (UNGA). The Declaration and Statement contain Malaysia's proclamation, interpretation and understanding of specific provisions of the LOSC relating to sovereignty, sovereign rights, security, jurisdiction, pollution prevention, navigational rights, maritime boundaries, access to fishery, military exercises or manoeuvres and jurisdiction over marine archaeological objects. In the statement of ratification, the Malaysian Minister of Foreign Affairs stated that Malaysia "undertakes faithfully to perform and carry out the stipulation" contained in the LOSC.

The main objective of this paper is to examine the argument for or against the establishment of a new legal regime to govern Malaysia's maritime sector particularly in light of Malaysia's ratification of the LOSC. In addition, in view of Malaysia also being party to many maritime or maritime-related treaties, this study will endeavour to relate pertinent legal issues within the wider context of ocean governance in Malaysia. To do this it is necessary to firstly, examine the adequacy and shortcomings of the present maritime legal regime in Malaysia in relation to the national and international rights and responsibilities respecting ocean management. The following question is to determine whether it is necessary or viable to augment, or in the most radical situation, change, the present maritime legal regime in Malaysia so that all stakeholders of the marine environment may achieve their respective objectives in the most equitable manner possible.

**Key words:** Law of the sea, maritime conventions, marine environment, United Nations Convention on the Law of the Sea, 1982, ocean governance, national legislation.

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## **A New Maritime Legal Regime for Malaysia Within the Context of Ocean Governance**

### **Introduction**

#### ***Historical perspectives: pre-twentieth Century***

Historically, peoples of the Southeast Asia region have in general organised their lives within the context of surrounding land and seas. The coastal Malays in particular regarded the seas as natural appurtenances to the land they occupy.<sup>2</sup> Sovereign States exercised absolute sovereignty and jurisdiction in seas such as the Strait of Malacca, the Celebes Sea, the Sulu Sea and the South China Sea which encompass the Malay Peninsula and the Malay Archipelagos. The seas surrounding the land played a significant role in the defence, economic, and political matters of the State concerned. The concept of unity between land and water expressed by the Malay word “*tanahair*”<sup>3</sup> which literally means, “land and water” depict the embodiment of the unity assumed simultaneously with the native land. Such was already the significance and appreciation of the seas in this region. As early as 1276 during the reign of Sultan Muhammed Shah - the first sovereign of the Malacca Sultanate - it was found that the Malays had had already designed a set of laws of the sea applicable in sea areas within the jurisdiction of the Malacca Sultanate. These laws were referred to as the *Malaca Code*.<sup>4</sup> The Bugis, Makassar and Celebes States also used similar codes based on the *Malaca Code*. The Code provided “laws to be enforced on ships, *Junks* and *Prahus*” and covered wide

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<sup>2</sup> Tunku Sofiah Jewa. 1996, *Law of the Sea in Public International Law: A Malaysian Perspective*, Volume II, Pacifica Publications, Kuala Lumpur, p.634.

<sup>3</sup> In modern Indonesia, the concept of “*tanahair*” is reflected in the concept of “*Wawasan Nusantara*” or in the English transliteration, the Archipelagic Concept. In the words of Hasjim Djalal, “[t]he concept of archipelago presupposes the unity between the water and the land; both should be regarded as a single unit.” See, Hasjim Djalal. 1995, *The Archipelagic Concept and Other Ocean Issues in Indonesia and the Law of the Sea*, Centre for Strategic and International Studies (CSIS), Jakarta, p.293. See also, The Doctrine of “*Wawasan Nusantara*” (1973) – The Indonesian Archipelagic Outlook, in Dino Patti Djalal. 1996, *The Geopolitics of Indonesia’s Maritime Territorial Policy*, Centre for Strategic and International Studies (CSIS), Jakarta, pp. 152 –153 in which the concept of “*Wawasan Nusantara*” is enshrined in four articles encompassing Political Unity, Social and Cultural Unity, Economic Unity and Unity of Defence and Security.

<sup>4</sup> The *Malaca* (Maritime) Code was found and translated by Sir Stamford Raffles in *The Maritime Institutions of the Malays, translated from the Malayu Language*, published in 1820, pp. 130 -158. For details see, *op. cit.*, Tunku Sofiah Jewa, pp. 885 – 913.

aspects of admiralty laws from the description and authority of persons on board a *Prahu* – termed as including every description of vessel – to regulations for the safety of the *Prahu* while at sea, laws on troves and of crimes and punishment on board a *Prahu*. At first blush, the *Malacca Code* tells us that the laws designed were significantly related to the trading activities within the region, which thrived for centuries under the reign of the Malacca Sultanate. During this simple era of living where daily lives were easily entertained, it is remarkable that such law and order governing matters both on land and at sea had had been successfully administered. Such is the nature of victorious civilisation and it is regrettable that as beneficiaries we have failed in perpetuating or pursued to develop, in the least, the codified *Malacca* laws of the sea.

### ***Present Maritime Legal Regime in Malaysia***

#### Domestic Laws

Present day Malaysia nonetheless, has a plethora of maritime and ocean laws. Malaysia's participation in 20<sup>th</sup>. Century international trading and the influence accorded by the development of world-wide laws of the sea since the advent of Western European dominance in ocean-related matters<sup>5</sup> precipitated the establishment of a rather irregular mix of national and international legislation in Malaysia. Malaysia's earliest recorded 20<sup>th</sup>. Century national law - considered remotely relating to management of maritime matters - is the *Waters Act, 1920* enacted to provide for the control of rivers and streams. It was not until 20 years later when the Federation of Malaya<sup>6</sup> became an active rubber producer in the region that the *Rubber Shipping and Packing Control Ordinance, 1949* was promulgated for the purposes of regulating shipping and packing of rubber for export. In the following years we may observe that domestic laws pertinent to shipping, navigation and port were duly promulgated and enforced. These included *Carriage of*

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<sup>5</sup> For further discussion on the evolution of European interests in maritime trade which led to dominance of large sea areas from which wealth was to be gained from and later to the concept of *mare clausum* where protection of the seas to serve immediate national needs and interests were established, see, Edgar Gold. 1981, *Maritime Transport – The Evolution of International Marine Policy and Shipping Law*, D.C. Heath and Company, Toronto.

<sup>6</sup> The Federation of Malaya came into existence on 1 February 1948 and consisted of nine Malay States – Perak, Selangor, Negri Sembilan, Kedah, Perlis, Kelantan, Terengganu, Pahang and Johor – and two Settlements – Penang and Malacca. RH Hickling. 1997, *Malaysian Public Law*, Pelanduk Publications (M) Sdn. Bhd., Petaling Jaya, pp. 5 - 11.

*Goods by Sea Act, 1950; Merchant Shipping Ordinance, 1952;*<sup>7</sup> *Federation Light Dues Act, 1953; Penang Port Commission Act, 1955; Port Authorities Act, 1963* and so on.<sup>8</sup> This trend was consistent with pre-*Merdeka*<sup>9</sup> and pre-Federation of Malaysia<sup>10</sup> days when the ruling British were active in pursuing interests in maritime trade arising from an abundance of agricultural produce in the Malay States. It is important to note at this juncture that all of the pre-Federation of Malaysia laws were derived from British domestic laws.

### International laws

A thorough appreciation of requirements underlying State Parties' rights, duties, responsibilities, obligations and liabilities stipulated by the *United Nations Convention on the Law of the Sea, 1982* (LOSC) is understandably difficult, yet necessary. It is important not only so that a State Party can fully reap the benefits accorded by the LOSC and discharge its obligations responsibly but it is also vital for the State to comprehend the provisions of the LOSC *vis-à-vis* other related conventions. The LOSC repeatedly refers to the application of "other rules of international law", establishment of global and regional "rules, standards and recommended practices and procedures" through "competent international organisation or general diplomatic conference".<sup>11</sup>

Since its adoption in 1982, the LOSC has been accorded due recognition in many newly developed international and regional agreements such as the *Agenda 21*, the *1992 Rio Declaration of the UN Conference on Environment and Development*, the *1995 Agreement Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks* and so on. Nonetheless, laws and regulations adopted prior to LOSC also complement the LOSC, otherwise, they act as the principal legislation in cases where the LOSC does not adequately stipulate. Some examples include, the

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<sup>7</sup> *Merchant Shipping Ordinance* (MSO) 1952 applies to Peninsula Malaysia, *MSO, No. 2 of 1960* applies to Sarawak, whereas its counterpart of No. 11 applies to Sabah.

<sup>8</sup> See, Juita Ramli. 1997, Annex I: Summary of Major Malaysian Federal Statutes on Maritime and Oceanic Matters in *MIMA Report on Status of Maritime-Related National Laws and Maritime Conventions in Malaysia*. Maritime Institute of Malaysia, unpublished, pp. 10 - 25.

<sup>9</sup> I.e. Independence gained on 31 August 1957. *Op. cit.*, R.H. Hickling, p. 13.

<sup>10</sup> The Federation of Malaysia ceased to exist on 16 September 1963 upon accession of Singapore, Sarawak and Sabah into what was known as the Federation of Malaysia. *Op. cit.*, R.H. Hickling, p. 16.

<sup>11</sup> See, e.g. LOSC, Article 21 on innocent passage; Article 39 on aircraft in transit passage; Article 58 on rights and duties of other States in the EEZ; Articles 207 - 212 on marine pollution; etc.

*International Convention on Prevention of Pollution from Ships, 1973 as modified by the Protocol of 1978 (MARPOL 73/78) and the IMO<sup>12</sup> Guidelines and Standards for the Removal of Offshore Installations and Structures on the Continental Shelf and in the Exclusive Economic Zone, 1989.*

Thus, in addition to being a party to the LOSC - Malaysia is party to many other maritime- or ocean-related treaties that influence the use and management of Malaysia's marine environment. These include *The Basel Convention on the Control of the Transboundary Movement of Hazardous Wastes and their Disposal, 1989* (ratified, 12 August 1993); *Safety of Life at Sea Convention (SOLAS), 1974* (acceded, 10 October 1983); *Load Lines Convention, 1966* (acceded, 12 January 1971); *Tonnage Convention, 1969* (acceded, 24 April 1984); *COLREG, 1972* (acceded, 23 December 1980); *Standards of Training, Certification and Watchkeeping Convention (STCW), 1978* (acceded, 30 January 1992); *Convention on the International Maritime Satellite Organisation (INMARSAT), 1976* (ratified, 12 June 1986); *Civil Liability Convention, 1969* (acceded, 6 January 1995); *Fund Convention, 1971* (acceded, 6 January 1995) and *Agreement on the International Association of Lighthouse Authorities Maritime Buoyage System, 1982* (ratified, 9 July 1987).

Some of the conventions to which Malaysia is a party have been incorporated into the Malaysian national legislation. A recent example include the *International Convention on Civil Liability for Oil Pollution Damage, 1969 (CLC)* and the *International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1971 (Fund Convention)*. Both of which have been given effect to in the *Merchant Shipping (Oil Pollution) Act, 1994* upon Malaysia's accession to both conventions on 6 January 1995.<sup>13</sup>

Nevertheless, there still are a number of conventions ratified by Malaysia, which have yet to be made into national laws. An example is the *International Convention on Load Lines, 1966* that Malaysia ratified in 1971.<sup>14</sup> Hitherto, no national laws have been promulgated to give effect to this Convention in Malaysia. In the years before Malaysia's independence, the Great Britain acceded to some of the earlier treaties for the Federation

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<sup>12</sup> International Maritime Organization, an agency of the United Nations based in London.

<sup>13</sup> Came into force on 6 April 1995.

<sup>14</sup> For more examples refer to *op. cit.* Juita Ramli, pp. 26 – 44.

of Malaya or the Borneo States of Sabah and Sarawak. Malaysia may or may not have succeeded to the treaties that were entered into by the Great Britain. In this regard, there is a need to examine these conventions either:

- to adopt the conventions into national laws, if Malaysia has succeeded to the conventions, or
- for formal ratification of the conventions by Malaysia, if Malaysia has not succeeded to the conventions, and it is deemed that Malaysia will benefit from becoming a party to the identified treaty.

Examples for the above include the *International Convention for the Unification of Certain Rules Relating to the Arrest of Sea-going Ships, 1952 (Arrest Convention)*, the *International Convention for the Unification of Certain Rules Concerning Civil Jurisdiction in Matters of Collision, 1952* and the *International Convention for the Unification of Certain Rules Relating to the Penal Jurisdiction in Matters of Collision or Other Incidents of Navigation, 1952*. These conventions were acceded to by the United Kingdom for Sarawak. To date there are no known records depicting formal ratification or succession by Malaysia, nor any national laws giving effect to these conventions.

### **Malaysia and the LOSC**

It was not until Malaysia - acting as an independent sovereign State - became involved directly in pursuing national interests at the international level regarding expansion of maritime jurisdiction for the purposes of security and self-preservation, resource exploration and exploitation, and political well-being that Malaysia embarked on what we now term as, the sectoral approach to formulating maritime- or ocean-related laws for the administration of the maritime sector. The trend was consistent with other State practices<sup>15</sup> although development of Malaysia's maritime interest lagged a couple of

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<sup>15</sup> States of distinct and similar interests seemed to group together in furthering their respective interests prior to and during the negotiation period on the law of the sea, which began in 1958 and ended in 1982. Malaysia was one of the many developing countries, which advocated for the expansion of maritime zones culminating in the concept of the exclusive economic zone (EEZ). The establishment of the EEZ by a coastal State meant that the coastal State shall have sovereign rights to benefit from the exploration and

decades possibly due to pursuance of national development and unity subsequent to Malaysia being a wholly independent State. Malaysia's involvement in international negotiations concerning law of the sea - beginning from participation in the First United Nations Conference on the Law of the Sea (UNCLOS I) from February 24 – April 29, 1958; the Second United Nations Conference on the Law of the Sea (UNCLOS II) from March 17 – April 26, 1960; to the Third United Nations Conference on the Law of the Sea (UNCLOS III) from 1973 to 1982 - saw the promulgation of several fundamental laws establishing Malaysia's maritime estate extending seawards to 200 nautical miles - drawn particularly upon perceived needs of a young developing nation. Thus, during the period leading to Malaysia's ratification of the LOSC in 1996, many sectorally written national laws of the sea were established. These included *inter alia* measures to declare and delimit parts of Malaysia's territorial sea up to 12 nautical miles under the *Emergency (Essential Powers) Ordinance, 1969*; the declaration of Malaysia's exclusive economic zone (EEZ) of 200 nautical miles vide the *Exclusive Economic Zone Act, 1984*; and proclamation of the legislation pertaining to conservation, management and development of maritime and estuarine fishing and fisheries provided for in the *Fisheries Act, 1985*.

Of particular import was the intent underlying Malaysia's proclamation of the EEZ on 25 April 1980 by the then Prime Minister, Dato' Hussein Onn. Malaysia's interests are highlighted in the excerpts of the proclamation presented below:<sup>16</sup>

AND WHEREAS a number of States have taken action in pursuance of the existing law and practice and have made declaration in regard to their exclusive economic zones;

NOW THEREFORE WE, Sultan Haji Ahmad Shah Al-Musta'in Billah Ibni Al-Marhum Sultan Abu Bakar Yang di-Pertuan Agong of the States and territories of Malaysia, hereby declare and proclaim that the Federation of Malaysia shall have –

- (a) sovereign rights for the purpose of exploring, exploiting, conserving and managing the natural resources, whether living or non-living, of the sea-bed and subsoil and the superadjacent waters, and with regard to other activities for the economic zone, such as the production of energy from the water, currents and winds;

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exploitation of the resources within the expanded maritime zones, amongst other rights and responsibilities. See, LOSC, Article 56.

<sup>16</sup> For the full text see, *op. cit.* Tunku Sofiah Jewa, pp. 673 – 674.

- (b) jurisdiction with regard to –
  - (i) the establishment and use of artificial islands, installations and structures;
  - (ii) marine scientific research;
  - (iii) the preservation of the marine environment in the exclusive economic zone which is hereby established and that such exclusive economic zone extends to 200 nautical miles from the baseline which the breadth of the territorial sea is measured.

Following the EEZ Proclamation, the then Acting Minister of Law, Tan Sri Datuk Haji Abdul Kadir bin Yusof, on 28 April 1980, made an announcement asserting Malaysia's rights and responsibilities in the newly proclaimed EEZ. The Minister affirmed that<sup>17</sup> –

[T]he proclamation over our EEZ is consistent with current State practice...We will enjoy exclusive rights over fishery resources of the zone...I would like to state here that the proclamation is only in respect of living resources, marine scientific research and preservation of the marine environment.

In a separate statement reported by the *Bernama* on 22 May 1980, the Minister stated that the proclamation of the EEZ would allow Malaysia to venture into deep-sea fishing in deeper waters, which had previously been explored by foreign fishermen. He recognised the interests of foreign fishing vessel from Thailand and South Korea in our EEZ area and encouraged joint ventures with Malaysian fishermen or government agencies - which would require approval and support of the respective Governments - to exploit the abundant fisheries resources in the Malaysian EEZ.<sup>18</sup>

Further to this, the Minister announced that “a Bill would be introduced in Parliament to confer enforcement powers on the various agencies and to provide penalties for the infringement of our rights.” In 1984, the *Exclusive Economic Zone, Act* [ACT 311] was passed and came into force on 1 May 1985.

Malaysia's ratification of the LOSC augments Malaysia's earlier proclamation of the EEZ. Malaysia can now legitimately exercise sovereign rights over a vast sea area for resource exploration and exploitation *inter alia*, which is delicately balanced<sup>19</sup> with responsibilities to protect and preserve the surrounding marine environment.<sup>20</sup>

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<sup>17</sup> *Ibid.*

<sup>18</sup> *Ibid.* p. 676.

<sup>19</sup> For an in-depth discussion on the balance of rights and responsibilities of State party to LOSC, see, Max Herriman. 1997, *The Law of the Sea – A Delicate Balance of Rights and Responsibilities in Conserving*

### *Malaysia's ratification of the LOSC*

On 2 October 1996 the Minister of Foreign Affairs of Malaysia, Abdullah bin Haji Ahmad Badawi signed on behalf of the Government of Malaysia, the instrument of ratification to the *1982 United Nations Convention on the Law of the Sea*. The instrument of ratification was deposited to the Secretary-General of the United Nations on 14 October 1996 - as required by LOSC, Article 306 - included a confirmation by the Government of Malaysia to faithfully undertake the performance and execution of the stipulation contained in the 1982 Convention.<sup>21</sup>

The ratification of the LOSC by Malaysia was significant in marking the end of a long decision-making process on when if at all, Malaysia would ratify the LOSC which it had signed along with 118 other States in Montego Bay on 10 December 1982.<sup>22</sup> For fourteen years, Malaysian bureaucrats and interested individuals debated over the pros and cons for Malaysia's ratification of the LOSC.<sup>23</sup> At the same time, while some parts of the LOSC were emerging as customary law, Malaysia began to adopt practices deemed beneficial to Malaysia. As we have seen earlier, the most significant was the declaration of an exclusive economic zone (EEZ). This was followed by the enactment of the *1985 Fisheries Act* [ACT 317] which declared a Malaysian Fisheries Waters (MFW) of 200 nautical miles in which some concepts introduced by LOSC albeit briefly, such as conservation and management principles, and optimum utilisation were included.<sup>24</sup>

Although Malaysia had not yet then ratified the LOSC, the adoption of an EEZ (and MFW) was consistent with the practices of many developing countries, which favoured the EEZ regime. The regime empowered coastal States with sovereign rights

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*Australia's Oceans: Development of Australia's Oceans Policy*, ACIUCN Occasional Paper number 7, Australian Committee for IUCN Inc., Sydney, pp. 21 - 31.

<sup>20</sup> LOSC, Article 56(1)(b)(iii).

<sup>21</sup> See, "Instrument of Ratification" in *The MIMA Bulletin*, Volume 4, No.1/97, Maritime Institute of Malaysia (MIMA), p.15.

<sup>22</sup> "Signatories of the Convention", Appendix to *The Law of the Sea, Official Text of the United Nations Convention on the Law of the Sea with Annexes and Index*, United Nations, New York, 1983.

<sup>23</sup> See generally discussion in submittal papers and articles for example by BA Hamzah (ed). 1994, *Malaysia and the 1982 Law of the Sea Convention*, Maritime Institute of Malaysia (MIMA), Kuala Lumpur; and articles in *The MIMA Bulletin*, Volume 4, No.1/97.

<sup>24</sup> See, Section 6 for "Fisheries Plans" of the *Fisheries Act, 1985*.

over resources in adjacent maritime areas of up to 200 nautical miles measured from the territorial sea baselines.<sup>25</sup>

We should recognise at this juncture that Malaysia is a member of Group 77 who at UNCLOS III fought hard in favour of coastal State sovereignty and sovereign rights over an expanded area of maritime zones whilst challenging the concept of *mare liberum*. As a State almost surrounded by the seas, Malaysia is highly dependent on the seas for economic, resource exploitation, trade, communication and security. Malaysia is endowed with plenty of marine living and non-living resources. To date, all of its hydrocarbon deposits are found offshore, and 80% of its people depend on fish as a source of daily protein. Additionally, almost 95% of Malaysia's trade are seaborne.<sup>26</sup> Therefore, Malaysia's proclamation of the EEZ followed by the ratification of the LOSC fortifies Malaysia's quest to develop its management of surrounding seas and resources. In line with this, it is not an overstatement to say that Malaysia's policy with regard to national ocean affairs thus, its acceptance of the LOSC, reflect its national priority and requirements regarding its marine affairs.

## Issues

### ***Obligations, Responsibilities, Duties and Liabilities of Malaysia as a State Party to International Conventions***

As a responsible sovereign nation, and in meeting at least, minimal international duties and obligations, it is imperative that the Government of Malaysia and the various stakeholders recognise that Malaysia is party to many maritime treaties and that Malaysia honours such treaties. This is vital in order that Malaysia is seen not only at the international level as a State which meets its commitment and is abreast with

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<sup>25</sup> See, ED Brown. 1994, *The International Law of the Sea*, Volume I Introductory Manual, Dartmouth Publishing Company Limited, Aldershot, p. 10; in which Professor Brown says that "(t)he demands of the Third World to develop a New International Economic Order, (the LOSC) seeks to ensure that the immense wealth of the deep seabed should be shared with the developing world; and yet it accepts, in the form of the new 200-mile Exclusive Economic Zone, a new concept of national enclosure...". This is consistent with practices of non-maritime power States which 'feared projection of power from the sea'. The adoption of *mare clausum* regime (closed seas) encouraged small maritime States to put forward national security and economic interest against maritime powers, often viewed as hostile, which advocated for the *mare liberum* – the freedom of the seas concept.

<sup>26</sup> B.A. Hamzah & Jenny LP Wong. 1997, Current Issues of Marine and Coastal Affairs in Malaysia in *The International Journal of Marine and Coastal Law*, Volume 12, Number 2, May 1997, pp. 226 –228.

international aspiration, but also, at the domestic level, is seen as a Government which is desirous of pursuing national interests beyond national boundaries.

After *Merdeka* in 1957, Malaysia became party to several treaties on its own accord. In this regard, it is clear that Malaysia agreed to be bound by the requirements contained in the treaties which spell out the various rights, responsibilities, obligations, duties and if any, liabilities to be borne by Malaysia as a Contracting Party. It will be far too cumbersome at this juncture to list the various requirements of each convention Malaysia is party to. Undoubtedly so, it is strongly advised that relevant authorities undertake a thorough examination of all treaties in order to establish the rights and responsibilities required by the conventions.

Malaysia has yet to be party to a number of international conventions that may be considered useful for a meaningful management of Malaysia's sea areas and heterogeneous maritime activities. Ratification and the eventual adoption of these conventions into the national legislation will facilitate and legalise the administration, control and enforcement of maritime activities. Among the conventions which require urgent attention include IMO conventions like the *Intervention Convention, 1969*; *Protocol of 1992 to amend the International Convention on Civil Liability for Oil Pollution damage, 1969*, and *Protocol of 1992 to Amend the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1971*. Other conventions which may be worth considering for ratification include the *Salvage Convention, 1989* and the *1996 Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matters, 1972*. A point to note is the fact that many conventions particularly IMO-generated are, more often than not, inter-linked. This to say that for the implementation of particular provisions of certain conventions, reference is made to the application of other conventions. By way of illustration, the implementation of Article 3 of the *OPRC 1990* concerning oil pollution emergency plans requires the application of regulation 26 of *MARPOL 73/78*. In addition, implementation of international convention at the national level also cross-refers to other relevant conventions. Let us examine the relationship between *MARPOL 73/78* and the *Basel Convention, 1989*. Coastal States party to *MARPOL 73/78* are obliged to provide reception facilities for the disposal of ship-generated wastes. Such

wastes are categorised as scheduled wastes under the *Environmental Quality (Scheduled Wastes) Regulations, 1989*, the national law adopting the *Basel Convention, 1989*. Oil tanker sludge, oil-water mixture such as ballast water and sludge from oil storage tank, lubricating oil and hydraulic oil are classified as “mineral oil and oil contaminated wastes” under the 1989 Regulations. These are category A wastes under Annex II of *MARPOL 73/78*. Other scheduled wastes include toluene (category C under Annex II of *MARPOL 73/78*) and dimethyl formamide (category D under Annex II of *MARPOL 73/78*). Disposal, treatment and storage of scheduled wastes may be executed at prescribed premises categorically listed under the *Environmental Quality (Scheduled Wastes Treatment and Disposal Facilities) Order, 1989*. Such facilities require operating licence as per the 1989 Environmental Quality Regulations and Order. In this regard, collaboration between the agencies implementing *Basel* and *MARPOL* conventions at the national level is essential toward an effective and efficient management of ship-generated wastes.

### ***Harmonisation vis-à-vis Interpretation of National Laws***

National laws are implemented by several different agencies. This may lead to different interpretation of the laws by implementing agencies. A common interpretation of the provisions of particular laws which require collaboration of different agencies for their implementation may be necessary for effective enforcement of the laws. The dilemma presented earlier in the implementation of the *Basel Convention* and *MARPOL 73/78* at the domestic level can be taken as an example.

Another peculiar situation would be the control and prevention of marine pollution offences through the *Environmental Quality Act, 1974* and the *Exclusive Economic Zone Act, 1984*. Enforcement measures are inadequate, if not haphazardly carried out, because there are far too many enforcement agencies operating in the two maritime zones - the 12 nautical mile of territorial sea and the exclusive economic zone (EEZ). Some enforcement agencies have found it difficult to operate in grey areas i.e. in areas where the territorial sea and the EEZ “meet” at which the demarcation of the

boundaries are not distinguishable.<sup>27</sup> In addition, existing laws do not adequately provide punishable offences the necessary deterrence which would discourage potential and regular offenders.<sup>28</sup>

The harmonisation of the national merchant shipping laws is another pressing instance. As many of us know, Malaysia administers merchant shipping through three different laws, viz. the *Merchant Shipping Ordinance of 1952* for Peninsular Malaysia, the *Merchant Shipping Ordinance, No. 2 of 1969* for Sarawak and the *Merchant Shipping Ordinance No. 11 of 1960* for Sabah. It is acknowledged that efforts are currently being undertaken to integrate the merchant shipping laws into one Act for application throughout Malaysia.

### **Recommendations**

Actions toward endorsing the *1982 United Nations Convention on the Law of the Sea* at the National Level should be given priority if Malaysia is serious about managing its marine environment in a consistent, clear and appropriate manner. Therefore, in the light of Malaysia's recent ratification of the *1982 UN Convention on the Law of the Sea* on 14 October 1996, and especially on the basis of the firm Declaration made by *Wisma Putra*<sup>29</sup> it is perhaps reasonable to suggest that the following proposals are considered by relevant Government agencies for expeditious implementation in order that the needs and interests

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<sup>27</sup> However, the Doctrine of Constructive Presence provides that "(w)here a foreign ship is situated just outside the territorial sea of a coastal State and commits something prejudicial to the law of the coastal State,..., then the foreign ship can be deemed to be within the jurisdiction of the coastal State." *Op. cit.*, Tunku Sofiah Jewa. p. 698. For case study, see *The Araunah*, British and Foreign State Papers, Vol. 82, London, 1812, pp. 1058 –1059; and *The Grace and Ruby*, (1922) 283 Fed. 475.

<sup>28</sup> For example, Section 27(2) of the *Environmental Quality Act, 1974* amended in 1996 by A593/96 provides that a person who is found guilty of discharging oil into "Malaysian waters" i.e. Malaysian territorial sea, shall be fined not exceeding RM500,000 or to imprisonment not exceeding five years, or both. Section 10 of the *EEZ Act, 1984* imposes a fine not exceeding RM1million or, imprisonment of if the offender is found guilty of discharging oil or pollutant into the EEZ. C/f Singapore laws – in the *Prevention of Pollution From Land and Apparatus*, an offender shall be liable to a fine not less than S\$500 and not more than S\$500,000 or to imprisonment not exceeding 2 years or both; whereas Part III governing "Prevention of Pollution From Ships" imposes a fine "not exceeding S\$10,000 or imprisonment for a term not exceeding 2 years or both" for discharge of refuse, garbage, wastes, effluents, plastics and dangerous pollutants from ships; and Section 7 imposes a fine between S\$500 and S\$500,000 or imprisonment of 2 years or both, for oil or oily mixture discharge offences.

<sup>29</sup> Malaysian reference to the Ministry of Foreign Affairs. *Supra* p. 9.

of all stakeholders<sup>30</sup> of Malaysia's vast marine environment are adequately met. With regard to specifically, the LOSC, the following is recommended:

- promulgation of national legislation giving effect to the LOS Convention;
- the publication of a chart of a scale or scales adequate for ascertaining the baselines for measuring the breadth of the territorial sea, or alternatively a list of geographical co-ordinates of those points; and
- the delimitation of internal waters, territorial sea, contiguous zone, EEZ and the continental shelf.

It would be also reasonable to suggest that any in-depth study of maritime laws in Malaysia, particularly with regard to the adoption of international conventions into the domestic environment take cognisance of the following to complement a meaningful legal framework of maritime matters in Malaysia. The proposals include:

- identification of significant maritime issues which lack legal measures for implementation;
- identification of current principal legislation providing enabling powers which has yet to make the necessary subsidiary legislation;
- harmonisation of national laws – if necessary, State and Federal legislation;
- identification of implementing agencies with regard to new responsibilities and obligations;
- rationalisation of enforcement powers identified through national laws and policies;
- thorough analysis of rights, obligations, responsibilities, duties and, liabilities of Malaysia as a Contracting Party to international conventions;
- promulgation of national legislation adopting provisions of the treaties Malaysia is party to, reflecting the rights, obligations etc. required thereof;
- ratification of international conventions governing maritime issues which require international and national legal measures.

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<sup>30</sup> Public and private sectors, groups or individuals.

## **Maritime Legal Regime and Ocean Governance**

In the above sections we may have observed that many domestic laws which are in the public domain are in force. Nevertheless, there are particular maritime interests which have not been given adequate attention and require urgent national laws for the systematic and controlled management of that activity. There are also treaties which have not been given due emphasis. Consequently, there may be gaps within existing national laws, and with regard to national laws *vis-à-vis* international instruments. The latter is particularly pertinent with respect to either, the adoption of international laws into national legislation or with regard to giving effect to international obligations. As such, the following observations can be made:

- There are many more national legislation that we need to promulgate in order to enhance ocean governance as well as to meet our international responsibilities and obligations.
- There is a need for the rationalisation and harmonisation of national laws on ocean uses in order to improve efficiency and enforcement of maritime activities, particularly in respect of multiple-use activities within the marine environment.
- It is important that considerable weight and attention is granted to the pressing need towards ratifying several identified international conventions.
- Malaysia's ratification of the *1982 UN Convention on the Law of the Sea* means that national maritime laws and policies regarding our new responsibilities and obligations need to be streamlined with the provisions of the 1982 Convention.

## **Conclusion**

It is without doubt that Malaysia recognises the complexity of ocean-related matters both at the domestic level and within the region. Malaysia lies in a semi-enclosed region where Malaysia shares with neighbouring States surrounding seas. Consequentially, States within this region share maritime boundaries, overlapping EEZ and in the most complex scenario vital resources. As an important and responsible member of ASEAN,<sup>31</sup> rationalisation of maritime activities with an effective and clear legal framework would prove useful for Malaysia, which is currently in an interesting era of ocean governance.

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<sup>31</sup> Association of South East Asian Nations.

An in-depth study of world trend shows that there is now an “unprecedented level of interest ... in development strategies that will ensure maximum benefit from marine zones of jurisdiction”.<sup>32</sup> Many policy-defining international instruments have only come into force within the last ten years or so. Therefore, Malaysia will need to “recognise the dynamic nature of the international framework within which it must operate and provide for continual, systematic and controlled evolution”.<sup>33</sup> Malaysia currently adopts a “sectoral-approach” in addressing marine policy issues regarding individual operations of its major maritime activities like shipping, port, offshore exploration, fishing and tourism. Perhaps it is reasonable to suggest that a consideration of rationalising multiple-use maritime activities from a fresh perspective organised under a rationalised maritime legal framework would motivate policy-makers to address whether Malaysia should embark on administering the multiple-use of marine and coastal areas in Malaysia accordingly. Presently, three distinct and prominent policies are enforced in different parts of the world – (a) the ‘sectoral approach’ adopted by e.g. Malaysia and Japan; (b) the ‘co-ordination approach’ where States like the Netherlands and China attempt to support cross-sectoral awareness, and simultaneously try to maintain sectoral autonomy; and most recently the phenomena of (c) the ‘centralisation approach’ introduced by Canada and South Korea where both States have created a central institution of the highest possible level to administer ocean affairs. Canada has gone a step further in introducing the *Canadian Oceans Act, 1996*<sup>34</sup> where all maritime activities particularly those occurring within a multiple-use environment are managed according to priority. The challenge present before Malaysia is for policy-makers to judge which of the options if at all, is best suited for this country.<sup>35</sup>

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<sup>32</sup> Max Herriman, Martin Tsamenyi, Juita Ramli & Sam Bateman. 1997, *Australia’s Oceans Policy: Review of International Agreements, Conventions, Obligations and Other Instruments Influencing Use and Management of Australia’s Marine Environment*, A Report Commissioned by Environment Australia, Commonwealth of Australia, Canberra, p. 11.

<sup>33</sup> *Ibid.*, Max Herriman et. al., p. 10.

<sup>34</sup> The Canadian *Oceans Act* is divided into three parts. Part I recognises Canada’s jurisdiction over its ocean area through the declaration of an exclusive economic zone and a contiguous zone in accordance with the LOSC. It also incorporates provisions of the *Canadian Laws Offshore Application Act* and of the *Territorial Sea and Fishing Zones Act*. Part II provides for the development and implementation of a national Oceans Management Strategy based on the sustainable development and integrated management of oceans and coastal activities and resources. Finally, Part III provides for consolidation and clarification of federal responsibilities for managing Canada’s oceans.

<sup>35</sup> *Ibid.*, Max Herriman et. al., p. 10.

In our endeavour to achieve the status of a developed nation - in which the maritime sector has been identified as one of the major players expected to contribute to the realisation of 'Vision 2020'<sup>36</sup> - it is reasonable to allude to the concept of 'Malaysia Incorporated'<sup>37</sup> in the process of making such decisions of great consequence. Malaysia seems committed to "collaborative efforts between the public and private sectors" toward achieving the goal of making a developed country.<sup>38</sup> In strengthening this spirit, both policy-makers and stakeholders should co-operate in contributing to the development of legal and administrative requirement, which would increase transparency, encourage cross interpolation of information and eradicate cumbersome procedures.

"[R]ules were needed only to prevent direct conflict through poor planning or misunderstanding"<sup>39</sup> but in recent times, rules, regulations and laws are needed not only to rationalise planning and management of activities but also to command and impose sustainability of specific activities. The saying *corruptissima republika, plurimae leges* (when the State is most corrupt, there are the most laws) advocated by a Roman historian, Tacitus (ca. 55-117) does not hold water in these modern times. In his counter, Hickling said that a plethora of laws does not imply a plenitude of corruption but rather, made to regulate the increasing demands of a technological world.<sup>40</sup>

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<sup>36</sup> 'Vision 2020' is a continuation of the advancement of the New Economic Policy (NEP) initiated in 1970 which has been given some new dimensions. See, Berita Publishing Sdn. Bhd. 1997, *Information Malaysia 1997 Yearbook*, Kuala Lumpur.

<sup>37</sup> See, Limkokwing Integrated Sdn. Bhd. 1997, *Malaysia Incorporated*, Kuala Lumpur.

<sup>38</sup> Prime Minister Dato Seri Dr. Mahathir bin Mohammad. 1995, In the Spirit of Malaysia Incorporated in *ibid.*, Limkokwing Integrated Sdn. Bhd., pp. 6 - 7.

<sup>39</sup> *Op. cit.*, Max Herriman. p. 21.

<sup>40</sup> *Op. cit.* RH Hickling. "Introduction"

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