

The Development of the Law of the Sea in Relation to Malaysia

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ABSTRAK

Pada zaman pemerintahan Kesultanan Melaka, perairan di sekitarnya tidak dikuasai oleh mana-mana pihak. Pada zaman pemerintahan Portugis dan Belanda pula, kawasan perairan ini dianggap sebagai kawasan tertutup. Peraturan perairan hanya mula diperkenalkan pada zaman pemerintahan British. Peraturan ini telah berkembang melalui beberapa perjanjian dan perundangan. Artikel 233 peraturan perairan ini khasnya, mungkin akan dijadikan satu perundangan yang khusus bagi Selat Melaka dan Singapura.

ABSTRACT

Freedom of the seas existed during the Melaka Sultanate. When the Portugese and later the Dutch occupied Melaka, the seas were treated as mare clausum. The concept of the territorial sea was evolved during British Colonial period. Conventional rules of the law of the sea applied to Malaysia by accessions to the relevant conventions. The law of the sea also developed thorough unilateral claims, bilateral treaties and legislations. The Statement relating to Article 233 of the Convention on the law of the sea may develop into a special legal regime peculiar to the Straits of Malacca and Singapore.

INTRODUCTION

In Malaysia the law of the sea had evolved as far back as the Melaka Sultanate during the fifteenth and early sixteenth century. The law of the sea was written in a codified form known as the Maritime Law of Melaka, (hereinafter referred to as "The Maritime Code of Melaka") which was based on the practices prevailing at that time.

THE MARITIME CODE OF MELAKA

The codification of the Maritime Law of Melaka took place during the reign of Sultan Mahmud Shah (1424-1444). The task of compiling the Maritime Code was given to three senior *nakhodas* or sea captains in Melaka. They were Narkhoda Jenal, Narkhoda Dewa and Narkhoda Isahak (Raffles, 1879). They were commissioned to do the work of codification of maritime customs which had developed into mari-

time practice (Alexandrowicz, 1967). When they completed their work they presented the draft code to Dato' Bendahara Sri Maha Raja, who in turn laid it before Sultan Mahmud Shah. The Sultan accepted the code prepared by the *narkhodas* and the Maritime Code of Melaka was accordingly established. The Sultan ordered that the Maritime Code was to "...be carried into effect at Sea in like manner as those of the Land are carried into effect on Land..." (Raffles, 1879).

The Code contained provisions for the safety of vessels at sea. It provided that when a vessel proceeded to sea, every person on board would be under the charge of the *nakhoda*. Before the vessel set sail care should be taken that the rigging and sails were in order to prevent accident and fire. No vessel was allowed to run adrift or to be grounded on shore. If such an accident occurred the *Muda-Mudas* would be held responsible and would accordingly be punished. When a vessel passed

another vessel, the persons on watch must hail the other vessel (Raffles, 1879).

The Code also contained rules to prevent collisions at sea. A vessel should take due care not to collide with a guard or naval vessel (Raffles, 1879). [Raffles used the term "armed vessel." On reading the text, the writer is of the view that Raffles must be referring to "naval vessel" (Raffles, 1879)]. When a vessel struck a rock or a shoal or ran ashore or collided with another vessel, the loss or damage suffered by either vessel was not due to an accident but due to the negligence of either vessel or both, because when there was a heavy sea, a vessel should take due care to prevent such occurrences (Raffles, 1879). The *nakhoda* of the vessel which was being wrecked as a result of the collision could lodge a complaint before a judge who would then decide the appropriate compensation to be paid by the *nakhoda* of the other vessel (Winsteadt & De Jong, 1956).

The Code also contained provisions with regard to the rescue of persons in distress at sea. When a person was in distress as a result of shipwreck, the *nakhoda* of a vessel should rescue him, provide him with food and send him to the nearest port. The matter would be referred to the *shahbandar*, who decided how much to be paid by the rescued person to the *nakhoda* for the rescue services rendered by the *nakhoda* (Liaw, 1976).

Under the Code the *nakhoda* was a Raja while at sea (Raffles, 1879). While the vessel was at sea the *nakhoda* exercised disciplinary powers over the crew and passengers (Alexandrowicz, 1967). The *nakhoda* was empowered to inflict capital punishment on board his vessel of a person mutinied against him, or if a person conspired and combined with another person for the purpose of killing the *nakhoda*, or if a person unlawfully wore a *kris* or when a person committed adultery on board the vessel (Raffles, 1879). The powers of the *nakhoda* while at sea were, however, not absolute. If he rescued a person who was shipwrecked, the payment for the services rendered by him would be decided by the *Shahbandar*. If the *nakhoda* killed an innocent man he would be tried in Court in the country of his destination. If he was found guilty he would either be sentenced to death or fined (Liaw, 1976). When the vessel entered a foreign port the *nakhoda's*

jurisdiction over his vessel gave way to a co-jurisdiction exercised by him and the *Shahbandar* (Alexandrowicz, 1967). When the vessel entered a port, it had to pay the necessary tax and port dues to the *Shahbandar* (Liaw, 1976).

Professor Alexandrowicz has rightly concluded that the specific character of the rules relating to a ship while she was outside a harbour or inland water testifies to the fact that the high sea was not treated as *mare clausum* (Alexandrowicz, 1967). His conclusion was based on the rules in the code which stated that the *nakhoda* was sovereign at sea. According to him the ship was treated as a piece of quasi-territory sailing in the legally undefined vastness of the sea (Alexandrowicz, 1967). He gave three other reasons in support of his conclusion. Firstly, the law relating to piracy authorised common action of all nations in order to maintain maritime safety. Secondly, early European travellers mentioned the existence of freedom of the high seas in the Indian Ocean. Thirdly, the Ruler of Macassar had a general concept of *mare liberum* and claimed a right for his ships not to be interfered with on the high seas (Alexandrowicz, 1967).

With regard to the third reason the Ruler of Macassar in fact declared in 1615 that "God has made the earth and the sea, has divided the earth among mankind and given the sea in common. It is a thing unheard of that anyone should be forbidden to sail the seas" (Zakaria, 1979).

Two other reasons may perhaps be added in support of Professor Alexandrowicz's conclusion. The Port of Melaka during the period of the Melaka Sultanate was an open port where merchants from Arabia, Persia, India and Indonesia were trading freely. These merchants and their vessels were well received and their requirements well looked after by the *Shahbandar*. Duties levied at the Malaka Port were comparatively moderate, and no duties were charged on vessels exporting goods from Melaka. Furthermore the bureaucracy in Melaka was fair and efficient and gave foreign merchants a considerable degree of security. The city's flourishing trade depended solely on the Strait of Melaka through which all vessels converged into its port. Melaka would not be a prosperous port if the waters in the Straits were treated as *mare clausum* (Zakaria, 1979).

There is no evidence that the Sultan of Melaka levied tolls on foreign vessels passing through the Straits of Melaka or compelled foreign merchant vessels to call at the port of Melaka during peace time. There is also no evidence that Melaka enforced a blockade of the sea during peace time. According to the Maritime Code of Melaka, a country at war could levy tolls on foreign merchant vessels [In Winstedt & De Jong, 1956, the English text omitted the word "foreign" but the Malay text used the words, "segala dagang perahu..." which mean foreign vessels]. Similarly a country could enforce a blockade by patrol boats at sea in time of war (Winstedt & De Jong, 1956). According to the Code the "...levying of toll is comparable to the enforcing of a blockade by patrol boats at sea..." From the Melaka Code it can be inferred that the Sultanate of Melaka did not impose any toll on merchant vessels passing through the Strait of Melaka during peace time. This is consistent with the present rule of international law. Article 18(1) of the Geneva Convention on the Territorial Sea and the Contiguous Zone, 1958 provides that, no charge may be levied upon foreign ships by reason only of their passage through the territorial sea (499 UNTS, 1964). With regard to the enforcement of naval blockade in time of war, it is to be noted that such practice is justified in law even in modern times (499 UNTS, 1964). Indeed under the present customary rules of international law, even pacific blockade is permissible in time of peace (Oppenheim, 1952; Columbus, 1967).

Reference was made by Professor Alexandrowicz to the law relating to piracy. As already stated under the Maritime Code of Melaka, the *nakhoda* was the *Raja* while at sea. According to the Code when a vessel encountered pirates on the high seas it was the duty of the *jurumudis* (or *muda-mudis*) to fight the pirates. The *jurumudis* were steermen but when they were not on duty at the helm it was their responsibility to look after the arms in the vessel. The Code stated, "In the event of the Perahu falling in with pirates, let them combat with a strong hand and courageous heart, for such is their duty." (Raffles, 1879). It is evident that during that period acts of piracy on the high seas were regarded as illegal acts and the pirates were regarded as enemies of mankind. The Melaka Sultanate enforced pacific blockade

as a measure for the control of piratical activities in the Strait of Melaka (Zakaria, 1979).

The Maritime Code of Melaka applied throughout the Melaka Sultanate, which by the end of the fifteenth century, had extended from North Malaya to Singapore, The Riau Archipelago and the Island of Lingga in the south, and across the Strait of Melaka to the States of Rokan, Siak, Kampar and Indragiri on the east coast of Central Sumatra (Harrison, 1968; Zakaria, 1979). The Bugis and Macassar States adopted the provisions of the Melaka Code (Zakaria, 1979). Subsequently, Brunei also adopted the Melaka Code (*JMBRAS*, 1923). There is reason to believe that freedom of the high seas was observed throughout the waters of the Malay Archipelago (*JMBRAS*, 1923). There is also reason to believe that the rules contained in the Melaka Code were observed throughout the Malay Archipelago. It can safely be concluded that under the Melaka Code the seas in the Malay Archipelago were treated as *mare liberum* during the fifteenth century and early sixteenth century.

It should be mentioned here that when Hugo Grotius, the Dutch jurist, who is acclaimed by the western world as the "Father of International Law" wrote his treatise *De jure Praedae* in the winter of 1604 - 1605 he had with him the relevant documents and laws of the peoples in the East Indies including the Melaka Code. In Chapter 12 of his work he wrote the "Mare Liberum" or the "Freedom of the Seas" where he, *inter alia* stated, "... the subjects of the United Netherlands - have the right to sail to the East Indies ...Every nation is free to travel to every other nation, and to trade with it..." According to him the sea was *res communis* in common to all (Grotius, 1916).

It has been rightly suggested that "...Grotius in formulating his doctrine of the freedom of the sea found himself by what he learnt from the study of Asian maritime custom..." (Alexandrowicz, 1967) including that found in the Malay Archipelago.

Because of the liberal trading policy of the Melaka Sultanate in Melaka, and since the high seas in the Malay Archipelago were treated as *mare liberum*, Melaka became a prosperous city. One writer, Barbosa described the city as "the richest sea port with the greatest number of wholesale merchants and abundance of ship-

ping and trade that can be found in the whole world..." (Barbosa, 1921). The Melaka Sultanate may thus be described as one of the civilized states during the fifteenth century and the first decade of the sixteenth century.

Melaka was, therefore, the envy of European nations. These nations had to get their supply of eastern products through Venice, which was holding the monopoly of the eastern trade. The Portuguese knew the strategic importance of Melaka. One Portuguese writer said that, "...whoever is lord of Malacca has his hand on the throat of Venice" (Cartesas, 1944).

While the high seas in the Malay Archipelago were treated as *mare liberum* during the fifteenth and the first decade of the sixteenth century, European countries claimed proprietary rights over the high seas in Europe during the same period. England claimed sovereignty over the high seas off the coast (Fulton, 1911). Denmark and Sweden claimed sovereignty over the Baltic. The Danish claim was later extended to all the northern seas between Norway, Iceland and Greenland. Venice claimed sovereignty over the Adriatic Sea whilst Genoa and Pisa claimed the Liguarian Sea. According to Colombos, as a result of the claims of the Italian States, freedom of the seas in the Mediterranean was altogether lost between the eleventh and sixteenth centuries (Columbus, 1967).

In 1493, the Pope by the Bull *Inter Caetera* drew a straight line from the North Pole to the South Pole passing 100 leagues to the West of the Azores and Cape Verde Islands. In 1494 the line was shifted to pass 370 leagues to the west of Cape Verde Islands. The area to the west of this line came under the sphere of Spain and the area to the east came under Portugal (Fulton, 1911 ; Columbus, 1967).

THE PORTUGUESE IN MELAKA

The Portuguese immediately established their supremacy in the Indian Ocean and in Southeast Asia after a series of battles with the Muslims culminating in the capture of Melaka in 1511. At first they were fighting what they claimed to be a religious crusade against the Muslims. But when they discovered that the Muslim traders in India were thriving on the spice trade their religious motive succumbed to an economic consideration (Hall, 1970).

After the capture of Melaka by the Portuguese the status of the waters in the Strait of Melaka was that of *Mare Clausum*. All trading vessels passing through the Strait must carry passes issued by the Portuguese authorities in Melaka. Trading vessels were compelled to call at Melaka. A "road block" was maintained across the sea lane in the Strait for this purpose. When a vessel was at Melaka it was subject to a thorough search by the Portuguese authorities. The Portuguese claimed that they were justified in ordering trading vessels to carry passes because they claimed that they were in possession of the high seas.

After the Portuguese had captured Melaka, Portuguese ships and the Fort of Melaka were under constant attack by the exiled Sultan Mahmud Shah and his son and later by the Archenese, the Javanese and the Dutch. Portuguese sea power in the Strait of Melaka gradually weakened and in 1641 the Dutch captured Melaka (Zakaria, 1979).

THE DUTCH IN MELAKA

After the Dutch had captured Melaka, the policy of *mare clausum* was unscrupulously carried out in the Malay Archipelago. They took over the monopoly of the eastern trade. Like the Portuguese, the Dutch also required trading vessels passing through the Strait of Melaka to carry passes. If trading vessels failed to carry passes they would be seized and brought to Melaka. The pass system applied to Malay trading vessels as well. The Dutch also compelled all trading vessels passing through the Strait to call at Melaka and to trade there (Zakaria, 1979). The regime of *mare clausum* continued in the area until the English established themselves firmly in the Malay Peninsula.

ANGLO-DUTCH RIVALRY

In 1790 the Dutch were at war with the British. Although the war lasted for only nine months, it was not until June 1784 that a Peace Treaty was signed. It is significant to note that Article 6 of the Peace Treaty provided that British ships were accorded freedom to navigate through the Strait to China without any interference from the Dutch. After the signing of the

Treaty, the British were free to sail through the Strait of Melaka. They were then ready to look for trading stations along the Strait of Melaka. As we know in 1786, Francis Light of the English East India Company occupied Penang after concluding a treaty with the Sultan of Kedah. By this time Dutch Supremacy in the Strait of Melaka was on the decline. However, despite the Peace Treaty the Anglo-Dutch Rivalry in the Malay Archipelago continued. In 1795 Melaka was taken by the English but was restored to the Dutch in 1818. With Melaka restored to them, the Dutch began to revive their control of the Strait of Melaka. The English, realising the aim of the Dutch, immediately looked for a settlement at the Southern end of the Strait. In 1819 Stamford Raffles acquired Singapore from the Temenggong of Johore and the Sultan of Johore under two separate agreements. The Dutch protested Raffles' action of acquiring Singapore. The Anglo-Dutch dispute in the Malay Archipelago ended by the signing of the Anglo Dutch Treaty on March 17, 1824. Under the Treaty, Melaka was returned to the British in exchange for Fort Malborough and all British possessions in Sumatra. The Treaty clearly marked the separate spheres of influence of the British and the Dutch in the region. It was implicit that under the Treaty, the British, Dutch, Malays and Indonesians enjoyed freedom of trade and navigation in the Malay Archipelago in particular in the Strait of Melaka (Zakaria, 1979).

THE ANGLO-DUTCH TREATY, 1824

One writer, Professor K.E. Shaw has expressed the view that under the Anglo - Dutch Treaty, third states (other than the Malays and the Indonesians) acquired right of passage through the Strait of Melaka. He states that the Treaty established "the international juridical status" of the Strait of Melaka. According to him under the Treaty, the Strait was internationalised. He further states,

"The Treaty made open for a tacit compromise, a *pactum tacitum*. Tacit recognition of the International juridical status (internationalized) of the Straits by Britian and Holland on the one part, in exchange for tacit recognition (acquiescence) of

the new territorial arrangements and the new sea-order within the Straits by other states on the other part (Shaw, 1969). "

Professor Shaw expresses the view on the assumption that "...there had long before 1824 been in the process of crystallization of a customary right to pass through the Malacca Straits" (Shaw, 1969).

With respect, the writer is unable to agree with the view expressed by Professor Shaw. Firstly, as already noted, for almost three centuries after Melaka was captured by the Portugese the Strait of Melaka was treated as *mare clausum*. Freedom of navigation in the Strait was unknown during that period. Secondly, the Treaty contained no provision what so ever in favour of granting third states the right of passage through the Strait (Zakaria, 1979). Thirdly, the main purpose of the Treaty was to exchange territories and to divide the Malay Archipelago into two spheres of influence. We all know that the British and the Dutch proceeded to colonize the territories within their respective spheres of influence after the Anglo-Dutch Treaty was concluded (Zakaria, 1979).

THE TERRITORIAL SEA

After the signing of the Anglo-Dutch Treaty, 1824, Melaka came under the British in addition to Penang and Singapore. Subsequently the other Malay States in the Malay Peninsular came under British Colonial rule. It was during British Colonial rule in the Malay Peninsular that the concept of the territorial sea was introduced. Before considering the development of the territorial sea in Malaya and Indonesia, it is pertinent to note that during the Melaka Sultanate and during the Portugese rule and the Dutch rule of Melaka the concept of the territorial sea did not exist. During the Melaka Sultanate, however, the port area of Melaka was treated as internal waters because the Port came under the jurisdiction of the *Shahbandar*. The practice of treating port area as internal waters was consistent with the present rules of international law (499 UNTS, 1964)

After Penang, Melaka and Singapore had become British Colonies, the English Territorial

Waters Jurisdiction Act, 1878 (Halsbury's Statutes, 1969) applied to these colonies. Under Section 7 of the Act, the territorial seas of Penang, Melaka and Singapore would be the seas adjacent to them as deemed by international law to be within the territorial sovereignty of the Queen of England. The Act did not define the breadth of the territorial sea. But for the purpose of any offence declared by the Act to be within admiralty jurisdiction was one marine league measured from the low water mark. The breadth of the territorial sea of these three colonies was to be determined in accordance with international law. In 1931, the Singapore Admiralty Ordinance was passed but this ordinance did not define the breadth of the territorial sea (Laws of Singapore, 1955). The breadth of the territorial sea of these settlements followed the practice of Great Britain at that time namely three nautical miles from the low water mark (Zakaria, 1979).

It is now proposed to examine the position *vis-a-vis* the Malay States. By a treaty signed between Great Britain and the State of Johore, it was recognized that the territorial sea of Johore extended to three miles from the shore of the state (Maxwell & Gibson, 1924). With regard to Perak and Selangor, the early enactments merely referred to the waters adjacent to the states (Perak Laws, 1877-1900; Selangor Laws, 1877-1899). It is not clear what was the status of the waters adjacent to the two states. In 1933, the territorial sea of the Federated Malay States was defined as that part of the sea adjacent to the coasts of the states as deemed by international law to constitute the territorial sea of the state (Laws of FMS, 1935). A similar provision was included in a Kedah Enactment passed in 1934 (Laws of Kedah, 1934). In 1948, the territorial sea of the newly formed Federation of Malaya was defined to include inland waters and such part of the sea adjacent to the coast as deemed by international law to constitute the territorial sea (Malayan Union Ordinance, 1948). In my view, such definition was not consistent with the rules of customary international law. It is true that under customary rules of international law the sovereignty of the coastal state extends to the territorial sea subject to the limitation of the right of innocent passage by foreign ships. Foreign ships however do not have the right of

innocent passage through the internal waters of a state (Zakaria, 1979).

It will be noted that even in 1948, the breadth of the territorial sea was not defined. The reference to international law in the definition of the territorial sea was a reference to the international law as practiced by the United Kingdom. The practice of the United Kingdom at the time was to uphold the three mile breadth of territorial sea measured from the low water mark (Zakaria, 1979; Columbus, 1967). The breadth of the territorial sea of the Federation of Malaya was therefore three miles measured from the low water mark (Zakaria, 1979). The breadth of the territorial sea of Singapore, Sabah and Sarawak was also three miles when Malaysia was formed (Laws of Sarawak, 1958; Laws of North Borneo, 1953).

In 1969, Malaysia extended her territorial sea to twelve nautical miles measured from the low water mark (Malaysia, Fed. Sub. Leg., 1969). Internal waters were no longer regarded as part of the territorial sea. The method of drawing the baseline from which the territorial sea is measured is in accordance with the rules laid down in Articles 3 to 13 of the Geneva Convention on the Territorial Sea and the Contiguous Zone, 1958 (499 UNTS, 1964). It should be mentioned here that Malaysia had acceded to this Convention on December 21, 1961 (499 UNTS, 1964). Following the provisions of the Conventions, Malaysia's Sovereignty extends to the twelve mile breadth of territorial sea. Malaysia's sovereignty also extends to the airspace over the territorial sea as well as its seabed and subsoil (499 UNTS, 1964). Ships of all states however enjoy the right of innocent passage through the territorial sea (499 UNTS, 1964). When Malaysia extended her territorial sea to the twelve mile limit, there were no formal protests from any state. Indeed, it was not contrary to international law for Malaysia to claim the twelve mile limit (Zakaria, 1988). Today the twelve mile limit has crystallised into a customary rule of international law in view of a large number of states adopting the twelve mile limit. Furthermore, the Law of the Sea Convention, 1982, now provides that a state can claim its territorial sea up to a distance of twelve nautical miles measured from the low water mark (ILM, 1982).

THE CONTINENTAL SHELF

Malaysia also acceded to the Geneva Convention on the Continental Shelf, 1958 (516 UNTS, 1964). In 1966 the Malaysian Parliament passed the Continental Shelf Act (Laws of Malaysia, Act 83). Under the Act the continental shelf of Malaysia is defined as the seabed and subsoil of the submarine areas adjacent to the coast of Malaysia but beyond the limits of the territorial sea the surface of which lies at a depth no greater than two hundred metres below the surface of the sea where the depth of the superjacent waters admits of the exploration of the natural resources of the said areas, at any greater depth (Laws of Malaysia, Act 83).

Section 3 of the Act provides that rights with respect to the exploration of the continental shelf and the exploration of its natural resources are vested in Malaysia and exercisable by the Federal Government. Both the definition of the continental shelf in the Act and Section 3 were taken substantially from Articles 1 and 2 of the Convention on the Continental Shelf, 1958. These articles have now been declared as rules of customary international law in the *North Sea Continental Shelf Cases* (I.C.J. Reports, 1969).

It should be noted that Malaysia's right in the continental shelf is confined to the seabed and subsoil thereunder. The superjacent waters beyond the limit of the territorial sea remain as high seas. The right of Malaysia to the Continental Shelf does not affect the above waters. This is provided in Article 3 of the Convention on the Continental Shelf and the provisions of that Article too has become rules of customary international law (I.C.J. Report, 1969). The Act provides however that the waters within five hundred metres of an installation, shall be deemed to be part of Malaysia (Laws of Malaysia, Act 83)

The boundaries of the continental shelf of Malaysia have been defined by agreements with two neighbouring states namely Indonesia and Thailand. In the Gulf of Thailand, Malaysia and Thailand concluded an agreement to share the resources of the seabed and subsoil within a triangle which includes part of the Continental Shelf of Thailand and part of the Continental Shelf of Malaysia. Malaysia and

Thailand will begin exploration and exploitation work in the joint development area soon (New Straits Times, 1989). There is yet no agreement to define the boundary of the continental shelf between Malaysia and the Philippines.

THE EXCLUSIVE ECONOMIC ZONE (EEZ)

On April 25, 1980, by a proclamation made by His Majesty the Yang Di Pertuan Agong, Malaysia claimed :

- (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 preservation of the marine environment

in the exclusive economic zone which is hereby established and that such exclusive economic zone shall extend to 200 nautical miles from the baselines from which the breadth of the territorial waters is measured" (Malaysia, Fed. Sub. Leg., 1980).

It will be noted that this claim included a claim over the non-living resources in the seabed and subsoil. The main purpose of the Proclamation was to claim the Exclusive Economic Zone (EEZ) up to 200 nautical miles from the baselines from which the territorial sea of Malaysia is measured. When this claim was made no protests were lodged by any State. A number of states had already made similar claims when Malaysia made her claim (Churchill & Lowe, 1983). Furthermore a consensus was already reached on the concept of the EEZ at the Third United Nations Conference on the Law of the Sea, which was still in progress at that time. The Convention on the Law of the

Sea, 1982 now contains provisions relating to the EEZ. Malaysia was, therefore, entitled in law to make the claim. International law and practice recognize that a coastal state may establish an EEZ adjacent to the coast up to a distance of 200 nautical miles (Churchill & Lowe, 1983).

The Malaysian Parliament passed the Exclusive Economic Zone Act in 1984 (Laws of Malaysia Act 311). The Act came into force on May 1, 1985.

Under the Act, the seas comprised in the Exclusive Economic Zone shall be part of Malaysian fisheries waters. The Minister responsible for fisheries is responsible for fisheries in the EEZ. The Fisheries Legislation therefore, applies to the EEZ. A new Fisheries Act was passed by Parliament in 1985 and it came into force on January 1, 1986. The Act requires the Director-General of Fisheries to prepare and keep under continued review fisheries plans based on the best scientific information available and designed to ensure optimum utilization of fishery resources consistent with sound conservation and management principles and with the avoidance of overfishing (Laws of Malaysia, Act 317). The Act also provides that foreign fishing vessels are prohibited from fishing in the EEZ and from conducting any techno-economic research or survey of any fishery unless these vessels are authorised to do so under inter-governmental arrangements with Malaysia or unless such vessels are in possession of permits issued by the Director-General (Laws of Malaysia, Act 317).

Under the Act, no marine scientific research may be conducted in the EEZ or in the continental shelf without the express consent of the Government of Malaysia.

It is significant to note that Section 22 of the Act prohibits any person from laying submarine cables or pipelines in the EEZ or on the continental shelf without the consent of the Government of Malaysia.

Article 58 of the New Convention on the law of the sea however provides that states enjoy the freedom of laying submarine cables in the EEZ of a state. Under the Article, foreign ships enjoy freedom of navigation in the EEZ. But this freedom is not absolute. The Article also provides freedom of overflight. Here again the freedom is not absolute. The EEZ may thus be regarded as a zone *sui generis*.

THE LAW RELATING TO THE STRAITS OF MELAKA AND SINGAPORE

As stated earlier, in 1969 Malaysia claimed a territorial sea up to a distance of twelve nautical miles. Indonesia had in fact claimed a territorial sea of twelve nautical miles in 1960 (Zakaria, 1979). The effect of the claims by Malaysia and Indonesia was to cover the southern half of the Strait of Melaka with the territorial seas of the two countries.

Under both customary international law, (I.C.J. Reports, 1949), and conventional law (499 UNTS, 1964) foreign ships enjoy the right of innocent passage through the southern half of the Strait of Melaka. Passage is innocent so long as it is not prejudicial to the peace good order or security of the coastal state.

During the negotiations in the Sea-Bed Committee and later at the Third United Nations Conference on the law of the Sea, the maritime powers led by the United States opposed the extension of the territorial sea beyond the three mile limit. Many coastal states especially the developing countries were however in favour of the twelve mile limits. The principal reason why the maritime powers opposed the twelve mile limit was that if states were permitted to claim the twelve mile limit, 116 important straits would be changed from those of the high seas to those of the territorial seas of the littoral states. The maritime countries wanted freedom of the high seas in straits so as to enable their warships, nuclear submarines and military aircraft to pass through and over the straits (Zakaria, 1988). When they found that they had little support for the three mile limit they came out with a proposal that they would be prepared to accept the twelve mile limit provided that there was a right of free transit through straits used for international navigation (Zakaria, 1988). Malaysia, Indonesia and other straits states strongly objected to the free transit proposal. They argued that under the rules of international law passage through straits was innocent passage. Despite opposition by Straits States, the proposal on transit passage through the straits was incorporated into the Informal Single Negotiating Text, which was produced at the end of the Third Session of the Conference (Off. Rec. Third UN Conference on the Law of the Sea, 1975). The opposition

to the free transit rule gradually weakened (Zakaria, 1988).

Malaysia continued to raise the straits issue at the Conference. She realised that it would be a futile exercise to oppose the proposed regime of free transit. Instead, she raised the issue on the basis of the protection of the marine environment in the Straits of Melaka and Singapore.

The Straits of Melaka and Singapore are among the busiest straits in the world. The navigable channel in the Strait of Melaka is narrow and shallow. In some areas the depths are less than twenty-three metres. The Strait of Singapore is extremely narrow at certain points. Mammoth tankers when laden with oil passed through the Straits of Melaka and Singapore with an underkeel clearance of less than two metres. In view of the geographical factors and the density of traffic in the Straits there were a number of serious accidents involving tankers the result of which large quantities of oil escaped into the sea (Zakaria, 1988 ; Zakaria, 1978).

Malaysia, Indonesia and Singapore, the three coastal states were greatly concerned over the safety of navigation in the Straits. They submitted a proposal to the Inter-Governmental Maritime Consultative Organization, (IMCO) in London for the establishment of traffic separation scheme in the Straits. They also proposed that the minimum underkeel clearance in the Straits was 3.5 metres. Their proposals were accepted by IMCO with slight modifications with regard to the traffic separation scheme. In its resolution adopted in November 1977, IMCO stated:

“Deep draught vessels and VLCCs shall allow for an Under Keel Clearance (UKC) of at least 3.5 metres at all times during the entire passage through the Straits of Malacca and Singapore and shall also take through the Straits of Malacca and Singapore and shall also take all necessary safety precautions especially when navigating through the traffic separation schemes (IMCO Doc. A.X/Res.375, 1978).”

Malaysia, on behalf of the other coastal states, Indonesia and Singapore, carried on intensive negotiations at the Third United

Nations Conference on the law of the sea, with the maritime powers, namely, the United States, USSR, United Kingdom and Japan, to secure the agreement of those countries that a provision be incorporated in the chapter on straits in the new Convention empowering the states bordering the straits to take enforcement measures against vessels violating the minimum 3.5 underkeel clearance.

As a result of these negotiations, a provision was incorporated in Article 234 of the Informal Composite Negotiating Text (ICNT) which was produced by the Conference in July 1977 (Off. Rec. Third UN Conference on the Law of the Sea, 1980). This article is basically the same as Article 233 of the new Convention. Article 233 states:-

“Safeguards with respect to straits used for international navigation. Nothing in sections 5, 6 and 7 affects the legal regime of straits used for international navigation. However, if a foreign ship other than those referred to in section 10 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, the states bordering the straits may take appropriate enforcement measures and if so shall respect *mutatis mutandis* the provisions of this section (21 ILM 1982).”

But section 7 of Part XII of the Convention does not permit a coastal state to prevent the passage of a vessel violating the 3.5 metre underkeel clearance. In fact the section makes no reference to underkeel clearance at all.

Therefore, further negotiations were held to formulate an interpretative statement on Article 233 in its application to the Straits of Melaka and Singapore. After lengthy negotiations, the three coastal states, on one hand, and the maritime powers on the other, reached a common understanding relating to the purpose and meaning of Article 233 of the Convention in its application to the Straits of Melaka and Singapore (Zakaria, 1988). The common understanding is contained in a “Statement relating to Article 233 of the Convention on the Law of the Sea in its application

to the Straits of Malacca and Singapore (Off. Rec, Third UN Conference on the Law of the Sea, 1984)". The understanding took cognizance of the peculiar geographic and traffic conditions in the Straits and recognized the need to promote safety of navigation and to protect and preserve the marine environment in the Straits. Paragraph 1 of the Statement states that laws and regulations enacted by states bordering the straits under article 42 paragraph 1(a) of the Convention refer to laws and regulations relating to traffic separation schemes, including the determination of underkeel clearance for the straits provided in Article 41.

Paragraph 2 states that a violation of the Resolution A375(x) by IMCO adopted on November 14, 1977, whereby vessels referred to therein shall allow for an underkeel clearance of at least 3.5 metres during passage through the Straits of Melaka and Singapore, shall be deemed, in view of the peculiar geographic and traffic conditions of the Straits, to be a violation within the meaning of Article 233. The states bordering the Straits may take appropriate enforcement measures, as provided for in Article 233. Such measures may include preventing a vessel violating the required underkeel clearance from proceeding. Such action shall not constitute denying, hampering, impairing or suspending the right of transit passage in breach of Article 42 paragraph 2, or Article 44 of the Convention. Paragraph 3 states that states bordering the straits may take appropriate enforcement measures in accordance with Article 233 against vessels violating the laws and regulations referred to in Article 42 paragraph 1(1) and (b) causing or threatening major damage to the marine environment of the straits. Paragraph 5 states that Articles 42 and 233 do not affect the rights and obligations of states bordering the straits regarding appropriate enforcement measures with respect to vessels in the Straits not in transit passage (Zakaria, 1988).

At the end of the eleventh session of the Third United Nations Conference, the representative of Malaysia wrote to the President of the Conference enclosing a copy of the common understanding as contained in the statement relating to Article 233 of the Convention and the contents of this letter and the said

statement were confirmed by the delegations of the United States, United Kingdom, Australia, Federal Republic of Germany and Japan in their respective letters to the President. The letters and the statement formed part of the records of the Conference (Zakaria, 1988).

CONCLUSION

We have noted that the Law of the Sea during the period of the Melaka Sultanate was formulated by the Sultanate itself. The Maritime Code of Melaka was subsequently adopted in Makassar, Brunei and Kedah. The concept of the territorial sea was evolved gradually during the colonial period through the various enactments of the States. The concept was introduced by the British. Conventional rules of the Law of the Sea applied to Malaysia after she had acceded to a number of conventions, in particular the four Geneva Conventions on the law of the sea 1958. The Law of the Sea was also introduced into this country through unilateral claims made by Malaysia such as the claim to the EEZ. Bilateral treaties concluded between Malaysia and another state also contributed to the development of the Law of the Sea in Malaysia. Finally the understanding reached in the Statement relating to Article 233 of the Convention on the Law of the Sea may form the basis of a special legal regime peculiar to the Straits of Malacca and Singapore.

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