

THE MALAYSIAN MARITIME ENFORCEMENT AGENCY ACT 2004: MALAYSIA'S LEGAL RESPONSE TO THE THREAT OF MARITIME TERRORISM

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1. Introduction

On 11 September 2001, the world watched in horror as commercial passenger jets that were hijacked by suicide terrorists crashed into the Twin Towers of the World Trade Centre in New York. This audacious attack signalled the dawn of a new reign of global terror.¹ It highlighted the stark reality that security systems of an important mode of transport were highly vulnerable and a seemingly innocuous vehicle such as an aeroplane could so easily be exploited as a weapon. One writer has pointed out that shipping is arguably even more vulnerable to terrorism than air transport.² There are certain cargoes such as ammonium nitrate³ that are safe when handled properly, but could, without much effort, be converted into a powerful explosive when triggered by the right explosive catalyst.⁴ There are further fears that terrorists could also take advantage of containers that have long been used for the smuggling of contraband. A small nuclear device could be placed within the containers and then detonated when the ship is berthed at a port.⁵ The bomb's real potency is not the actual physical damage to the surrounding area, but the fact that radiation from the fall out would contaminate a large area and make a commercially vital maritime hub uninhabitable for thousands of years to come.⁶ Less drastic acts of maritime terrorism such as the hijacking of a tanker and discharging its contents could have an equally devastating effect on the environment and population centres adjacent to port facilities or shipping channels.⁷

The international community's response to the threat of global maritime terrorism was the International Ship and Port Facility Security Code (ISPS Code) which came into force internationally on 1 July 2004. In order to effectively coordinate the various security measures, a 'coast guard' type agency was viewed as essential because as the International Maritime Bureau⁸ rightly points out, the ISPS Code alone cannot defeat the challenges facing maritime security.⁹ The *Malaysian Maritime Enforcement Agency Act 2004* (Malaysia)¹⁰ (MMEA 2004) was Malaysia's statutory response to the threat of maritime terrorism.¹¹ It

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¹ The reason such terrorism has become widespread in the world today is because it provides a highly advantageous method of combat, with its potential for significant results at limited human and financial cost. Technical progress has played an essential role in this regard. Nitro-glycerine or mercury bombs have been replaced by remote-controlled devices that are increasingly difficult to detect. The growing fragility of civilisation has increased the number of sensitive targets as it has the means of escape. Lastly, the development of mass media has enabled terrorists to put across their message more effectively and through the press and television to accentuate the terror they seek to spread. Impassioned feelings, or indeed fanaticism, have further increased the risks. See Gilbert Guillaume, 'Terrorism and International Law' (2004) *ICLQ* 533, 537.

² Struan Robertson, 'Shipping and Terrorism: The ISPS Code' (2004) 154 (7119) *New Law Journal* 388.

³ This is a type of agricultural fertilizer.

⁴ Above, n 2.

⁵ A similar scenario has been dreamt up in a best-selling novel. See Tom Clancy, *The Sum of All Fears* (2002) It has also been made into a Hollywood movie directed by Phil Alden Robinson with an ensemble cast that included Ben Affleck, Morgan Freeman, James Cromwell and Richard Marner.

⁶ For example, americium-243 has a half-life of 7,370 years. For information on the effects of nuclear radiation, see <<http://science.howstuffworks.com/nuclear2.htm>> at 3 November 2004. This website explains scientific concepts in language that is easily understandable to a layperson.

⁷ Above, n 2.

⁸ Founded in 1981, this organisation has the support of the International Maritime Organisation (IMO) and has observer status with Interpol. The International Maritime Bureau is tasked with preventing fraud in international trade and maritime transport. In 1992, reacting to an alarming growth in piracy on the world's oceans, the organisation created the Piracy Reporting Centre at its Far East Regional Office in Kuala Lumpur. See <http://www.iccwbo.org/ccs/menu_imb_bureau.asp> at 3 November 2004.

⁹ Sandra Speares, 'ISPS Code is No Answer to Maritime Security Challenges', *Lloyd's List*, 24 September 2004, 1.

¹⁰ Act 633. Malaysian Acts are numbered in chronological order. Act 633 means the 633rd Act passed by the Parliament. The number does not denote the 633rd Act of a particular year.

¹¹ MMEA 2004 Act was given Royal Assent on 25 June 2004 and coincidentally gazetted on the same day that the ISPS Code came into force internationally on 1 July 2004. The Act came into force on 2 February 2005. See APMM(R)300 Jld.2 (PU³)2321/IV (Dated

contains legal provisions for the setting up of a Malaysian 'coast guard',¹² known as the Malaysian Maritime Enforcement Agency (MMEA). The preamble describes the *MMEA 2004* as:

[a]n Act to establish the Malaysian Maritime Enforcement Agency to perform enforcement functions for ensuring the safety and security of the Malaysian Maritime Zone with a view to the protection of maritime and other national interests in such zone and for matters necessary thereto or connected therewith.

This objective of this article is to provide a legal analysis of the *MMEA 2004*. The article begins with an examination of the circumstances under which the *MMEA 2004* was drafted and enacted by the Malaysian Parliament. At this stage, it is important to ask whether the MMEA was a genuine response to the threat of maritime terrorism, or whether it is a by product of pressure from the United States of America. The article continues with a critique of the structure of the agency and its personnel, followed with a scrutiny its functions and powers as provided for in the *MMEA 2004*. Although the *MMEA 2004* is silent on the issue of legal liability of the agency and its personnel while conducting maritime related operations under the Act, the final part of this article contains an endeavour to determine the nature, scope and extent of that liability. The conclusion will include an assessment of whether the legislative drafting of the *MMEA 2004* is sufficient to empower the MMEA to carry its functions as a coastguard unit that has an important role to play in the fight against maritime terrorism.

2. The General Framework of the *MMEA 2004*

The *MMEA 2004* is relatively concise, comprising a mere 19 sections, when compared to other major shipping legislation such as the *Merchant Shipping Ordinance 1952* (Malaysia) (MSO 1952) which stretches from s1 to s531,¹³ and that does not take into account its 15 schedules. The *MMEA 2004* is divided into four parts. Part I, is titled 'Preliminary' and contains the short title and commencement under s1, as well as the 'Interpretation' section under s2. Part II concerns establishment of the agency and appointments of officers of the agency. It comprises s3 on 'Establishment of the Malaysian Maritime Enforcement Agency', s4 on 'Appointment of the Director General of the Agency' and 'Appointment of other officers of the Agency'.¹⁴ In Part III, there are stipulations for the functions¹⁵ and powers of the MMEA in s7. The last part of the *MMEA 2004* is simply titled 'General'. It includes s8 that deals with a variety of subject matter ranging from prosecutions, s9 on reporting the status of investigations, s10 on protection of the officers of the Agency, s11 on identification requirements and s12 on the carrying of arms, to provisions on desertion in s13, mutiny in s14, penalties for causing disaffection in s15, co-ordination of the various enforcement authorities s16, powers during an emergency, special crisis or war in s17, standing orders in s18 and the power to make regulations in s19.

From a prima facie examination, it is clear that the *MMEA 2004* is not exhaustive. References are made to numerous other domestic statutes such as the *Emergency (Essential Powers) Ordinance, No.7 1969* (Malaysia),¹⁶ the *Continental Shelf Act 1966* (Malaysia),¹⁷ the *Fisheries Act 1985* (Malaysia),¹⁸ the

2 February 2005) where the Deputy Minister, Dato' Sri Haji Mohd. Najib bin Tun Haji Abdul Razak made the following declaration in P.U.(B) 67-68 titled 'Malaysian MMEA 2004 – Appointment of Date of Coming into Operation': 'In exercise of the powers conferred by subsection 1(2) of the Malaysian MMEA 2004 [Act 633], the Minister appoints 15 February 2005 as the date of the coming into operation of the Act'. (For non-Malaysian readers of this article, the phrase "Dato' Sri" is a title that may be conferred on an individual by the ruler of a state, a Sultan. The word "Haji" refers to a man who has visited the Muslim holy land and performed a religious pilgrimage called the Haj).

¹² The MMEA 'will be like a Malaysian Coast Guard. It will patrol [the] waters like the police and navy'. See Shahrullizan Rosli, 'APMM to be Elite Force' (2004) *Bernama*.

¹³ There are actually more than 531 sections because some new sections have been added. For example, there is now a new Part IIB on the Domestic Shipping Licensing Board, comprising of s65A to s65T. Another illustration of new statutory additions is in Part IIC on the Malaysia International Ship Registry, which contains s66, s66A to s66G.

¹⁴ *MMEA 2004*, s5.

¹⁵ *Ibid* s6.

¹⁶ *P.U. (A) 307A / 1969*.

¹⁷ Act 83. Malaysian Acts are numbered in chronological order. Act 83 means the 83rd Act passed by the Parliament. The number does not denote the 83rd Act of a particular year.

¹⁸ Act 317.

Exclusive Economic Zone Act 1984 (Malaysia),¹⁹ the *Police Act 1967* (Malaysia),²⁰ the *Customs Act 1967* (Malaysia),²¹ the *Criminal Procedure Code* (Malaysia)²² and the *Mutual Assistance in Criminal Matters Act 2002* (Malaysia).²³ Therefore in order to understand the MMEA in its entirety, mere reference to the 2004 Act itself is not sufficient. In addition to using the legislative aid to interpretation in the s2, the MMEA 2004 must also be read and construed in the light of these other statutes.

3. Background to the MMEA 2004: The ISPS Code

The ISPS Code was the end product of a weeklong diplomatic conference²⁴ in London organised by the International Maritime Organisation²⁵ (IMO) in December 2002. Representatives from 108 governments that had signed up to the *Safety of Life at Sea Convention 1974 (SOLAS)* agreed to an amendment²⁶ that incorporated the ISPS Code directly into SOLAS via a new Chapter XI-2. The irony about this move is that although SOLAS was designed with primarily the 'safety' of mariners in mind, it now contains provisions on 'security'. Much of the groundwork for the ISPS Code was in fact performed by a committee on safety at sea, commonly known as the Maritime Safety Committee. In addition, SOLAS was supposed to regulate the safety of mariners at sea, but has now been extended to port facilities as well through the ISPS in the schedule.²⁷

There are two parts to the ISPS Code. Part A is mandatory and contains security related requirements for shipping companies, port authorities and governments, whether as flag states, as operators of port facilities or as regulatory authorities of privately owned port facilities. Part B consists of non-mandatory guidelines as to how the mandatory requirements could be met. For example, evidence of a ship's compliance with the ISPS Code is a valid 'International Ship Security Certificate'²⁸ issued by the administration of the flag state and a 'Ship Security Officer'²⁹ on board the ship who is assisted by a 'Company Security Officer'³⁰ at each shipping company.³¹

The ISPS Code only deals with two aspects of maritime security, i.e. security of ships and of ports. The security of the waters around the ports and the navigation routes used by ships are not covered. Thus, there is a lacuna in international maritime security. This prompted calls for the formation of coast guard agencies by coastal states that do not have the equivalent of such an enforcement agency. Countries that already have well-established coast guard units such as the United States, are implementing measures to bolster their existing operations.³² In Europe there is now a proposal for a European Community coast guard, a single agency comprising all of Europe's coast guards.³³

¹⁹ Act 311.

²⁰ Act 344.

²¹ Act 235.

²² Act 593.

²³ Act 621.

²⁴ *Conference of the Contracting Governments to the International Convention for the Safety of Life at Sea 1974* (17 December 2002).

²⁵ For more information on this United Nations organisation that is concerned with the safety of shipping, see <<http://www.imo.org>> at 3 November 2004.

²⁶ Voting on agenda items 7 and 8, the conference adopted on 12 December 2002, Conference Resolution 2 and related amendments to the *SOLAS Convention* and Conference Resolutions 3 to 11.

²⁷ According to the Conference, the reason why port facilities were also included was because SOLAS allowed the speediest means of ensuring that the necessary security measure entered into force and given effect quickly. See Conference Resolution 2.

²⁸ ISPS Code, Art.19. The certificate can be issued for a maximum of five years (Art 19.3.1).

²⁹ Ibid Art.12. This is a person on board the ship, accountable to the master, designated by the ship owning company as responsible for the security of the ship, including implementation and maintenance of the ship security plan and for liaison with the company security officer and the port facility security officers (Art 2.1.6). Note that the ship security plan is a plan developed to ensure the application of measures on board the ship designed to protect the persons on board, cargo, cargo transport units, ship's stores or the ship from the risks of a security incident (Art 2.1.4).

³⁰ Ibid Art.11. This person is designated by the shipowner to ensure that the ship's security assessment is carried out; that a ship security plan is developed, submitted for approval, and thereafter implemented and maintained and for liaison with port facility security officers and the ship security officer (Art 2.1.7).

³¹ Struan Robertson, 'Shipping and Terrorism: The ISPS Code' (2004) 154 (7119) *New Law Journal* 388.

³² Paul S Edelman and Philip S. Lapenta, 'The Maritime Industry Since 9/11' 299 *New York Law Journal* 3.

³³ Justine Stares, 'Is It Time to Get Off the Security Bandwagon?' *Lloyd's List*, 20 July 2004, 7.

As it would be difficult to get various nations around the world to sign a maritime convention for a coast guard agency, pressure was put on the governments of selected hotspots around the world where there was a dire need for security. There was international concern that in the Strait of Malacca, there could be a process of graduation from simple piracy to full blown terrorism.³⁴ There is clearly a greater need for security in a coastal state like Malaysia as there are 2,068 kilometres of coastline that require protection in Peninsular Malaysia, as well as 2,607 kilometres in Sabah and Sarawak.³⁵

The *MMEA 2004* is the nation's long overdue response to calls for a security crackdown in the region³⁶ and the move was welcomed by the international-community,³⁷ as slow moving merchant vessels are particularly vulnerable to attack.³⁸ Perhaps an even bigger motivation for the setting up the MMEA is the fact that the United States had threatened to intervene in the Straits of Malacca if incidents of piracy continued to escalate.³⁹ With the setting up of the MMEA, Malaysia is politically in a stronger position to argue its case that everything possible is being done to beef up maritime security in the region.⁴⁰ The United States will no longer be able to use the lack of security as an excuse to strategically place its troops along the Strait of Malacca.⁴¹ Recently, the United States acknowledged that Malaysia is doing its utmost to ensure maritime security, particularly in the Straits of Malacca and expressed that it respected Malaysian sovereignty with regard to the busy waterway. Hence, the setting up of the MMEA has been warmly welcomed by arguably the world's only military superpower.⁴² There is anecdotal evidence⁴³ that coast guard agencies are effective in increasing the level of certain aspects of maritime security, for example, the Indian Ocean was once known for its vulnerability, but efforts by Indian and Bangladeshi governments in setting up their Coast Guard had effectively stopped piracy and smuggling.⁴⁴

4. A Brief Overview of the Enforcement of Laws in the Malaysia Maritime Zone Prior to the *MMEA 2004*

³⁴ Michael Grey, 'Asian Waters Showing 'Graduation' from Piracy to Full-Blown Terrorism', *Lloyd's List*, 30 September 2004, 13.

³⁵ Arun Bhattacharjee, *Southeast Asia: Malaysian Coastline Easy Pickings* (2003) Asia Times Online <<http://www.atimes.com>> at 5 November 2004.

³⁶ In fact, the now retired Laksamana Muda Datuk Tuan Hashim Tuan Mohamad made a call for such an agency as far back as 1998. See *Malaysia Needs A Coast Guard Force, Says a Top Naval Official* (1988) Bernama <www.bernama.com> (For non-Malaysian readers of this article, "Laksamana Muda" means Junior Admiral. The word "Datuk" is a title that may be conferred on an individual by the ruler of a state, a Sultan).

³⁷ The United States has acknowledged the fact that Malaysia is doing its utmost to ensure maritime security, particularly in the Strait of Malacca. See *US Pleased with Malaysia's Maritime Security Effort* (2004) Bernama <<http://www.bernama.com>> at 4 November 2004.

³⁸ Michael Grey, 'Asian Waters Showing 'Graduation' from Piracy to Full-Blown Terrorism', *Lloyd's List*, 30 September 2004, 13.

³⁹ *American Intervention on Piracy in Strait of Melaka Not Needed* (2004) Bernama <<http://www.bernama.com>> at 4 November 2004. In this Bernama report, the Menteri Besar of Perak, Datuk Seri Tajol Rosli Ghazali, warned that 'the federal government should give special attention to piracy in the Strait of Malacca to prevent the United States from using it as an excuse to interfere in Malaysia's security affairs'. (For non-Malaysian readers of this article, the phrase "Menteri Besar" means 'Chief Minister'. The phrase "Datuk Seri" is a title that may be conferred on an individual by the ruler of a state, a Sultan).

⁴⁰ *Malaysia on Right Track in Combating Piracy, Says IMB* (2004) Bernama <www.bernama.com>. The Director of the International Maritime Bureau, Captain P. Mukundan, said, 'We, at IMB, receive good cooperation from the Malaysian law enforcement agencies which have shown commitment in ensuring that their waters remain safe to all vessels'. He also added that the setting up of a paramilitary maritime enforcement agency was another indication that the Malaysian government was moving in the right direction not only to combat piracy but to face any potential terrorist attacks within its waters.

⁴¹ The Menteri Besar of Perak, Datuk Seri Tajol Rosli Ghazali, warned that the federal government should give special attention to piracy in the Strait of Malacca to prevent the United States from using it as an excuse to interfere in Malaysia's security affairs. (For non-Malaysian readers of this article, see above n 39 for an explanation of 'Menteri Besar' and 'Datuk Seri'). See *Solve Piracy Problem, Urges Tajol Rosli* (2004) Bernama <<http://www.bernama.com>> at 4 November 2004. The United States is now no longer thinking of deploying marines in the Strait of Malacca to counter terrorist threats in the narrow waterway and has instead offered intelligence and training to boost security in the Strait. See *Shipping News: US Mends Fences with Malaysia over Strait. KL Assures Admiral Fargo of Help to Fight Terrorism, but Rejects Joint Patrol and US to Offer Data, Know-how to Boost Strait Security* <<http://www.scoop.agonist.org/story/2004/6/22/55619/4527>> at 5 November 2004.

⁴² *US Pleased with Malaysia's Maritime Security Effort* (2004) Bernama <<http://www.bernama.com>> at 4 November 2004.

⁴³ *Malaysia on the Right Track in Combating Piracy, Says IMB* (2004) Bernama <<http://www.bernama.com>> at 4 November 2004.

⁴⁴ *Ibid.*

The following critical observation of enforcement laws in Malaysia's Maritime Zones was published on a popular Internet news website in 2004:⁴⁵

Poor coordination among about 11 government agencies continues to make Malaysia's coastline one of the least protected in Southeast Asia. ... Unlike many other countries with a large coastline, Malaysia has no coast guard. Responsibility for protecting the coast is divided among several agencies, often with overlapping duties, and while the total number of boats patrolling the coast is quite large, many of them are old, slow and outgunned. ... A bureaucrat in the Ministry of International Trade admits that Malaysia was more concerned with a trade policy than a comprehensive ocean policy to defend its coastline and protect its revenue by preventing smuggling of contraband as well as illegal immigrants and other human cargo.

Is there any the truth behind these observations? Prior to the enactment of the *MMEA 2004*, enforcement of laws in the maritime zones of Malaysia was 'sectoral'.⁴⁶ Hansard⁴⁷ reveals that one reason for setting up MMEA was to change from a 'sectoral' approach of maritime enforcement to a 'singular dedicated agency' for the enforcement of all Federal laws relevant to the sea.⁴⁸ Prior to the establishment of MMEA, the Royal Malaysian Navy was tasked with the defence of the nation's seas,⁴⁹ whereas the Marine Police⁵⁰ concentrated on prevention of criminal offences at sea.⁵¹ However, if goods were smuggled through a port, although this is a criminal offence, the relevant government agency would be the Royal Malaysian Customs.⁵² Meanwhile, enforcement officers from the Fisheries Department ensure compliance with the federal laws on fisheries,⁵³ but mangrove swamps are an important breeding ground for fish, prawns and crabs and fall within the jurisdiction of the Forestry Department.⁵⁴ If there is oil pollution from a vessel, both the Marine Department⁵⁵ and the Department of Environment⁵⁶ have a legitimate claim for

⁴⁵ Arun Bhattacharjee, *Southeast Asia: Malaysian Coastline Easy Pickings* (2003) Asia Times Online <<http://www.atimes.com>> at 28 October 2004.

⁴⁶ This means that enforcement by a particular government agency depended on which maritime zones particular incidents occurred in, what was the subject matter of the incident.

⁴⁷ These are records of the Malaysian Parliament's Lower House of Representatives.

⁴⁸ *Penyata Rasmi Dewan Rakyat, Parlimen Kesebelas, Penggal Pertama, Mesyuarat Pertama, Bil.17, Isnin, 14 Jun 2004*, p 3 per Dato' Seri Mohamed Nazri bin Abdul Aziz on the second and third reading of the Malaysian Maritime Enforcement Agency Bill 2004. Malaysian Hansard is written in Malay and the views quoted here are a translation into English by the author of this paper.

⁴⁹ The Royal Malaysian Navy is tasked with protecting the sovereignty of the nation's seas and ensuring its security. During peace, the Navy has the added functions of aiding civilian maritime agencies in combating piracy and enforcement of laws in the Exclusive Economic Zone. See: <<http://maf.mod.gov.my/homepage/navy>> (accessed on 5 November 2004).

⁵⁰ The Marine Police are a branch of the Jabatan Keselamatan Dalam Negeri dan Ketenteraman Awam (i.e. The Department of Internal Security and Public Order), a department within the Royal Malaysian Police. See <<http://www.rmp.gov.my/rmp03/kdnka.htm>> (accessed 5 November 2004).

⁵¹ The trafficking of dangerous drugs is prohibited under the *Dangerous Drugs Act 1952 (Revised 1980)* (Malaysia). Concealing dangerous drugs on board a ship in the territorial waters of Malaysia is a criminal offence punishable with a maximum fine of RM 20,000, a maximum imprisonment of five years, or both under s38.

⁵² It is a criminal offence to import or export any prohibited goods without declaring them to Customs. See *Customs Act 1967* (Malaysia) (Act235) s135(1)(a).

⁵³ For example, it is a criminal offence to undertake any fishing activity in Malaysian fisheries water without a valid licence. See *Fisheries Act 1985* (Malaysia) (Act 317) s8.

⁵⁴ An example of a mangrove swamp under the control of the Forestry Department is 'Hutan Lipur Kuala Sepetang', which is located 10 km from Taiping.

⁵⁵ The Marine Department has equipment to deal with oil spills at sea. There are three headquarters (Northern, Central and Southern) where oil-spill response equipment such as the Kepner Boom System, Kepner Skimmer System, Water Pressure Washer, Temporary Storage Tanks, Equipment Storage Containers and Spare Parts are kept. The department also has work boats (e.g. Lang Tiram and Lang Siput), tug boats (e.g. Lang Kangok and Land Hindek), patrol boats (e.g. Lang Rajawali) and barges (e.g. Doe I and Doe II) that aid in the containment of an oil spill. See <http://www.marine.gov.my/service/kp_oil.html> (accessed 5 November 2004). In addition, a tanker operating in Malaysian waters must have compulsory insurance against liability for oil pollution. The Director of marine will issue such a certificate that a ship has the requisite insurance in Malay, accompanied with an English translation. If a ship operates without such a certificate, the Director of Marine or any authorised officer of the Marine Department may detain the vessel. Non-compliance with the insurance requirements is a criminal offence punishable with a maximum fine of RM 50,000, a maximum imprisonment of four years, or both. See *Merchant Shipping (Oil Pollution) Act 1994* (Malaysia) s11. In particular Part II on 'Civil Liability for Oil Pollution'.

⁵⁶ Discharge of oil into Malaysian waters is prohibited under the *Environmental Quality Act 1974* (Malaysia) (Act 127) s27. Contravention of the provision is a criminal offence punishable with a maximum fine of RM 500,000, a maximum imprisonment of 5 years, or both. It is a defence under s28 of the 1974 Act if the discharge or spillage is for the purpose of securing the vessel, or to save human life, or all reasonable steps were taken to prevent, stop or reduce spillage, or the only reasonably practicable step of disposing an effluent is by spilling or discharging it into Malaysian waters. There is also a prohibition under s29 of the 1974 Act on discharge of wastes into Malaysian waters. Contravention of the prohibition is a criminal offence punishable with a maximum fine of RM 500,000,

jurisdiction over the incident. It gets even more complicated because if the oil spill threatens the breeding grounds of Leatherback turtles, the relevant State government can exercise jurisdiction, as such marine animals fall within its sphere of protection.⁵⁷

In the light of the bewildering combinations of subject matter and jurisdictions illustrated above, it is not surprising that the *MMEA 2004* is the perfect opportunity for maritime enforcement to be brought under one roof. This would enable a more effective and orderly ocean governance, besides utilising the available resources to the optimum.⁵⁸ Clearly, the current maritime enforcement, that is carried out according to sectors of 11 government departments and agencies involving 5,000 personnel and more than 400 ships and boats, is less than satisfactory.⁵⁹

5. Structure of the MMEA

5.1. The Director General of the MMEA

The MMEA is headed by, a Director General (DG) who is chosen 'from among members of the public services'.⁶⁰ The DG is appointed from among the ranks of government servants or civil service, and the MMEA could never take advantage of expertise from the private sector. The appointment is made by the Yang di-Pertuan Agong⁶¹ on the advice of the Prime Minister.⁶² In general, there are no legal limits as to the duration of the appointment as the appointment could be 'for such period and on such terms and conditions as may be specified in the instrument of appointment'.⁶³ However, as the DG is a civil servant, the period of appointment 'shall not extend beyond the date of his compulsory retirement from the public service'. But, should the DG's services still be needed, he may be re-appointed by the Yang di-Pertuan Agong⁶⁴ on the advice of the Prime Minister, on contract.⁶⁵

There appears to be no legal limit on the period of a DG's post-retirement contractual appointment as *MMEA 2004* s4(2) clearly states that the appointment may be 'on such terms and conditions as may be specified in the instrument of appointment'. Evidence of the DG's appointment is a certificate of appointment in the form of an authority card.⁶⁶ Before assuming the duties and responsibilities of his office, *MMEA 2004* s4(6) requires that the DG shall make 'in such manner as he may declare to be most binding on his conscience before the Yang di-Pertuan Agong,⁶⁷ such declaration as may be prescribed by

a maximum imprisonment of 5 years, or both. The Director General has power under the *Environmental Quality Act 1974* (Malaysia), s46 to seize a ship that contravenes the provisions of the Act. The ship would only be released if a bond or other security that is adequate to cover the value of the ship were furnished. The Director General has the power to sell such detained ships under s48 if the shipowner is unable to pay the costs and expenses incurred in removing or eliminating the oil, or mixture containing oil or scheduled wastes.

⁵⁷ Although the Federal government has control over maritime and estuarine fishing and fisheries, the enumerated item 9(c) of List I – The Federal List of the *Federal Constitution* (Malaysia), 9th Schedule expressly excludes 'turtles'. Hence the welfare of turtles fall within the jurisdiction of the State government and this fact is confirmed by enumerated item 12 of List II – The State List of the *Federal Constitution* (Malaysia), 9th Schedule. Further protection to turtles is given by *Fisheries Act 1985* s27 which makes it an offence to fish, disturb, harass or catch any turtle. Contravention of s 27 is a criminal offence punishable with a fine not exceeding RM5000.

⁵⁸ Penyata Rasmi Dewan Rakyat, Parlimen Kesebelas, Penggal Pertama, Mesyuarat Pertama, Bil.17, Isnin, 14 Jun 2004, p2 and p 3 per Dato' Seri Mohamed Nazri bin Abdul Aziz on the second and third reading of the Malaysian Maritime Enforcement Agency Bill 2004. See also *Para-Military Agency to Begin Operations in March – Nazri* (2004) Bernama <<http://www.bernama.com>> (accessed 4 November 2004).

⁵⁹ Ibid.

⁶⁰ *MMEA 2004* s4(1).

⁶¹ The King of Malaysia.

⁶² *MMEA 2004* s4(1).

⁶³ *MMEA 2004* s4(1).

⁶⁴ Above n 61.

⁶⁵ *MMEA 2004* s4(2).

⁶⁶ *MMEA 2004* s4(7).

⁶⁷ Above n 61.

the Minister by regulations made under section 19.⁶⁸ The procedure for the declaration can now be found in *Malaysian Maritime Enforcement Agency (Declaration of Office) Regulations 2005* (Malaysia).⁶⁹

During his tenure, the DG is responsible for the direction, command, control and supervision of all matters relating to the MMEA.⁷⁰ He holds office 'at the pleasure of the Yang di-Pertuan Agong,⁷¹ subject to the advice of the Prime Minister'.⁷² It is submitted that this statutory provision overrides any contractual terms of dismissal or termination should the DG be re-appointed after his compulsory retirement from the civil service. Further, regardless of whether the DG is a civil servant or contractually re-appointed, it is apparent from the *MMEA 2004*, s4(4) that for the purposes of discipline, the DG shall, 'during the period of his term of office ... be deemed to be a member of the Federation'. This means that the DG would be subject to the General Orders, Chapters A to G.⁷³

5.2 Appointment of Other Officers of the MMEA

The *MMEA 2004* does not detail the organisational structure of the MMEA. There is merely a general power of appointment by the King in s5(1) which provides '[t]here shall be appointed such number of officers of the Agency as may be necessary, whose ranks shall be determined by the Yang di-Pertuan Agong by order, for the purpose of carrying into effect the provisions of this Act'. The appointed officers of the MMEA have ranks equivalent to police officers under the *Police Act 1967* (Malaysia), customs officers under the *Customs Act 1967* (Malaysia) and 'any other officers whose ranks are specified in or under any other written law'.⁷⁴ The purpose is to encourage personnel from existing maritime agencies such as the Marine Police, Royal Malaysian Navy, Fisheries Department, Marine Department and the Royal Customs Department to join the new agency.⁷⁵

There are several interesting issues that are left unanswered: should encouragement fail to attract a sufficient number of new personnel, would the newly established MMEA have the authority to compulsorily recruit human resources from other existing maritime agencies? The *MMEA 2004* does not contain any legal provision for such a recruitment exercise. There is only a press statement that a total of 4,035 personnel would be needed initially and would be recruited from existing maritime agencies and the public.⁷⁶ The existing maritime agencies from which recruitment would be made in the initial stages are the Royal Customs Department, the Marine Department, the Fisheries Department, the Royal Malaysian Navy and the Marine Police, but the MMEA is also looking to recruit former personnel of the Armed Forces who have retired early at 40 years of age.⁷⁷

Could staff from the other maritime agencies be merely seconded to the MMEA instead of being permanent employees? Once again, the *MMEA 2004* neither provides any answers nor any clues. However recently, the *Malaysian Maritime Enforcement Agency (Ranks of Officers of the Agency and Equivalent Ranks) Order 2005* (Malaysia)⁷⁸ came into force,⁷⁹ but the question remains unanswered. The First Schedule of the 2005 Order merely contains the equivalent ranks of the officers of the agency when recruitment is made from other government departments.⁸⁰ When officers are appointed from other sectors of government service, the equivalent of their rank in the Malaysian Maritime Enforcement Agency is

⁶⁸ *MMEA 2004* s19 states that '[t]he Minister may make such regulations as are necessary or expedient to give full effect or for carrying out the provisions of this Act'.

⁶⁹ P.U.(A) 383. The 2005 Regulations came into force on 10 October 2005.

⁷⁰ *MMEA 2004* s4(5).

⁷¹ Above n 61.

⁷² *MMEA 2004* s4(3). This means that the DG does not have security of tenure and could be dismissed at any time.

⁷³ In particular Chapter D which contains the Rules for Civil Servants (Conduct and Discipline) 1993. This is an English translation as the original rules are in Malay.

⁷⁴ *MMEA 2004* s5.

⁷⁵ *Para-Military Maritime Agency to Begin Operations in March* – Nazri (2004) Bernama <<http://www.bernama.com>> at 4 November 2004.

⁷⁶ Shahrullizan Rosli, *APMM to be Elite Force* (2004) Bernama <<http://www.bernama.com>> at 4 November 2004.

⁷⁷ Ibid.

⁷⁸ P.U. (A) 492 [APMM(S)213/1/(22); PN(PU2)643/II].

⁷⁹ The order came into operation on 30 November 2005, see Order 1(2) of the 2005 Order.

⁸⁰ *Malaysian Maritime Enforcement Agency (Ranks of Officers of the Agency and Equivalent Ranks) Order 2005* (Malaysia), Order 2.

found in the First Schedule.⁸¹ For example when recruitment is made for the post of ‘Captain Maritime’ for the Malaysian Maritime Enforcement Agency the equivalent is a Colonel from the Malaysian Armed Forces, but a Senior Assistant Director from the Royal Customs of Malaysia. The classification system employed in First Schedule of the 2005 Order appears to be highly ‘imaginative’. There are two broad categories: ‘Officers’ and ‘Other Officers’. The personnel falling into the former are: Rear Admiral Maritime, First Admiral Maritime, Captain Maritime, Commander Maritime, Lieutenant Commander Maritime, Lieutenant Maritime, Sub Lieutenant Maritime, and Acting Sub Lieutenant Maritime. By contrast, personnel falling into the latter category are: Warrant Officer I Maritime, Warrant Officer II Maritime, Chief Petty Officer Maritime, Petty Officer Maritime, Leading Rate Maritime, Able Rate Maritime, and Junior Able Rate Maritime. There is no indication of the duties or responsibilities of these persons within the structure of the Malaysian Maritime Enforcement agency as the 2005 Order is silent on the matter.

What is apparent is that certain organisations like the Armed Forces have statutory authority to second their personnel to other services. For example, *Armed Forces Act 1972* (Malaysia), s5C⁸² provides that:

[t]he Armed Forces Council may second any officer or serviceman to the service of –

- (a) a department of the Federal Government;
- (b) a State;
- (c) a local authority;
- (d) a statutory authority; or
- (e) an organisation,

in or outside Malaysia.

If a member of the Armed Forces is seconded under s5C, he or she technically remains a member of the regular forces, but the remuneration ‘shall be paid by that department of the Federal Government, the State, authority or organisation, as the case may be, to whose service he is seconded’.⁸³ The question here is whether those government departments and agencies that do not have such statutory authority to second their personnel to the Maritime Enforcement Agency could be made to do so? As yet, no answer has been forthcoming from the authorities on this matter as to what policies are to be formulated and whether amendments to legislation would be made.

If other maritime agencies second their personnel to the MMEA, would Malaysia’s new ‘coast guard’ agency have the final say on the acceptance of such human resources? There are concerns that the ‘black sheep’ of other maritime agencies could be ‘dumped’ into the service structure of the MMEA, that is, the nation’s flagship enforcement agency could end up being a place of employment for misfits that could not find their niche in other agencies.⁸⁴ The *MMEAA 2004* does not contain any express provision that empowers the DG to pick the best officers. Further, there is also no legal duty on the other agencies to send their best officers to the MMEA.

5.3 Regulation of the MMEA Personnel

The MMEA can only carry out its functions effectively in accordance with the *MMEAA 2004* if there is some measure of discipline. Employment incentives such as remuneration and medical benefits only go so far in providing motivation. It is insufficient to merely dangle such carrots in front of the personnel of the

⁸¹ *Malaysian Maritime Enforcement Agency (Ranks of Officers of the Agency and Equivalent Ranks) Order 2005* (Malaysia), Order 3.

⁸² Act 77.

⁸³ Proviso to s 5C of the *Armed Forces Act 1972*.

⁸⁴ *Penyata Rasmi Dewan Rakyat*, Parlimen Kesebelas, Penggal Pertama, Mesyuarat Pertama, Bil.17, Isnin, 14 Jun 2004, p2 and p 22 per Tuan Nasaruddin bin Hashim on the second and third reading of the Malaysian Maritime Enforcement Agency Bill 2004. The member of Parliament for Parit pointed out that under the current civil service structure, when a request is made to a particular department for secondment of staff, the agency making the request would have to accept whoever that was sent. There was no guarantee that the best officers were sent.

MMEA because it is human nature that more often than not, a very big stick also needs to be used concurrently.

Desertion⁸⁵ is dealt with in *MMEA 2004* s13. It is deemed to be a criminal offence under s13(1) for an officer of the agency to absent himself from duty for a continuous period of twenty-one days or in circumstances which show that he has the intention of not returning to his duty. Unlike most offences where the prosecution bears the burden of proving the offence, s13(1) reverses the burden and puts it on the officer of the MMEA to prove his or her innocence by showing that the absence was with reasonable cause. If the officer fails to establish this, a conviction under s13(1) would result in a maximum term of imprisonment of 12 months. There is no provision for a fine in s13(1), but under s13(2), the MMEA's Disciplinary Authority may direct that all arrears of pay due be forfeited. The *MMEA 2004* does not contain any definition as to what is the 'Disciplinary Authority' and what are its composition, duties and powers. Perhaps this is a matter that would be dealt with in Regulations drafted under s19.

Mutiny⁸⁶ is an offence under *MMEA 2004* s14. This is a section that does not contain any subsections and is an example of convoluted statutory drafting, as there are eight lines to this long continuous paragraph. However, this has not prevented s14 from classifying an extensive range of acts as criminal in nature. Active participation in the mutiny, causing or inciting a mutiny, conspiracy to cause a mutiny, the failure of any officer to use his utmost endeavour to suppress such mutiny and the failure to give information or even delay in giving information of a mutiny are offences under s14. Upon conviction under s14 an officer of the MMEA 'shall be liable... to imprisonment for a term not exceeding five years'. This is considered a serious offence and no provision has been made for a fine. However, unlike the offence of desertion, there is no provision here equivalent to the *MMEA 2004* s13(2) that allows forfeiture of an officer's pay.

Regulation of personnel is in itself insufficient because, as an enforcement agency, the MMEA is in constant contact with members of the public. Hence, there needs to be a section that targets individuals causing disaffection among officers of the MMEA. This is now an offence that under *MMEA 2004* s15.⁸⁷ The drafting of s15 is wide enough to cover even officers of the MMEA causing disaffection within the ranks of the Agency. There is a wide range of acts that have been criminalized by s15(1) although this appears to be narrower in its content to s14 that deals with mutiny. It is an offence for any person to cause or perform an act calculated to cause disaffection amongst the officers of the agency as well as an offence to induce an officer of the MMEA to withhold his services or to commit a breach of discipline. Section 15(1) also extends criminality to attempts of the aforementioned acts, thus expanding the application of the section to inchoate offences. Should there be a conviction under s15(1), the guilty person shall be liable to imprisonment for a term not exceeding five years, a fine not exceeding RM10,000, or both.

Under the *Police Act 1967* (Malaysia), s92 provides that employees of the Royal Malaysian Police are prohibited from being a member of the trade union. However, there is no such equivalent prohibition in the *MMEA 2004*. It is not clear from the drafting of the 2004 Act as a whole or the parliamentary debates reported in the Malaysian Parliament's Hansard whether this omission is intentional or could perhaps be attributed to an oversight in the drafting process. This could result in the rather absurd scenario where officers of the Marine Police who are recruited in the service structure of the MMEA could enjoy the benefits of union membership, whereas if the Marine Police officer were merely seconded to the MMEA, the prohibition would be in force as such an officer is still technically within the employment structure of the Royal Malaysian Police.

6. Functions of the Agency

6.1. The Geographical Division of Functions

⁸⁵ This is also a criminal offence under the *Police Act 1967* s86.

⁸⁶ This is also a criminal offence under the *Police Act 1967* s87.

⁸⁷ This is also a criminal offence under the *Police Act 1967* s88.

The functions of the MMEA differ depending on the maritime zone in which the agency is operating, i.e. either the 'Malaysian Maritime Zone'⁸⁸ or the 'High Seas'.⁸⁹ The *MMEAA 2004* does not define 'High Seas'. As Malaysia is a signatory⁹⁰ to the *United Nations Convention on the Law of the Sea 1982 (UNCLOS)*,⁹¹ it is submitted that an examination of that convention provides some clarification. Article 86 stipulates that the high seas are 'all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State, or in the archipelagic waters of an archipelagic State'.

By contrast, the 'Malaysian Maritime Zone', is defined in the interpretation section of the *MMEAA 2004*, s2 to mean 'the internal waters, territorial sea, continental shelf, exclusive economic zone and the Malaysian fisheries waters and includes the air space over the Zone'. From a cursory examination of that section it is evident that describing the new enforcement agency as merely a 'Maritime Enforcement Agency' is a slight misnomer. The jurisdiction of the MMEA obviously is not strictly limited to the maritime zones, but also to the air space over each of the aforementioned zones.⁹² There is little evidence that patrolling the air space appears to be at the forefront of official thinking. More often than not, the numerous official government press statements on the MMEA's role in the air space above the maritime zone appears to have been added as an afterthought,⁹³ or worse still, not even mentioned.⁹⁴ **6.1.1.**

Internal waters and the territorial sea

The 'internal waters' described in the definition of the 'Malaysia Maritime Zone', means 'any areas of the sea that are on the landward side of the baselines from which the breadth of the territorial sea of Malaysia is measured'.⁹⁵ An identical definition is found in the *Fisheries Act 1985* (Malaysia), s2. This provision is based on the definition found in *UNCLOS*, Article 8(1) which provides that subject to the regime for Archipelagic States in Part IV,⁹⁶ 'waters on the landward side of the baseline of the territorial sea form part of the internal waters of the State'.⁹⁷

In order to determine the internal waters over which the MMEA has jurisdiction, the baselines for delimiting the territorial sea have to be identified. According to the *MMEAA 2004* s2, 'territorial sea' means the territorial waters of Malaysia determined in accordance with the *Emergency (Essential Powers) Ordinance, No.7 1969* (Malaysia) (*EEPO7*).⁹⁸ The *EEPO7* s 3 states 'the breadth of the territorial waters of Malaysia shall be twelve nautical miles and such breadth shall be measured in accordance with Articles 3, 4, 6, 7, 8, 9, 10, 11, 12 and 13 of the *Geneva Convention on the Territorial Sea and the Contiguous Zone* (1958) (the *Geneva Convention*)'.⁹⁹ The *EEPO7* uses the term 'territorial waters', but the *Geneva*

⁸⁸ *MMEAA 2004* s 6(1)(a)(h), 6(2).

⁸⁹ *Ibid* s6(3).

⁹⁰ Malaysia signed up to the Convention on 14 October 1996. To obtain information on the status of various maritime conventions, see <<http://www.comitemaritime.org>> at 5 November 2004.

⁹¹ The Convention supersedes the *Geneva Convention on the High Seas 1958*, of which Art 1 merely stated that high seas meant 'all parts of the sea that are not included in the territorial sea or in the internal waters of a State'. There is no reference in this older convention to the exclusive economic zone and archipelagic waters as these maritime zones were not yet recognised internationally at that time.

⁹² Extension of jurisdiction to the airspace is also found in the *Civil Aviation Act 1969* (Malaysia) (*Act 3*) s2 and *Court of Judicature Act 1964* (*Act 91*) s3.

⁹³ See for example, *Para-Military Maritime Agency to Begin Operations in March* (2004) *Bernama* <<http://www.bernama.com>> at 4 November 2004 and *Shshrullizan Rosli, APM to be Elite Force* (2004) *Bernama* <<http://www.bernama.com>> at 4 November 2004.

⁹⁴ For example, reference being made to only the ships required for the MMEA to perform its functions, see Marhalim Abas, '20 Year Old Vessels to Patrol the Seas', *Malay Mail*, 21 June 2004. Even when an announcement is made by the Deputy Prime Minister Datuk Seri Najib Tun Razak on the purchase of helicopters for the nation, this is made in the context of procurement for the army's air wing. See Arul Rajoo, *Najib's Visit to Italy Starting Tomorrow Described as a Milestone* (2004) *Bernama* <<http://www.bernama.com>> at 4 November 2004.

⁹⁵ *MMEAA 2004*, s2.

⁹⁶ An 'archipelago', according to *UNCLOS*, Part IV, Art 46(b) means a group of islands, including parts of islands, interconnecting waters and other natural features which are so closely interrelated that such islands, waters and other natural features form an intrinsic geographical, economic and political entity, or which historically have been regarded as such. Art 46(a) defines 'archipelagic State' as 'a State constituted wholly by one or more archipelagos and may include other islands'.

⁹⁷ The earlier definition of 'internal waters' found in Art 5(1) of the *Geneva Convention on the Territorial Sea and the Contiguous Zone 1958* merely made reference to 'waters on the landward side of the baseline of the territorial sea' and did not encompass a special recognition for archipelagic waters.

⁹⁸ *P.U. (A) 307A / 1969*.

⁹⁹ The relevant provisions of the *Geneva Convention* are set out in a Schedule to the 1969 Ordinance.

Convention uses the term ‘territorial sea’ in its drafting instead. This inconsistency is resolved by *EEPO7*, s3(2) which states that in applying the articles of the Geneva Convention, the expression ‘territorial sea’ occurring therein shall be construed as ‘territorial waters’.

It is not clear why under the *MMEA 2004* Malaysia’s territorial sea is still defined in accordance with the *Geneva Convention*. There are problems with this. The nation signed up to the *UNCLOS* on 14 October 1996¹⁰⁰ and has an international obligation to measure its baselines in accordance with the 1982 UN Convention. Malaysia subscribes to the principle of ‘dualism’,¹⁰¹ i.e. an international convention, although subscribed to by a State internationally, could only apply domestically through an Act of Parliament.¹⁰² There is no explanation as to why there is such a long delay in implementing the international obligations at a national level when Malaysia signed up to the *UNCLOS* almost a decade ago. No effort was made to amend the *EEPO7* after Malaysia signed up to the *UNCLOS*. As the required amendment still has not been made, the drafters of the *MMEA 2004* had no choice but to incorporate the definition found in the *Geneva Convention* as that was still good law nationally. The irony here is that *UNCLOS*, Art 311(1) very specifically stipulates that once a State has signed up, the provisions of the new convention ‘shall prevail, as between State Parties, over the Geneva Conventions on the Law of the Sea of 29 April 1958’. Malaysia therefore finds itself in the surreal legal position where its international relations are governed by the *UNCLOS*, whereas from a domestic perspective, its territorial sea is demarcated under the *Geneva Convention*.

If Parliament has intentionally chosen not to adopt this particular part of the *UNCLOS* whilst implementing its other provisions, Malaysia would be in breach of its international obligations. It is well-known that the *Geneva Convention* is a ‘package deal’, and States that have signed up to its provisions have to implement the convention in its entirety, as there are no legal mechanisms for partial adoption. Under *UNCLOS* Art 309 reservations¹⁰³ and exceptions are generally not permitted.¹⁰⁴ Art 310 only allows states to make ‘declarations and statements, however phrased or named, with a view, *inter alia*, to the harmonization of its laws and regulations with the provisions’ of the *Geneva Convention*. Further, Art 310 makes it abundantly clear that such declarations or statements must ‘not purport to exclude or to modify the legal effect of the provisions of ... [the] Convention in their application to that State’. Both of these problems leave the MMEA in a very uncomfortable position of enforcing domestic law within boundaries of internal waters and the territorial sea that are not demarcated in accordance with international law.

What are the rules for drawing the necessary baselines for demarcation of Malaysia’s internal waters and territorial sea? The normal baseline in the *Geneva Convention* Art 3 for measuring the breadth of the territorial sea is ‘the low water line along the coast as marked on large-scale charts¹⁰⁵ officially recognised by the coastal State’. However, normal baselines could not be used in all instances and other methods have been recognised internationally. For example, straight baselines can also be used under Art 4(1) ‘where the coast line is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity’. In such instances, Art 4(1) stipulates that, ‘the method of straight baselines joining appropriate points may be employed in drawing the baseline from which the breadth of the territorial sea is measured’.¹⁰⁶ Other instances where normal baselines could not be used are when baselines need to be

¹⁰⁰ To obtain information on the international legal status of various maritime conventions, see <<http://www.comitemaritime.org>> at 4 November 2004.

¹⁰¹ See Shearer, *Starke’s International Law* (11th Edn, 1994), 64 for further explanation of the concept of ‘dualism’.

¹⁰² For example Malaysia applies the Hague Rules via the *Carriage of Goods by Sea Act 1950* (Malaysia) (Act 527) and the Warsaw Convention through the *Carriage by Air Act 1974* (Malaysia) (Act 148).

¹⁰³ *Vienna Convention on the Law of Treaties* 1969 Art 2 defines a ‘reservation’ as a unilateral statement, however phrased or named, made by a state, when signing, ratifying, accepting, approving, or acceding to a treaty, whereby it purports to exclude or modify the legal effect of certain provisions of the treaty in their application to that state. See also Shearer, *Starke’s International Law* (11th ed, 1994) 421.

¹⁰⁴ Under normal circumstances, States that are party to a multilateral convention are allowed under the *Vienna Convention on the Law of Treaties* 1969 Art 19 to make a reservation in respect of a particular treaty provision, provided that it is not incompatible with the object and purpose of the treaty.

¹⁰⁵ The publication of the map must be done in accordance with the *Emergency (Essential Powers) Ordinance, No.7 1969* (Malaysia) s5(1) and is required by s 5(2) to be published in the *Gazette* for general information.

¹⁰⁶ For the restrictions on the use of straight baselines, see Art.4(2) and Art.4(3)

drawn across bays,¹⁰⁷ where there are harbours,¹⁰⁸ roadsteads,¹⁰⁹ low-tide-elevations,¹¹⁰ river mouths,¹¹¹ or where there are opposite or adjacent coastal states.¹¹²

Once the relevant baselines have been drawn along the coast, only then can the process of demarcation of the internal waters and territorial waters commence. According to the *EEPO7* s3 the territorial waters of Malaysia are, 'twelve nautical miles' from the aforementioned baselines. By contrast, the *Geneva Convention* Art 6 states that the outer limit of this territorial sea 'is the line every point of which is at a distance from the nearest point of the baseline equal to the breadth of the territorial sea'. If these were the territorial seas of Malaysia, the nation's internal waters could easily be determined under the *MMEAA 2004* s2 as 'any areas of the sea that are on the landward side of the baselines from which the breadth of the territorial sea of Malaysia is measured'.¹¹³

6.1.2. Continental shelf

The term 'continental shelf' that is found in the definition of the 'Malaysian Maritime Zone' in the *MMEAA 2004* s2 is the 'continental shelf of Malaysia as defined under section 2 of the Continental Shelf Act 1966'.¹¹⁴ Under the *Continental Shelf Act 1996* (Malaysia) s2, a continental shelf means:

the sea-bed and subsoil of submarine areas adjacent to the coast of Malaysia but beyond the limits of the territorial waters of the States, the surface of which lies at a depth no greater than two hundred metres below the surface of the sea, or, where the depth of the superadjacent waters admits the exploitation of the *natural resources* of the said areas, at any greater depth.¹¹⁵

¹⁰⁷ The bays referred to here are 'bays the coast of which belong to a single coastal state'. (Article 7(1) of the *Geneva Convention on the Territorial Sea and the Contiguous Zone 1958*) The mechanism for drawing baselines across bays is in Art.7(2) to Art.7(6)

¹⁰⁸ For the purpose of delimiting the territorial sea, Article 8 of the *Geneva Convention on the Territorial Sea and the Contiguous Zone 1958* states that, 'the outer most permanent harbour works which form an integral part of the harbour system shall be regarded as forming part of the coast'.

¹⁰⁹ The *Geneva Convention on the Territorial Sea and the Contiguous Zone 1958* Art 9 provides '[r]oadsteads which are normally used for the loading, unloading and anchoring of ships, and which would otherwise be situated wholly or partly outside the outer limits of the territorial sea, are included in the territorial sea'. Article 9 also stipulates that coastal states are under a legal obligation to 'clearly demarcate such roadsteads and indicate them on charts together with their boundaries' and to give 'due publicity'.

¹¹⁰ This is described in the *Geneva Convention on the Territorial Sea and the Contiguous Zone 1958* Art 11(1) as 'a naturally-formed area of land which is surrounded by and above water at low-tide but submerged at high tide'. The article goes on to lay down that '[w]here a low tide elevation is situated wholly or partly at a distance not exceeding the breadth of the territorial sea from the mainland or an island, the low-water line on that elevation may be used as the baseline for measuring the breadth of the territorial sea'. However, where under Article 11(2), '[w]here a low-tide elevation is wholly situated at a distance exceeding the breadth of the territorial sea from the mainland or an island, it has [no] territorial sea of its own'.

¹¹¹ If a river flows directly into the sea, Art 13 of the *Geneva Convention on the Territorial Sea and the Contiguous Zone 1958* makes provision for a straight baseline to be drawn 'across the mouth of the river between points on the low-tide end line of its banks'.

¹¹² Where the coast of two States are opposite or adjacent to each other the *Geneva Convention on the Territorial Sea and the Contiguous Zone 1958* Art 12(1) forbids either State 'to extend its territorial sea beyond the median line of every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of each of the two States is measured'. The line of delimitation between such States must, under Art 12(2), 'be marked on large scale charts officially recognised by the coastal States'. Such extension beyond the median point is, only permitted by Art 12(1), if there is an agreement to such effect between the two States. It has to be noted here that Art 12(1) specifically excludes application of the international rules where a 'historic title or other special circumstances ... delimit the territorial seas of the two States'.

¹¹³ The mechanism for determining the baseline can now be found in the *Baselines of Maritime Zones Act 2006* (Malaysia) s5 which provides:

- (1) Subject to subsection (2), the baselines for the purpose of determining the maritime zones of Malaysia shall be —
 - (a) the low-water line along the coast as marked on large scale charts;
 - (b) the seaward low-water line of a reef as shown by the appropriate symbol on charts; or
 - (c) the low-water line on a low-tide elevation that is situated wholly or partly at a distance not exceeding the breadth of the territorial sea from the mainland or an island.
- (2) Notwithstanding subsection (1), in respect of any area for which geographical co-ordinates of base points have been declared under section 4, the method of straight baselines interpreted as geodesics joining the consecutive geographical coordinates of base points so declared may be employed for determining the maritime zones of Malaysia.

¹¹⁴ Act 83.

¹¹⁵ Emphasis added.

According to s2(a) 'natural resources' means minerals and other non-living resources of the sea-bed and subsoil. The definition is further expanded by s2(b) to encompass 'living organisms belonging to sedentary species, that is to say, organisms which, at the harvestable stage, either are immobile on or under the sea-bed or are unable to move except in constant physical contact with the sea-bed or the subsoil'. The term 'natural resources' also incorporates 'petroleum' which is defined by s2 to include 'any mineral oil or relative hydrocarbon and natural gas existing in its natural condition in strata'. However, s2 makes it abundantly clear that 'petroleum' does not include 'coal or bituminous shales or other stratified deposits from which oil can be extracted by distillation'.

All rights with respect to the continental shelf, such as exploration of the continental shelf and exploitation of its natural resources are vested by s3 and 'shall be exercisable by the Federal Government'. Hence, s4(1) provides that any prospecting or mining of petroleum on the continental shelf must be done in accordance with the *Petroleum Mining Act 1966* (Malaysia).¹¹⁶ All mining operations must be licensed in line with the requirements of the *Continental Shelf Act 1996* (Malaysia) (*Continental Shelf Act*) s 4(3) to 4(6). Failure to do so is an offence punishable under s4(7) with a maximum fine of RM20,000, maximum imprisonment term of 2 years, or both. All 'machinery, tools, plant, buildings and other property together with any minerals or other products which may be found upon or proved to have been obtained' from an unlawful exploration, prospecting or mining of the continental shelf, 'shall be subject to forfeiture'.¹¹⁷

The MMEA would therefore now have, as part of their duties, the responsibility of ensuring that the natural resources of Malaysia's continental shelf are exploited in accordance with the *Continental Shelf Act*. Sadly, in the haste to get the *MMEA 2004* passed through Parliament, the drafters overlooked the fact that the *Continental Shelf Act* does not take into account Malaysia's more recent international obligations under the *UNCLOS*. As was mentioned earlier, Malaysia had signed up to this treaty on 14 October 1996. Despite the passing of more than a decade, the *Continental Shelf Act* has only been amended twice; Once on 8 November 1969, by the *Emergency (Essential Powers) Ordinance No.10 of 1969* (Malaysia), and again on 29 August 1975, by the *Malaysian Currency (Ringgit) Act 1975* (Malaysia). Clearly, the *Continental Shelf Act* has not taken into account the provisions of the *UNCLOS* Part VI.

It is submitted that this is a missed opportunity as *UNCLOS* Art 77 is superior in its drafting to the *Continental Shelf Act* s3. Unlike s3, Art 77(1) unequivocally provides that '[t]he coastal state exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources'.¹¹⁸ This is further strengthened by Art 77(2) which elaborates that 'sovereign rights' are 'exclusive in the sense that if the coastal State does not explore the continental shelf or exploit its natural resources, no one may undertake these activities without the express consent of the coastal State'. In addition, Art 77(3) clarifies that '[t]he rights of the coastal State over the continental shelf do not depend on occupation, effective or notional, or on any express proclamation'.

6.1.3 Exclusive economic zone

Reference is also made to the 'exclusive economic zone' (EEZ) in the definition of the 'Malaysia Maritime Zone' in the *MMEA 2004* s2 which stipulates that the term 'means the exclusive economic zone of Malaysia as determined in accordance with the Exclusive Economic Zone Act 1984' (*EEZA*).¹¹⁹ The interpretation section of the *EEZA* s 2 provides that 'exclusive economic zone' or 'zone' means 'the exclusive economic zone of Malaysia as determined in accordance with section 3'. Under the *EEZA* s3 the EEZ is defined in the following terms:

¹¹⁶ Act 95.

¹¹⁷ *Continental Shelf Act 1966* (Malaysia) s4(7).

¹¹⁸ Emphasis added.

¹¹⁹ Act 311. The title of the Act is a misnomer, as s 1(1) of the Exclusive Economic Zone Act 1984 applies the statute to both the 'exclusive economic zone as well as the continental shelf of Malaysia'. Further, s 1(2) of the 1984 Act states that it 'shall be in addition to, and not in derogation of, the provisions of the *Continental Shelf Act 1966*'. This is a recipe for a legal disaster, so in to prevent conflict between legislation governing both these maritime zones, s 1(3) of the 1984 Act declares that '[i]n the event of any conflict or inconsistency between the provisions of this Act and of any applicable written law, the provisions of this Act shall supersede the conflicting or inconsistent provisions of that applicable written law and the latter shall be construed as so superseded'.

The exclusive economic zone of Malaysia, as proclaimed by the Yang di-Pertuan Agong¹²⁰ *vide* P.U. (A) 115/80, is an area beyond and adjacent to the territorial sea of Malaysia and, subject to subsections (2) and (4), extends to a distance of two hundred nautical miles from the baselines from which the breadth of the territorial sea is measured.

Where there is an agreement in force between Malaysia and a State with an opposite or adjacent coast, s3(2) provides that the general rule on demarcation of the EEZ does not apply. Instead, the EEZ 'shall be determined in accordance with the provisions of that agreement. State practice could also be used to determine the EEZ as recognised by s3(4). The sub-section empowers the Yang di-Pertuan Agong,¹²¹ if he considers it necessary to do so, alter the limits of the EEZ determined in accordance with the general rule, to take into account State practice or an agreement between States.

Malaysia has 'sovereign rights' under the *EEZA* s4(a) for the following:

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 production of energy from the water, currents and winds.

The exercise of such sovereign rights are however tempered by *EEZA* s9 which lays down a legal obligation on the nation to only exploit the EEZ 'pursuant to her environmental policies and in accordance with her duty to protect and preserve the marine environment in the zone'. As the nation has sovereign rights, Malaysia has the jurisdiction under s4(b) to establish and use artificial islands, installations and structures. S4(b) also grants jurisdiction with regard to marine scientific research as well as the protection and preservation of the marine environment. S4(c) is the omnibus provision facilitating national jurisdiction over 'such other rights and duties as are provided for by international law'. The MMEA therefore has the jurisdiction to enforce prohibition of the unauthorized activities banned in the *EEZA* s 5.¹²²

6.1.4 Malaysian fisheries waters

The term 'Malaysian Fisheries Waters' that is listed in the definition of Malaysia Maritime Zone in the *MMEA 2004* s 2; 'means the Malaysian fisheries waters as defined under s 2 of the Fisheries Act 1985'.¹²³ In the *Fisheries Act 1985* (Malaysia) (*Fisheries Act*) s 2 defines the aforementioned waters to mean '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 comprised in the exclusive economic zone of Malaysia'.¹²⁴ 'Maritime waters', according to the *Fisheries Act* s 2 'means areas of the sea adjacent to Malaysia, both within and outside Malaysian fisheries waters and includes estuarine waters,¹²⁵ and any reference to marine culture

¹²⁰ This person is the King of Malaysia.

¹²¹ *Ibid.*

¹²² The *Exclusive Economic Zone Act 1984* (Malaysia), s5 states that the following activities are prohibited in the EEZ and could only be carried out by authorized persons:

- (a) explore or exploit any natural resources, whether living or non-living;
- (b) carry out any search, 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.

¹²³ Act 317.

¹²⁴ Emphasis added by the author.

¹²⁵ Under the interpretation section of the 1985 Act, i.e. s2, this means the waters of a river extending from the mouth of the river – (a) up to the point upstream penetrated by sea water at neap tides; and (b) in the case of the State of Sarawak, up to the limits set by the Minister, with the concurrence of the State Authority, in regulations made under this Act.

system,¹²⁶ fishing¹²⁷ or fisheries¹²⁸ is construed as referring to the conduct of any of these activities in maritime waters’.

6.2 Functions in the Malaysian Maritime Zone

Under the *MMEA 2004* s6(1)(a) to s6(1)(h), the MMEA has 8 distinct functions in the Malaysian Maritime Zone. The first function under s6(1)(a) is ‘to enforce law and order under any federal law’, for example, prohibiting the unlawful import or export of dangerous drugs using a ship or aircraft under the *Dangerous Drugs Act 1952* (Malaysia)¹²⁹ Part VI,¹³⁰ s38 or ensuring that tankers carrying more than two thousand tons of oil have compulsory insurance against liability for pollution under the *Merchant Shipping (Oil Pollution) Act 1994* (Malaysia)¹³¹ s11. The second function, provided for in s6(1)(b), is ‘to perform maritime search and rescue’. The third function, listed in s6(1)(c), is the prevention and suppression of the commission of an offence, such as pollution of the EEZ through discharge or escape of substances amounting to an offence under the *EEZA* s10. Another example is preventing causing an explosion with intent to endanger life or property under the *Explosives Act 1957* (Malaysia), s7.¹³² Fourthly, the *MMEA 2004* s6(1)(d) compels the MMEA ‘to lend assistance in any criminal matters on a request by a foreign State as provided under the *Mutual Assistance in Criminal Matters Act 2002*’.¹³³ The fifth and sixth functions are ‘to carry out air and coastal surveillance’¹³⁴ and ‘to provide platform and support services to any relevant agency’.¹³⁵ The interesting point about the sixth function of the MMEA is that the *MMEA 2004* appears to add a new layer of maritime enforcement and does not contain any provisions to oust the jurisdiction of previous maritime agencies. For example, the MMEA could aid fisheries officers to enforce the *Fisheries Act 1985* s26 which deals with the prohibition against fishing with explosives, poisons or pollutants, etc.

Despite its name, the MMEA is not an organisation that is restricted to ‘enforcement’. Under the *MMEA 2004*, there is provision for a seventh function in s6(1)(g) ‘to establish and manage maritime institutions for the training of officers of the Agency’. However, as mentioned earlier in this article, the MMEA’s policy in these initial stages appears to be recruitment of staff from other existing maritime agencies such as the Royal Malaysian Navy, the Marine Police and the Royal Customs Department. A training and management institute appears to be an option that would, hopefully, be implemented in the not too distant future. The final function of the MMEA, stipulated in s6(1)(h), is to ‘generally perform any other duty for ensuring maritime safety and security or do all incidental matters thereto’. This is an omnibus provision that contains a general statutory authority to perform all the necessary functions that are essential to the MMEA being an effective enforcement agency.

¹²⁶ According to the *Fisheries Act 1985* (Malaysia) s2 this ‘means any establishment, structure or facility employed in aquaculture includes on-bottom culture, cage culture, hanging-net culture, pen culture, pond culture, pole or stick culture, raceway culture, raft culture, rope culture and hatchery’.

¹²⁷ The term ‘fishing’ is defined by s 2 of the 1985 Act to mean –

- (a) the catching, taking or killing of fish by any method;
- (b) the attempted catching, taking or killing of fish;
- (c) engaging in any activity which can reasonably be expected to result in the catching, taking or killing of fish; or
- (d) any operation in support of, or in preparation for, any activity described in paragraph (a), (b) or (c) of this definition.

¹²⁸ ‘Fishery’, under the *Fisheries Act 1985* (Malaysia) s2 ‘means any one or more stocks of fish which can be treated as a unit for the purposes of their conservation, management and development and includes fishing for any such stocks, and aquaculture’. Section 2 also goes on to explain that ‘aquaculture’ means ‘the propagation of fish seed or the raising of fish through husbandry during the whole or part of its lifecycle’. ‘Fish seed’ is also defined in s2 to mean ‘fish egg or larva or post-larva of fish or the spawn, fry or fingerling of fish’.

¹²⁹ Act 234.

¹³⁰ Titled ‘Ancillary and General Provisions’.

¹³¹ Act 515.

¹³² Act 207.

¹³³ Act 621.

¹³⁴ *MMEA 2004* s 6(1)(e).

¹³⁵ *MMEA 2004* s 6(1)(f).

The MMEA has a role to perform even in the high seas. This is a rather fascinating legal development as this raises the question whether the MMEA has been given extra-territorial jurisdiction, albeit implicitly. *UNCLOS* Art 89 unmistakably states that '[n]o state may validly purport to subject any part of the high seas to its sovereignty' and any attempt by the state to do so is invalid. However, s6(3) of the *MMEAA 2004* empowers the MMEA to perform the following in the high seas: Maritime search and rescue;¹³⁶ controlling and preventing maritime pollution;¹³⁷ preventing and suppressing piracy;¹³⁸ and preventing and suppressing illicit traffic in narcotic drugs.¹³⁹ Prima facie, this looks like an attempt by the Malaysian Parliament at granting extra territorial jurisdiction to the MMEA. There are an increasing number of States purporting to exercise such extra-territorial jurisdiction, an international practice spearheaded by the United States.¹⁴⁰ The principle has also been accepted in the international fight against crime,¹⁴¹ genocide¹⁴² and pollution.¹⁴³

Although the granting of extra-territorial jurisdiction may have been the intention of the *MMEAA 2004*, the drafting of the statute has not taken this to its logical conclusion. It is apparent that the *MMEAA 2004* s6(3) does not extend the MMEA's function to 'enforce law and order under any federal law', which is provided earlier in s6(1)(a) with respect to the Malaysian Maritime Zone. Further, in the high seas, the MMEA does not have the function of preventing and suppressing the commission of an offence as it does with respect to the Malaysian Maritime Zone in the *MMEA 2004* s 6(1)(c). The enforcement of law and order as well as the thwarting of criminal activities through the strong arm of government agencies are acts of sovereignty, and the *MMEAA 2004* does not go so far as to exert Malaysia's sovereignty over the high seas beyond the Malaysian Maritime Zone. The drafters of the *MMEAA 2004* probably had in mind the principle of freedom of the high seas¹⁴⁴ enshrined in the *UNCLOS* Art 89. The only time when the nation claims to have extra-territorial jurisdiction is in respect of offences listed in the *Extra-Territorial Offences Act 1976* (Malaysia) (*ETOA 1976*) s 2.¹⁴⁵ This means offences under the Schedule, i.e. those found in the *Official Secrets Act 1972* (Malaysia)¹⁴⁶ and the *Sedition Act 1948*.¹⁴⁷ The MMEA would have extra-territorial jurisdiction via the *ETOA 1976* s2 in respect of such offences committed, as the case may be, on the high seas on board any ship or on any aircraft registered in Malaysia,¹⁴⁸ or by any citizen or any permanent resident on the high seas on board any ship or on any aircraft,¹⁴⁹ or by any citizen or any permanent resident in any place without and beyond the limits of Malaysia.¹⁵⁰

7. Powers of the MMEA

The MMEA has very wide statutory authority under the *MMEAA 2004* s7(1) and is empowered 'to do all things reasonably necessary for or incidental to the performance of its functions under s 6'. In addition, an

¹³⁶ Section 6(3)(a).

¹³⁷ Section 6(3)(b). For the specific prevention of maritime pollution, see the *Merchant Shipping (Oil Pollution) Act 1994* (Malaysia). For the prevention of pollution generally, see the *Environmental Quality Act 1974* (Malaysia).

¹³⁸ Section 6(3)(c). There is no specific offence for piracy in the *Penal Code* (Malaysia) (Act 574).

¹³⁹ Section 6(3)(d). For prohibition on the trafficking of dangerous drugs, see the *Dangerous Drugs Act 1952* (Malaysia).

¹⁴⁰ See Sean D. Murphy, 'Contemporary Practice of the United States Relating to International Law' (2002) 96 *A.J.I.L.* 956. The United States takes a broad approach to extra territorial jurisdiction as opposed to the limited approach by the United Kingdom.

¹⁴¹ See Jacqueline Klosek, 'The Development of International Police Cooperation within the EU and Between the EU and Third Party States' (1999) 14 *Am.U.Int'l L. Rev.* 599.

¹⁴² See Matthew Lippman, 'The Convention on the Prevention and Punishment of the Crime of Genocide: Fifty Years Later' (1998) 15 *Ariz. L. Int'l & Comp. Law* 415 See also Matthew Lippman, 'The Pursuit of Nazi War Criminals in the United States and Other Anglo-American Systems' (1998) 29 *Cal. W. Int'l L.J.* 1 and Mark A Summers, 'The International Court of Justice's Decision in Congo v Belgium: How has it Affected the Development of a Principle of Universal Jurisdiction that would Obligate All States to Prosecute War Criminals?' (2003) 21 *B. U. Int'l L.J.* 63.

¹⁴³ See Christopher P. Mooradian, 'Protecting 'Sovereign Rights': The Case for Increased Coastal State Jurisdiction Over Vessel-Source Pollution in the Exclusive Economic Zone' (2002) 82 *B.U.L. Rev.* 767.

¹⁴⁴ First espoused by Hugo Grotius, *Mare Liberum* (1609) (Magoffin provided an English translation in 1916) For further commentary on this work, see E.D. Brown, *The International Law of the Sea* (Vol 1,1994) p 12 at fn 9.

¹⁴⁵ Act 163.

¹⁴⁶ Act 88.

¹⁴⁷ Act 15.

¹⁴⁸ *Extra-Territorial Offences Act 1976* (Malaysia) s2(1)(i).

¹⁴⁹ *Ibid* s 2(1)(ii).

¹⁵⁰ *Extra-Territorial Offences Act 1976* s 2(1)(iii).

officer of the MMEA, shall have, for the purpose of the *MMEAA 2004*, all the powers which any relevant agency may exercise under any federal law which is applicable in the Malaysian Maritime Zone.¹⁵¹ This subsection is evidence that the MMEA is an organisation that is created in addition to the existing maritime agencies, not as a replacement for such agencies. The *MMEAA 2004* is silent as to how the division of responsibilities between the MMEA and the existing agencies is going to be resolved.

Without prejudice to the general power, the *MMEAA 2004* s 7(2) further adds that the MMEA shall also have the more detailed powers enumerated in s 7(2)(a) to 7(2)(i) 'to receive and consider any report of the commission of an offence'¹⁵² and 'to stop, enter, board, inspect and search any place, structure, vessel or aircraft and to detain any vessel or aircraft'.¹⁵³ The advantage of this subsection is that the MMEA has express power of its own to conduct its enforcement functions without the need to constantly figure out which federal law it is going to invoke in a given maritime zone.

These first two powers are very similar to the powers that are vested in the Marine Police to aid the fight against maritime crime. The similarity does not end here. In addition to these powers, the MMEA is now also able 'to investigate any offence which it has reason to believe is being committed, or is about to be committed or has been committed',¹⁵⁴ as well as having the power 'to arrest any person whom it has reason to believe has committed an offence'.¹⁵⁵ Although the *MMEAA 2004* is silent on this point, it is submitted that the powers of investigation and arrest exercised by the MMEA must comply with the legal requirements of the *Criminal Procedure Code* (Malaysia) (*CPC*). After all, there is oblique reference to the *CPC* in the *MMEAA 2004*, s 5 which deals with appointment of officers of the agency which specifies that the *CPC* 'shall be construed accordingly'. It is submitted that officers of the MMEA must not derogate from the procedures on investigation and arrest laid down in that code.

A power that is aimed at enabling the MMEA to perform a more regulatory function is found in the *MMEAA 2004* s7(2)(c). It empowers the MMEA to 'demand the production of any licence, permit, record, record, certificate or any other document and to inspect such licence, permit, record, certificate or other document or make copies of or take extracts from such licence, permit, record, certificate or other document'. It appears that the MMEA can aid the Fisheries Department and the Marine Department in the enforcement of licensing requirements under the *Fisheries Act 1985* (*Fisheries Act*) (Malaysia) and the *Merchant Shipping (Oil Pollution) Act 1994* (Malaysia) respectively.

There are powers enumerated in the *MMEAA 2004* s 7(2)(f), 7(2)(g) which result in the MMEA performing a duplication of duties with the Fisheries Department under the *Fisheries Act*. Under the s7(2)(f) the MMEA is authorised 'to examine and seize any fish, article, device, goods, vessel, aircraft or any other item relating to any offence which has been committed or it has reason to believe has been committed' and further by s7(2)(g) 'to dispose of any fish, article, device, goods, vessel, aircraft or any other item relating to any offence which has been committed or it has reason to believe has been committed'.

Under the *MMEAA 2004* s 7(2)(i) the MMEA has the power 'to expel any vessel which it has reason to believe to be detrimental to the interest of or to endanger the order and safety in the Malaysian Maritime Zone'. Prima facie, s7(2)(i) appears to be very draconian in nature. The MMEA is able to act even if no criminal offence has been committed. Further, there is also no requirement that either the interest of the nation, or the order and safety of the country's maritime zone *in fact* be endangered. It is sufficient that the MMEA has reason to believe it to be so.

The power 'to exercise the right of hot pursuit is found in the *MMEAA 2004* s7(2)(e). No definition of 'hot pursuit' is in that statute. The drafters of the Act have chosen to side step this difficult technical point consistent with international conventions such as the *UNCLOS* which have also not provided a legal definition. The right of hot pursuit is intended to empower the MMEA to pursue criminals, pirates and

¹⁵¹ *MMEAA 2004* s7(3).

¹⁵² *MMEAA 2004* s 7(2)(a).

¹⁵³ *MMEAA 2004* s 7(2)(b).

¹⁵⁴ *MMEAA 2004* s 7(2)(d).

¹⁵⁵ *MMEAA 2004* s 7(2)(h).

terrorists beyond the waters of the Malaysian Maritime Zone. However, there are concerns as to the effectiveness of the application of this power in practice.¹⁵⁶ The Straits of Malacca is a very narrow body of water, and more often than not, effective pursuit of pirates would mean encroaching into the waters of a neighbouring country such as Indonesia. There is no problem with hot pursuit from the Malaysian Maritime Zone into the High Seas, but pursuing the speed boats of terrorists and pirates into Indonesian waters without a treaty could result in an international incident because Indonesia exercises sovereignty over its maritime zones. If Malaysia were to argue for such a right, it would also mean that the reverse would hold true, that is, Indonesian enforcement vessels could pursue criminals into the Malaysian Maritime Zone. Perhaps what is needed here is cooperation between the various coastal states to provide a solution to this region's maritime security needs.

To aid the MMEA in the exercise of its powers, the *MMEA 2004* s12 stipulates that '[a]n officer of the Agency may in the performance of his duties carry arms'. This provision is very similar to the one found in the *Police Act 1967* (Malaysia) s 85. The statutory provision in the *MMEA 2004* s12 is drafted widely and no limit has been put on the type of arms that may be carried, presumably ranging from handguns to assault rifles. As no mention has been made on the type of ammunition that could be used, this would also probably range from standard ammunition to the explosive and armour piercing variety. The MMEA would have to carry arms and ammunition that are appropriate because it has been set up specifically to combat aggressive threats such as terrorism and piracy.

Although the MMEA appears to have very wide ranging powers under the *MMEA 2004* s 7(1), 7(2) and 7(3), there is a limit to these powers, even within the territorial seas of Malaysia. The MMEA has no jurisdiction over a vessel undergoing 'innocent passage' as s7(4) declares that 'no vessel shall be stopped, entered, boarded, searched, inspected or detained within the area of the territorial sea if the passage of the vessel within the territorial sea is an innocent passage'. The meaning of 'innocent passage' is identified in s7(5) as 'the passage of a vessel is an innocent passage if and so long as the passage of the vessel is not prejudicial to the peace, good order and security of Malaysia'. The MMEA would only be able to exercise its powers on a ship that is no longer undergoing innocent passage. A list as to what activities are considered 'prejudicial to the peace, good order and security of Malaysia' is found in the *MMEA 2004* s7(6).

First on the list is 'any threat or use of force against the sovereignty, territorial integrity or political independence of Malaysia or any act which in any manner is a violation of the principles of international law'.¹⁵⁷ Second, 'any exercise or practice with weapons of any kind'.¹⁵⁸ Third, 'any act aimed at collecting information to the prejudice of the defence or security of Malaysia'.¹⁵⁹ Fourth, 'any act of propaganda aimed at affecting the peace, defence or security of Malaysia'.¹⁶⁰ Fifth, 'the launching, landing or taking on board any aircraft'.¹⁶¹ Sixth, 'the launching, landing or taking on board of any military device'.¹⁶² The common link of the six activities is that they expressly specify that innocent passage of a ship ends when the passage of that ship is a threat to the national security of Malaysia.

Seventh on the list is 'the loading or unloading of any commodity, currency or person contrary to the customs, fiscal, immigration or health laws of Malaysia'.¹⁶³ The eighth and ninth are 'any act of pollution'¹⁶⁴ and 'any fishing activities',¹⁶⁵ respectively. Tenth on the enumerated list is 'the carrying out of

¹⁵⁶ See for example, Penyata Rasmi Dewan Rakyat, Parlimen Kesebelas, Penggal Pertama, Mesyuarat Pertama, Bil.17, Isnin, 14 Jun 2004, p 33 per Datuk Haji Wan Junaidi, Member of Parliament for Santubong, on the second and third reading of the Malaysian Maritime Enforcement Agency Bill 2004.

¹⁵⁷ *MMEA 2004* s7(6)(a).

¹⁵⁸ *MMEA 2004* s 7(6)(b). For example, being involved in a military exercise at sea.

¹⁵⁹ *MMEA 2004* s 7(6)(c). This is intended to cover incidents of vessels being used for spying.

¹⁶⁰ *MMEA 2004* s 7(6)(d). More likely than not, this was drafted with the aim of preventing acts of sedition.

¹⁶¹ *Ibid*, s7(6)(e).

¹⁶² *Ibid*, s 7(6)(f). This would easily cover the laying of mines by a belligerent ship.

¹⁶³ *Ibid*, s7(6)(g).

¹⁶⁴ *Ibid*, s7(6)(h).

¹⁶⁵ *Ibid*, s 7(6)(i).

unauthorised research or survey activities'.¹⁶⁶ Eleventh is 'any act aimed at interfering with any systems of communication or any other facilities or installations of Malaysia'.¹⁶⁷ Lastly, there is an omnibus provision that covers 'any other activity not having a direct bearing on passage'.¹⁶⁸ Although not as serious as jeopardising national security, these circumstances are sufficient to establish that the ship's passage through the territorial sea of Malaysia, are definitely not innocent in nature.

8. Investigations and Prosecution by the MMEA

When a person has given information to the MMEA under any federal law, such person may, under the *MMEA 2004* s9(1) 'request for a report on the status of the investigation of the offence complained of in his information from the Agency'. After such a request has been made, s9(2) provides that 'a status report on the investigation of such offence' must be given 'to the informant not later than two weeks from the receipt of the request made under s9(1)'. These two provisions appear to be aimed at introducing an acceptable level of efficiency and transparency in the functioning of the MMEA. However, s9(3) states that the status report need not be given if one of three circumstances is in operation: '[T]he offence complained of is a sizeable offence';¹⁶⁹ '[a] period of four weeks has lapsed from the date of the giving of the information';¹⁷⁰ or if the status report, 'contains any matter that is likely to adversely affect the investigation into the offence or the prosecution of the offence'.¹⁷¹

If the MMEA fails to furnish such a report, the informant may make a report to the Public Prosecutor of that failure.¹⁷² The Public Prosecutor then has the power to 'direct the Agency to furnish him with a detailed status report on the investigation that has been conducted by the Agency in relation to the offence in the information given by the informant'.¹⁷³ In addition, the Public Prosecutor also has the power to 'cause to be furnished to the informant, or direct the Agency to furnish to the informant, a status report containing such information as may be directed by the public Prosecutor'.¹⁷⁴ In order to ensure compliance with the orders of the Public Prosecutor, the *MMEA 2004* s9(7) states that any officer of the Agency who fails to comply with a directive of the Public Prosecutor commits an offence and shall on conviction be liable to imprisonment for a term not exceeding one month, a fine not exceeding RM1,000 or both.

When an officer of the MMEA is acting against a person, that person is entitled to demand under the *MMEA 2004* s11 the officer's identification. The identification card must also be produced on demand when an officer of the MMEA 'seeks any information'. Where a person is arrested by the MMEA pursuant to the exercise of its powers under the *MMEA 2004* s7(2)(h) it is provided for by s 8 that 'no prosecution shall be instituted against that [arrested] person except by or with the written consent of the Public Prosecutor'.¹⁷⁵

9. Legal Liability of the Agency under Civil Law for the Breach of its Statutory Duties

If officers of the MMEA fail to discharge their statutory duties and as a result a person has suffered physical, property or financial loss, could such an aggrieved person sue the MMEA? The *MMEA 2004* does not contain any statutory mechanism for making a civil claim against the MMEA, although statutory protection has been given to officers of the Agency. Under the *MMEA 2004* s 10 it is now unmistakably apparent that '[n]o action shall be brought against any officer of the Agency in respect of anything done or omitted to be done by him in good faith in the execution or purported execution of his functions, powers

¹⁶⁶ Ibid, s 7(6)(j).

¹⁶⁷ Ibid, s7(6)(k).

¹⁶⁸ Ibid, s 7(6)(l).

¹⁶⁹ Ibid, s9(3)(a).

¹⁷⁰ Ibid, s 9(3)(b).

¹⁷¹ Ibid, s 9(3)(c).

¹⁷² Ibid, s9(4).

¹⁷³ Ibid, s 9(5).

¹⁷⁴ Ibid, s 9(6).

¹⁷⁵ The words in the brackets have been added by the author for clarity.

and duties under this Act'. Similar personal protection is also found in the *Police Act 1967* (Malaysia), s32¹⁷⁶ and in the *Local Government Act 1976* (Malaysia), s125 (*LGA*).¹⁷⁷ The *LGA*, however, goes further than the *MMEAA 2004*, because s125(2) of the former statute provides that any expense incurred by the officer shall be borne and paid out of the Local Authority Fund. There is no equivalent to the *LGA* s125(2) in the *MMEAA 2004* and one is left questioning why officers at the forefront of the nation's war on terrorism and piracy do not enjoy such additional protection, whereas councillors and officers of local government who are involved in more mundane administrative activities enjoy such benefits.

The *MMEAA 2004* s10 provides personal immunity to officers of the MMEA, but does not go beyond that. This raises the possibility of claimants bypassing personal lawsuits against individual officer, who were not financially 'plump' defendants anyway, and proceed directly against the MMEA. It is submitted that legal basis of any claims against the MMEA would have to be in negligence or breach of statutory duty. Liability arises through the principle of vicarious liability for the negligent or wrongful acts of the MMEA officers. Although technically available to claimants, it is submitted that such lawsuits are unlikely to succeed. No crystal ball is needed for such a prediction because the signs are clearly sign-posted in the various common law cases concerned with civil liability of the police, which would provide a useful indicator of how the courts would decide this point in the future.

*Hill v Chief Constable of West Yorkshire*¹⁷⁸ provides a useful guide as to why the courts are reluctant to find the police negligent in such civil lawsuits. First, the imposition of such liability would not have a positive result. In fact, it has been argued that it actually leads to 'defensive policing', 'a concept developed to parallel 'defensive medicine' – that is the excessive use of expensive test and diagnostic aids together with meticulous record-keeping undertaken by doctors whose main concern is not the patient's welfare but their own defences against potential tort actions'.¹⁷⁹ In the context of the MMEA, this could result in the Agency being bogged down with documentation, and constant checking as to whether their operations are within the realms of legality for fear of civil liability.

Secondly, the resources of the enforcement agency could be better used elsewhere. In *Hill*, Lord Keith went so far as to say that a 'great deal of police time, trouble and expense might be expected to have to be put into the preparation of the defence to the action. ... The result would be a significant diversion of police manpower and attention from their most important function, that of suppression of crime'.¹⁸⁰ In the context of the MMEA, the argument would be that money that would have been spent on legal fees and payment of damages could bring greater benefit to the nation if channelled into the fight against terrorism and other maritime crimes such as piracy.

There is also further precedent that such civil claims against the MMEA are likely to fail. The courts are in all likely to allow the MMEA considerable leeway in how its officers exercise their powers. If previous cases such as *Mahmood v Government of Malaysia*,¹⁸¹ are looked upon as a yardstick, the court would not find an officer of the MMEA negligent if a suspect is shot in the process of being arrested. This leaves us with a lacuna in the civil compensation system. The government would have to seriously consider some sort of compulsory insurance scheme for all parties engaging in activities within the Malaysian Maritime Zone, or a form of state funded no fault compensation scheme. The consultation process has to start now because by the time the nation does suffer from a horrific terrorist attack on a maritime target along the lines of the 11 September 2001 attack in New York, it will be too late to implement plans for compensating physical, property and economic loss. It is submitted that a system along the lines of the compensation system for marine oil pollution should be implemented, with financial contributions from various stakeholders in the shipping industry.

¹⁷⁶ Personal protection is available provided that officer acted under authority of a warrant.

¹⁷⁷ Act 171. Providing protection for councillors, officers and employees of the local authority from personal liability.

¹⁷⁸ [1989] A.C.53.

¹⁷⁹ Howarth, *Textbook on Tort* (1st ed., 1995) 192.

¹⁸⁰ [1989] A.C.53, 63.

¹⁸¹ [1974] 1 M.L.J. 103.

10. Conclusion

The *MMEAA 2004* was drafted in preparation for enactment into legislation after the events of 11 September 2001. At around that time, there is evidence that some pressure was exerted by the United States on the littoral states of the Strait of Malacca¹⁸² to beef up the security of one of the world's busiest navigation routes for commercial shipping. Simultaneously, there was concerted pressure through IMO to enforce the ISPS Code with the aid of SOLAS Chapter XI-2. Coincidentally, the *MMEAA 2004* was gazetted on the same day that the ISPS Code came into force around the world. It is difficult to imagine that these events did not have an impact on the enactment of the *MMEAA 2004*. The question that still remains unanswered is which event was the most influential factor in the enactment of the *MMEAA 2004*. One view is that the *MMEAA 2004* had to be enacted to set up a Malaysian Coast Guard to effectively provide security in the maritime zones of Malaysia to effectively put into practice the letter and spirit of the ISPS Code. An alternative view is that the *MMEAA 2004* was predominantly a direct result of pressure from the United States of America. If that were the case, then the *MMEAA 2004* is a by-product of Malaysia's political reaction to the threat of armed forces from arguably one of the most formidable military powers on earth being stationed at strategic places along the Strait of Malacca, effectively taking away control of the Strait of Malacca from the littoral states.

What is probably less contentious is the allegation that the *MMEAA 2004* was hurried through Parliament with the legislation being hastily cobbled together and rubber stamped during the legislative process. It is submitted that there is evidence for this view from the Act itself. If the *MMEAA 2004* was an attempt at solving the problem of a 'sectoral' approach to enforcement of laws in Malaysia's maritime zones, the Act is an abject failure. A myriad of domestic legislation empowering numerous Malaysian government agencies still exist and govern the enforcement of laws in those maritime zones. The *MMEAA 2004* merely adds another layer of bureaucracy and empowers a new agency, the MMEA, to enforce domestic laws in Malaysia's maritime zones. In the event of a conflict of jurisdiction between enforcement agencies, it is apparent that there is now no clear statutory guideline as to where the powers of the existing agencies end in the maritime zones of Malaysia and where the powers of the MMEA commence. What Malaysia now has is the MMEA performing enforcement duties in Malaysia's maritime zones in addition to the existing domestic enforcement agencies. For example, if there is a terrorist threat in the territorial waters off one of Malaysia's leading ports, Westport, Klang, there would be a response by the Royal Malaysian Navy, the Marine Police as well as the MMEA.

It is indeed alarming that there is no statutory rule on to how a conflict of operational procedures and management philosophies between these different enforcement agencies would be resolved. There is only a broad statement of hope in the *MMEAA 2004* s16 that the MMEA and the relevant existing maritime agencies 'shall closely co-ordinate, consult and liaise with each other and render to each other assistance for carrying out the provisions of the 2004 Act'. As yet, there are no detailed plans on how this broad statutory directive is to be carried out. It is suggested that these are the concerns that the relevant Malaysian Minister should address when drafting the various delegated legislation to aid the MMEA in performing its function under s19. The only matter that appears to have some clarity at the moment is that during any period of emergency, special crisis or war, s17(1) empowers the relevant Minister to put the MMEA under the command and control of the Armed Forces of Malaysia. Should there be any doubt as to whether there was indeed an emergency, special crisis or war, s 17(2) declares that 'a proclamation signed by the Yang di-Pertuan Agong¹⁸³ and exhibited at such places as the Minister deems fit shall be conclusive proof of that fact'.

Despite the less than satisfactory legislative framework, the *MMEAA 2004* does indeed have the powers to carry out its functions as a coastguard and play an important role in the fight against maritime terrorism. The *MMEAA 2004* clearly sets out the functions of the MMEA and backs that up with the granting of statutory powers of enforcement in the Malaysian maritime zones. Any improvement to legislation must not be confined solely to the *MMEAA 2004*. As this Act makes references to other domestic legislation

¹⁸²Malaysia, Singapore and Indonesia.

¹⁸³The King of Malaysia.

relating to specific Malaysian maritime zones, the defects in those statutes must also be rectified in order to provide the MMEA with a solid legal foundation on which to carry out its functions. What is needed is legislative reform to sort out the conflicts and overlaps in jurisdiction with other domestic enforcement agencies. Although this could be performed by amendments of the individual domestic legislation relevant to each maritime zone, a quicker and more efficient route is to provide for the primacy of the MMEA via legislative amendments to the *MMEA 2004*.

The *MMEA 2004* alone cannot provide a complete legislative solution to maritime terrorism. When the *MMEA 2004* first came into force, specific offences for ‘terrorism’ in the *Penal Code* (Malaysia) were not yet in force. Instead, Malaysia continued to rely heavily on detention without trial under the *Internal Security Act 1960* (Malaysia). If any terrorist were apprehended in the maritime zones of Malaysia by the MMEA during this time, there would not have been the option of charging these individuals in court. The amendment to the *Penal Code* by the *Penal Code Amendment Act 2003* (Malaysia)¹⁸⁴ includes a new Chapter VI A which is titled ‘Offences Relating to Terrorism’, which contains new offences relating to terrorism, under ss 130B to 130T. Examples of the new offences are committing a terrorist act under s130C, providing devices to terrorist groups under s130 D and recruiting persons to be members of terrorist groups or to participate in terrorist acts under s130E. Recently on 6 March 2007, these new offences relating to terrorism have been brought into force.¹⁸⁵ These offences would give the MMEA more teeth in its role of beefing up security against terrorism in Malaysia’s maritime zones.

¹⁸⁴ *Act A1210*. The letter ‘A’ in the numbering system denotes that the *Penal Code (Amendment) Act 2003* is merely legislation that amends the main statute. From the number, the 2003 Act is the one thousand two hundred and tenth amending Act of Malaysia.

¹⁸⁵ See P.U. (B) 67, Dated 5 March 2007 [(11) dlm. BHEUU/06/(S)/370; PN(U2)2364].