CHAPTER 5

SAFETY OF NAVIGATION AND PREVENTION OF POLLUTION: PROPOSALS OF THE COASTAL STATES AND THEIR RIGHT OF ACTION UNDER INTERNATIONAL LAW

I. Coastal State Proposals

The safety of navigation in the Straits and the ensuing problem of of pollution are two very critical issues for Malaysia and Indonesia. Singapore too shares the concern of the other two states, for a major oil spill in the Straits would inevitably affect her coastline. The recent spate of collisions and mishaps to oil tankers in the Straits of Malacca show the imperative demand for navigational regulations which should have been enacted years ago.

In response to this demand the Malaysian Cabinet approved the establishment of a standing committee called the Straits of Malacca Committee on 14th September 1971. The objects of the Committee are to examine the need for a limitation of the type, tonnage and draught of ships passing through the Straits, to study proposals for the establishment of a traffic separation scheme in the Straits, and to determine the regulations to be passed should such a scheme be desirable; to study measures that should be undertaken nationally and internationally to prevent and to prepare for the eventuality of an oil spillage in the Straits; and to liase with the Government of Indonesia on the above matters.

Two months after the establishment of the Committee, consultations were held between the three coastal states with a view to adopting a common position on matters relating to the Straits so that any action needed may be facilitated smoothly, without misunderstanding among the coastal states themselves. The meeting which was held in November 1971 resulted in the November declaration.

Following upon these consultations, a tripartite meeting was held in Jakarta in July 1972 as a further step towards achieving the coastal states objectives. The meeting discussed common possible measures to ensure safe navigation, considered protective and compensatory measures against oil pollution in the Straits. Indonesia proposed 5 safety measures which were discussed at the meeting. These were the imposition of a Traffic Separation Scheme, limitation of tonnage and draught (these two being considered the primary measures), compulsory pilotage, preporting obligation and compulsory insurance.

Under the Traffic Separation Scheme which would be worked out by technical experts of the 3 coastal states it was proposed that South and East bound traffic should go through the deeper channel on the West side of the Straits of Malacca and the South side in the Straits of Singapore known as the Philip Channel. West and North bound traffic would pass through the narrower channel in the East side in the Straits of Malacca and North side in the Straits of Singapore. Such a separation of routes is necessary because the navigable channel in the Straits are narrow (in some parts they are less than 2 miles wide), shallow (the depth in some parts is less than 19 metres) and crowded (with over 150

ships passing through each day). At present ships navigate both ways in opposite directions, and with vessels sailing day and night, the present system constitute a great risk of collision especially for ships with limited breaking power and manouvrability.

A Traffic Separation Scheme had been devised by the British Royal Navy which conducted a survey of the Straits in early 1971, under which the Straits was bifurcated into a dual carriageway - one lane to be used for East-bound tankers, and the other by West-bound tankers. Unfortunately, although the scheme was submitted to IMCO nothing has materialized.

The peculiar configuration of the Straits makes the demand for a Traffic Separation Scheme imperative. A Joint Hydrographic Survey conducted jointly by Japan and the 3 coastal states over a five-year period revealed 98 shallow spots with depths of less than 75 feet and found sunken wrecks which pose a danger to ships, especially tankers of over 200,000 tons which are unable to navigate safely through the Straits at low tide. Thus a Traffic Separation Scheme would be of particular benefit to maritime nations especially Japan, the owners of the supertankers, while the coastal states would gain indirectly from the minimisation of collisions and pollution.

The installation of an electronic chain as has been done in the Bay of Bengal and in the North Sea, would be of tremedous help in reducing the danger of collisions and strandings because by this method the position of a ship may be accurately located by electronic stations set up on the land areas on either side of the Straits, and warnings may be

issued in time. This device however would cost an enormous sum, thus it is unlikely that Malaysia and Indonesia would be able to instal it.[88] The provision of additional lighthouses and buoys seem to be the only safeguard within the means of the coastal states, aside from the imposition of compulsory pilotage which may be necessary in the case of certain categories of ships.[89]

It is unlikely that the Traffic Separation Scheme proposed for the Straits would be opposed by the Maritime Community. The assistance provided by such schemes has been expressly recognized by the International Convention on the Safety of Life at Sea (SOLAS) 1960, Regulation 8, Chapter V pronounces:

> "The practice of following . . . routes adopted for the purposes of separation of traffic including avoidance of passage through areas designated as areas to be avoided by ships or certain classes of ships, or for the purpose of avoiding unsafe conditions has contributed to the safety of navigation and is recommended for use by all ships concerned."[90]

Article 7(1) of the Oman Draft Articles allows coastal states to prescribe compulsory sealanes and traffic separation schemes in their territorial sea on condition that they take into account recommendations of competent international organisation; any channels customarily used

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[88] Das and Pradhan, op.cit. n.3, p.66.

[89] This will be discussed later in the chapter.

[90] United Nations Treaty Series, Vol.536, p.406.

for international navigation; the special characteristics of particular channels and the special characteristics of particular ships. The latter provisions are enclosed in article 7(2).

Agreeable provisions with regard to this issue have also been made by the United States Draft Articles. Article II provides that "coastal states may designate corridors suitable for transit by all ships and aircraft through and over such Straits."

Thus, with the willingness of the coastal states to consider the recommendations of competent international organizations, the pledge by Malaysia and Indonesia that no extreme measures would be taken, and their readiness to consult IMCO, the international body responsible for maritime safety, objection to the Traffic Separation Scheme seems unlikely. After all coastal state action has been motivated throughout, by a consideration for the safety of navigation in the Straits.

The second safety measure proposed involves the limitation of the tonnage and draught of certain ships using the Straits. This proposition refers most particularly to ships carrying oil in bulk, because limitation of the passage of tankers above a certain tonnage is an essential ingredient in the attempt to reduce the risk of pollution caused by stranding and collisions. To this effect Malaysia proposed a limitation specified at 200,000 tons and a draughtage of 60 feet, so that a greater safety margin between the vessel and the bed of the Straits may be possible. Singapore however is not agreeable to this. She considers tonnage rather than draughtage as the determining factor. Howover, an

an increase in draughtage would lead to a corresponding increase in tonnage and dangers would definitely be greater with increased tonnage and draughtage.

Collision have been known to occur between vessels weighing less than 100,000 tons, while the shifting sandbanks and submerged wrecks have caused the grounding of ships whose draught are less than 60 feet.[91] The capacity of a vessel to pollute per se is thus unlimited. But the coastal states in specifying a limitation are merely acting upon the calculated degree of risk involved in the passage of these tankers on the basis of their ability to navigate safely through the Straits. Thus it has been shown that the Straits may accommodate supertankers with the maximum capacity of 200,000 tons which will have only 6 feet clearance at some points. The passage of tankers of greater tonnage would in the light of the degree of risk be beyond the capacity of the Straits to handle.

It is essential that the permissible maximum tonnage and draughtage of passing ships be stipulated commensurate with the physical capacity of the Straits to handle them in order to protect the natural resources in the Straits which are important to the economic well-being of the coastal states, and safeguard them from pollution.

It is worth noting that in the Straits of Dover where the navigable channel is between 2 to 4 miles wide and where the depth of the channel permits the passage of ships of up to 300,000 tons, a ban has

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[91] Refer to Chapter 3.

been imposed on the passage of supertankers more than 200,000 tons. A similar decision imposed in the Straits of Malacca would be just and reasonable considering that the navigable channel is at many places less than 2 miles wide and the depth at some places have caused stranding of smaller vessels.

The third safety measure proposed is the imposition of compulsory pilotage in the Straits. Under this scheme certain categories of ships would, especially in the shallower and narrower channels, be required to sail under the guidance of local pilots who, because of their familiarity with the geophysical conditions and normal traffic flow in the Straits, would be less accident-prone than the foreign pilots.

The Singapore delegation at the meeting objected to this proposal on the ground that it might not be permissible under international law except in cases of canal zones and internal waters. These objections may be met by arguing that compulsory pilotage should be regarded in the light of practical matters, that is, in the context of the safety of navigation for both the users and the coastal states rather than by legal considerations in the framework of international law. It must be remembered that the reasons for prescribing compulsory pilotage is the same whether it be in internal waters, in territorial waters, or in the high sea corridor of the Straits. The reality of the situation must be given priority.

As a further safety precaution, it was proposed that reporting obligation be imposed on ships which have a capacity of more than 100,000

tons before they enter the Straits, and while they are traversing the Straits. The ships would be required to report their position at certain intervals to radio stations on shore so that vital information may be quickly disseminated to them in order to avoid collision or strandings.

Finally, to guarantee that the coastal states as the potential victims are promptly and justly indemnified should an accident of super-tankers occur in the Straits,it was proposed that a certain type of compulsory insurance or compulsory deposit in a specific fund to cover the indemnity, be set up. This proposal is timely because the 1969 Convention on Civil Liability for Oil Pollution Damage which was intended to help coastal states as potential victims of pollution has not been enforced yet. This Convention which was adopted by the International Legal Conference on Marine Pollution Damage convened in Brussels following the "Torrey Canyon" disaster, while imposing strict liability, limits a faultless owner's maximum liability to approximately U.S.$15 million. Thus even if enforced, compensation for coastal states following a big spillage would be wholly inadequate. In the "Showa Maru" incident, for example, Malaysia made an official claim of $23 million for damage to marine resources and the cost of anti-pollution operations. Indonesia sent in a bill of $34.5 million for the clean-up costs.[92] The bill for pollution damage was still being worked out at the time of writing. Under the 1969 Convention therefore the amount the coastal states be able to claim can hardly be called compensation.

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[92] The New Straits Times, January 25, 1975.

Mere insurance of the tankers against pollution may also be inadequate. The "Showa Maru" was insured for $75 million but the bill submitted by the 3 coastal states would exceedthis amount. Thus getting adequate compensation would be an arduous task.

The "Torrey Canyon" affair also prompted a private response by tanker owners. Dominant oil companies sponsored the **Tanker Owners** Voluntary Agreement Concerning Oil Pollution (TOVALOP) which came into force on 6 October 1969. By this agreement tanker owners undertake voluntarily to compensate governments to a maximum of US$10 million for expenses incurred in responding to a negligently created oil pollution threat.[93] On January 14, 1971 another agreement was signed between the oil companies and the Oil Companies Institute for Marine Compensation Limited. Called the Contract Regarding an Interim Supplement to Tanker Liability for Oil Pollution (CRISTAL) the agreement provides for compensation for damage in excess of liability provided by TOVALOP and in other treaties, with a maximum total liability of US$30 million. Though it is commendable that tanker owners now realise their responsibility to the pollution victims, it is quite obvious that they were motivated by the hope of avoiding a sterner impact. This,however, is beside the point. What is disturbing is the fact that these are voluntary agreements which might not undergo permanency. Also the Agreements make no guarantee that a prompt and immediate compensation would be made.

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[93] (1969) 8 International Legal Material, p.497.