

CHAPTER 2

CONFLICTING CLAIMS AS TO THE STATUS OF THE STRAITS

I. Present Legal Status of Straits

The question of the existence of a separate legal regime for Straits, is still one that lacks a satisfactory answer. Legally, the regime of a Strait is affected by its breadth, especially by the fact whether or not passage through it is possible without having to pass through the territorial waters of one or the other of the coastal states.¹¹

Writers generally agree that on the assumption that the breadth of the territorial sea is 3 miles, a strait whose width is less than 6 miles would be territorial. Controversy arises when the width of the strait exceeds 6 miles. Some writers contend that such waters are territorial; others say they are not.¹² Any consideration of this problem would have to take into account the existing trend of unilateral extension of the territorial sea among states and the effect of these extensions on the right of passage in the strait. Indeed the idea of a special regime for straits was mooted because of claims by coastal states

¹¹ Johnson, "Some Legal Problems of International Waterways, With Particular Reference to the Straits of Tiran and the Suez Canal" 1968 Modern Law Review, Vol. 31, p.153 at p.157.

¹² Starke, Introduction to International Law, 7th Edn., Butterworth, London 1972, p.220.

for an extended territorial sea,¹³ and their tendency to regard straits more than 6 miles wide as territorial. Assuming that the breadth of the territorial sea is 3 miles, no special regime in such straits will, in principle, be required as there will always exist the right of unimpeded passage in the column of high seas in the straits. However, where the territorial seas of the coastal state eliminate the high seas channel in the strait, the problem of the right of passage of foreign vessels arises.

In this regard, the International Court of Justice in the Corfu Channel Case (Merits)¹⁴ stated,

"It is, in the opinion of the Court, generally recognized and in accordance with international custom that states in time of peace have a right to send their warships through straits used for international navigation between two parts of the high seas without the previous authorization of a coastal state, provided that the passage is innocent."¹⁵

In this case which is often cited as authority for arguing in favour of a distinction between passage through territorial straits and passage through territorial waters which do not encompass a strait,¹⁶ the special regime envisaged by the Court seems to depend solely upon

¹³Johnson, loc. cit.

¹⁴I.C.J. Report, 1949, p.4. in Green, International Law Through The Cases, 3rd Edn., London Institute of World Affairs, 1970, p.254.

¹⁵Ibid. p.260.

¹⁶Das and Pradhan. Op. cit. n. 3 at p. 4.

factual considerations, that is, whether the strait in question is used for "international navigation between two parts of the high seas."

In article 16(4) of the Geneva Convention on the Territorial Sea, the words "or of the territorial sea of a foreign State" are added. But this is thought to be a mere reflection of existing usage safeguarding the right to use the straits linking the high seas with the territorial sea of a State.¹⁷

However, though the Corfu Channel Case and the Geneva Convention have laid down certain principles with regard to the status of straits in general, there still remain certain questions which are inconclusive. One is the applicability of the conventional rules on innocent passage to warships. A further question is the right of the coastal state to require prior notification of the passage of foreign warships, a requirement which does not involve the prior authorization principle objected to by the Court. No mention of this right is made in the Geneva Convention. These questions will be discussed further in relation to the Malacca Straits.

An additional problem arises with regard to the territorial sea claims of Malaysia and Indonesia and the consequence of these claims on the status of the Malacca Straits, because while Malaysia accedes to all four Conventions, Indonesia has ratified only the High Seas Convention and Singapore none. As the Territorial Sea Convention is the most relevant of the four Conventions in relation to this question, its

¹⁷Brown, E.D. in a paper delivered at The David Davis Memorial Lecture.

applicability in the present case is questionable because Indonesia and Singapore are non-signatories. The International Court of Justice in the North Sea Continental Shelf Cases¹⁸ laid down that a state would still be bound by a rule laid down in a convention if that rule forms part of the corpus of general international law, whatever the state's position with regard to the International Convention may be.¹⁹ Thus Indonesia and Singapore would be bound by the principle of innocent passage of foreign vessels in the Straits since the provisions of article 16(4) form part of customary international law.

The status of some straits vital to international navigation has been defined in line with usages and custom by bilateral and multilateral treaties, which in most cases are concluded to solve international conflicts over the strait. As such these treaties may often be declaratory rather than constitutive.²⁰ The Danish Straits, the Straits of Magellan and the Turkish Straits are all governed by special treaty arrangements. The Danish Straits is governed by the Treaty of Copenhagen signed as early as 1857 at the International Conference of Copenhagen because of protests from the United States. By this Treaty Denmark abolished all taxes on passage through the Straits and agreed not to detain for any reason, any American vessel passing through the Straits.

¹⁸ I.C.J. Report 1969, p.3, Green, op.cit.n.14, p.479.

¹⁹ Ibid, p.484.

²⁰ However where the waterway or strait has never been used as a passage-way for international navigation, or modern technology has made it available only recently for use by international shipping, a multilateral treaty concerning the waterway is often constitutive.

Similarly the Treaty of 1881 between Argentina and Chile in respect of the Straits of Magellan declares that the Straits shall be free for passage of all ships, that its banks shall not be fortified and that the waters shall be neutralized in time of war. This bilateral Treaty however has not been strictly respected by third states, nor is it persistently adhered to by the parties.

Perhaps the model example of a multilateral treaty governing passage through straits is the Montreaux Convention of 1936 signed by Bulgaria, France, Great Britain, Greece, Japan, Rumania, Turkey, the U.S.S.R. and Yugoslavia with regard to the Turkish Straits. Article 1 of the Convention states "the contracting parties recognise and affirm the principle of freedom of transit and navigation by sea in the Straits." In time of peace merchant vessels are guaranteed complete freedom of passage. In time of war, Turkey being a belligerent nation, merchant vessels not belonging to a country at war with Turkey and not in any way assisting the enemy shall enjoy the same freedom of passage through the Straits, but by day and through routes designated by Turkish authorities.

A call for the internationalization of the Malacca Straits will be discussed below.

II. Status of the Malacca Straits

(a) The Anglo-Dutch Treaty 1824

It is alleged by Shaw and Thomson²¹ that the status of the Straits of Malacca has been laid down conclusively by the Anglo-Dutch

²¹Op.cit. n.10. p.33.

Treaty of 1824. Although the British and the Dutch had stopped at the demarcation of their colonial spheres of influence through mutual concessions of territories without any stipulation with regard to the status of the Straits, Shaw and Thomson conclude that:

"Since it was illegal that Britain and the Netherlands with the Treaty of 1824 declared their rights of navigation through the Malacca Straits to the exclusion of other States, unless other States had renounced their freedom to pass through the Malacca Straits in favour of the two Powers to that Treaty, and since there had been no sign whatsoever on the part of other States to have so renounced their freedom in question, it must be concluded on this point that the Treaty of 1824 also took for granted general freedom of navigation through the Malacca Straits theretofore enjoyed by all States."²²

A new sea order has thus been established in the Straits.

The fact that it would be illegal for the British and the Dutch to claim sovereignty over the Straits has led the writers to contend that the Treaty opened the way for a tacit compromise: "Tacit recognition of the international juridical status (internationalization) of the Straits by Britain and Holland on the one part, in exchange for tacit recognition (acquiescence) of the new territorial arrangements and the new sea-order within the Straits by other States on the other part."²³

²² Ibid., at p.23.

²³ Ibid., at p. 29.

The right of passage through the Malacca Straits is a customary right established long before 1824 through continuous and consistent attitudes and conduct, and the writers argue that by refraining to declare monopoly over the Straits, the British and the Dutch had implicitly recognised such customary right as part of the new sea-order (the internationalization of the Straits) established by the Treaty. Their abstention from obstructing navigation in the Straits subsequent to the Treaty served as a guarantee of the right of passage to other states who thus refrained from protesting against their territorial claims. There thus came into existence a tacit Accord as to the sea-order in the Straits which converted the customary right of passage into a Treaty right. Any unilateral change of this sea-order which affects the exercise of such rights would be illegal without the consent of the other sea Powers of the time.²⁴

Malaysia has inherited the Anglo-Dutch Treaty and thus the Accord which is an inseparable part of the Treaty establishing the international juridical status of the Straits, by reason of the Devolution Clauses signed upon Malaya's independence in 1957. By these Clauses which remain a part of the Malaysian Constitution, Malaysia chose to favour the continuity of treaties and succeeded to rights and obligations accruing from them. It is argued that Indonesia succeeded to the Treaty by reason of the continuity of Dutch treaties in Indonesia while that country was in the union with the Netherlands despite the fact that Indonesia subsequently expressed a policy of non-succession to most of the treaties previously applied to it.²⁵ Thus it is concluded by Shaw and Thomson,

²⁴ Ibid., at p.33.

²⁵ Refer ibid., at pp.36 - 41.

Malaysia and Indonesia by inheriting the Anglo-Dutch Treaty, must not disturb the status-quo established by their predecessors.

In contention to this viewpoint it is submitted that the Anglo-Dutch Treaty of 1824 did not lay down the status-quo of the Malacca Straits as alleged, and that the status of the Straits subsequently fell to be governed by the international customary law previous to 1824 which had established the right of passage and the freedom of navigation in the Straits through long and continued usage. The Anglo-Dutch Treaty was signed merely to conclude the long existing differences between the two Powers and to establish their conclusive spheres of influence in the East by a demarcation line at sea. No mention was made anywhere in the Treaty of the territorial sea or of the international status of the Straits. Because the objective of the Treaty was to settle disagreements between the parties it is only natural that the provisions made related only to their rights and obligations, and those of the natives of the area. As long as these rights and obligations did not infringe upon the rights of third States to the use of the Straits there was no need to make provisions with regard to the third State rights as these already exist under the international customary law of the time. The third states too had made no attempt to protest over the territorial claims made by the two Powers because their interest in the Straits were not threatened. The Anglo-Dutch Treaty thus did not establish any status-quo for the Straits of Malacca.

Shaw and Thomson had argued that since it would be illegal for the Dutch and the British to claim monopoly over the use of the Straits to the exclusion of the other States, the fact that other States had not renounced their right and the two Powers had not in fact claimed exclusive use of the Straits justify the conclusion that the Treaty took for granted the freedom of navigation in the Straits and established by tacit Accord a status-quo for the Straits which cannot be changed except with the consent of the existing sea Powers. It is submitted that this argument does not arise because the British and the Dutch had not claimed exclusive use of the Straits as they were protagonists of the principle of the freedom of the seas, and the aim of the Treaty in the first place was not to regulate the status of the Straits either bilaterally or multilaterally, but to settle their differences through territorial concessions. There was thus no need for third States to either renounce or assert their rights over the use of the Straits, as these were already recognised by customary law.

If the Treaty had established a new sea order in the Straits by tacitly stipulating its international juridical status the provisions of the Treaty would, to some extent affect the third States because they would be the ones concerned in an internationalization of the Straits of Malacca. However it is a well established principle of treaty relations that a State cannot be bound by any treaty provisions without its consent. Thus if the Treaty of 1824 was meant to regulate the international status of the Malacca Straits, then, an international convention comprising all third States concerned would be the proper

form of agreement.

Based on the arguments above, it would not be unreasonable to conclude that there is no basis for the assumption of the tacit Accord with regard to the new sea-order in the Straits or to the right of passage through the Straits. Whatever right of passage there was, existed because of international custom and no tacit Accord ever incorporated it into the Treaty. Without the tacit Accord the arguments of the writers that they Treaty established a lasting status-quo of the Straits would fall because the Accord was an essential component of the assumption for their argument.

If the Anglo-Dutch Treaty does not establish the status-quo of the Straits, the status would thus be governed by existing international rules with regard to the status of straits. The validity of the extension of the territorial seas by Indonesia and Malaysia and the Declaration of 1971 must accordingly be determined by state practice and international custom as in existence today.

(b) Extension of Territorial Waters by Malaysia and Indonesia

In February 1960 Indonesia declared the extension of her territorial sea to 12 miles. In 1969 Malaysia followed suit. In the interest of maritime defence²⁶ and economic necessities²⁷ the Emergency

²⁶ Impetus was provided by the Indonesian-Malaysian Confrontation during which time Indonesian troops crossed the Straits, making it for the first time, an area of conflict.

²⁷ The main consideration at the time seemed to be the fact that Indonesian fishermen were coming very close to Malaysian waters and depriving Malaysian fishermen of their livelihood.

(Territorial Waters) Ordinance was enacted which extended the breadth of Malaysian territorial waters to 12 miles. This Ordinance was later embodied into the Territorial Waters Act 1972. As a result of these new claims overlapping occurred in the southern portion of the Straits where its width is less than 24 miles. Consequently an agreement, the Friendship Treaty and the Delimitation of the Territorial Seas Treaty was concluded between Malaysia and Indonesia in March 1970 delimiting the boundary of their respective territorial waters in this region based on the median line principle. This Treaty questioned implicitly the long standing status of the Straits as an international waterway.²⁸

The breadth of the territorial sea has always been a source of great controversy. Lack of consensus prevented its stipulation in the 1958 Geneva Convention. However based on current state practice and juristic opinions the 12 mile limit seems to be achieving a growing general consensus and prospects seem good that it would replace the customary rule of 3 miles. In terms of state practice, figures show that as of October 1972, 15 states claim more than 12 miles, 50 claim 12 miles, while 44 claim less than 12 miles.²⁹ It has been observed that those States which claim more than 12 miles do so primarily for economic reasons and their agreement to the 12-mile limit may be secured if their interests may be accommodated on a functional basis,

²⁸ Leifer and Nelson, "Conflict of Interest in the Straits of Malacca", International Affairs, April 1973.

²⁹ E.D. Brown, "Maritime Zones: A Survey of Claims" in New Directions in the Law of the Sea, Vol. III, p. 157, at p. 162.

for example, by providing a 200-mile economic zone, or some kind of extended functional zone beyond the territorial sea. Thus, with the vast majority of states claiming 12 miles or more, it is increasingly difficult for States claiming less than 12 miles to decline to recognise 12-mile claims. Even champions of the 3-mile rule are willing to accept international agreement on a 12-mile limit, though conditional upon the guarantee of free transit through and over straits used for international navigation.

In the North Sea Continental Shelf Cases³⁰ the International Court of Justice recognised that "extensive and virtually uniform" state practice could form a new rule of customary international law. The growing general consensus towards the 12-mile rule is surely taking concrete form and heading towards the establishment of a new rule of customary law to replace the 3-mile principle.

Since the 12-mile rule is acceptable in current international practice, the Indonesian Presidential Act of 1960 and the Malaysian Emergency (Territorial waters) Ordinance 1969, declaring the extension of the territorial seas of both States, are valid. They do no more than stipulate what has been consented to by a majority of States.

In support of the above conclusion, it may also be argued, as one writer did,³¹ that because the Geneva Conferences failed to decide

³⁰ I.C.J. Report 1969, p.3; in Holder and Brennan, International Legal System, Butterworths, London (1972), p.396, at p.401.

³¹ Gormley, "The Unilateral Extension of Territorial Waters", 43 University of Detroit Law Journal (1965 - 1966) p. 695 at p.706; quoted from Das and Pradhan, op.cit., n.3 at p.23.

the proper breadth of the territorial sea, the 1956 Codification of the Law of the Seas by the International Law Commission, known as the "Regime of the Seas" is the most authoritative document in this field; Article 3(2) of the Codification states: "The Commission considers that international law does not justify an extension of the territorial sea beyond 12 miles." The writer thus contends that a 12-mile claim would be legal.

Such an argument is reinforced by the fact that article 3(2) of the Codification has been retained in part in article 24(2) of the Geneva Convention on the Territorial Seas and Contiguous Zone 1958. The latter article states: "The contiguous zone may not extend beyond 12 miles from the baseline from which the breadth of the territorial sea is measured." Although in the contiguous zone a state merely has the jurisdiction to prevent infringement of its customs, fiscal, immigration or sanitary regulations within its territory or territorial sea, it has been suggested³² that most countries imply from this provision that coastal States have the faculty to extend their territorial seas to a maximum limit of 12 miles. These States have, pending the incorporation of the 12-mile rule into an international convention, construed article 24(2) as providing a legal basis on which they may rest their claim.

In addition to the above arguments, it may also be noted that about the only consensus achieved in the first session of the Third

³² Interview with Mr. L.C. Vohrah, Legal Adviser to the Ministry of Foreign Affairs.

Law of the Sea Conference was a 12-mile territorial sea, although the major maritime nations stipulated that their agreement was conditional upon the right of free transit in Straits used for international navigation. It would seem therefore that the 12-mile territorial sea would soon replace the 3-mile limit to become the new customary international law regarding this matter.

A question that may arise in this connection is whether the delimitation of the territorial sea by a State in international straits such as the Straits of Malacca can be done in the same manner as the extension of the territorial sea in waters that do not encompass a strait. Although there may be valid reasons for restricting the extension of the territorial sea by coastal States within the strait areas,³³ the general view in international law seems to be that the territorial sea in international straits shall be ascertained in the same manner as on the other parts of the coast. The 1958 Geneva Convention has failed to provide a specific article devoted to the delimitation of waters in straits. Thus it is reasonable to assume that article I³⁴ of the Territorial Sea Convention applies to all areas of the coast. It may also be argued, as did Gormley, that since the Geneva Convention has failed to make any provision relating to the matter, the "provisional articles concerning the regime of the territorial

³³ See Shaw, *op.cit.* n.10 pp.46 - 51.

³⁴ Article 1(1) states: "The sovereignty of a state extends, beyond its land territory and its internal waters, to a belt of sea adjacent to its coast, described as the territorial sea.

sea" adopted by the Sixth Session of the International Law Commission in Paris in 1954, would be the most authoritative document on the matter. Clause 1 of article 12 which deals with the delimitation of the territorial seas in straits states: "In straits joining two parts of the high seas and separating two or more States, the limits of the territorial sea shall be ascertained in the same manner as on the other parts of the coast."³⁵

Also, Oppenheim who discusses the matter of straits in his book points out that all rules of international law concerning navigation fishery and jurisdiction within the maritime belt are similarly applicable to navigation, fishery and jurisdiction in the straits area.³⁶

It may thus be concluded that the extension of their territorial seas by Malaysia and Indonesia within the Malacca Straits is permissible under international law in the same manner as the extension on the other parts of the coast.

(c) The Declaration of November 1971

In November 1971, the Indonesian and Malaysian Governments issued a joint declaration stating that:

"The Governments of the Republic of Indonesia and Malaysia agreed that the Straits of Malacca and Singapore are not international straits, while fully recognising their

³⁵ Yearbook of the International Law Commission, 1955 Vol.2, p.38.

³⁶ Oppenheim, International Law: A Treatise, Vol. 1, Eighth ed., Longmans, Green & Co., London, 1966, at p. 511.

use for international shipping in accordance with the principle of innocent passage. The Government of Singapore takes note of the position of the Governments of the Republic of Indonesia and of Malaysia on this point."³⁷

This declaration was contained in paragraph (V) of an agreement known as the Safety of Navigation Agreement drawn up by the representatives of the three coastal states, clarifying their governments' position on the status of the Straits.

In this context it is necessary to examine the Corfu Channel Case (Merits)³⁸ which has been regarded as laying down the international customary law with regard to the classification of straits. In this case, the Albanian Government, while not disputing the fact that the North Corfu Channel is a strait in the geographical sense, denied that it is an international waterway on the grounds that it is only of secondary importance and not even a necessary route between two parts of the high seas, and that it is used exclusively by local traffic. The International Court of Justice in rejecting the above contention stipulated that

"the decisive criterion is rather its geographical position as connecting two parts of the high seas, and the fact of its being used for international navigation."³⁹

³⁷ Singapore Government Press Statement, November 16, 1971; quoted from Das and Pradhan, op.cit. n.3 at p.9.

³⁸ Op. cit. n.14.

³⁹ Ibid., p.187.

The 1958 Geneva Conference on the Law of the Sea approved this criterion by deleting the qualification "normally used for international navigation" in the 1956 Draft of the International Law Commission and substituting the more restrictive definition "used for international navigation" in article 16(4)⁴⁰ in the Convention on the Territorial Sea. This was thought to state the rule of the Corfu Channel Case which did not require an "extent of use" criterion.

Applying these factual considerations it would seem that the Malacca Straits fall within the category of international waterways. It is an inter-oceanic straits connecting two parts of the high seas, and is used for international navigation. About 150 ships ply the Straits daily making it one of the busiest Straits in the world, second only to the Strait of Dover.

The joint declaration by Malaysia and Indonesia disclaiming the international character of the Straits rests on the consideration that their 12-mile territorial sea claims have wiped out the remaining column of high seas in certain parts of the Straits thus bringing these portions wholly within their territorial jurisdiction. Such an argument is, strictly speaking, valid.

The question however arises as to whether Malaysia and Indonesia may alter the status of the Straits by unilateral action on their part.

⁴⁰This article includes straits which link one part of the high seas and the territorial sea of a foreign state. This difference between the provision of the Geneva Convention and international customary law as laid down in the Corfu Channel case must be borne in mind because only 44 states are signatories to the Convention. Indonesia is a non-signatory.

The maritime nations deny the existence of any such possibility. This in effect means that Malaysia and Indonesia have no right of unilateral extension of their territorial seas, the effect of which would be to convert the Malacca Straits into a territorial Straits in those portions of the Straits where the width is less than 24 miles. The Anglo-Norwegian Fisheries Case⁴¹ has often been cited as authority for the proposition that a coastal state may not unilaterally extend its territorial sea. In this case the International Court of Justice stated:

"the delimitation of sea areas has always an international aspect; it cannot be dependent merely upon the will of the coastal state as expressed in its municipal law.

Although it is true that the act of delimitation is necessarily a unilateral act, because only the coastal state is competent to undertake it, the validity of the delimitation with regard to other States depends upon international law."⁴²

The Court in this case had sanctioned Norway's application of the straight baseline system (which amounted to a de facto extension of her territorial sea beyond the historic 4-mile limit) in consideration of her peculiar geographical and economic reasons. The import of the judgement is that the baseline method adopted in this case was an application of the general principles of the law to special facts.

⁴¹ I. C. J. Report 1951, p.116.

⁴² Green, op.cit. n.18, p.475.

Thus some jurists are prepared to deduce that the judgement would warrant the unilateral delimitation of sea areas if the criterion of reasonableness is fulfilled.⁴³

To this effect delegates at the seventh session of the International Law Commission have suggested reasons of security, coastal fisheries, requirements and configurations of the coast and historical grounds as reasonable.⁴⁴ Where security is concerned, it is necessary to think not only in terms of invasion of the territorial sea by large fleets but also in terms of subversive activities that might be conducted under the guise of fishing. Coastal fisheries which represent the livelihood of a large part of the population of the coastal states especially the poor people is another reasonable ground of unilateral extension of the territorial sea because sophisticated and organised fishing fleets from distant lands could rob them of their catch. However, as pointed out by Mr. Sandstrom, the Swedish delegate, it would not be easy to establish these criteria because historical rights for example, are often subject to uncertainty, while what constitute geographical reasons would be still harder to determine. Brownlie contends that such a power of delimitation would in practice be little more than an uncontrolled discretion."⁴⁵

⁴³ Brownlie, Principles of Public International Law, 2nd Edn., Clarendon Press, Oxford, 1973, p.196.

⁴⁴ Yearbook of the International Law Commission, 1955, Vol. 1, pp.157 - 161.

⁴⁵ Brownlie, op. cit., n.43, p.196.

A more favourable argument on behalf of the coastal states would therefore depend on the criterion laid down by the International Court of Justice itself, that is the "validity of the delimitation with regard to other states depends on international law." This criterion presupposes the formal recognition of an accepted (if not definite) breadth of the territorial sea in existing international law.⁴⁶ In the absence of an international convention on the breadth of the territorial sea, current state practice on the matter would be relevant. As discussed above,⁴⁷ figures now show that the majority of states claim a territorial sea of 12 miles or more and this claim has received general consensus at the Caracas Session of the Third Law of the Sea Conference. Pending the incorporation of this accepted breadth into international legislation, (thus constituting formal recognition) the Indonesian and Malaysian Acts proclaiming the extension of their territorial seas are thus valid since the Acts merely stipulate the claims of the two states in accordance with current state practice. Those parts of the Straits which are less than 24 miles wide therefore fall wholly within their territorial jurisdiction.

In the Declaration of November of 1971 the Singapore Government merely took note of the position of the Indonesian and the Malaysian Governments, her reason being that,

" . . . the status of the Straits of Malacca and Singapore must not be considered in isolation but in conjunction with the status of some 114 straits scattered throughout

⁴⁶ Das and Pradhan, op. cit., n.3, at p.20.

⁴⁷ see p.15

the world and which are considered vital sea links in international sea communications."⁴⁸

Singapore's reservation has been termed by one writer⁴⁹ as a reflection of self-interest; and this is not untrue considering that the Straits is the key means of access to the fourth largest port in the world where between 2000 to 3000 ships call monthly either to refuel or to discharge and collect cargo. Furthermore, whereas any regulation of traffic in the Straits by the coastal States is bound to include a ban on supertankers of over 200,000 tons, Singapore is not at all anxious to cut off supertanker traffic to the vast oil refineries which are a mainstay of her economy.

Singapore's position echoes the response of the major maritime powers to the claims made by Malaysia and Indonesia. The most aggressive opposition comes from Russia, whose naval chief Admiral Gorshkov warned that his surface and submarine fleet could destroy opponents on the high seas in any part of the world.⁵⁰ Subsequently the Russian Ambassador to Japan was quoted as saying that Moscow regarded the Malacca Straits as an "international waterway which must be kept open for free passage of foreign ships."⁵¹

⁴⁸ R.S. Rajaratnam, Singapore's Foreign Minister, Singapore Government Press statement, November 16, 1971, in Das and Pradham, op.cit. n.3 p.9

⁴⁹ Leifer and Nelson, op.cit. n.29, p.194.

⁵⁰ Ibid, p.195.

⁵¹ Pathmanathan, "The Straits of Malacca: A Basis for Conflict or Co-operation?" in New Directions in the International Relations of Southeast Asia, The Great Powers and Southeast Asia, Edited by Lau Teik Soon, Singapore University Press, 1973, p.186 at p.188.

A similar stand is taken by the United States whose position was clarified by Admiral Thomas Moorer, the Chairman of the U.S. Joint Chief of Staffs who said, "the United States feel that we should have and must have freedom to go through, under and over the Malacca Straits . . . regardless of Malaysian and Indonesian claims that they are territorial waters."⁵²

The Japanese opposition is made on the ground that the Malacca Straits is an established waterway forming part of the high seas, and as such its status cannot thereafter be changed by extension of the territorial seas of individual states. Japan supports its argument by drawing an analogy from article.5(2) of the Territorial Sea Convention which provides that if "adoption of a straight baseline system of delimitation has the effect of transforming territorial seas into internal waters, a right of innocent passage shall continue to exist in such waters."⁵³

Such an argument however is without merit and has no basis. The analogy might apply to Indonesia if she uses straight baselines to enclose her archipelagic waters. It would not apply to territorial sea claims of Malaysia and Indonesia, claims which are in agreement with those of the majority of the coastal states.

(d) Internationalization of the Straits?

Internationalization of a strait may involve either one of two things: it may mean the definition of the status of the strait by a

⁵²The New Straits Times Press, April 8, 1972.

⁵³"Existing International Law Relating to Sea Navigation", A 1973 Study prepared by a committee of the National Petroleum Council at the request of the U.S. Department of the Interior.

treaty between the interested parties, or by the regulation of traffic in the strait by an international body set up for that purpose.

Internationalization by treaty has already been discussed in the first part of this chapter. To this end, one writer⁵⁴ has called for the internationalization of the Malacca Straits by the superpowers should the coastal states fail to agree among themselves, as to the status of the Straits. Such an action he says, would mean

" . . . a formal declaration of the Straits-zone as an international domain internationalised and where feasible, neutralised (if not demilitarised) in time of peace as well as in time of war, through an international convention after the model of existing conventions on other straits and canals, with the establishment of an international agency for this specific purpose."⁵⁵

This proposal which reflect an insensitivity to the coastal states' sovereignty would be undesirable to Indonesia and Malaysia. Passage of all foreign warships, military aircraft and submerged submarines would be legitimized and thus increase the intimidation already felt by the two states whose territorial waters are plagued by undesired warships. No prior notification need be given to the coastal states, much less prior authorization sought. Furthermore, since this call is for the internationalization of the Straits by the super powers it is almost certain that the international agency proposed under the scheme would

⁵⁴Shaw, op. cit. n.10, p.85.

⁵⁵Ibid.

comprise a majority of representatives from the international maritime community, making an impartial traffic system in the Straits inconceivable. The interests of the maritime nations are inconsistent with coastal state interests. The Japanese are keen to preserve the Straits for the passage of their giant tankers and this conflicts with coastal state concern over safety of navigation in the Straits; and whereas the Americans and the Russians might find the scheme convenient for the strategic deployment of their troops, the coastal states feel their political security undermined by such presence. The proposal is unlikely to succeed taking into account the many difficulties that would be faced by the regulating body in trying to maintain a balance between maritime interests and those of the coastal states.

A state may also be internationalized by allowing an international body set up for that purpose to regulate passage in the straits. This would constitute internationalization because the coastal state's right to regulate shipping would be abrogated in favour of the body.⁵⁶ Under this scheme, unlike the above, there would be no multilateral convention to govern the status of the straits. Instead an international body is set up, for example, under the auspices of the Inter-Governmental Maritime Consultative Organization (IMCO) for the purpose of improving and maintaining the safety of navigation in the Straits. Malaysia and Indonesia are totally opposed to such a scheme. Both are determined that under no circumstances should they lose their territorial sovereignty over that portion of the Straits falling within their territorial

⁵⁶ Das and Pradhan, op. cit. n.3, p.82.

jurisdiction. Should anybody be set up for the purpose of maintaining the safety of navigation in the Straits, that body should compose only of representatives of Malaysia and Indonesia (and perhaps Singapore and Thailand because both these countries would also be adversely affected in the case of oil spills in the Straits). Thus both states reacted with vigorous opposition when Japan submitted to IMCO, the Asian and Pacific Council (ASPAC) and the Ministerial Conference for the Economic Development of Southeast Asia in 1968, its own traffic separation scheme for the Straits. Malaysia and Indonesia termed this as an illegitimate attempt to internationalize the Straits. This event may have prompted the signing of the Safety of Navigation Agreement in which the three coastal states asserted that the maintenance of the safety of navigation in the Straits was their exclusive responsibility.

A statement added:

"The problem of the safety of navigation and the question of the internationalization of the Straits are two separate issues."⁵⁷

The conflicting claims regarding the status of the Straits stem really from the conflicting interests of the major maritime powers and the coastal states. These opposing interests will be examined in the next chapter.

⁵⁷ Singapore Government Press statement, November 16, 1971.