

CHAPTER SIX

RECOMMENDATIONS AND CONCLUSIONS

6.1 INTRODUCTION

It is a well known fact that the Straits of Malacca is very significant to Malaysia as she utilizes the water within the Straits of Malacca for her natural resources, important ports along the straits and many others (refer in Chapter Two).¹ It is an established fact that there are two important aspects that need constant attention and management by the strait States, the user States and IMO along the Straits of Malacca; the safety of navigation and the protection and preservation of the marine pollution.² However, inevitably, despite efforts for enhancement of safety of navigation and protection from marine pollution addressed by the strait States, the incidents of HNS shipment is anticipated to occur along the Straits of Malacca. Yohei Sasakawa observed that the traffic through the Straits of Malacca is ten (10) times greater than through Panama Canal and more than four (4) times greater than the Suez Canal.³ The Straits of Malacca is highly congested, confined sea lanes with high biodiversity and the strait States common concerns on marine pollution.⁴ As explained earlier, Malaysia has established her liability and compensation in oil pollution after she ratified the 1992 CLC and the 1992 FUND Convention, and later implemented the provisions in the domestic laws through the 1994 Malaysia Merchant Shipping Act.

Is Malaysia well prepared for the liability and compensation of HNS pollution along the Straits of Malacca? Based on the research done regarding the anticipation of HNS

¹ *Marine Electronic Highway Demonstration Project*, Protecting the Environment of the Straits, 7 July 2010 <http://www.meh-project.com>

² *Ibid.*

³ Sasakawa, Yohei, "Development Toward a New World Maritime Community", *Symposium On The Enhancement Of Safety Of Navigation And The Environmental Protection Of The Straits Of Malacca And Singapore*, (Kuala Lumpur, 13-14 March 2007).

⁴ *Marine Electronic Highway Demonstration Project*, The Straits of Malacca and Singapore, 7 July 2010 <http://www.meh-project.com>

incidents by Malaysia along the Straits of Malacca, it is recommended that the Government of Malaysia ratifies The 1996 International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, together with the 2010 HNS Convention Protocol and the 2000 OPRC-HNS Protocol.

The two-fold objectives of this thesis were analysed in the following four chapters:

- i) Chapter Two examines the regime of the Straits of Malacca in International Law and analyses the reports on the increasing number of vessels, types and carriage of vessels passing through the congested waterway and significance of the passage through the Straits of Malacca and the implications of this trend for HNS incidents. It argues in conclusion that the status quo on the legal aspects must change.
- ii) Chapter Three analyzes the international environmental law principles and the provisions in the 1996 International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea 1996, the 2010 HNS Convention Protocol and the 2000 OPRC-HNS Protocol and other related IMO international conventions on shipment of HNS and marine pollution control. It examines the implications of these conventions for Malaysia in the context of HNS pollution.
- iii) Chapter Four examines the adequacy of the current sub-regional mechanisms for containment of HNS pollution and compares other international and regional cooperation mechanisms including oil spill response action plans in this context and assesses its implications for the Straits of Malacca and emphasizes the need to adopt a sub-regional HNS pollution control approach.
- iv) Chapter Five enquires into the adequacy of the provisions of Malaysian, Indonesian and Singaporean domestic laws on HNS shipment and evaluates these inadequacies

in terms of an HNS pollution incident. A model national law setting out the main features on HNS liability and compensation is also drawn up.

Finally in conclusion this thesis proposes ratification of the imminent 2010 HNS Protocol to the 1996 International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea and to implement these provisions into Malaysian domestic laws and lays down the Recommendations for the adoption of a Sub-regional Model for the Strait of Malacca for management of HNS pollution incidents by ratification of the 2000 OPRC-HNS Protocol.

6.2 FINDINGS TO THE OBJECTIVES

The findings in these Chapters relating to the objectives are as follows:

- i) Chapters Two analyses the current regime of navigation and shipping statistics as recorded at vessel traffic systems at several ports in Peninsular Malaysia bordering the SOM namely Klang, Penang and Johore, shipping incidents in the designated sea lanes of the SOM with a special focus on the increasing number of ships reporting and types of ships carrying HNS at the Klang Vessel Traffic System and chemical pollution and marine scientific research on chemical pollution control. It argues in conclusion that the status quo on legal aspects in the SOM must change.
- ii) Chapter Three analyses international environmental law principles, HNS shipments on safety and security of navigation, marine pollution control, liability and compensation framework and waste control regulations for HNS pollution under the HNS Conventions. The principal international convention on liability and compensation for HNS shipment is the 1996 HNS Convention and the 2010 Protocol HNS Convention. Both Conventions are not enforced yet and have not been ratified by the strait States. It concludes by stressing the importance of ratification of the HNS Conventions.

- iii) Chapter Four analyses the sub-regional response action plans for chemical spill containment or HNS substances with a focus on comparative analysis with the oil spill response action plans. It stresses the need to adopt a sub-regional approach to chemical or HNS pollution as there is none available at present.
- iv) Chapter Five assesses the adequacy of Malaysian, Indonesian and Singaporean laws for chemical or HNS shipments and in particular on liability and compensation. It underscores the importance of adopting the chemical or HNS liability and compensation provisions of chemical or HNS Conventions as the claimant of chemical or HNS incident will face problems in the absence of the element of strict liability and ship and cargo owners will face problems in the absence of compulsory insurance against liabilities arising from chemical or HNS incidents.

Stemming from the above findings of Chapters Two to Five, the following recommendations are tabled:

6.3 RECOMMENDATIONS

6.3.1 First Recommendation

The first recommendation proposes Malaysia's ratification of the 1996 International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, the 2010 HNS Convention Protocol and the 2000 OPRC-HNS Protocol and to implement these provisions in to Malaysian domestic laws. This is discussed in Chapter Six (6) of this thesis. The first recommendation refers to the need to ratify the 1996 HNS Convention, the 2010 HNS Convention Protocol and the 200 OPRC-HNS Protocol.

6.3.2 Second Recommendation

As proposed, the Government of Malaysia should ratify the 1996 HNS Convention based on the findings mentioned above. After thorough studies are done for this research, there are recommendation laid down for the benefit of future generations using the hereditary water way; The Straits of Malacca.

6.3.2.1 Once Malaysia ratifies the 1996 HNS Convention and the 2010 HNS Convention Protocol, a draft of the recommendations on ratification of HNSC should be submitted to the cabinet. The 1996 HNS Convention and the 2010 HNS Convention Protocol should be introduced to Parliament and there are two ways to incorporate the 1996 HNS Convention into Malaysia domestic law⁵:

- i) to introduce HNSC into amendments in the 1994 Merchant Shipping (Oil Pollution) Act. Basically, this can be done because the two-tier compensation system of HNSC is largely similar to the provisions in CLC/FUND system or
- ii) to legislate a new Act; “The 2011 HNS Liability and Compensation Act.”

6.3.2.2 Malaysia shall designate an authority, perhaps the most suitable authority would be The Director of Marine Department, to receive and submit reports to IMO/HNS FUND. The Director of Marine Department is the person or body who is appointed to administer the 1996 HNS Convention AND THE 2010 HNS Convention Protocol which will later on implement it into Malaysian domestic laws.

⁵ Malaysia needs to be prepared in advance the domestic legislation of the HNS Convention 1996 before ratifying. This is because it is important to define and identify the issues of ‘receiver’ and to develop the reporting system for contributing cargo.

6.3.2.3 As reported, Malaysia is liable under the HNS recipient category therefore, the early proposed step would be for Malaysia before she ratifies the 1996 HNS Convention is to report the contributing cargo in the country correctly that is the names, the addresses of each contributor and quantities received and annually until the 1996 HNS Convention enters into force to the Director of the HNS FUND. The mechanism, HNS Convention Contributing Cargo Calculator (HNS CCCC) is developed by the secretariat of International Oil Pollution Compensation Fund. Upon preparing and determining the exact contributors of HNS cargo, the government of Malaysia should request the HNS CCCC from the IMO or the HNS FUND. After entry into force, HNS Fund can issue invoices to contributors.

6.3.2.4 All persons referred to in the Convention from amounts payable pursuant to Articles 18, 19 and 21 (5) are required to keep records and books of account at their place of business in the State Party, or at any other place in the State Party that may be designated by the State Party, that sets out:⁶

- i) The amounts payable by that person;
- ii) The type and quantity of the substance in respect of which the amounts referred to in paragraph (i) are payable;
- iii) The time and place where such amounts were paid or security for their payment was provided; and,
- iv) Any other information that the State Party may require to determine the amounts referred to in paragraph (i) and the time when they become due.

⁶ McKinley, Derek. The 1996 International Convention on Liability and Compensation for the Carriage of Hazardous and Noxious Substances by Sea: Implications for State Parties, the Shipping, Cargo and Insurance Industries, (Diss. LLM, University of Cape Town, South Africa, 2005) at 7.

6.3.2.5 Once the 1996 HNS Convention has been ratified, the Government of Malaysia is under an obligation to ensure all HNS ships entering or leaving a port or terminal in Malaysia (as the state party) has insurance certificates or security regardless whether the ship is registered in the state party of the convention.

6.3.2.6 Every person or body who is required by these regulations to keep records and books of account shall, unless otherwise authorized by the State Party, retain every such record and book of account and every account or voucher necessary to verify the information contained in the record or book until expiry of years from the end of the year to which the record or book of account so relates.⁷

6.3.2.7 Every person who is required by these regulations to keep records and books of account shall, at all responsible times, make the records and books of account and every account and voucher necessary to verify the information contained in them, available to any person designated in writing by the State Party and give that person every facility necessary to inspect the record books account.⁸

6.3.2.8 Any person designated in writing by the State Party for the purpose may, at any reasonable time, enter any premises where the person believes on reasonable grounds there are any records, books, accounts, vouchers or other documents relating to payment under the Convention, and⁹

⁷ McKinley, Derek. The 1996 International Convention on Liability and Compensation for the Carriage of Hazardous and Noxious Substances by Sea: Implications for State Parties, the Shipping, Cargo and Insurance Industries, (Diss. LLM, University of Cape Town, South Africa, 2005) at 7.

⁸ McKinley, Derek. The 1996 International Convention on Liability and Compensation for the Carriage of Hazardous and Noxious Substances by Sea: Implications for State Parties, the Shipping, Cargo and Insurance Industries, (Diss. LLM, University of Cape Town, South Africa, 2005) at 7.

⁹ Ibid.

- i) examine anything on the premises and copy or take away for further examinations any record, book, account, voucher or other documentation that they believe, or reasonable grounds, contains any information relevant to the enforcement of Articles 18, 19 and 21 (5) of the Convention; and
- ii) require the owner, occupier or person in charge of the premises to give the person all reasonable assistance in connection with the examination under paragraph (i) and to answer all proper questions relating to the examination and, for that purpose, require the owner, occupier or person in charge of the premises to attend those premises with the person.

6.3.3 Third Recommendation

Malaysia and other strait States should work together with ISCO (International Spill Control Organization) in order to develop professional competency in preparedness and co-operation in response of chemical spills.

6.3.4 Fourth Recommendation

The fourth recommendation to Malaysia concerns the implementation of the Australian Model of National Marine Chemical Spill based on 2000 OPRC HNS Protocol and to ensure the safety of navigation through the Australian Coastal Pilotage and Torres Strait Vessel Traffic Service.

The aim of ChemPlan is to outline the national arrangements for responding to chemical spills in the marine environment, with the aim of protecting public health and the marine environment from chemical pollution or, where this is not possible, to minimize the effects.

6.4 CONCLUSION.

The spillage or incidents of HNS would become critical to the Straits of Malacca as certain portions of the Strait of Malacca are narrower than 24 (twenty four) nautical miles.¹⁰ Although the volume of chemicals transported by sea is significantly lower than the seaborne trade in oil, it is nevertheless increasing.¹¹ The consequences of a chemical spill can be more wide reaching than that of oil and there is growing international awareness of the need for safe and effective contingency arrangements for chemical spills.¹² The wide variety of chemicals transported, their varying physical and chemical properties, the different ways in which they behave in the environment and the potential for effects on human health mean that response to chemical spills is not straightforward as for oil.¹³ Despite the damage that a spill of hazardous and noxious substances can cause to human health, living resources and marine life, the response measures to a potential chemical spill in the region is weak or non-existent.¹⁴

To conclude, it is recommended that now is the right moment for the government of Malaysia to ratify the 1996 International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea and the 2010 HNS Convention Protocol, once the Protocol is open for signature. This research has evidently proved that at present the conventions ratified by Malaysia on HNS shipments, Malaysia's domestic laws and Malaysia's sub-regional cooperation pertaining to HNS shipment are insufficient. Thus, this situation apparently leads to a most

¹⁰ For example, between Tanjung Tohor (latitude 1 51 N) on the Malaysian side and Tanjung Parit on the Indonesian side, the fairway narrows to a width less than 26 miles over a distance of about 11 miles. Facts taken from Ahmad, Hamzah ,ed., *The Straits of Malacca, International Co-Operation In Trade, Funding & Navigational Safety*, (Petaling Jaya, Pelanduk Publication, 1997), at page 128.

¹¹ Bateman Sam, Ho Joshua, Chan Jane, "Good Order At Sea In Southeast Asia" S.Rajaratnam School of International Studies, Nanyang Technological University, Policy paper, 2009.

¹² *Ibid.*

¹³ *Ibid.*

¹⁴ Bateman Sam, Ho Joshua, Chan Jane, "Good Order At Sea In Southeast Asia" S. Rajaratnam School Of International Studies, Nanyang Technological University, Policy Paper, April 2009.

disadvantageous situation for the government of Malaysia because this research has demonstrated that Malaysia is liable under the HNS regime and the most important factor is that Malaysia should be proactive in securing her most important water way; THE STRAITS OF MALACCA .