THE LEGAL FEASIBILITY OF IMPOSING SHIPPING CONTROLS IN STRAITS USED FOR INTERNATIONAL NAVIGATION: A STUDY OF THE STRAITS OF MALACCA AND SINGAPORE

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Abstract: The Straits of Malacca and Singapore are two of the most significant straits for international shipping activities. The navigational regime of foreign vessels in the Straits of Malacca and Singapore is governed by Part III of the LOSC. It prescribes that vessels and aircraft of all flags may exercise the unimpeded right of transit passage while navigating through straits used for international navigation. With the projected steady increase of navigational traffic through the Straits of Malacca and Singapore each year, this situation would eventually create intricate situations for the littoral States of Malaysia, Indonesia and Singapore particularly in protecting the marine environment of the Straits from vessel-source pollution. The Straits are currently facing many environmental problems as a result of heavy shipping activities. This article examines the current issues pertaining to marine pollution that is affecting the well-being of the marine environment of the Straits of Malacca and Singapore. This article also discusses the current as well as the potential future environmental protection measures that the littoral States could consider resorting to, and the possible legal consequences as a result of the implementation of such measures. This article concludes by suggesting ways and proposals to achieve environmental sustainability in the Straits of Malacca and Singapore.

Keywords: Environmental Sustainability, Law of the Sea, Marine Environment, Straits of Malacca and Singapore

INTRODUCTION

The Straits of Malacca and Singapore are two of the most important shipping lanes in the world (George, 2008). The Strait of Malacca is bordered by Indonesia and Malaysia while the Strait of Singapore is shared collectively by Malaysia, Indonesia and Singapore. The Strait of Malacca narrows into a funnel-shaped channel as it flows south before joining its southern counterpart, the Strait of Singapore that links the Indian Ocean to the South China Sea.

THE STRAITS OF MALACCA AND SINGAPORE: IMPORTANT WATERWAYS

Fishing, Tourism and Marine Biodiversity

The Straits of Malacca and Singapore are important fishing grounds for their coastal populations. Their coastlines are rich with mangrove vegetation and extended mudflats, which are vital breeding grounds for important fishes, prawns, crabs and other marine creatures (Hooi, 2008). The marine fisheries industry in Malaysia contributes considerably to the national economy in terms of income, foreign exchange and employment (Mohammad-Isa, Ahmad, & Yusof, 1999). In 2007, almost 44% of the total fish landings valued at RM1, 745.55million, came from the Strait of Malacca (Ishak & Hooi, 2008). Furthermore, coastal areas on both Straits of Malacca and Singapore are also renowned for their many white sandy beaches, coral reef concentration, getaway islands and many other natural attractions, either on the Sumatra side, or the western coast of Peninsular Malaysia and the Riau Islands to the south. The tourism industry is a lucrative industry, which in the year 2007 contributed considerably to the Malaysian economy amounting to US$14.37billion ("Summary: Malaysia Tourism Report Q2 2008," 2008).

Besides being significant for fishing and tourism industries, the Straits of Malacca and Singapore and their coastal areas are also vital for biodiversity conservation as they are habitats for many scarce and endangered fauna such as migratory birds, monkeys, fruit bats, estuarine crocodiles, dolphins, dugongs, turtles and fireflies (Hooi, 2008). There are also

concentrations of coral reef in some areas of the Straits such as in Cape Rachado (Tanjung Tuan) and Pulau Payar which are natural homes for marine life like sea sponges, crustaceans and coral reef fishes (Hooi, 2008).

Shipping

Apart from the interests already discussed, the importance of both Straits of Malacca and Singapore to global maritime navigation is undoubted. These waterways are two of the most important shipping lanes in the world and considered to be the longest straits used for international navigation (Emran, 2007). They serve as the shortest route connecting the Far East and the West, facilitating global international trade (George, 2008). If these Straits were closed for navigation, vessels would be forced to traverse the longer Lombok and Makassar routes through Indonesian archipelagic waters, and the Celebes Sea south of Mindanao through the Surigao Strait and along the eastern Philippine waters, inevitably adding to shipping costs (Sondakh, 2004). As a result, the navigational distance for vessels between the Middle East and the East Asian ports would be extended by 1000 nautical miles (Sakamoto, 2008).

A Japanese study shows that if tankers used the Lombok and Makassar Straits this would cost Japanese consumers an additional US$0.10 in the price of crude oil in Japan and would cost each tanker an extra 10 million yen for the two additional days required to navigate the Lombok Strait ("The Importance of The Straits of Malacca and Singapore," 1998). After the recent crude oil spikes, this would mean an extra shipping cost of US$500, 000.00 per ship per voyage for a large vessel such as a Very Large Crude Carrier (VLCC) (Sakamoto, 2008). Any interference with the free flow of maritime traffic through the Straits of Malacca and Singapore would therefore be detrimental for the global economy (Ibrahim, Husin, & Sivaguru, 2008). They are now transited by almost 80,000 vessels annually and it is predicted that by 2020, the Straits would be navigated by approximately 150, 000 vessels, a double of what they are burdened with now (R. Beckman, 2009).

NAVIGATIONAL REGIME THROUGH THE STRAITS OF MALACCA AND SINGAPORE

Part III of the United Nations Convention on the Law of the Sea 1982 (LOSC) expounds on the legal status of straits used for international navigation and is applicable to both the Straits of Malacca and Singapore. The regime of transit passage provides for continuous and expeditious passage of all vessels and aircraft through straits used for international navigation which cannot be denied, hampered or impaired by the bordering States (Rusli, 2009).[i] The States bordering straits must give appropriate publicity to any danger to navigation or overflight within or over the straits of which they have knowledge (R. Beckman, 2004). Unlike the regime of innocent passage where the coastal States have the right to temporarily suspend passage of foreign vessels for reasons essential for the security of the coastal State,[ii] the bordering States of straits used for international navigation do not have this right (R. Beckman, 2004). The LOSC does however encourage States bordering straits and user States to co-operate in maintaining and preserving the marine environment of the straits.[iii]

EXISTING MARINE ENVIRONMENTAL PROTECTION MEASURES IN THE STRAIT OF MALACCA

Malaysia, Singapore and Indonesia are parties to the LOSC. As such, they are bound by its provisions not only in formulating laws to regulate maritime traffic in the Straits of Malacca and Singapore, but also in taking measures for the protection and preservation of the marine environment of the Straits (Smith & Roach). These States are in fact inextricably connected based on the fact that they cannot act unilaterally on these matters.[iv] A fundamental principle that the littoral States, namely Malaysia, Indonesia and Singapore must follow in legislating for the passage of vessels in the Straits of Malacca and Singapore is that these laws must not, in one way or the other, have the practical effect of hampering, denying or impairing the right of transit passage.[v] The littoral States are permitted to make laws by giving effect to applicable international regulations[vi] and to refer these regulatory measures to the competent international organisation that is the International Maritime Organization (IMO) to be endorsed and adopted by the IMO Assembly before being implemented by the littoral States.[vii] Once implemented, transiting ships and vessels are expected to observe and comply with these measures.[viii]

Efforts to regulate maritime traffic to provide safer shipping in these waterways were initiated well before the introduction of the LOSC. This was done through the Joint Statement on the Malacca Strait on 16 November 1971 when the three governments agreed that matters of safety of navigation related to the Straits fall under the responsibility of the coastal states concerned. A Tripartite Technical Experts Group (TTEG) on the safety of navigation was established to facilitate co-operation between littoral states in developing measures to regulate safer shipping in the Straits. At that time, the littoral States, in particular Malaysia and Indonesia, were of the view that the Straits were not straits used for international navigation but did acknowledge their

importance to international navigation (Vivian Loius Forbes, 1995).

With steadily increasing navigational traffic transiting the Straits each year, it was crucial that ships routeing systems be established in these waterways (Sativale, 2003). The first Traffic Separation Scheme (TSS) was introduced in 1977 and was first adopted by IMO through an Assembly Resolution A.375(X) 1977. This involved areas including the One Fathom Bank, Singapore Strait and the Horsburgh Lighthouse Area. The TSS was amended in 1981 and was again adjusted and extended in 1998 to accommodate the increased shipping traffic in the Straits of Malacca and Singapore ("Resolution A.476(XII) 1981, Navigation Through the Straits of Malacca and Singapore," 1981).

Under Article 41(7) of the LOSC, vessels traversing through the Straits are bound to follow the prescribed TSS. Together with the TSS, the TTEG on Safety of Navigation also discussed the matters pertaining to the minimum requirement of Under Keel Clearance (UKC). The UKC refers to the distance between the sea bed and a ship's keel. It became a contentious issue given that the waters of the Straits are relatively shallow making them environmentally and navigationally dangerous if navigated by large tankers of over 200,000 Dead Weight Tonnes (DWT) ("The Importance of The Straits of Malacca and Singapore," 1998).

Malaysia initially proposed 4.5 metres UKC, Indonesia 4.4 metres and Singapore 2.5 metres (Sativale, 2003). As a compromise, the TTEG on maritime safety agreed with a UKC of 3.5 meters which was submitted to and agreed by the IMO through IMO Assembly Resolution A 375(X) (Hashim Djalal, 2004). Under Resolution 375(X), the littoral States have introduced more measures on navigational safety such as the usage of the designated deep water route by deep draught vessels and ensuring that vessels comply with accepted international conventions and recommendations (Yaacob, 1997). Besides TSS and UKC requirements, the littoral states with the assistance of the members of the international community have installed various navigational safety measures in the Straits such as the Vessel Traffic Management System (VTS) in 1997, the Mandatory Ship Reporting System (STRAITREP) in 1998 and other aids to navigation in that area (Basiron, 2004).

Another safety of navigation development in the Straits of Malacca and Singapore is the Marine Electronic Highway Project (MEH). The MEH, which started in 2006, is aimed at providing safer shipping through precision navigation utilising information technology to facilitate safer shipping (Sekimizu, Sainlos, & N.Paw, 2001). This is achieved by having smooth communication and data exchange between onshore, sea-based and ship-based transponder facilities. With enhanced communication and data exchange, hydrographic and oceanographic data including weather conditions can be transmitted effectively and received, facilitating ships' movement in difficult and constricted waterway such as the Straits of Malacca and Singapore (Kiat, 2001). This project is still at an early stage and is being gradually developed in the Straits focusing on areas where TSS is applicable (Hand, 2008).

The improvement and installation of reliable navigational safety aids and infrastructure in the Straits of Malacca and Singapore has witnessed continued increases in navigational traffic in the Straits. In 2007, approximately 80, 000 vessels of all types transited the Straits of Malacca and Singapore as shown in the following Table 1.

Vessel Type	**Transits**	**% Transits**	**DWT**	**% DWT**
Container	26. 884	35	1, 018,691,556	24
Dry Bulk	13, 416	17	907,891,519	21
Other Dry Cargo	16,286	21	161,583,651	4
Tanker	21,073	27	2,133,689,923	50
TOTAL	**77,659**	**100%**	**4,231,856,649**	**100**

Table 1: Transiting Vessels in the Straits of Malacca and Singapore in 2007
(Source: Lloyd's MIU)

No.	Country/ Organisation	Year	Amount (USD)
1.	United Arab Emirates (UAE)	2009	100, 000.00
2.	Republic of Korea	2009	83, 532.00
3.	India	2009	774, 000.00
4.	Nippon Foundation	2009	2, 500, 000.00
5.	Middle East Navigation Aids Service (MENAS)	2009	1, 000, 000. 00
6.	Malacca Strait Council (MSC)	2009	500, 000.00
7.	International Maritime Organization (IMO)	2009	50, 000.00
TOTAL			**5, 007, 532.00**

Table 2: Donations Made to the Fund in 2009
(Source: Maritime Institute of Malaysia [MIMA])

The donation made to the Fund in 2010 is much lesser than in 2009 with only USD2.18 million managed to be collected.

No.	Country/ Organisation	Year	Amount (USD)
1.	United Arab Emirates (UAE)	2010	100, 000.00
2.	Republic of Korea	2010	88, 235.00
3.	Saudi Arabia	2010	100, 000.00
4.	Nippon Foundation	2010	1, 390, 000.00
6.	Malacca Strait Council (MSC)	2010	500, 000.00
TOTAL			**2, 178, 235**

Table 3: Donations Made to the Fund in 2010
(Source: MIMA)

From 40,000 ship movements in 1982, to almost 80,000 in 2007, it is predicted that traffic will continue to increase up to 140,000 ship movements by the year 2020 (Sakhuja, 2007). Traffic in the Straits is reported to grow at an average rate of 9 per cent annually (M. R. b. Ahmad, 1997). This ongoing phenomenon will eventually affect the well-being of the marine environment of both the Straits of Malacca and Singapore.

NAVIGATIONAL HAZARDS IN THE STRAITS OF MALACCA AND SINGAPORE

Despite being the nearest and the most convenient route connecting the Middle Eastern oil producers to its major consumers of East Asia, the Straits of Malacca and Singapore are not entirely safe for navigation. The waters of the Straits are rather shallow, and the water level varies with the changing of the tides. More often than not, the seabed also shifts, creating serious risks of groundings (Dyke, 2009). Due to this, in certain areas of the Straits, the IMO has recommended a maximum draught of 19.8 metres for passing ships (Zubir, 2005). The Straits narrow at different points along their length with the narrowest point in the Strait of Singapore being only 3.2 kilometres in breadth hence making navigation in the Straits more intricate (George, 2008). Accidents and maritime collisions in the Straits of Malacca and Singapore are also influenced by other factors such as the heavy density of traffic, poor visibility during squalls, numerous shoals and banks that often change in location along the waterways, confusing crossing patterns by small domestic craft and several wrecks in certain localities along the Straits (Emran, 2007).

These facts show that navigation in the Straits of Malacca and Singapore may not be as easy as it appears. Due to these and other navigational hazards, there were 888 accidents reported to have occurred in the Straits of Malacca and Singapore in the 25 year period of 1978-2003 (Basiron & Hooi, 2007). Between the years of 2001-2007, the number was around 237. The marine environment of the Straits will be the inevitable victim should such maritime casualties continue to take place along the waterway.

THE IMPACTS OF SHIPPING ON THE MARINE ENVIRONMENT OF THE STRAITS OF MALACCA AND SINGAPORE

Oil spills and discharge of waste are typical of modern shipping activities, either through operational or accidental discharges. With the high volume of shipping movements in the Straits of Malacca and Singapore, there is always a high risk of the occurrence of maritime casualties involving accidental spills of oil in the waters of the Straits

(Mandryk, 2008). Oil spill incidents entail adverse impacts on the marine environment. They may deteriorate the well-being of sea and coastal wildlife through destruction of coastal and marine ecosystems. An oil slick has devastating effects on everything that it touches whether further out to sea or in the coastal areas. This was illustrated by the 1997 MT Evoikos and MT Orpin Global collision in the Strait of Singapore ("Malaysia's Response to the Evoikos Incident," 1998).

The collision caused an oil spill which later formed a slick that flowed from the collision site towards the Malaysian side of the Strait of Malacca. As a result, the whole west coast of Peninsular Malaysia from Johor to Selangor was exposed to the pollution threat. This oil slick posed hazards not only to the marine environment but also to the mangrove swamps and jungles, fish and prawn farms in coastal areas and the beach resorts along the south-western coast of Peninsular Malaysia.

Moreover, the costs for cleaning up are not cheap either. The Diego Silang 1976 oil spill clean up cost US$1,086, 421.00, while the Nagasaki Spirit oil spill incident in 1993 incurred clean up expenditure amounting to US$1,506,160.00 (Rusli, 2010a).

Due to the busy nature of the Straits, maritime accidents are still happening along these waterways. The most recent accident which took place in the Strait of Malacca involved a collision between a Liberian registered tanker, MT Formosa Product Brick and an Isle of Man-registered tanker, MV Ostende Max, on 19 August 2009 in waters off Port Dickson, Malaysia (BERNAMA, 2009). Fortunately, after extensive monitoring work, the Malaysian Maritime Enforcement Agency (MMEA) confirmed that there was neither naphtha nor oil spills had taken place (R. Ahmad, 2009). Later in the same year, another foundering incident occurred involving an Indonesian ferry, Dumai Express 10 in which 29 passengers were drowned. The ferry was hit by the turbulent waters off Tokong Hiu, Karimun, Indonesia, causing the starboard side of the ship, which was carrying 279 passengers to split in half ("How Tragic The Dumai Express 10 Tragedy was," 2009).

In 2010, a tanker identified as MT Bunga Kelana 3 collided with a bulk carrier MV Waily in Malaysian waters off the coast of Singapore resulting in an oil spill ("Collision off Singapore Spills oil," 2010). The Malaysian-registered tanker MT Bunga Kelana 3, which was ferrying 63, 054 tonnes of light crude oil from Bintulu, Sarawak to Malacca suffered damage to one if its cargo tanks spilling an estimated 2000 tonnes of oil into the Strait of Singapore (Basiron, 2010). Despite assurances by the local authorities that utmost efforts were being taken to contain the spill, some oil did reach the shores of Johor and Singapore and this prompted a public outcry and claims of loss of livelihood by fishermen.

The volume of shipping activity taking place each year in the Straits is thought to be one of the causes of, coral reef developments in the Strait of Malacca being recorded as amongst the lowest in this region (Thia-Eng et al., 2000). The well-being of the mangrove ecosystem along the coast bordering the Strait of Malacca is also threatened due to constant soil erosion caused by shipping traffic and the turbulence engendered (Basiron, 2008). One good example of this is the soil erosion in mangrove vegetation along the coast of the south-western tip of Johor, which is an area with high shipping transits where the Strait of Malacca converges with the Strait of Singapore (Basiron & Hooi, 2007).

Apart from oil, modern seafaring vessels discharge other types of contaminants as well, such as butyltin (Hua & Liu, 2007). Butyltin is normally concentrated in areas with significant boating activities, ports and dockyards (Page, Ozbal, & Lanphear, 1995). The high concentration of this chemical substance could harm marine life, the environment and human health. Shipping may also injure the marine environment through the introduction of invasive species such as the toxic *algae dinoflagellates* that originate from a vessel's ballast water exchange (Bahe et al., 2007). This creature can survive for years in ballast tanks. When introduced to new environments, it can poison shellfish, which, if then consumed by humans, may be fatal. In addition, shipping also discharges other types of pollutants such as marine debris, sewage, hazardous and noxious substances, noise emissions and air pollution (Kaur, 2008). These are among the polluting substances that damage and deteriorate the marine environment of the Straits on a continuous basis year in, year out.

It is true that currently, there is an ongoing co-operative mechanism scheme between the littoral States and the User States in managing the issues on safety of navigation and the control of vessel-source pollution in the Straits (Ho, 2009). Nevertheless, these developments have been moving rather slowly and have not kept pace with the increasing number of ships that transit the Straits of Malacca and Singapore each year. To date, Japan is the only User State that has consistently assisted the littoral States; the Nippon Foundation of Japan took the initiative to donate (in American dollar [USD]) USD2.5 million in 2009 to the Aids to Navigation Fund (the Fund), which was set up in 2008 to deal with the Straits maintenance (Tharp, 2010). The 2009 budget for the Fund was USD8 million but it has managed to raise only around USD5 million, with USD2.5 million

coming from the Nippon Foundation (Bateman, 2009).

This issue of lack of participation particularly from private stakeholders in the co-operative mechanism scheme has been consistently raised resulting in a proposal that the littoral States consider lodging a complaint to the International Tribunal on the Law of the Sea citing the users for violating Article 300 of LOSC[ix] on good faith and abuse of rights (Basiron, 2007).

Given the fact that the Straits are projected to accommodate constant increase of shipping traffic in the future, the current available environmental protection regime including the co-operative mechanism scheme may not be entirely sufficient to protect the marine environment of these shipping lanes. Besides, with more vessels plying the Straits, the question of safety and environmental concerns will become more acute for the littoral States bordering the Straits of Malacca and Singapore (Hamzah, 2008). If this situation continues, it may be difficult in the future to promote environmental sustainability in the waters of the Straits of Malacca and Singapore. As such, suggestions have been made to designate the Straits as a Special Area under MARPOL 73/78[x] and Particularly Sensitive Sea Areas (PSSA)[xi] to further protect and preserve the marine environment of the Straits (Unlu, 2006).

Given the mixed response given by some maritime States, particularly Singapore and the United States of America (U.S.) to the implementation of compulsory pilotage in the Torres Strait in Australia, the designation of Straits of Malacca and Singapore as Special Areas under MARPOL 73/78 or a PSSA may also probably be controversial, as the ensuing Associated Protective Measures (APM) may be seen to likely affect, directly or indirectly the free flow of navigational traffic through the Straits of Malacca and Singapore (Seng, 2006), (R. C. Beckman, 2007). Such designations should also go through the IMO, and given the fact that the Straits of Malacca and Singapore are now indispensible shipping arteries particularly in the Asia-Pacific region, the proposed designations may probably ended up in complication.

Assuming that the PSSA or Special Area under MARPOL 73/78 proposals were unsuccessful, the littoral States may opt for the implementation of unilateral measures instead, which may be as follow:
(a) The Application of Non-Suspendable Innocent Passage in the Straits of Malacca and Singapore;
(b) The Re-adoption of Three Nautical Mile Territorial Sea Claims in the Strait of Malacca.

POSSIBLE UNILATERAL MEASURES BY LITTORAL STATES

The Application of Non-Suspendable Innocent Passage in the Straits of Malacca and Singapore.

The Straits of Malacca and Singapore are located between two main oceans of the world that are the Indian Ocean in the West via the Andaman Sea and the Pacific Ocean via the South China Sea in the East. These waterways thus fit the definition of a strait used for international navigation in Articles 37 and 38(1) of the LOSC. Hence, the transit passage regime is applicable in these straits and inevitably opens them up to international shipping traffic with the burden falling on the littoral States of accommodating unlimited shipping traffic (Okuwaki, 2007). This would be the case if the Straits of Malacca and Singapore are considered as one entity. If they are treated separately, the navigational regime that would apply to the Strait of Malacca would not be transit passage, as it connects the Andaman Sea and the Indian Ocean to the Strait of Singapore, which partly lies within the territorial sea of Singapore and Indonesian archipelagic waters. The LOSC does provide for non-suspendable innocent passage to apply to a strait which connects one part of the high seas or Exclusive Economic Zone (EEZ) to the territorial sea of another State. The Malaysian side of the Strait of Malacca if considered separately from the Strait of Singapore would fulfill the requirement needed for non-suspendable innocent passage to apply as articulated in Article 45(2) of the LOSC.[xii] The LOSC is silent on the navigational regime applicable in a strait that connects a part of an Exclusive Economic Zone to the archipelagic waters of a foreign state. Hence, it could be argued that if the Strait of Malacca and the Strait of Singapore are considered as separate straits, non-suspendable innocent passage would apply in the Strait of Malacca instead of transit passage.

If Malaysia and Indonesia, as States bordering the Strait of Malacca, supported such an interpretation of the Strait's status, the navigational regime in the Strait of Malacca would be viewed differently by these States who would contend that foreign vessels would cease to have the right to exercise transit passage in the Strait (Rusli, 2010b). The application of non-suspendable innocent passage would allow both Malaysia and Indonesia to put more shipping control mechanisms on ships and aircraft transiting the Strait. Submarines are required to surface while exercising navigation and aircraft would have no freedom of overflight over the Strait of Malacca.

The LOSC is silent about the application of Article 233 to straits used for international navigation and

which types of straits used for international navigation are subjected to the provisions of Article 233. Article 233 of the LOSC has resulted in the regulatory powers of States bordering straits over shipping in straits used for international navigation to be very restricted, so much so that they can only interfere with the passage of vessels if they have committed major damage to the marine environment of the straits.[xiii] As Beckman (2004) comments:
"If a vessel exercising the right of transit passage violates obligations under Article 39(2), but the vessel in question does not come into port, and the violation in question does not cause or threaten major damage to the marine environment of the straits, the rights of the littoral State are more limited. The littoral State would not have a right to interfere with the passage of the vessel or a right to arrest it (p. 250)".

Assuming that Article 233 only applies to straits used for international navigation that are subject to transit passage regime, the littoral States of the Strait of Malacca supporting a non- suspendable innocent passage regime in the Strait would not consider themselves bound by the enforcement limitations on marine pollution incidents as embodied in Part III, particularly Article 42 and Article 233 of Part XII of the LOSC. This is because in straits used for international navigation where non-suspendable innocent passage applies, the navigational regime in that strait would be governed by the regime of innocent passage in accordance with Part II, Section 3 of the LOSC.[xiv] Under this regime, both Malaysia and Indonesia would consider themselves as having the right to suspend passage of vessels without having to wait for them to cause or threaten to cause major damage to the Strait of Malacca, as reiterated in Article 233 of the LOSC. The littoral States could also apply Sections 5, 6 and 7 of Part XII on enforcement and procedural powers against recalcitrant ships.[xv] In other words, the application of non-suspendable innocent passage would ultimately strengthen the regulatory powers of the littoral States which are more limited under the transit passage regime.

However this interpretation of the navigational regime applicable in the Strait would be highly contentious with other members of the international maritime community. Given the fact that the extent of freedom of navigation provided by the non-suspendable innocent passage regime is less liberal than that of transit passage, the smooth flow of vessels through the Straits of Malacca and Singapore which has been enjoyed since before the LOSC came into force would inevitably be disrupted. In addition, the fact that the Strait of Malacca is a strait used for international navigation of long-standing (Vivian Louis Forbes, 2009), and that the littoral States have over many years acquiesced in the application of transit passage to the Strait are indications of State practice and *opinio juris* going towards the customary international law position that transit passage is applicable in the Straits of Malacca and Singapore.

The littoral States of the Straits of Malacca and Singapore have acknowledged the importance of the Straits to shipping even before the LOSC entered into force,[xvi] however, the littoral States could argue in response that the application of non-suspendable innocent passage would not impede and hamper free passage of shipping. If ships complied with accepted international rules and did not commit any acts that would prejudice the peace, good order or security of the littoral States, then the littoral States would not interrupt such passage. Vessels and ships would continue to enjoy free passage through the Strait of Malacca. Nevertheless, the replacement of the application of transit passage with non-suspendable innocent passage in the Strait of Malacca is arguable under the provisions of the LOSC. Looking at the current political and world trade situation, there is little prospect that this argument would be acceptable to the majority of the international community as the Strait of Malacca has become indispensable to global shipping and trade (Tongzon, 2006).

THE RE-ADOPTION OF THREE NAUTICAL MILE TERRITORIAL SEA CLAIMS IN THE STRAIT OF MALACCA

The extension of the maximum territorial sea limit from 3 nautical miles to 12 nautical miles led to the introduction of the transit passage regime in straits used for international navigation to ensure smooth flow of maritime traffic through straits. For straits that are wide enough and possess a convenient high seas or EEZ corridor, transit passage would not be applicable; instead freedom of navigation in the high seas or EEZ corridor would apply along such routes.[xvii]

Japan did extend its territorial sea limits from 3 nautical miles to 12 nautical miles as promulgated by its domestic law, however, the application of the 12 nautical mile limit was excepted for five straits lying within the Japanese territorial sea which are Soya, Osumi, Tsushima, Tsugaru and Korea Straits ("Law on the Territorial Sea ", Law No.30 of 2 May 1977). Tsushima Island straddles the middle of the waterway, dividing the Korea Strait into two parts i.e. the Western Channel and the Eastern Channel. South Korea shares the Western Channel of the Korea Strait with Japan, and did the same thing by not extending its territorial Sea more than 3 nautical miles in some parts of the Strait (Kwon, 2000). They did this mainly due to security reasons and to provide freedom of navigation to Soviet warships to sail through their territorial Sea (Pak, 1988).

The introduction of a 12 nautical mile territorial sea limit in the Strait of Malacca by Malaysia and Indonesia has resulted in some parts of the Strait becoming integrated in totality as a territorial Strait, particularly in areas having breadths of 24 nautical miles or less. Malaysia and Indonesia have full sovereignty over the Strait, however, as far as regulating shipping traffic is concerned, their powers are limited. Should both nations revert back to their former territorial sea limits of 3 nautical mile in the Strait of Malacca, there would be a 'high-seas or EEZ' corridor running through the Strait. This could nullify the application of transit passage in the Strait of Malacca.

With transit passage ceasing to be applied, ships and vessels would have the freedom to navigate in the high seas or EEZ corridor within the Strait of Malacca. They would be bound by a more restricted innocent passage regime if they traverse the Strait in areas within the 3 nautical mile limit from the baseline of the two littoral States. Hence, a 'marine environmental protection buffer zone' or 'pollution-prevention bubble' could be created within the Strait where the littoral States are given more powers by international law to regulate ship movements and traffic. This would put the littoral States in a better position to monitor pollution from vessels as well as enhancing security in areas of the Strait which are closest to the shore. There are no provisions in the LOSC and customary international law that prevent a State from reverting to its former territorial sea limits.

Article 3 of the LOSC allows every State to establish the breadth of its territorial Sea up to a limit not more than 12 nautical miles, measured from its territorial sea baseline. The Strait of Malacca is quite wide at its north western entrance where it is around 200 miles from one coast to the other (Leifer, 1978). However the narrowest point of the Strait of Malacca is between Tanjung Piai, located at the southwestern tip of Peninsular Malaysia to Pulau Kerimon Kecil in Indonesia, which measures around 8.4 nautical miles. If the littoral States of the Strait of Malacca reverted to a 3 nautical mile territorial sea limit in the Strait, it would leave approximately 2.4 nautical miles of high seas/EEZ corridor at the narrowest point. It is true that Malaysia and Indonesia would sustain some significant territorial and resource losses if they applied a 3 nautical mile territorial sea limit at the northern part of the Strait. Not only they would they lose 9 nautical miles of their territorial sea, they would also forego their rights to exploit the maximum breadth of the EEZ in those areas.

One solution could be for both Malaysia and Indonesia to adopt both 12 nautical mile and 3 nautical mile limits in claiming their territorial sea in the Strait. In areas where the breadths of the Strait are quite wide, the littoral States may apply a 12 nautical mile territorial Sea limit. As the Strait gets constricted in its size, this is where the 3 nautical mile regime should be applied. By doing this, there would be sufficient areas within the Strait that could be a high seas/EEZ corridor for maritime traffic to pass through. The littoral States would then possess a 3 nautical mile territorial sea buffer zone in which they can exercise more power to control marine pollution and maritime security. The littoral States would not lose out on EEZ-limit claims; as the Strait narrows in breadth, there would be lesser EEZ areas that can be claimed by the littoral States. It is not without precedent to apply both 3 nautical mile and 12 nautical mile territorial sea limits as this has already been practiced by South Korea in relation to the Korea Strait. Given the success of this regime as implemented by Japan and Korea in some of their straits, this proposal may also be a viable option for the Strait of Malacca.

Notwithstanding its attractions for the littoral States, the proposal would have some downsides. A critical question to be considered is whether the reversion to a 3 nautical mile territorial sea in the Strait of Malacca would create a high seas/EEZ corridor within the Strait? Even though it is theoretically correct that there will be 2.4 nautical miles of high Seas/EEZ corridor at the narrowest point of the Strait should 3 nautical miles territorial Sea limit be made applicable, this may not be entirely accurate in reality. Leifer says that although the breadth of the Strait of Malacca at its narrowest point is around 8.4 nautical miles, this figure does not indicate the precise extent of the navigable channel which, for deep draught vessels, is very much less (Leifer, 1978). Therefore, if the 2.4 nautical miles high Seas/EEZ corridor is not navigationally viable because, for example, it possesses navigational hazards such as sand banks, shoals and reefs, the transit passage regime would continue to apply under the LOSC even though the breadth of the strait is more than 6 nautical miles from either shore. Some states have also argued that even if a strait is wide enough to have an EEZ or high Seas corridor, but the corridor is too narrow to transit without accidentally swerving into the territorial sea of the State bordering strait, the entire strait can be treated as a territorial strait (Pak, 1988).

For example, the UK has always considered that the application of the regime of transit passage is applicable in any straits used for international navigation, regardless of their width. Maritime States may also object on the basis that it has been customary practice to regard the Strait of Malacca, regardless of its size or width, as a strait that is subject to the application of the transit passage regime and the littoral States have acquiesced in this

position. With or without the re-adoption of the 3 nautical miles limit in the Strait of Malacca, transit passage may still be applicable in the Strait.

The re-adoption of the 3 nautical mile territorial sea limits in some parts of the Strait of Malacca would also enable foreign military powers to station its naval ships or conduct military exercises in the waters of the Strait, as the waters of the Strait would not be totally integrated into the territorial Seas of the littoral States. This may be seen as something which is uncalled for by the littoral States. The presence of foreign military powers may create a perception on the part of the littoral States that their security is threatened. Malaysia and Indonesia have, for a considerable period of time reiterated that their sovereignty over the Strait of Malacca must not be eroded, and any military use of the waterway must have prior sanction of the two littoral States (Mak, 2006). If extra-regional countries were to be involved, it was strictly to be limited for capacity building, information exchange and the provisions of training (Ho, 2009). Nevertheless, this would be borne out by Malaysia's declaration upon ratifying the LOSC in 1996 that: "The Malaysian Government also understands that the provisions of the Convention do not authorise other States to carry out military exercises or manoeuvres, in particular those involving the use of weapons or explosives in the exclusive economic zone without the consent of the coastal State. ("Declarations and Statements: Malaysia," 2011)".

Furthermore, should the 3 nautical mile territorial Sea regime be made applicable in some parts of the Strait of Malacca, Malaysia and Indonesia would not only have renounced their sovereignty to some areas of the Strait that they currently possess, both nations would also have to re-determine their maritime boundary delimitation in the Strait of Malacca. The fact that these States would have to relinquish their sovereignty in order to obtain more regulatory powers to control shipping in the Strait would lessen the attraction of this proposal.

CONCLUSION

The Straits of Malacca and Singapore will continue to become important maritime super-highways that accommodate considerable number of shipping traffic in the future. The littoral States cannot manage the protection and preservation of the marine environment of the Straits by themselves because they do not have full capacity to do so, both from a policy and resource perspective. It is not equitable to impose the entire burden for this protection on the shoulders of the littoral States, as the users too, benefit economically from using the Straits of Malacca and Singapore to regulate their shipping industries. Therefore, a comprehensive co-operative regime should be established in the Straits in which the littoral States and users collectively share the burden for the maintenance of the Straits. There is an existing co-operative mechanism going on between the littoral States and the user States, however the development of such a mechanism does not go hand in hand with the increasing number of ships plying the Straits of Malacca and Singapore each year. If users of the Straits continue to be reluctant to assist, the littoral States may have no other option but to consider resorting to other solutions either through IMO processes or through unilateral measures.

These possible unilateral measures as discussed, may have the effect of restricting the full transit rights that foreign vessels enjoy now, which in high probabilities, may not be favoured by most users and maritime States. Theoretically, the implementations of these possible unilateral measures may directly or indirectly increase the regulatory powers of the littoral States. Nevertheless, the imposition of these measures, on the other hand may also likely to end up in complication given the degree of controversy that they may carry. Should the waters of the Straits of Malacca and Singapore end up becoming foul and polluted, this is in itself contrary to the objectives of the LOSC and the IMO that promote balance between shipping and protection of the marine environment.[xviii] Indeed, an equitable balance between shipping and marine environmental protection of the Straits of Malacca and Singapore could be achieved if both users and the littoral States effectively and efficiently co-operate towards achieving these ends.

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[i] Article 37 of the LOSC prescribes that transit passage regime applies to straits which are used for international navigation between one part of the high seas or an Exclusive Economic Zone (EEZ) and another part of the high seas or an EEZ. Article 38(2) of the LOSC defines transit passage as 'freedom of navigation and overflight solely for the purpose of continuous and expeditious transit'.

[ii] See Article 25(3)- LOSC (1982).

[iii] See Article 43-LOSC (1982).

[iv] States bordering straits can take appropriate enforcement measures against recalcitrant vessels that have violated regulations formulated under Article 42(1) (a) & 42 (1) (b) and this violation has caused or is threatening to cause major damage towards the marine environment of the straits. This is further reiterated in Article 233 (Part XII) of the LOSC.

[v] See Article 42(2) – LOSC (1982).

[vi] As far as laws and regulations relating to the prevention, reduction and control of pollution in the Straits of Malacca and Singapore are concerned, the littoral states may enact national pollution control laws by giving effect to accepted international regulations such as the International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978 relating thereto (MARPOL 73/78). Malaysia, Singapore and Indonesia are parties to MARPOL but not to all of its annexes.

[vii] See Article 41 (3), Article 42 (1)(a) & Article 42 (1) (b) – LOSC (1982).

[viii] See Article 39(2) (a) & (b) – LOSC (1982).

[ix] Article 300 of the LOSC states that 'State Parties shall fulfill in good faith the obligations assumed under this Convention and shall exercise the right, jurisdiction and freedoms recognised in this Convention in a manner which would not constitute an abuse of right'.

[x] The Resolution A. 927(22) on "Guidelines for the Designation of 'Special Areas' under MARPOL 73/78[x] and Guidelines for the Identification and Designation of Particularly Sensitive Sea Areas" (Resolution A. 927[22]) issued on 29 November 2001 described 'Special Area' as "…a sea area where for recognised technical reasons in relation to its oceanographical and ecological conditions and to the particular character of its traffic, the adoption of special mandatory methods for the prevention of sea

pollution by oil, noxious liquid substances, or garbage, as applicable, is required".[x] See ("Resolution A.927 (22): Guidelines for the Designation of Special Areas Under MARPOL 73/78 and Guidelines for the Identification and Designation of Particularly Sensitive Sea Areas," 2002).

[xi] Resolution A.982 (24) or its full name, *Revised Guidelines for the Identification and Designation of PSSAs* defines PSSA as 'an area that needs special protection through action by IMO because of its significance for recognised ecological or socio-economic or scientific reasons and which may be vulnerable to damage by international maritime activities'. See ("Revised Guidelines For the Identification and Designation of Particularly Sensitive Sea Areas," 2006).

[xii] Articles 45(1) (b) and 45(2) of the LOSC prescribes that the regime of innocent passage, in accordance with Part II of the LOSC shall apply in straits used for international navigation between a part of the high seas or an EEZ and the territorial sea of a foreign State. However, there shall be no suspension on the passage.

[xiii] Article 233 of the LOSC reads "… if a foreign ship … has committed a violation of the laws and regulations referred to in article 42, paragraph 1(a) and (b), causing or threatening major damage to the marine environment of the straits, the States bordering the straits may take appropriate enforcement measures and if so shall respect *mutatis mutandis* the provisions of this section.

[xiv] See 1982 LOSC Art 45(1) (b).

[xv] See Part XII of the LOSC

[xvi] On 16 November 1971, the littoral States of Malaysia, Indonesia and Singapore have reached an understanding on the Straits of Malacca and Singapore, *inter alia*, (a) The three governments agreed that the safety of navigation in the Straits of Malacca and Singapore is the responsibility of the coastal States concerned; (b) The three governments agreed on the need for tripartite cooperation on the safety of navigation in the two straits; (c) The three governments agreed that the Straits of Malacca and Singapore are not international straits but acknowledge their importance in maritime navigation; (d) The three governments agreed that a body for cooperation to coordinate efforts for the safety of navigation in the Straits of Malacca and Singapore be established as soon as possible and that such body should be composed of only the three coastal States concerned. See (Hasjim Djalal, 2008).

[xvii] Article 36 of the LOSC states that transit passage does not apply to a strait used for international navigation if there exists through the strait a route through the high seas or through an EEZ of similar convenience with respect to navigational and hydrographical characteristics.

[xviii] It is true that the LOSC promotes the unimpeded right of transit passage through straits used for international navigation. Nevertheless, at the same time, the LOSC too prescribes that every State has the duty to protect and preserve the marine environment as embodied in Article 192 of the LOSC.