

THE INCORPORATION OF INTERNATIONAL LAW RULES IN REGULATING SAFETY OF NAVIGATION AND MARINE POLLUTION PREVENTION IN STRAITS USED FOR INTERNATIONAL NAVIGATION: A STUDY OF MALAYSIA'S NATIONAL LAW AND POLICY.

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ABSTRACT

Ever since the 1982 United Nations Convention on the Law of the Sea (LOSC) entered into force in 16 November 1994, it has always been regarded as the Constitution that governs matters pertaining to ocean governance. As a result, the LOSC has ended the multiplicity of practices of various nations of the world in empowering their sovereignty, exercising their sovereign rights and duties towards their maritime space. Malaysia became a signatory of the LOSC on December 12, 1982 and ratified it on October 14, 1996. During the third United Nations Conference on the Law of the Sea (UNCLOS III), as a state that borders the Strait of Malacca, Malaysia was among the States Parties that raised the issue of navigational rights of foreign vessels through straits used for international navigation. UNCLOS III eventually gave birth to the LOSC in which rules on navigation of foreign vessels through straits used for international navigation are set out in Part III. After ratifying the LOSC, Malaysia ratified other related international maritime conventions 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), the International Convention On The Control Of Harmful Anti-fouling Systems on Ships 2001(AFS) and many more. This study will look at the extent to which these international rules have been incorporated and integrated into Malaysia's domestic legislation and policy on these matters.

Sub-theme: Government & Politics, International Relations, Foreign Policy

INTRODUCTION

Malaysia is a littoral state of the Strait of Malacca, a strait having a reputation as one of the most congested waterways in the world. The Strait of Malacca flows along the length of the Malay Peninsula and joins the Strait of Singapore at the bottom tip of the peninsula. Together, the Straits of Malacca and Singapore form an important sea line of communication connecting the Far Eastern nations with the Middle Eastern countries and Europe. The Strait of Malacca is bordered considerably by Malaysia and Indonesia and Strait of Singapore is shared jointly by Malaysia, Indonesia and Singapore. During the course of negotiation of UNCLOS III, Malaysia participated actively together with the other straits States including Spain, Indonesia and Singapore in discussing the issues on straits.¹ The conclusion of UNCLOS III gave birth to the LOSC that governs the navigational regime through straits used for international navigation.

¹ Shekhar Ghosh, 'The Legal Regime of Innocent Passage Through the Territorial Sea' in Hugo Caminos (ed), *Law of the Sea* (2001) ; 51-56; S.N. Nandan and D.H. Anderson, 'Straits Used for International Navigation: A Commentary on Part III of the United Nations Convention on the Law of the Sea 1982.' in Hugo Caminos (ed), *Law of the Sea* (2001) , 70-73.

Hence, for the purposes of this article, focus would be directed on the provisions of the LOSC and the International Maritime Organisation (IMO) Conventions that are related to matters on safety of navigation and pollution prevention in straits used for international navigation. Ultimately, this study will unearth to what extent that these laws and regulations have been incorporated into Malaysian domestic laws.

LEGAL STATUS OF STRAITS USED FOR INTERNATIONAL NAVIGATION UNDER THE LOSC

Realising the importance of straits to shipping, the issues on navigational regime through straits were one of the matters discussed by nations of the world during the course of UNCLOS III. Before the introduction of the 12-nautical mile maximum limit for the territorial sea in the LOSC, the customary international law rule was that the territorial sea extends to a maximum of 3-nautical miles from the territorial sea baseline of the coastal state.² When this rule was adopted, most straits in the world would have had a high seas corridor in them.³ Subsequently, when the 3-nautical mile limit for the territorial sea was replaced with the 12-nautical mile limit, the waters of most straits were completely amalgamated as territorial waters of littoral states.⁴ In the territorial sea of a coastal state, foreign ships may exercise innocent passage; however such passage may be suspended temporarily by the coastal State for reasons essential for the protection of its security.⁵ This affected the passage rights of ships in critical international waterways such as the Straits of Dover, Bab el-Mandeb, the Straits of Gibraltar, the Strait of Hormuz and the Straits of Malacca and Singapore.⁶

The Straits of Malacca and Singapore can illustrate a good example. The importance of the Straits of Malacca and Singapore to maritime navigation could never be doubted. Should the Straits be closed for international shipping, ships are compelled to sail the longer Sunda or Lombok and Makassar route which would add an extra shipping cost of US\$500, 000.00 per ship per voyage for a large vessel like a VLCC.⁷ The number of navigational traffic in 2007 is shown by the following Table 1:

² Raj Sativale, "Transit Passage in the Straits of Malacca." *MIMA Bulletin* (2003), <http://www.mima.gov.my/mima/htmls/papers/bulletin/articles/transit-passage.pdf>, 2.

³ *Ibid.*

⁴ See 1982 LOSC Art 3.

⁵ See 1982 LOSC Art 25(1) & (3).

⁶ Edgar Gold, "Transit Services in International Straits: Towards Shared Responsibilities." *MIMA Issue Paper*, 1-20.

⁷ Shigeki Sakamoto, 'Non-State Actors' Role in the Co-operative Mechanism for the Straits of Malacca and Singapore- Seeking to Substantiate UNCLOS Article 43' (Paper presented at the International Symposium on Safety and Protection of the Marine Environment in the Straits of Malacca and Singapore, Kuala Lumpur, 2008), 1-3.

Table 1: Transiting Vessels in the Straits of Malacca and Singapore in 2007

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

(Source: Lloyd's MIU).⁸

From 40,000 ship movements in 1982,⁹ to almost 80,000 in 2007, it is predicted that traffic will continue to increase up to 140,000 transits by the year 2020.¹⁰ Traffic in the Straits of Malacca and Singapore is reported to grow at an average rate of 9 per cent annually.¹¹

Therefore, this was unacceptable for the major maritime states as most straits are critical navigational waterways and they could not afford the smooth passage of their ships to be compromised by the application of an innocent passage regime in these critical waterways.¹² As a *quid pro quo* for the extension of the territorial sea limit to 12-nautical miles, they contended that in straits used for international navigation, a guaranteed right of transit passage would be applicable to all ships instead of the innocent passage regime exercised in the territorial sea.¹³ Transit passage and other provisions governing straits are found in Part III of the LOSC under the heading 'straits used for international navigation'. The term 'international strait' was not adopted in the LOSC, highlighting the fact that key states at UNCLOS III particularly the littoral States of major straits did not recognise the concept of internationalisation of straits.¹⁴

LOSC PROVISIONS ON NAVIGATIONAL REGIMES THROUGH STRAITS USED FOR INTERNATIONAL NAVIGATION

The Innocent Passage Regime

The regime of innocent passage is categorised into two i.e. the right of innocent passage and the right of non-suspendable innocent passage. The navigational regime of innocent passage is defined in Article 17 of the LOSC which reads 'ships of all States, whether coastal or land-

⁸ Wally Mandryk, 'Lloyd's Marine Intelligence Unit : Strategic Importance of Trade & Shipping in the Straits of Malacca and Singapore' (Paper presented at the Symposium on Safety and Protection of the Marine Environment in the Straits of Malacca and Singapore, Kuala Lumpur, Malaysia, 2008)

⁹ G Naidu, 'The Straits of Malacca In The Malaysian Economy' in Hamzah Ahmad (ed), *The Straits of Malacca: International Co-operation In Trade, Funding & Navigational Safety* (1997)

¹⁰ Vijay Sakhujia, *Malacca: Who's to pay for smooth sailing?* (2007) Asia Times Online <http://www.atimes.com/atimes/Southeast_Asia/IE16Ae01.html> at 14 January 2009

¹¹ Muhammad Razif bin Ahmad, 'The Financial Cost of Risk Management in the Straits of Malacca' in Hamzah Ahmad (ed), *The Straits of Malacca: International Co-operation In Trade, Funding & Navigational Safety* (1997) , 187-188.

¹² Robert W Smith, and J Ashley Roach. "Navigation Rights and Responsibilities in International Straits : A Focus on the Straits of Malacca.", 1-24.

¹³ See 1982 LOSC Art 37.

¹⁴ See 1982 LOSC Art 34(1).

locked, enjoy the right of innocent passage through the territorial sea.¹⁵ The LOSC also prescribes that passage shall be continuous and expeditious,¹⁶ and any acts committed by the transiting vessel that could compromise the peace, good order or security of the coastal State would remove the innocent status of that vessel.¹⁷ Submarines and other underwater vessels are required to navigate on the surface while navigating through the territorial sea of states other than the state whose flag they are carrying.¹⁸ Innocent passage applies only to maritime navigation and does not include the right of foreign aircraft to fly in the airspace above the territorial sea of another country. The coastal State on the other hand is under a duty not to hamper innocent passage of any foreign vessel unless the passage ceases to be innocent or the coastal State fears that the passage would undermine its security interests.¹⁹ In addition, tolls and charges cannot be levied upon foreign ships by reason only of their passage but may be levied for other specific services rendered to the ship.²⁰ It is not clear whether general services such as the maintenance of navigational aids fall within the scope of Article 26(2) of the LOSC.²¹ In enhancing navigational safety in its territorial seas, the coastal state may designate sea lanes and Traffic Separation Schemes (TSS) for navigating vessels. The creation of the sea lanes must be based on recommendations of the competent international organisation, namely the IMO.²²

The right of non-suspendable innocent passage applies in straits of the type prescribed in Article 38(1) and 45(1) (a) & (b) of the LOSC.²³ Unlike innocent passage *per se* which is subject to temporary suspension for reasons essential to the protection of the coastal State's security under Article 25(3) of the LOSC, the passage of vessels that exercise non-suspendable innocent passage must not be suspended by the coastal State. As regards the other aspects of innocent passage, the non-suspendable innocent passage regime is similar to the right of innocent passage governed by Part II, section 3 of the LOSC. It is important to note that the right of non-suspendable innocent passage applies only to ships and does not include overflight rights of foreign aircrafts. In addition, submarine and other underwater vehicles carrying the flag of a state other than the coastal state must surface while exercising this right.

Part III of the LOSC - The Transit Passage Regime

The LOSC has divided maritime space into various zones namely internal waters, territorial sea, Exclusive Economic Zone (EEZ) and the High Seas. Therefore, depending on its breadth and size, a strait may have these types of maritime zones. Transit Passage regime applies

¹⁵ See 1982 LOSC Art 17.

¹⁶ See 1982 LOSC Art 18(2).

¹⁷ See 1982 LOSC Art 19(1) & (2).

¹⁸ See 1982 LOSC Art 20.

¹⁹ See 1982 LOSC Art 24(1)(a) & (b).

²⁰ See 1982 LOSC Art 26(1) & (2).

²¹ Yasuhiko Kagami, 'International Support for Navigational Aids : Lesson Learned from International Practices' (Paper presented at the International Symposium on Safety and Protection of the Marine Environment in the Straits of Malacca and Singapore, Kuala Lumpur, 2008), 45-46.

²² See 1982 LOSC Art 22(1) & (3) (a).

²³ Non-suspendable innocent passage will apply to vessels transiting straits used for international navigation connecting one High Seas or Exclusive Economic Zone (EEZ) to a territorial sea of a another state. This navigational regime would also be applicable for ships travelling from one port to another port located within the strait. Refer Mary George, *Legal Regime of the Straits of Malacca and Singapore* (2008), 45-50.

in areas of a strait where its breadth from one coast to the other is less than 24nms. In straits where the breadth is more than 24nms, all vessels and ships may exercise freedom of navigation as exercised in the EEZ.²⁴ In contrast to the more constrained right of innocent passage, all vessels and aircraft that are exercising transit passage through straits used for international navigation enjoy unimpeded navigational rights which cannot be hampered by the littoral States and straits States must also give appropriate publicity to any danger to navigation or overflight in the straits.²⁵ Unlike the regime of innocent passage,²⁶ the LOSC does not specify circumstances when a ship ceases to exercise transit passage.²⁷ Thus, the transit passage regime inevitably limits the straits States power to regulate maritime traffic through their territorial waters.²⁸ Nevertheless, to conciliate this situation, the LOSC encourages states bordering straits to cooperate with user states in managing the navigational safety and marine environment of the straits.²⁹ However, this requirement is not mandatory as the main responsibility for administering navigational safety is imposed on the straits States.³⁰ Article 42 (1) (a) & (b) also allow straits States to adopt applicable international regulations relating transit passage through straits on matters pertaining to safety of navigation and the protection and preservation of marine environment of straits. Nevertheless, these laws and regulations shall not hamper the right of transit passage of foreign vessels.³¹ Articles 42 (1) (a) & (b) and 42 inevitably limit the straits States power to regulate shipping and protection and preservation of the marine environment of the Strait. Part III of the LOSC confers sovereignty on the straits States over their maritime space. However, the extent of the sovereignty of the straits States is excepted only in matters relating to the exercise of transit passage regime by all ships and vessels through straits used for international navigation. In other words, Part III of the LOSC has introduced a regime of internationalisation of straits without having to internationalise them in a true sense.³²

Part XII of the LOSC

Part XII of LOSC devotes itself with the matters on protection and preservation of the marine environment, including that of straits used for international navigation.³³ The first provision of Part XII of the LOSC denotes that all states in the world have a general obligation to protect and preserve the marine environment. Article 192 of the LOSC reads:

²⁴ See 1982 LOSC Art 36 & 58(1).

²⁵ Robert Beckman, 'Transit Passage Regime in the Straits of Malacca : Issues for Consideration' (Paper presented at the Building A Comprehensive Security Environment in the Straits of Malacca, Kuala Lumpur, 2004), 244-247.

²⁶ See 1982 LOSC Art 19 (2) (a-l).

²⁷ See 1982 LOSC Art 38(3)

²⁸ Beckman, above n 25, 244-269

²⁹ See 1982 LOSC Art 43 (a) & (b).

³⁰ Arif Havas Oegroseno, 'Straits of Malacca and the Challenges Ahead : Indonesian Point of View' (Paper presented at the Building A Comprehensive Security Environment in the Straits of Malacca, Kuala Lumpur, 2004), 28-39.

³¹ See 1982 LOSC Art 42(2)

³² See 1982 LOSC Art 34. Article 34(1) reads "The regime of passage through straits used for international navigation established in this Part shall not in other respects affect the legal status of the waters forming such straits or the exercise by the States bordering the straits of their sovereignty or jurisdiction over such waters and their air space, bed and subsoil."

³³ 'UNCLOS III and Global Environmental Governance' in Dennis L. Soden and Brent Steel (eds), *Handbook of Global Environmental Policy* (1999)

States have the **obligation to protect and preserve** the marine environment

Article 192 of the LOSC was further supported by Article 194 which promotes that all states to take any measures, individually or jointly, that is consistent with the LOSC to prevent, reduce and control pollution from the marine environment. The LOSC also promotes states to co-operate either on a global, regional or through IMO to formulate rules in protecting the marine environment, as enumerated in Article 197.

From the historical point of view, when LOSC was drafted, Malaysia was one of the delegates that persistently insisted on Article 233 to be included in the LOSC. Article 233 was regarded as a condition *quid pro quo* for straits States to accept the transit passage regime as enumerated in Part III of the LOSC. Nevertheless, as a condition for its acceptance and ratification of the LOSC, Malaysia proposed Article 233³⁴ as a guarantee that the marine environment of such straits could still be protected and safeguarded despite having responsibilities to accommodate free navigation to all vessels.³⁵ Despite the fact that Article 233 may be perceived to facilitate the straits States in protecting and preserving the marine environment, it does have some weaknesses to it. Firstly, the initial sentence of Article 233 connotes that Sections 5, 6 and 7 of Part XII of the LOSC would not affect the legal regime of straits used for international navigation. Sections 6 and 7 lay down the procedural and enforcement measures for States to take action against recalcitrant ships. Therefore the exception of Sections 5, 6 and 7 leaves the strait States without any procedural and enforcement guidelines to be followed. The second part of Article 233 elucidates that a strait State could only take appropriate enforcement measures if:

- (a) a ship has committed a violation of the laws and regulations referred to in Article 42, paragraph 1(a) and (b);
- (b) causing or threatening to cause MAJOR DAMAGE to the marine environment of the straits.

Section 5 of Part XII elucidates the types of pollution that is dealt with by the LOSC. However, the wordings of Article 233 have expressly excluded the application Section 5 of Part XII on straits used for international navigation and this leaves a big *lacunae*; consequently, what kind of pollution may be covered by Article 233? The wordings of Article 42(1)(a) & (b) of the LOSC are not compatible with the provision elucidated in Article 42(2). The latter mentions that such law and regulations shall not hamper or impair the right of transit passage of navigating vessels. George argued that:

When strait States through their laws and regulations are required to promote safe navigation without correlative powers vested in

³⁴ Article 233 of the LOSC states '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'.

³⁵ Myron H. Nordquist, *United Nations Convention on the Law of the Sea 1982: A Commentary* (1991), 382-392.

them to detain ships that violate these laws, such actions could be interpreted as falling within the terms of Article 42(2). It seems therefore that Article 42(1) is nullified by Article 42(2).³⁶

Simply, how could a strait State take enforcement measures against recalcitrant ships if it is disallowed from hampering or impeding smooth navigation of vessels? It is rather impossible to take actions against ships if the option to suspend navigation is unavailable. The second limb of Article 233 emphasised that only pollution in the degree that can cause major damage would allow straits States to take appropriate enforcement action against the ship. Now comes another question; what does it mean by the phrase "major damage"? Nordquist contended that even though the expression "major damage" is not defined, the term major damage can be seen as referring to major maritime calamities in the history of shipping such as Amoco Cadiz and so on.³⁷ Koh suggested that two factors had to be looked at *inter alia*:

- (a) the occurrence of accidents in the concerned strait as a result of a breach of a navigation rule;
- (b) the extent of the damage that occurred depending upon the type of ships and goods carried.³⁸

Indeed, any maritime casualties that may cause pollution would be detrimental for the economic survival of the straits States. For example, the Orapin Global and Evoikos oil spill in the Straits of Malacca and Singapore had compromised the well-being of the western coast of Johore to the extent of upsetting the aquaculture, tourism and fishing industry of that part of Malaysia.³⁹ Therefore it is important that the phrase "major damage" is looked upon at the extent of loss sustained by the straits States; this includes the coastal population and commercial enterprises as well. The absence of the meaning of the phrase "major damage" further represents the weakness of the drafting of Article 233. It is also not too excessive to state that Article 233 was drafted hastily without considering how it would in the future affect the management and protection of the marine environment of straits. Beckman illustrated the effect of the phrase "major damage" to straits States' enforcement powers as follows:

"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 the right to interfere with the passage of the vessel or a right to arrest it. However, the littoral State would not be without a remedy. It could make a formal complaint to the flag State of the offending vessel, alleging violation of the 1982 UNCLOS."⁴⁰

³⁶ George, above n 23, 77.

³⁷ Nordquist, above n 35, 301.

³⁸ George, above n 23, 83.

³⁹ PINMAG, *Malaysia's Response to the Evoikos Incident* (1998) Petroleum Industry of Malaysia Mutual Aid Group (PINMAG) <http://www.pcs.gr.jp/doc/esymposium/12172/98_abdullah-h-mohammad-e.pdf> at 16 June 2009

⁴⁰ Beckman, above n 25, 250.

Some may argue that LOSC is a multilateral treaty and therefore subject to the application of Vienna Convention on the Law of Treaties, where it should be exercised in good faith⁴¹ Nonetheless, the phrase good faith neither carries weight in justifying the straits States to impede the navigation of recalcitrant ships nor allowing the termination of right of transit passage for vessels. Unlike the right of innocent passage, the LOSC in both Part III and Part XII is silent whether or not transit passage regime could be terminated or suspended. This weakness has prompted the Spanish delegation to make a remark on Article 233, saying, *inter alia*:

Article 233 has to be considered discriminatory against States bordering straits, inasmuch as it is precisely their geographical narrowness that creates greater risks of accident which could cause damage to the marine environment. Apart from being unjust, this provision is poorly drafted.⁴²

George contended that the so-called unimpeded transit passage for all ships should be equitably adjusted to logically enable straits States to properly exercise their regulatory and enforcement powers on recalcitrant ships.⁴³ In addition, without proper definition of the phrase major damage it means that transiting vessels are allowed to pollute the marine environment of the straits if it will only result in minor repercussions.

The final part of Article 233 reads 'the States bordering the straits may take appropriate enforcement measures and if so shall respect *mutatis mutandis* the provisions of this section.' The phrase *mutatis mutandis* seems to be an ambiguous expression. Nordquist asserted that it is not possible to furnish any accepted explanation for the ambiguous expression *mutatis mutandis* in Article 233.⁴⁴ Nevertheless, it may connote that a strait State may only take enforcement measures against ships that has clearly and/or blatantly violate the safeguards provided for by Article 233. In other words, the expression *mutatis mutandis* disallows a strait State to apprehend vessels that do not cause or threatening to cause major damage to the marine environment of the strait.

Given the ambiguous wordings of Article 233, consultations were held among the delegation of States during the discussion of UNCLOS III to reach a common understanding regarding the purpose and meaning of Article 233 of the LOSC in its application to the Straits of Malacca and Singapore.⁴⁵ A letter was sent by the representative of Malaysia, Z.B.M. Yatim, to the President of Conference containing an Annex which indicated the understandings reached

⁴¹ Article 26 of the 1969 Vienna Convention on the Law of Treaties reads 'Every treaty in force is binding upon the parties to it and must be performed by them in good faith.'

⁴² Jose A. de Yturriaga, *Straits Used For International Navigation: A Spanish Perspective* (1991), 180.

⁴³ George, above n 23, 84.

⁴⁴ Nordquist, above n 35, 391.

⁴⁵ *DOCUMENT A/CONF.62/L.145 : Letter dated 28 April from the representative of Malaysia to the President of the Conference* (1982) United Nations <http://untreaty.un.org/cod/diplomaticconferences/lawofthesea-1982/docs/vol_XVI/a_conf-62_l-145.pdf> at 11 March 2010

and the Statement made relating to Article 233 of the draft convention on the law of the Sea in its application to the Straits of Malacca and Singapore.⁴⁶ They are *inter alia*, as the following:

- (a) Laws and regulations enacted by States bordering the Straits under Article 42(1) (a) refer to laws and regulations on Traffic Separation Schemes (TSS) and the determination of Under Keel Clearance (UKC);
- (b) Any violation on the limitation of UKC would be deemed to a violation of Article 233, and states bordering the Straits of Malacca and Singapore may take appropriate enforcement measures as provided by Article 233 to prevent the passage of the vessel. Such act cannot be deemed as hampering, denying and impairing transit passage as enumerated in Article 42 of the LOSC;
- (c) States bordering the Straits of Malacca and Singapore may take appropriate enforcement measures against ships that has caused or threatening to cause major pollution to the marine environment of the Straits;
- (d) Although the wordings of Article 233 has excepted the application of Sections 5, 6 and 7 of Part XII, states bordering the Straits of Malacca and Singapore may observe the provisions on safeguards in Section 7 of Part XII in taking appropriate enforcement measures as provided in Article 233 against recalcitrant ships;
- (e) Article 42 and 233 do not affect the rights of the straits States to take action against ships which are not in the exercise of transit passage;
- (f) Anything contained in the letter regarding Article 233 is not intended to impair the sovereign immunity of ships enumerated in Article 236 and the duties of ships and aircraft during transit passage in Article 39.⁴⁷

Indonesia and Singapore issued letters to the President of UNCLOS III reiterating their support towards Malaysia's stand. Letters signed by both Indonesia's M Kusumaatmadja⁴⁸ and Singapore's T.T.B.Koh⁴⁹ confirms the statement and the contents of the letter sent by Malaysia's representative. As a result, Article 233 was considered as the brainchild of Malaysia.⁵⁰ Despite this, George contended that the legal validity of the Statement may be questioned.⁵¹ It is not an amendment to Article 233 as it was only a letter written by the representative of Malaysia to the President of the Conference.⁵² George continues to argue that the statement has very limited legal significance for the user States.⁵³ But this may not be entirely true. The fact that ships that sail the Straits of Malacca and Singapore have now followed the TSS and the UKC requirements enforced in the Straits show that the Statement had a positive implication. Should they choose not to be bound by the TSS and UKC requirement, based on the understandings reached in the

⁴⁶ Ibid.

⁴⁷ Nordquist, above n 35, 388-389.

⁴⁸ *DOCUMENT A/CONF.62/L.145/ADD.1*, United Nations Conferences on the Law of the Sea Official Records (2000), 250-251.

⁴⁹ *DOCUMENT A/CONF.62/L.145/ADD.2*, United Nations Conferences on the Law of the Sea: Official Records (2000), 250-251.

⁵⁰ Mary George, 'Transit Passage and Pollution Control in Straits under the 1982 Law of the Sea ' (2002) *Ocean Development and International Law* , 198.

⁵¹ George, above n 23, 79.

⁵² Ibid.

⁵³ Ibid.

Statement, the smooth navigation of the vessels may be prevented by states bordering the Straits of Malacca and Singapore. Having described the international law provisions on shipping and marine environmental protection of straits, it is crucial to see whether or not these provisions have been incorporated into the Malaysian domestic legislations and policy.

EXISTING ENVIRONMENTAL PROTECTION MEASURES IN THE STRAIT OF MALACCA AND SINGAPORE

The fundamental principle that the straits states have to follow in legislating for the Straits of Malacca and Singapore are that their laws must not have the practical effect of hampering, denying or impairing the right of transit passage.⁵⁴ Having said this, the straits states are allowed to make laws by giving effect to applicable international regulations⁵⁵ and to refer these regulatory measures to the competent international organisation that is the International Maritime Organisation (IMO) to be endorsed, and adopted and ultimately enforced by the straits States.⁵⁶ Transiting ships and vessels must observe and comply with these measures.⁵⁷

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 where the three strait State governments agreed that matters of safety of navigation relating to the straits fall under the responsibility of the coastal states concerned.⁵⁸ A Tripartite Technical Experts Group (TTEG) on the safety of navigation was established to facilitate co-operation between the littoral states in fashioning measures to regulate safer shipping in the straits. The littoral states, especially Malaysia and Indonesia had agreed at that time that the straits are not straits used for international navigation but did acknowledge their importance in international navigation.⁵⁹

The first TSS was introduced in 1977 and was first adopted by IMO through an Assembly Resolution A.375(X) 1977, which involved areas including the One Fathom Bank, Singapore Strait and the Horsburgh Lighthouse Area. The TSS was amended in 1981⁶⁰ and was again adjusted and extended in 1998 to accommodate the increased shipping traffic in the Straits of Malacca and Singapore.⁶¹ Under Article 41(7) of the LOSC, vessels traversing through the straits are bound to follow the prescribed TSS. The TTEG on Safety of Navigation also discussed

⁵⁴ Article 42(2) of LOSC (1982)

⁵⁵ 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.

⁵⁶ Article 41 (3), Article 42 (1)(a) & Article 42 (1) (b) of LOSC (1982)

⁵⁷ Article 39(2) (a) & (b) of LOSC (1982)

⁵⁸ Republic of Indonesia Department of Foreign Affairs, *Joint Statement of the Governments of Indonesia, Malaysia and Singapore (1971)* as quoted in Michael Leifer, *International Straits of the World*, Malacca, Singapore and Indonesia (1978), 204.

⁵⁹ Hashim Djalal, "The Malacca-Singapore Straits Issue." Paper presented at the Building A Comprehensive Security Environment in the Straits of Malacca, Kuala Lumpur 2004, 274-277.

⁶⁰ IMO Resolution A.476 (XII) 1981

⁶¹ Sativale, above n 2, 8-9.

matters pertaining to the minimum requirements for 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 DWT.⁶² Malaysia initially proposed 4.5 metres UKC, Indonesia 4.4 metres and Singapore 2.5 metres.⁶³ As a compromise, the TTEG on maritime safety agreed with a UKC of 3.5 metres and it was submitted to and agreed by the IMO through IMO Assembly Resolution A 375(X).⁶⁴ In accordance with 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 on safety of navigation and marine pollution prevention.⁶⁵ 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 kinds of aids to navigation in that area.⁶⁶

Another safety of navigation development in the Strait of Malacca 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.⁶⁷ This is achieved by having smooth communication and data exchange between onshore, sea-based and ship-based transponder facilities.⁶⁸ With enhanced communication and data exchange, hydrographic and oceanographic data including weather conditions can be transmitted effectively and/received, facilitating ships' movements especially in difficult and constricted waterway like the Strait of Malacca.⁶⁹ This project is still at the early stage and is being gradually developed in the Strait focusing on areas where a TSS is applicable.⁷⁰ The improvement and installation of reliable navigational safety aids and infrastructure in the Strait of Malacca has witnessed a continued increase of navigational traffic in the waterway.

⁶² 'The Importance of The Straits of Malacca and Singapore' (1998) 2 *Singapore Journal of International & Comparative Law* , 304.

⁶³ Sativale, above n 2, 12-13.

⁶⁴ Djalal, above n 59, 278-280.

⁶⁵ Wan Awang bin Wan Yaacob, 'Regional Co-operation And The Straits of Malacca' in Hamzah Ahmad (ed), *The Straits of Malacca: International Co-operation In Trade, Funding & Navigational Safety* (1997) 18-19.

⁶⁶ Mohd Nizam Basiron, "Comprehensive Security in the Straits of Malacca." Paper presented at the Building A Comprehensive Security Environment in the Straits of Malacca, Kuala Lumpur 2004, 9-17.

⁶⁷ Koji Sekimizu, Jean-Claude Sainlos, and James N.Paw. "The Marine Electronic Highway in the Straits of Malacca and Singapore- an Innovative Project for the Management of Highly Congested and Confined Waters." International Maritime Organisation, http://www.imo.org/includes/blastDataOnly.asp/data_id%3D3668/marineelectronichighwayarticle.pdf, 24-31.

⁶⁸ Ibid.

⁶⁹ Ibid.

⁷⁰ Ibid.

MALAYSIAN DOMESTIC LAWS ON SAFETY OF NAVIGATION AND PROTECTION AND PRESERVATION OF THE MARINE ENVIRONMENT OF THE MALAYSIAN SIDE OF THE STRAIT OF MALACCA

Treaties are made to be upheld or performed.⁷¹ *Pacta sunt servanda* is the fundamental principle of customary international law and it has been crystallised in Article 26 of the Vienna Convention on the Law of Treaties 1969 (Vienna Convention) which reads 'Every treaty in force is binding upon the parties to it and must be performed in good faith'. International law, like the law of treaties applies to states as they have always been an integral part of international law.⁷² Each state has its own ways in incorporating international law into its domestic application. As the legislative power in Malaysia is vested in the Parliament,⁷³ any international treaties, conventions or pacts will only become part of the Malaysian *lex loci* when the Parliament passes a statute, giving legal effect to the treaty in Malaysia.⁷⁴

The initial maritime-related conventions ratified by Malaysia before the LOSC were the Geneva Convention on the Territorial Sea and the Contiguous Zone 1958, the Geneva Convention on the Continental Shelf 1958, Convention on the High Seas 1958, and Convention on the Fishing and Conservation of the Living Resources of the High Seas 1958, all of which ratified on 21 December 1960.⁷⁵ These Conventions were then superseded by the LOSC when Malaysia signed it on 10 December 1982, and ultimately ratified it on 14 October 1996.⁷⁶

As a State party, Malaysia is bound by the provisions of the LOSC in enacting laws on maritime-related matters. As far as laws pertaining to safety of navigation and protection and preservation of the marine environment of the Malaysian side of the Strait of Malacca are concerned, they are governed by *inter alia*:

- (a) Environmental Quality Act 1974;⁷⁷
- (b) Exclusive Economic Zone Act 1984;⁷⁸
- (c) Merchant Shipping Ordinance 1952;⁷⁹
- (d) Malaysian Maritime Enforcement Agency Act 2004.⁸⁰

Being one of the biggest trading nations on Earth, Malaysia relies on sea transportation to engage trade with other nations. Hence, Malaysia became a member of the IMO on 17 June 1971 by ratifying the Convention on the International Maritime Organisation, 1948. This is the starting

⁷¹ Malgosia Fitzmaurice and Olufemi Elias, *Contemporary Issues in the Law of Treaties* (2005), 2-3.

⁷² Anthony Aust, *Handbook of International Law* (2005), 13-14.

⁷³ Article 74, Federal Constitution of Malaysia

⁷⁴ Abdul Ghafur Hamid @ Khin Maung Sein, 'Malaysia's Commitments Under International Convention and the Need for a Harmonized Legal Regime Regulating Marine Pollution' (2007) 6 *Malayan Law Journal* 124-148.

⁷⁵ Siti Norniza Zainul Idris, *Status of Maritime-Related National Laws and Maritime Conventions in Malaysia* (2006), 21-40.

⁷⁶ *Ibid.*

⁷⁷ P.U.(B) 113/75

⁷⁸ P.U.(B) 214/85

⁷⁹ Ord. 70/1952

⁸⁰ P.U.(B) 67/2005

point of this nation to ratify a number of other IMO Conventions relating to pollution prevention. This is shown by the following Table 2:

Table 2: Status of Ratification of IMO's Pollution Prevention by Malaysia

Conventions*	Date of Signing/Date of Ratification/Domestic Laws
International Convention for the Prevention of Pollution from Ships, 1973 as modified by the Protocol of 1978 (MARPOL 73/78) and its Annexes I, II and V.	31-1-1997 / 1-5-1997 / Environmental Quality Act 1974, Merchant Shipping Ordinance 1952, Merchant Shipping (Amendment and Extension) Act 2007, Exclusive Economic Zone Act 1984.
International Convention on Oil Pollution Preparedness, Response and Co-operation, 1990 (OPRC 1990)	30-10-1997 / 30-7-1997 / Exclusive Economic Zone Act 1984, Merchant Shipping Ordinance 1952, Merchant Shipping (Amendment and Extension) Act 2007.
Convention on the International Regulations for Preventing Collisions at Sea, 1972 (COLREGs)	23-12-1980 / 23-12-1980 / Merchant Shipping (Collision Regulations) Order 1984, Merchant Shipping (Collision Regulations) (Rules for Vessels Navigating through the Straits of Malacca and Singapore) Order 2000
International Convention for the Safety of Life at Sea, as amended 1974 (SOLAS 1974)	19-10-1983 / 19-1-1984 / Merchant Shipping Ordinance 1952, Merchant Shipping (Amendment and Extension) Act 2007.
International Convention for the Control and Management of Ships' Ballast Water and Sediments (BWM), 2004	17-09-2008 / 17-09-2008 / Merchant Shipping Ordinance 1952, Merchant Shipping (Amendment and Extension) Act 2007.
International Convention On The Control Of Harmful Anti-fouling Systems on Ships (AFS) 2001	17-09-2008 / 17-09-2008 / Merchant Shipping Ordinance 1952, Merchant Shipping (Amendment and Extension) Act 2007.
Protocol of 1978 relating to the International Convention for Safety of Life at Sea 1974, as amended (SOLAS PROT)	19-10-1983 / 19-1-1984 / Merchant Shipping Ordinance 1952, Merchant Shipping (Amendment and Extension) Act 2007.
International Convention on Load Lines, 1966 (Load Lines 1966)	12-01-1971 / 12-04-1971 / Merchant Shipping Ordinance 1952.

(Source: Idris [2006], Basiron & Hooi [2007], Marine Department of Malaysia)

*The Protocol of 1992 to amend the International Convention on Civil Liability for Oil Pollution Damage 1969 (CLC Protocol 1992), the International Convention on the Establishment

of an International Fund for Compensation for Oil Pollution Damage 1971 (FUND 71) and the FUND Protocol 1992, in which Malaysia is a party are not discussed in this Article as these instruments do not relate directly with safety of navigation and protection of the marine environment of the Strait of Malacca. These instruments deal greatly with matters on compensation as a result of an oil spill.

Having identified these, it is crucial to find out whether such laws coincide with the provisions of the LOSC and other related international conventions.

The Environmental Quality Act 1974

The Environmental Quality Act (EQA) is the main statute governing matters on environmental management in Malaysia. It has provisions on prevention on marine pollution within Malaysian waters, particularly on discharge of oil and waste.⁸¹ The EQA defines Malaysian territorial sea based on the definition given in Emergency (Essential Powers) Ordinance, No. 7, 1969, as amended in 1969.⁸² The EQA allows discharge of wastes into the Malaysian environment but based on the acceptable condition as enumerated in Section 21 of the EQA. Section 27 (1) of the EQA reads:

“No person shall, unless licensed, discharge or spill any **oil or mixture containing oil** into Malaysian waters in contravention of the acceptable conditions specified under section 21.”

Section 29 (1) of the EQA, which deals with prevention of discharge of waste reads:

“No person shall, unless licensed, discharge **wastes** into the Malaysian waters in contravention of the acceptable conditions specified under section 21.”

The EQA also prescribes penalties for wrongdoers who committed any acts in contravention of these two sections.⁸³ The EQA has a subsidiary legislation on marine pollution namely Environmental Quality (Delegation of Powers on Marine Pollution Control) Order 1994 which revoked the Environmental Quality (Delegation of Powers on Marine Pollution Control) Order 1993. This subsidiary legislation deals with the delegation of powers by the Director General of the Environmental Quality to specified persons i.e. the police to investigate offences relating to

⁸¹ *Compilation of Environmental Acts, Laws and Regulations Related to Construction History* (2008), 7-8.

⁸² Section 3(1) of the Emergency (Essential Powers) Ordinance, No. 7, 1969 contends that the breadth of the territorial waters of Malaysia shall be twelve nautical miles. Please refer 'Emergency (Essential Powers) Ordinance, No. 7, 1969, as amended in 1969' <http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/MYS_1969_Ordinance.pdf>

⁸³ Section 27(2) prescribes that the wrongdoer would be liable to a fine of not less than one thousand ringgit and not exceeding twenty-five thousand ringgit or to imprisonment not exceeding two years or to both. Section 29(2) stipulates that the penalty for offenders in violation of Section 29(1) to be liable to a fine not exceeding ten thousand ringgit or to imprisonment not exceeding two years or to both.

violation of Sections 27(1) and 29(1). These provisions are vital towards the protection and preservation of the marine environment of the territorial waters of Malaysia. Nevertheless, as stated earlier, the laws on protection and preservation of the marine environment of straits used for international navigation, which could partly or wholly lie within the territorial waters of a strait State, would be subjected to the provisions of the LOSC and related IMO Conventions. The strait State could not enact laws which are in contravention of accepted international regulations, as spelled out by Article 42(1) (a) & (b) of the LOSC.

The provisions of the EQA do not seem to accommodate and incorporate the accepted international rules on protection and preservation of the marine environment of straits used for international navigation, as required by Article 42(1) (a) & (b) of the LOSC. Sections 27(1) and 29(1) only deal with the territorial waters of Malaysia without mentioning their application in straits used for international navigation that lie within Malaysia's territorial Sea. It could be contended that Section 21 of EQA provides the exception to rulings laid down in Sections 26(1) and 29(1), by asserting that the term 'acceptable conditions' apply to Malaysian territorial waters that forms a strait used for international navigation. Nevertheless, the wordings of Section 21 are too general and could not be said to be directly related and apply to the Malaysian side of the Strait of Malacca. The EQA is also silent on the application of MARPOL 73/78 as it does not cross refer to any of its provision or Annexes.⁸⁴ In addition, the EQA also does not seem to have incorporated Article 233 within its provisions.

Realising this, the EQA should be slightly reformed particularly on wordings of its Section 21.⁸⁵ Section 21 should enunciate the acceptable conditions for the discharge of oil and waste into the Malaysian territorial sea of the Strait of Malacca, based on the requirements set out by Annex I of MARPOL 73/78.⁸⁶ As Malaysia is a State party to Annex I and II of MARPOL 73/78, the EQA, should incorporate Annex I and II of MARPOL 73/78 so that it could complement Sections 27(1) and 29(1) of the EQA. Given the fact that Sections 27(1) and 29(1) of the EQA only refer to discharge prevention of oil and wastes respectively into Malaysian waters, an additional section on hazardous and noxious substances should also be added in the EQA to ensure Annex II of MARPOL 73/78 could be incorporated and implemented effectively in Malaysia.

Since Article 233 of the LOSC deals with pollution from shipping activities, rulings laid down in that Article would probably be incorporated in Acts other than the EQA that deals with merchant shipping. Therefore it is essential to observe whether or not Article 233 has been incorporated in other shipping and environmental-related legislations in Malaysia.

⁸⁴ Abdul Haseeb Ansari and Nik Ahmad Kamal, 'Prevention, Abatement and Control of Pollution of Straits: An Appraisal With Special Reference to the Straits of Malacca' (2005) 3 *Malayan Law Journal* , 1xv111-1xix.

⁸⁵ Amelia Emran, *The Regulation of Vessel-Source Pollution in the Straits of Malacca and Singapore* University of Wollongong, (2007), 137-138.

⁸⁶ *Ibid.*

The Merchant Shipping Ordinance 1952 & Merchant Shipping (Amendment and Extension) Act 2007

The Merchant Shipping Ordinance 1952 (MSO) is the main law in Malaysia on merchant shipping. Like the EQA, it has provisions on prevention of oil pollution, particularly discharge from ships. Section 306C (2) MSO defines the meaning of pollution from ships as follows:

“Where oil or harmful substance has been, is being or is likely to be discharged, intentionally or otherwise, from a ship, the discharge or likely discharge of the oil or harmful substance from the ship shall, for the purposes of this Part, be deemed to be an escape or likely escape of oil or harmful substance from the ship.”

In 2007, some provisions of the MSO have been amended by the Merchant Shipping (Amendment and Extension) Act 2007 (MSA 2007). The MSA 2007 has added Section 306CA (1) which emphasised on pollution prevention within Malaysian waters. It reads:

“Subject to subsection (2) and any circumstances as may be specified in the rules or Malaysia Shipping Notice, the discharge of oil or harmful substances into any part of Malaysian waters, any Malaysian coast or Malaysian reef is prohibited.”

Sections 306C (2) and 306CA (1) coincide with Part XII particularly Articles 210 and 211 on pollution by dumping and pollution from vessels respectively. The MSO also has a few provisions that empower the Director of Marine, in consultation with the Director-General of Environmental Quality to take action against ships that has caused pollution or likely to cause pollution by the release of oil or harmful substances into any part of Malaysian waters, coasts or reefs.⁸⁷ The Director of Marine may require these actions to be taken:

- (a) to prevent the escape of oil or harmful substance from the ship;
- (b) the removal of oil or harmful substance from the ship, or a specified part of the ship, in such manner, if any, as is specified by the Director of Marine to such place, if any, as is so specified; and
- (c) the removal of the ship to a place specified by the Director of Marine.⁸⁸

Furthermore, the MSO is also equipped with provisions on actions to be taken in cases of maritime casualties to prevent discharge of oil and waste into Malaysian waters.⁸⁹ All these provisions follow the requirements laid down in Section 6 of Part XII of the LOSC on enforcement measures available to the coastal State, port State or the flag State. Nevertheless, the

⁸⁷ Section 306D(1) of the MSO.

⁸⁸ Section 306D(3) (a), (b) and (c) of the MSO.

⁸⁹ Section 306I of the MSO.

MSO is silent on the regime of transit passage. In contrast, the United Kingdom (UK) government clearly made known the application of transit passage within its waters, namely in the Strait of Dover, Fair Isle Gap between the Shetlands and the Orkneys and the North Channel between Scotland and Ireland.⁹⁰ The transit passage regime was also mentioned in a Declaration issued by France and Great Britain setting out the governing regime of navigation in the Strait of Dover, when both nations signed a boundary agreement on 2 November 1988.⁹¹ As far as the Straits of Malacca and Singapore are concerned, Malaysia, Indonesia and Singapore have never declared areas within the Straits where transit passage officially begins and ends. The UK Merchant Shipping Act 1995 (MSA 95) incorporates the regime of transit passage into its domestic law.⁹² The Merchant Shipping and Maritime Security Act 1997 (MMS 97), which is an Act to amend the MSA 95, has included the provisions relating to transit passage, although without elaboration, into the MSA 95 through Sections 100B(5) and 192A(2).⁹³

The MSA 2007 has amended the MSO by inserting Section 519A(1) on the application of Marine Shipping Notice. It reads:

öSubject to the provisions of the Ordinance, the Director of Marine may issue Malaysia Shipping Notices in respect of administrative matters or technical matters relating to shipping, navigation, maritime transport safety and security and marine pollution, as may be necessary for the purposes of the Ordinance.ö

Section 519A (3) of the MSO enunciates that it would be an offence if the provisions issued in the Marine Shipping Notice is violated. The MSO only clearly mentions two IMO Conventions within its provisions namely the Load Lines 1966⁹⁴ and SOLAS 1974.⁹⁵ Despite being silent on other IMO Conventions like MARPOL 73/78, COLREGs and the like, these Conventions are incorporated into the domestic application via the Malaysian Marine Shipping Notices, endorsed by the MSO. The implementation of these IMO Conventions in Malaysia can be summarised as the following:

⁹⁰ 484 H.L. Hansard (6th ser.) col. 382 as quoted in J. Ashley Roach and Robert W. Smith, *United States Responses to Excessive Maritime Claims* (Second ed, 1996), 364-365.

⁹¹ Ibid.

⁹² DH Anderson, 'British Accession to the UN Convention on the Law of the Sea' (1997) 46 *International and Comparative Law Quarterly* (1997) , 771-772.

⁹³ 'Merchant Shipping and Maritime Security Act 1997' <http://www.opsi.gov.uk/Acts/acts1997/ukpga_19970028_en_1> at 11 March 2010

⁹⁴ Section 2(a) of the MSO

⁹⁵ Section 2(a) of the MSO

Table 3: List of IMO Conventions enforced through Malaysian Shipping Notices

IMO Conventions	Malaysian Marine Shipping Notices (MSN)	Date of Issue
SOLAS 74/78 Chapter I- General Provisions	MSN 04/2008	24/12/2008
SOLAS 74/78 Chapter II - Structure, subdivision and stability, machinery and electrical installations for Malaysian Ship	MSN 09/2008	24/12/2008
SOLAS 74/78 Chapter II-2 Construction - Fire Protection, Fire Detection and Fire Extinction	MSN 11/2008	24/12/2008
SOLAS 74/78 Chapter III ó Liveósaving appliances and arrangement	MSN 14/2008	24/12/2008
SOLAS 74/78 Chapter IV ó Radiocommunications for Malaysian ships	MSN 22/2008	24/12/2008
SOLAS 74/78 Chapter VI ó Carriage of cargoes for Malaysian Ship	MSN 30/2008	24/12/2008
SOLAS 74/78 Chapter VI ó Carriage of dangerous goods for Malaysian ships	MSN 32/2008	24/12/2008
SOLAS 74/78 Chapter IX ó Management for the safe operation of ships for Malaysian ships	MSN 34/2008	24/12/2008
SOLAS 74/78 Chapter X ó Safety measures for high-speed craft for Malaysian ship	MSN 35/2008	24/12/2008
SOLAS 74/78 Chapter XI-1 ó Special measures to enhance maritime safety for Malaysian ships	MSN 36/2008	24/12/2008
SOLAS 74/78 Chapter XI-2 ó Special measures to enhance maritime security for Malaysian ships	MSN 37/2008	24/12/2008
SOLAS 74/78 Chapter XII ó Additional safety measures for bulk carriers for Malaysian ships	MSN 38/2008	24/12/2008
MARPOL 73/78 Annex I-Prevention of pollution by oil	MSN 39/2008	24/12/2008
MARPOL 73/78 Annex II- Control of pollution by noxious liquid substances in bulk	MSN 44/2008	24/12/2008
MARPOL 73/78 Annex V- Prevention of pollution by garbage from ships	MSN 45/2008	24/12/2008
AFS 2001	MSN 50/2008	24/12/2008
BWM 2004	MSN 51/2008	24/12/2008
COLREGS 1972	MSN 08/2008	24/12/2008

(Source: Marine Department of Malaysia)

This shows that Malaysia has followed the requirement set in Article 42(1) (a) & (b) of the LOSC. For instance, the enforcement of MARPOL 73/78 and its Annexes I, II and V has made applicable the application of accepted international regulations within Malaysian waters. Nonetheless, the MSO remains silent on the application of transit passage within Malaysian side of the Strait of Malacca and has yet to incorporate the application of Article 233 on safeguards of the marine environment of straits used for international navigation.

Merchant Shipping (Collision Regulations) Order 1984 & Merchant Shipping (Collision Regulations) (Rules for Vessels Navigating through the Straits of Malacca and Singapore) Order 2000

The Merchant Shipping (Collision Regulations) Order 1984 (MSO 1984)⁹⁶ was the initial Malaysian domestic law that dealt with the matters on safety of navigation of vessel transiting through the Straits of Malacca and Singapore.⁹⁷ Nevertheless, MSO 1984 was enacted at the time when Malaysia has yet to ratify the LOSC and the LOSC itself has yet to come into force.⁹⁸ At that time, Malaysia considered the Straits as part of its territorial Sea without having to be bonded by the application of transit passage, rendering it to be obsolete in current practice.⁹⁹ Hence, the MSO 1984 has no application now and it has been replaced by the Merchant Shipping (Collision Regulations) (Rules for Vessels Navigating through the Straits of Malacca and Singapore) Order 2000 (MSO 2000) that came into force from 17 March 2000.¹⁰⁰ The MSO 2000, together with COLREGs and IMO-adopted TSS are applicable throughout the operational area of STRAITREP.¹⁰¹ The MSO 2000 itself incorporates the rules embodied in COLREGs particularly in its Rule 6¹⁰² and IMO Resolution A. 858 (20) 1998 on Routeing Measures Other Than TSS.¹⁰³ Since the TSS lies considerably within Malaysian and Singaporean parts of the Straits of Malacca and Singapore, Singapore has also introduced rules and regulations that resemble the MSO 2000, enforced through the Port Marine Circular No. 20 of 2006 of the Maritime and Port Authority of Singapore.¹⁰⁴

⁹⁶ P.U.(A) 439/1984

⁹⁷ Sativale, above n 2, 11.

⁹⁸ Ibid.

⁹⁹ Section 3 of MSO 2000 states "The Merchant Shipping (Collision Regulations) (Rules for Vessels Navigating through the Straits of Malacca and Singapore) Order 1984 [P. U. (A) 439/84] is revoked."

¹⁰⁰ P.U.(A) 105/2000

¹⁰¹ Mark Heah Eng Siang, 'Implementation of Mandatory Ship Reporting in the Malacca and Singapore Straits' (1999) 3 *Singapore Journal of International & Comparative Laws*, 348.

¹⁰² Rule 6(a) of the MSO 2000 reads "Vessels proceeding in the westbound lane of the traffic separation scheme "In the Singapore Strait" when approaching Raffles lighthouse shall proceed with caution, taking note of the local warning system and compliance with **Rule 18(d) of the International Regulations for Preventing Collisions at Sea 1972**, avoid impeding the safe passage of a vessel constrained by her draught which is exhibiting the signals required by Rule 28 and which is obliged to cross the westbound lane of the scheme in order to approach the single point mooring facility (in approximate position 01 degrees 11'. 42N, 103 degrees 47'. 50E from Phillip Channel)." Rule 6(b) of the MSO 2000 also mentions specifically on COLREGs. It states "Vessels proceeding in the traffic separation schemes when approaching any of the precautionary areas shall proceed with caution, taking note of the local warning system and in compliance with **Rule 18(d) of the International Regulations for Preventing Collisions at Sea 1972**, avoid impeding the safe passage of a vessel constrained by her draught which is exhibiting the signals required by Rule 28 and which is obliged to cross that precautionary area."

¹⁰³ International Maritime Organisation (IMO), 'Routeing Measures Other Than Traffic Separation Schemes: Amended Rules for Vessels Navigating Through the Straits of Malacca and Singapore (Annex I)' (1998) <http://www.imo.org/includes/blastDataOnly.asp/data_id%3D8752/198.PDF> at 12 March 2010

¹⁰⁴ Maritime and Port Authority of Singapore (MPA), 'Port Marine Circular No. 20 of 2006' (2006) <http://www.mpa.gov.sg/sites/circulars_and_notices/pdfs/port_marine_circulars/pc06-20.pdf>

The MSO 2000 has incorporated the rulings laid down in Articles 41 and 42(1) (a) of the LOSC. The MSO 2000 facilitates the safe passage for ships and vessels navigating via the Malaysian side of the Straits of Malacca and Singapore. Nevertheless, like the other domestic laws discussed before, the MSO 2000 is silent on the application of transit passage and Article 233 of the LOSC.

The Exclusive Economic Zone Act 1984

To date, there has yet to be an agreement between Indonesia and Malaysia as to the demarcation of the Exclusive Economic Zone (EEZ) boundary in both Malaysian and Indonesian sides of the Strait of Malacca.¹⁰⁵ The negotiation on the maritime delimitation of EEZ in the strait is still ongoing between the two nations. Despite being narrow and constricted at the southern portion, the Strait of Malacca has a large breadth at its northern part and this means that the Strait has an EEZ corridor where transit passage does not apply to vessels while navigating through that part of the Strait.¹⁰⁶ Therefore, the Exclusive Economic Zone Act 1984 (EEZ 1984) plays an important role in the protection and preservation of that part of the Malaysian side of the Strait of Malacca. The EEZ 1984 Act incorporates the provisions of OPRC 1990, MARPOL 73/78 and it was also designed to implement certain aspects of the LOSC.¹⁰⁷ Part VI of the EEZ 1984 touches the matters on protection and preservation of the marine environment of the EEZ. Section 10 (1) makes it an offence to discharge any oil, mixture containing oil or pollutant into the Malaysian EEZ and any violation towards this provision would result that the offender to be liable to a fine not exceeding one million Ringgit. This clearly is in line with Article 56(1)(b)(iii) of the LOSC¹⁰⁸ and Article 4(1) of MARPOL 73/78.¹⁰⁹ Section 13 of the EEZ 1984 coincides with Article 221 of the LOSC where it provides measures available to Malaysia to take and enforce any means necessary to protect the nation's coastline or any segment or element of the environment or related interests from pollution that may arise from such casualties. Sections 12 and 14 of the EEZ 1984 deals with oil pollution reporting procedures and directions as well as actions to remove, disperse, destroy or mitigate damage which may arise from such casualties. This provision incorporates the rules and regulations laid down by the OPRC 1990 particularly:

¹⁰⁵ M.J Valencia, 'Validity of Malaysia's Baselines and Territorial Sea Claim in the Northern Malacca Strait' (2003) 27 *Marine Policy*; BAKOSURTANAL, *Peta Negara Kesatuan Republik Indonesia*, Peta Negara Kesatuan Republik Indonesia (2009).

¹⁰⁶ Article 36 of the LOSC states "this part (Part III on 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; in such routes, the other relevant Parts of this Convention, including the provisions regarding the freedoms of navigation and overflight, apply." For further reading on straits where transit passage does not apply, refer Lewis M. Alexander, 'Exceptions to the transit passage regime: Straits with routes of similar convenience' (2009) 18(4) *Ocean Development and International Law*, 479-491.

¹⁰⁷ Sein, above n 74, 124-148.

¹⁰⁸ Article 56(1)(b)(iii) of the LOSC articulates that "In the exclusive economic zone, the coastal State has jurisdiction as provided for in the relevant provisions of this Convention with regard to the protection and preservation of the marine environment."

¹⁰⁹ Article 4(1) of MARPOL 73/78 reads "Any violation of the requirements of the present Convention shall be prohibited and sanctions shall be established therefore under the law of the Administration of the ship concerned wherever the violation occurs. If the Administration is informed of such a violation and is satisfied that sufficient evidence is available to enable proceedings to be brought in respect of the alleged violation, it shall cause such proceedings to be taken as soon as possible, in accordance with its law."

- (a) Article 3 on oil pollution emergency plans;
- (b) Article 4 on oil pollution reporting procedures;
- (c) Article 5 on action on receiving an oil pollution report;
- (d) Article 6 on national and regional systems for preparedness and response;

The Malaysian Maritime Enforcement Agency Act 2004

The Malaysian Maritime Enforcement Agency Act 2004 (MMEA) was enacted with the purview to increase maritime security of the Malaysian waters, including the Malaysian side of the Strait of Malacca.¹¹⁰ Sections 7(4), 7(5) and 7(6) of the MMEA incorporate the provisions of Article 19(2) of Part II of the LOSC on the regime of innocent passage into domestic application in Malaysia. Section 7(4) of the MMEA provides that any ships or vessels sailing within Malaysian waters cannot be stopped if they are exercising the right of innocent passage. The passage can only be suspended by the Malaysian Maritime Enforcement Agency (the Agency) if these vessels cease to exercise the right innocent passage by indulging in certain illegal activities described in Section 7(6) of the MMEA, which includes any acts of pollution.

The Agency is responsible for performing its duties within the Malaysian Maritime Zone but as far as the matters on controlling and preventing maritime pollution are concerned, the MMEA authorises the Agency to exercise its powers on the high seas.¹¹¹ As such, the MMEA complements other domestic laws in Malaysia regarding prevention of marine pollution and maritime safety like the EQA, the EEZ 1984 and the MSO.¹¹² The broad powers entrusted to MMEA may cause clashes with powers given to other enforcement officers, for instance, the marine police and the port officers under other statutes like the EQA, the MSO and the like.¹¹³ This can be avoided with the existence of proper co-ordination and cooperation among these statutory enforcement bodies.¹¹⁴ Nevertheless, despite having provisions on innocent passage, the MMEA, like other domestic laws of Malaysia does not enunciate any laws pertaining to the regime of transit passage, as embodied in Part III of the LOSC.

CONCLUSION

Having regard that the nation is situated along the Strait of Malacca, one of the most important maritime superhighways on the planet, Malaysia has endeavoured to ensure that it has adequate laws and policies on matters pertaining to maritime affairs. Malaysia has signed and ratified a number of international maritime-related conventions namely the LOSC, MARPOL 73/78, SOLAS 74/78, COLREGs and many more. Some provisions of these international

¹¹⁰ The Preamble of the MMEA states "An Act to establish the Malaysian Maritime Enforcement Agency to perform enforcement functions for ensuring the safety and security of the Malaysian Maritime Zone with a view to the protection of maritime and other national interests in such zone and for matters necessary thereto or connected therewith."

¹¹¹ Section 6(3)(b) of the MMEA.

¹¹² Sein, above n 74, 124-148.

¹¹³ Ibid.

¹¹⁴ Ibid.

conventions have been incorporated and scattered around into a number of Malaysian domestic laws via the EQA, EEZ Act, MMEA, MSO and in numerous Malaysian Marine Notices, issued by the Marine Department of Malaysia. To date, there is only one piece of Malaysian legislation that relates specifically to safety of navigation in the Malaysian side of the Strait of Malacca that is the MSO 2000. However, the MSO 2000 only regulates shipping through the STRAITREP operational area in the Strait of Malacca without elucidating other relevant regulations pertaining to transit passage.

Most of Malaysian domestic laws on maritime affairs are silent on the application of Part III of the LOSC on transit passage as well as on Article 233 of Part XII of the LOSC on environmental safeguards with respect to straits used for international navigation. Given the fact that the Malaysian side of the Strait of Malacca is an important shipping corridor, it is proposed that Malaysia to have a specific statute governing safety of navigation and protection and preservation of the marine environment of the Strait, and not just by having the laws to be scattered into numerous legislations.

Malaysia has been a party to the LOSC for the past 14 years. The current situation is that Malaysia has yet to declare the application of the transit passage regime in its part of the Strait of Malacca even though the LOSC is in force. Hence, it is imperative for Malaysia to take regard of this current situation and give proper effect to the legal regime on straits used for international navigation. It may be that the reason these laws are not being incorporated into Malaysian domestic laws because of the ambiguity and vagueness of the words used in the said articles. For example, as discussed earlier in **Sub Heading 3.3**, Article 233 is said to be ambiguous as the LOSC does not interpret the meaning of certain phrases mentioned in it such as “major damage”, “appropriate enforcement measures” and “*mutatis mutandis*”. Nevertheless, by virtue of the fundamental principle of *pacta sunt servanda* spelled out in the law of treaties, Malaysia is bound to carry out its duties and obligation under the LOSC in utmost good faith. Once a state has ratified or acceded to a treaty, the State is expected to incorporate it. If not, there is a legitimate expectation that decision-makers would act in accordance with the treaty.¹¹⁵ Therefore, Malaysia should seriously consider bringing its maritime laws and regulations, particularly the ones relating to safety of navigation and marine pollution prevention of its part of the Strait of Malacca, to be more in line with the LOSC and other relevant IMO Conventions.

¹¹⁵ Minister of State for Immigration and Ethnic Affairs v Ah Hin Teoh (1995) 128 ALR 353.

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