

Evaluation of the Cooperative Mechanism in the Straits of Malacca and Singapore in the context of Article 43 of UNCLOS Shigeki Sakamoto, Professor of International Law, Kobe University

Thank you very much for your insightful and provocative presentation, Prof. Beckman..

As you rightly pointed out in your previous paper titled “Burden-Sharing in the Straits of Malacca and Singapore—Past Discussions and Future Prospects—”, “the legal regime governing straits used for international navigation gives much greater weight to the navigational interests of the international community than to the environmental and security interests of the littoral states.” The rights of the littoral states to regulate ships exercising transit passage are severely restricted. On the other hands, littoral States bears the heavy burden with regard to the maintenance of navigational safety of those ships. This is the starting point for discussing this issue. It seems to me that the Cooperative Mechanism in the Straits of Malacca and Singapore is an answer of embodiment of the cooperation among user States, littoral States and stakeholders on voluntary basis.

Not to mention, this Cooperative Mechanism in the Straits of Malacca and Singapore is very unique Mechanism. This uniqueness comes from the diversity of actors which play each roles in order to enhance safety and environmental protection in the Straits of Malacca and Singapore; international organization(IMO), States(littoral States and user States) and Non-State Actor(stakeholders, like INTERTANK ,the shipping industries(e.g. the Japanese Shipowners’ Foundation ) and Nippon Foundation). Behind this background, there is the fact that the idea that the safety of the sea is provided free is out of date and must be changed. It is necessary to consider a new mechanism where the cost of safety is borne not only by the littoral States but the States and stakeholders that use the Straits. In order to maintain the sustainable use of the straits, especially the straits constituting an international shipping route, not only State but also stakeholders have to share costs in a fair balanced manner.

Needless to say, any cooperative measures must be in conformity with international law including UNCLOS. Article 43 of UNCLOS requires the cooperation of user States and littoral States bordering a strait in the establishment and maintenance of navigational and safety aids and improvements to facilitate navigation. This cooperation may be either direct or through an appropriate international organization like IMO. Unfortunately, Article 43 provides no direct enforcement mechanism to ensure such cooperation. In this sense, the Cooperative Mechanism in the Straits of Malacca and Singapore is of much note.

However, when I look at the Cooperative Mechanism, a question comes to my mind. How should we evaluate “Co-operative mechanism” in the context of the Article 43? In the 1996 international conference organized by the Institute of Policy Studies, Singapore (IPS) and the IMO, Dr. Lim Lei Theng raised the question that .the reference in Article 43 to “user states” leaves open the question of how such user state should be

identified, flag states of ships, including flag of convenience states or shipowner's. state, exporting states or importing state. In addition, the reference to "user states" in Article 43 raises another question, because the word "user States" is applied, not the word "users". At the close of the 1999 Singapore Conference, Professor Tommy Koh pointed out as follows: "With respect to Article 43, 'user states' must include flag states, exporting states, and receiving states, as well as nationals of such states, both national persons and juridical entities, including ship-owners, marine insurers and major oil companies."

However, does the word "user States" really include nationals of the state concerned in accordance with the rule of interpretation embodied in the Vienna Convention on the Law of Treaties? Reflecting on the ordinary meaning of "States", the shipping industries or oil companies are really included in the word "user State"? If this answer is negative, what role do "users and stakeholders" play in the context of Article 43 of UNCLOS, especially referring to agreement between user states and states bordering a strait? As a matter of fact, even if the word "user" were adopted in Article 43, we cannot solve the problem, because there are no criteria defining the "users" in itself. In such a situation, what can we require the stakeholders, like the shipping industries or oil companies in the framework of cooperative mechanism except on the voluntary basis?

Unfortunately in the Cooperative Mechanism in the Straits of Malacca and Singapore, the support from private industries and other stakeholders for the Aids to Navigation Fund was scanty. No voluntary contributions have been announced except Nippon Foundation of Japan in 2007.

In this situation, how to develop a funding mechanism that could be used as a mechanism in other area of the world as well? Could we extend this kind of "Cooperate Mechanism" to another strait as you pointed out? I agree with Prof. Beckman that some form of burden-sharing arrangement is necessary and desirable in other international straits. However, as might be expected, I have a slight doubt about it, just only because it is too difficult to find the stakeholder like the Nippon Foundation who is willing to contribute the financial support to the maintenance of aids to navigation in other strait. If the argument's target were states, not the stakeholders, the situation is the same. With the exception of Japan and some Asian countries like China and Korea, user States have not shown any interest in co-operative arrangements under Article 43 for the straits. The Straits of Malacca and Singapore are very important to three countries, because these countries are dependable upon the import by the sea. Most of the oil tankers have to take the only route from the oil export countries to these three countries. The Cooperative Mechanism in the Straits of Malacca and Singapore is seems to me an

exceptional one, which cannot be a model to promote cooperation in the other area at this moment.

Thank you very much.