

Bangladesh Flag Vessels (Protection) Ordinance, 1982 Time to chart a new course

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IN June 1979, the member states of the United Nations met in Manila for the 5th session of UNCTAD conference. Earlier in the 1970s (1973/74), UNCTAD had proposed a cargo sharing rule of 40/40/20 giving each of the trading partner countries the right to carry 40 per cent of the liner cargo generated by their own foreign trade and leaving the remaining 20 per cent for third flag carriers.

One of the objectives of UNCTAD V was to discuss the progress the proposal adopted in 1973/74 and work out the necessary requirements to give it the effect of an international regime. The conference also resolved to ensure equitable participation of developing countries in the carriage of all cargo and more specially bulk cargo generated by their own international trade.

Moreover, many developing countries were trying to sustain their own maritime fleet and many were looking forward to inaugurate their own new merchant fleet to save the foreign exchange in the carriage of their own seaborne trade as well as earn revenue by participating in cross trades.

The UNCTAD Code of Conduct for Liner Conference needed an international convention to become international requiring 24 states representing 25 per cent of world liner tonnage. By early 1980s adequate countries adopted the code to give it the effect of an international convention.

The United Nations Convention on a Code of Conduct for Liner Conferences came into force on the 6th October 1983. Bangladesh had acceded to the convention on the 24th July 1975 and in light of it, the Bangladesh Flag Vessels (Protection) Ordinance 1982 was promulgated. A subsequent gazette notification SRO 343-2/82 was incorporated into the ordinance incorporating the following clause in recognition of UN Code of Conduct for Liner Conference

"7. UNCTAD Code of Conduct: In disposing of an application for waiver under these rules, the Prescribed Authority shall give due consideration to such principles of UNCTAD Code of Conduct for Liner Conference as are practically applicable."

The ordinance contained two variations of waivers, one is a "general waiver" and the other is a "certificate of waiver". The first is a kind when granted, the third flag carriers are exempted from applying for a waiver for each voyage. While a certificate of waiver is a case by case situation where an application is to be lodged for each voyage.

Bangladesh is a developing maritime nation which commenced its sailing in international waters after independence in 1971 with the lone merchant marine fleet in public sector under the banner of "Bangladesh Shipping Corporation". The public sector enterprise has not made much progress despite all the support it could get from the government while there has been some progress in private sector, a few operators have emerged carrying the Bangladesh flag to international waters. However, none of the operators whether in public or private sector have the resources nor the capability to participate truly in the international liner trade of Bangladesh. The liner trade is largely transformed into containerised traffic today making it almost beyond the reach of least developed countries like Bangladesh. The advent of containerisation though revolutionised the carriage of goods by sea as well as facilitated the concept of intermodalism but it favoured only those countries who were rich and had plenty of resources to undertake the project and execute containerisation successfully.

"Developed countries adopted containerisation swiftly so that the trade routes between North America, Europe, Japan and Australasia were containerised within six to seven years. The need and resources of developing countries, however, were not the same. For example, the expensive labour which impelled the industrialised countries to develop specialised cargo handling techniques is not a driving factor in countries where labour is cheap and plentiful. The high cost of container terminals and their associated infrastructures represented a considerable drain on scarce resources in developing countries. Nevertheless, containerisation in developed countries created very strong pressures for developing countries to follow suit." (OECD, The Maritime Transport, 1985).

To develop a container fleet also requires substantial investment not only in modern purpose built cellular ships but also a substantial number of different types and sizes of containers. It further requires skilled manpower and investment in IT in terms of both hardware and software.

Bangladesh has neither the necessary resources nor the skill to successfully adopt containerisation. As such, the traditional or developed maritime nations who could

quickly adopt and containerise their fleet became the beneficiaries of world sea borne trade. Bangladesh, however, has a different situation. Its ports are not deep enough to allow larger ships to call at nor the volume of traffic generated by its own foreign trade is sufficient enough to necessitate the direct calls of larger ships which can carry up to 4000 TEUs or even more on board. So, this small international liner trade of Bangladesh became more specifically a feeder trade i.e. the containers belonging to the international liner trade of Bangladesh are transhipped at any of the ports at Singapore/Malaysia or Sri

to open the gate for all to come and participate. Most countries in the world exercise their right to protect their own flag carriers under its own preferential policy or under the UN Regime. China emphasises on self-reliance in shipping its international trade, Egypt reserves 30 per cent for its flag carriers, France requires two-thirds of its oil imports to be carried by its flag carriers, India insists for 90 per cent of oil in its flag carriers despite the fact that its ships can only meet about 30 per cent of total import, Indonesia reserves 45 per cent for its flag carriers, Japan and many developed world countries offer incentives to their flag

by national flag carriers whether the policy should be based on an individualistic approach or on the basis of UN Convention on a Code of Conduct for Liner Conferences. In the latter case, it should be correctly explained and incorporated in the law and not leave for novices to mislead and create chaos. We cannot afford to jeopardise our international trade either. After all shipping happens to be a derived demand and there cannot be any demand for shipping in the absence of and demand for trade. We need to protect our fleet without jeopardising the trade.

The only course of action for the policy makers will be to recognise the UN Convention and correctly formulate our own policy. The 40 per cent should be reserved for our flag carriers and the remaining 60 per cent should be freed where the flag operators will also be able to compete on a level playing field. The general waiver if at all should be granted to 60 per cent and specific certificate of waiver should be considered on a time to time or case by case basis in the event there is no national flag carrier to lift their 40 per cent quota.

So, the obvious question that arises now is the monitoring of the 40 per cent share of flag operators. It is simple, the Department of Shipping should ask the mainline operators to ensure that they reserve 40 percent of their total container traffic to Bangladesh flag operators. The directive must include a penalty clause in the event of a non-compliance. The Principal Officers of Mercantile Marine Department at Chittagong and Mongla should oversee the protocol and maintain records.

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Lanka by smaller feeder ships. In other words, the feeder operators basically act for the mainline operators all of whom happen to be third flag carriers as far as Bangladesh trade is concerned. So, Bangladesh flag operators in the feeder trade are not main carriers as such but effectively the sub-contractors for the third flag carriers to carry their containers between Bangladesh ports and a nearest transshipment port.

It must be noted carefully that had the Chittagong port was a calling port for the container ships then it would have been impossible for Bangladesh flag operators to take any part in it with an investment that is presently beyond the reach of any flag operator.

So, the recent fiasco involving the general flag waiver was completely uncalled for and was very inefficiently handled. The UN Convention on a Code of Conduct for Liner Conferences gives only 40 per cent share to the trading partner country. In other words, a flag waiver is required only for this 40 per cent of the international liner trade in event there is no flag vessel to lift the cargo and not for the remaining 60 per cent.

The act promulgated in 1982 was too vague in recognising the UN Convention, could not even correctly mention the name of the convention, and remains ambiguous to a large extent as to the flag waiver in the container traffic. Besides the Bangladesh flag operators have made a recognisable improvement in capacity build up in recent years since 1982 to successfully participate in the feeder trade. It is interesting to note that the National Shipping Policy drafted only a few years ago also failed miserably to address the issue of flag protection/waiver.

The ambiguity has been largely responsible for the impasse in the recent stoppages at Chittagong ports in relation to the feeder trade. The flag operators represented by Bangladesh Ocean Going Shipowners' Association (BOGSA) and the third flag carriers represented by Chittagong Feeder Trade Committee (CFTC) both took, in my view, knowingly or unknowingly incorrect stand on the right of carriage. The situation also demonstrated a distinct lack of understanding of Admiralty/Maritime law by our legal and judicial fraternity.

The cabinet is also reported to be indecisive on the matter. CFTC with their powerful backers in the international maritime community takes the view that there is no necessity to reserve any liner trade for the flag operators and must be opened to all in light of free trade under emerging international order. Most of the local trade bodies including the BGMEA also tacitly supported the CFTC view. The BOGSA on the other hand depended completely on the Ordinance which itself needs to be clarified.

In my opinion, none of the parties in the dispute had presented a logical or rational argument nor the correct interpretation of the UN Convention. I am sure the correct interpretation would have taken this confusion away and there would be hardly any room for any further dispute over the issue of cargo sharing.

The UN Convention has very clearly stipulated the 40/40/20 arrangement without any shed of ambiguity and the right of Bangladesh over the international liner trade that is generated by its own foreign trade is just 40 percent. It cannot claim its exclusive right over the remaining 60 per cent but can certainly compete with the third carriers. This 60 per cent should be a level playing field for all flag carriers without any requirement of a flag waiver. A flag waiver should only be applicable in the event the flag carriers are unable to lift their 40 per cent quota.

Bangladesh is a developing maritime nation and it will be wrong

operators.

While preference of flag carriers remains a covert or overt policy for most governments, it is not only immature or even futile to suggest any scrapping of Bangladesh Flag Protection Ordinance in totality. We must encourage and support our own entrepreneurs and the investors who have courageously invested in the local flag despite all the demerits of Bangladesh Registry and look positively into the further development of our own fleets.

However, the Ordinance should also clearly spell the cargo sharing



Bapex yet to move in gas block 11 despite minister's nod

DR BADRUL IMAM

THE State Minister for Energy A K M Mosharrar Hossain deserves credit for his announcement of the decision to allocate gas block 11 to Bangladesh Petroleum Exploration and Production Company Limited (Bapex). This is perhaps the first time such a move is made over more than ten years now. The block 11 is situated in parts of the districts of Mymensingh, Netrakona and Kishoreganj and lie just west of the prospective block 12 in which several gas discoveries were previously made. Block 11 is perhaps the only gas block which is considered prospective but has not previously been given to any foreign oil company (IOC). There has not been any exploration drilling done earlier in the block.

However, although the above decision was made in December 2002 i.e. about five months ago, Bapex has not received any official directive from Petrobangla to that effect. It looks like the matter has been twisted by a group with vested interest so as to make undue complications with an aim to deprive Bapex of its rightful place in the gas sector. The petroleum observers are wondering who is actually in charge; the energy minister, the petroleum ministry, the Petrobangla or a powerful but unspecified quarter which does not want to see Bapex take a share in gas exploration, thus breaking the monopoly of the international oil companies (IOC) in the petroleum business of this country.

It may be mentioned that over the last ten years Bapex was gradually driven out of its own lands i.e. from all gas blocks in order to make room for the foreign oil companies. All the 23 gas blocks of the country were rendered open for foreign companies and Production Sharing Contracts (PSC) were negotiated with various companies. This was done in spite of strong opposition from the local experts and petroleum observers who felt that total dependence on foreign oil companies in petroleum activities of the country will have negative impacts on the overall petroleum economics. As the foreign companies like Cairn Energy, Occidental, United Meridian, Shell, Unocal, Tullow set their bases and geared up their machineries into the fields, Bapex quietly contemplate an uncertain and dark future knowing well that a group with vested interest was up on the loose to cripple it. In the mean time the negative impacts of giving away almost all the prospective gas blocks to foreign oil companies started to show up, as forecasted by the local experts. Firstly the foreign oil companies, aiming at immediate

profit from the discovered gas demanded outside market to export gas without considering the consequence on the longer term energy security of the country. Secondly, the purchase of IOC gas by Petrobangla at high international price and selling it at domestic price within the local market converts Petrobangla from a profit making organisation to a losing enterprise. The realisation of the government perhaps came at this point, though rather lately, that Bapex should be given its role to play. Since block 11 was the only prospective block left open, the minister made the

as failed and cancelled. It was at this time the energy ministry decided to allocate the block 11 to Bapex. But a vested interested quarter came up with argument and lobbied against such a decision. It has even been reported that representative from an IOC threatened that if the block is given to Bapex, they would claim \$8 million as compensation towards the unsuccessful negotiations.

The matter was sent to legal expert to know if there is any bar for the block to be given to Bapex now. The renown petroleum legal consultant firm Dr Kamal Hossain and Associate was engaged to give

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announcement that this block is to be given to Bapex.

Ideally, Bapex should have mobilised its men and machinery to block 11 and started work immediately after such an announcement from the top office of the government. "We are ready with our men and equipment to start work immediately, our seismic crew is ready to move to the field for seismic survey which we would do initially. We would then locate drilling point and target for drilling" said Mr. Mokbul Elahi, Managing Director of Bapex. But strangely, Bapex cannot do that because it has not received any official directive from Petrobangla to move to block 11 although it is about five months since the energy minister announced its decision for the above. So what happened in the mean time?

A point was raised that there were some negotiations between Petrobangla and two IOCs namely Tullow Oil (Ireland) and Petronas Carigali (Malaysia) with respect to block 11 in early 2001 although nothing was agreed upon and no PSC signed. During the course of discussions with Petrobangla the two companies differed on points of their mutual interest specially with respect to who would get the operatorship in case of a PSC settlement. Since the companies could not resolve their dispute, Petrobangla asked the companies to settle the matter within June 2001. But more than one year passed and the companies did not respond, nor did they come up with any alternative proposal whatsoever. This prompted the Bangladesh side to deem the negotiations

legal opinion. The consultant firm after studying the case, clearly mentioned that since no MOU or PSC was signed previously with any oil companies, there is no bar to allocate the block 11 to Bapex. The consultant observed that during an initial negotiation with Tullow and Petronas in early 2001, Petrobangla, observed that the matter was being dragged without settlement for long and requested the companies to finalise the deal within June 2001. The consultant firm noted that despite the passage of more than one and a half years, the PSC negotiation was still not done due to lack of response from the companies and therefore, the negotiation could well be considered null and void and the block free to be allocated to Bapex.

Thus as per the legal advice, the Chairman of Petrobangla sent, in February 2003, formal letters to the head office of both Tullow Oil and Petronas Carigali informing them that since there have been such protracted delays in response from there side in order to pursue towards negotiation, Bangladesh is withdrawing from negotiation and treating the negotiation closed in accordance with the right reserved in paragraph 3 of the letter of reference.

The above should have been enough of a clearance for Bapex to get block 11 without any further problem. But the matter dragged on further and the file was again sent to the ministry of energy for opinion. The energy ministry did not have anything to add to the file and sent it back to Petrobangla for taking necessary action. But the action was not forthcoming, according to

the sources inside. It seems somebody or some group apparently had enough influence so as to bar smooth implementation of the government's directive favouring Bapex.

Bapex is the only national organisation which has the capability of running full scale petroleum exploration and production activities. The last gas field discovery Bapex made was in 1996 in Saldanadi near Comilla. The field was then developed by Bapex and is now producing gas. As a highly placed official in Bapex explained "the successful completion of seismic work which Bapex recently completed for Tullow and Chevron in block 9, on a contract basis, testifies the international standard of the job Bapex could perform. Judging the excellent quality of seismic survey which Bapex did for Chevron and Tullow, Shell oil is reportedly contemplating to give contract for seismic job to Bapex in Shell's own block. While the quality of job is same, IOCs find Bapex lot cheaper than any other international seismic service company." What the official of the Bapex was trying to point out is that there is no point in asking if Bapex is capable of doing international standard work. It is perhaps more important to question who are holding Bapex back from coming up as a credible organisation capable of contributing enormously to the development of the country.

From the above discussion it appears that an invisible hand uses its influence to hold back any move which would break the monopoly of IOCs in gas exploration business in Bangladesh. It also apparently does not like Bapex to be strengthened to take a rightful position as an exploratory organisation. The petroleum observers are wondering who are these groups? Are they the local agents of IOCs who fear loss of commission earning if Bapex is given gas blocks for exploration or is it a group within the administration whose affinity with the IOCs is stronger than that of their own country? Whoever it is or whatever be the cause, nobody denies that Bapex has been overly neglected for the last one decade.

The latest directive and announcement made by the state minister of energy confirm government's commitment to hand over gas block 11 to Bapex. Immediate interference from the top of the hierarchy in the government is perhaps necessary to see that Bapex can really start exploration in gas block 11 without further delay.

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