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## OBSERVATIONS ON THE INTERPRETATION AND APPLICATION OF ARTICLE 43 OF UNCLOS WITH PARTICULAR REFERENCE TO THE STRAITS OF MALACCA AND SINGAPORE

### I. INTRODUCTION<sup>1</sup>

STUDENTS of the law of the sea prefer to work from the official publication of the United Nations Convention on the Law of the Sea (UNCLOS).<sup>2</sup> Immediately preceding the text of the Convention, they find in that publication eloquent and informative remarks by the President of the Third United Nations Conference on the Law of the Sea, and the organizer of our meeting here, Ambassador Tommy TB Koh. Those remarks are entitled, "A Constitution for the Oceans."<sup>3</sup> This description is an accurate portrayal of the role envisaged for the Convention in international law and international affairs, a role it is now well on the way to achieving.

The description is also an apt characterization of Article 43 of the Convention. Like many provisions of constitutions, Article 43 leaves it to the future to determine precise procedures and specific measures, but offers us authoritative guidance regarding goals, process and participation. Seen in this light, the institutional significance of Article 43 is the guidance it provides to straits states, user states and international organizations about how certain problems in straits should

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<sup>1</sup> This paper includes references to certain matters that came to the author's attention when he served as US Representative and Vice-Chairman of the US Delegation to the Third UN Conference on the Law of the Sea. The recollections and interpretations are however his own. The author expresses his thanks to J Ashley Roach of the Office of the Legal Adviser of the US Department of State for supplying copies of relevant IMO documents, some of which expressly state, "For reasons of economy, this document is printed in a limited number."

<sup>2</sup> United Nations Convention on the Law of the Sea, Dec 10, 1982, UN Pub Sales No E.83.V.5 (hereinafter referred to as the Convention).

<sup>3</sup> *Ibid*, p xxxiii.

be approached in the context of the Convention's overall system for promoting safety of navigation and protection of the marine environment.

## II. THE TEXT

Like all legal texts, Article 43 should be studied closely and analysed in context to understand its purpose and effect. The appropriate starting point is the text itself:

User States and States bordering a strait should by agreement co-operate:

- (a) in the establishment and maintenance in a strait of necessary navigational and safety aids or other improvements in aid of international navigation; and
- (b) for the prevention, reduction and control of pollution from ships.

Article 43 "was put forward with the case of shipping passing through straits such as Malacca particularly in mind."<sup>4</sup>

## III. THE DUTY TO CO-OPERATE

Article 43 is unnecessary to authorise co-operative agreements between straits states and user states. So long as they respect their duties to other states under the Convention, they are free to conclude such agreements even without such a provision. Article 311 of the Convention makes this clear.

The legal significance of Article 43 is that it mandates co-operation and agreement. Article 43, however, is not the only, or perhaps even the main, source in the Convention for a duty to co-operate to promote navigation safety and protect the marine environment. In light of this, it is a mistake to place too much emphasis either on the use of the word "should" in the text of Article 43 or on the geographic scope of application of Article 43.

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<sup>4</sup> SN Nandan and DH Anderson, "Straits Used for International Navigation: A Commentary on Part III of the United Nations Convention on the Law of the Sea 1982", (1989) 60 BYIL 159 at 193 (Ambassador Nandan of Fiji was Rapporteur of the Second Committee of the Conference whose mandate included the territorial sea and straits. Mr Anderson of the Foreign and Commonwealth Office was a member of the UK Delegation). Art 43 derives from a UK proposal. *Official Records of the Third United Nations Conference on the Law of the Sea* (hereinafter *Off Rec*), v III, p 183, UN Doc A/CONF.62/C2/L.3.

If the term “should co-operate” is not the same as “shall co-operate”, it is also not the same as “may co-operate”. Where co-operation and agreement are being mandated, it is not clear how much difference (if any) it makes whether one says “shall” or “should”. The Convention reflects this fact and often uses formulations such as “should”, “shall seek to”, “shall endeavour to”, “shall promote” or “shall as appropriate” in this connection in other places. This is especially true where the object of the co-operation is a matter that, under the Convention, engages the rights of a coastal state.<sup>5</sup> This is in fact the practical situation with respect to navigation aids and other improvements in aid of navigation in the territory or territorial sea of a straits state: the straits state has the right to deploy them on its own if it wishes, subject of course to international technical standards and other obligations.

The most forthright articulation of collective duties is to be found in Part XII of the Convention, which applies to all of the marine environment. It begins with the clarion call of Article 192, “States have the obligation to protect and preserve the marine environment.” Where the objective circumstances require co-operation in order to protect and preserve the marine environment, a duty to seek co-operative means to achieve those ends is implicit in the basic obligation set forth in Article 192 and is reinforced by the good faith and abuse of rights provisions of Article 300.

Part XII makes this clear. It is replete with references to co-operation and joint action. In particular, Article 194, paragraph 1, provides, “States shall take, *individually or jointly as appropriate*, all measures consistent with this Convention that are necessary to prevent, reduce and control pollution of the marine environment from any source.”<sup>6</sup> The third paragraph of the same article makes the link to safe navigation clear, specifying that these measures “shall include ... those designed to minimise to the fullest possible extent ... pollution from vessels, in particular measures for preventing accidents and dealing with emergencies, ensuring the safety of operations at sea, preventing intentional and unintentional discharges, and regulating the design, construction, equipment, operation and manning of vessels.”<sup>7</sup>

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<sup>5</sup> See, *eg*, Convention, Arts 61(2), 63, 123, 207(3)-(4), 210(4), 212(3).

<sup>6</sup> Emphasis added.

<sup>7</sup> In a similar vein, Art 211 requires states, acting through the competent international organisation or general diplomatic conference, to promote the adoption, wherever appropriate, “of routing systems designed to minimise the threat of accidents which might cause pollution of the marine environment.”

In addition, to the extent that the area of the Straits of Malacca and Singapore might be regarded as an enclosed or semi-enclosed sea under the Convention, Article 123 provides for co-operation and co-ordination among the riparian states and specifically authorises them to invite other interested States or international organisations to co-operate with them.

#### IV. LEGAL GEOGRAPHY

Article 43 appears in Part III of the Convention on straits used for international navigation, and more specifically in Section 2 of Part III on transit passage of straits. Section 2 of Part III

applies to straits which are used for international navigation between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone.<sup>8</sup>

The purpose is to secure a right of transit passage, defined as

the freedom of navigation and overflight solely for the purpose of continuous and expeditious transit of the strait between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone.<sup>9</sup>

This means that for the functional purposes of applying the transit passage regime pursuant to Section 2 of Part III of the Convention, the Straits of Malacca and Singapore rationally may be regarded as a single strait or single system of straits comprising those parts of the territorial seas<sup>10</sup> of each of three straits states that together separate one part of the high seas or an exclusive economic zone from another part of the high seas or an exclusive economic zone.<sup>11</sup>

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<sup>8</sup> Convention, Art 37.

<sup>9</sup> Convention, Art 38. With Singapore specifically in mind, Art 38 makes clear that "the requirement of continuous and expeditious transit does not preclude passage through the strait for the purpose of entering, leaving or returning from a State bordering the strait, subject to the conditions of entry to that State."

<sup>10</sup> The reference to the territorial sea, here and elsewhere, is a simplified formulation that, for juridical accuracy, should be read to include other waters in straits that are not part of the high seas or an exclusive economic zone. The application of the straits articles is not limited to the territorial sea. Convention, Arts 34-37, 45(1).

<sup>11</sup> It should also be borne in mind that Part IV of the Convention, on archipelagic states, permits Indonesia to establish archipelagic baselines enclosing archipelagic waters. Pursuant to Art 53 of the Convention, the regime of archipelagic sea lanes passage applies within "archipelagic waters and the adjacent territorial sea" and thus, depending on the location of the sea lanes, also may apply within the Straits

Nothing in Part III of the Convention affects "the legal status of the waters beyond the territorial seas of States bordering straits as exclusive economic zones or high seas."<sup>12</sup> Pursuant to Article 36, Part III does not apply "if there exists through the strait a route through the high seas or through an exclusive economic zone of similar convenience with respect to navigational and hydrographical characteristics; in such routes, the other relevant Parts of [the] Convention, including the provisions regarding the freedoms of navigation and overflight, apply." Article 36 is a further indication that the standard for determining the parts of the territorial sea to which the regime of passage of straits applies is not a strictly geographic one, but a functional one that reflects the underlying purpose of securing a meaningful and convenient right of passage.

The application of these limitations to the Straits of Malacca and Singapore is not entirely free from doubt. Substantial areas of the Straits are seaward of the territorial sea. There is, however, no high seas or exclusive economic zone route running completely through the Straits "between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone."<sup>13</sup> Assuming *arguendo* that the Article 36 exclusion is to be applied functionally rather than geographically, and thus applies even if a high seas or exclusive economic zone route does not run completely through a strait, this means that Part III does apply to areas of the territorial sea even where there is an adjacent route through the high seas or an exclusive economic zone if that route is not of similar convenience with respect to navigational and hydrographical characteristics.

## V. TYPES OF STRAITS

Part III applies two different regimes to different straits used for international navigation: a newly articulated regime of transit passage in Section 2 that applies to most straits, and a traditional, but refined, regime of innocent passage in Section 3 that applies to some other straits. With relatively minor exceptions that need not detain us here,

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to ships and aircraft traversing the Indonesian archipelago. This is legally interesting because Art 54 incorporates by reference into the regime of archipelagic sea lanes passage many of the provisions regarding transit passage, but not Art 43. However, insofar as the Straits of Malacca and Singapore are concerned, this legal difference is without practical importance, because Art 43 does apply to the Straits as such.

<sup>12</sup> Convention, Art 35(b).

<sup>13</sup> See Convention Arts 37-38.

the Section 2 regime of transit passage “applies to straits which are used for international navigation between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone.”<sup>14</sup> This includes the Straits of Malacca and Singapore.

Section 2 spells out the transit passage regime in detail. By contrast, apart from prohibiting suspension of innocent passage, Section 3 incorporates by reference the innocent passage regime that applies generally in the territorial sea pursuant to Part II of the Convention.<sup>15</sup> It is clear from this structure and from the *travaux préparatoires* of the Convention that the transit passage and innocent passage regimes should be viewed as alternatives. One of the most important reasons for a new articulation of a straits regime as transit passage was to preclude the application of the rules traditionally associated with innocent passage in most straits. Innocent passage does not apply to overflight and requires submarines to navigate on the surface;<sup>16</sup> transit passage applies to overflight and does not require submarines to navigate on the surface.<sup>17</sup> Both regimes address similar issues, but their solutions to those issues are different. This is evident with respect to regulation of safety of navigation and prevention of pollution from ships: the innocent passage regime accords significant unilateral powers to the coastal state,<sup>18</sup> while the transit passage regime requires that a straits state’s regulations regarding the safety of navigation and the

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<sup>14</sup> Convention, Arts 37-38. “[I]f the strait is formed by an island of a State bordering the strait and its mainland, transit passage shall not apply if there exists seaward of the island a route through the high seas or thorough an exclusive economic zone of similar convenience with respect to navigational and hydrographical characteristics.” *Ibid*, Art 38, para 1. See also *ibid*, Art 35(c).

<sup>15</sup> In this regard, Section 3 performs essentially the same function and takes the same approach as Art 16, para 4, of the 1958 Convention on the Territorial Sea and the Contiguous Zone. The primary legal significance of the separation of the regime of straits from the general regime of the territorial sea in separate Parts of the 1982 Convention is to be found in its newly articulated transit passage regime in Section 2 of Part III.

<sup>16</sup> Convention, Arts 17, 20.

<sup>17</sup> Convention, Arts 38, 39(1)(c).

<sup>18</sup> See Convention, Arts 21, 22, 211(4), 220(2); see also Arts 18, 19 & 25(1) regarding the powers the coastal state with respect to passage that is not innocent. Pursuant to Art 21(2), coastal state laws and regulations “shall not apply to the design, construction, manning or equipment of foreign ships unless they are giving effect to generally accepted international rules or standards.”

regulation of maritime traffic be approved by the competent international organisation<sup>19</sup> and that its regulations regarding pollution from ships give effect to applicable international discharge regulations.<sup>20</sup> Where it was considered desirable to include essentially the same rule in both regimes, this was done textually, not by incorporation.<sup>21</sup>

In light of this structure and history, it is of more than passing interest that there is no equivalent of Article 43 in the innocent passage regime. It is also of more than passing interest that there is no equivalent of Article 26 in the transit passage regime. Article 26 permits certain charges to be levied on a ship in innocent passage as payment for specific services rendered to the ship.<sup>22</sup> Its absence from the transit passage regime should not be viewed as accidental.<sup>23</sup> Suggestions to impose tolls to pay for lighting, buoying and dredging in straits were not accepted.<sup>24</sup> Malaysia attempted unsuccessfully in 1974 to include a provision authorising the coastal state to "require the co-operation of interested States and appropriate international organisations"<sup>25</sup> and in 1976 to add the substance of what is now Article 26 to the text of what is now Article 43.<sup>26</sup> Only may reasonably conclude that Article 43 is designed to respond, in a different way and with broader scope of application, to the issue addressed by Article 26.

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<sup>19</sup> Convention, Arts 41, 42(1)(a).

<sup>20</sup> Convention, Arts 42(1)(b), 233.

<sup>21</sup> Art 44 imposes essentially the same obligations on straits states with respect to transit passage that is imposed by Art 24 on coastal states generally with respect to innocent passage and by Art 45(2) on straits states with respect to those straits in which innocent passage applies.

<sup>22</sup> Art 26 is drawn from Art 18 of the 1958 Convention on the Territorial Sea and the Contiguous Zone, which appears in "Sub-section B. Rules Applicable to Merchant Ships" of "Section III. Right of Innocent Passage" of that Convention.

<sup>23</sup> It might be noted in this regard that the same members of most delegations generally worked on both the innocent passage and straits texts at the Third UN Conference on the Law of the Sea and that the delegations of Fiji and the United Kingdom played central roles in producing both the refinements of the innocent passage regime (as compared with that contained in the 1958 Convention on the Territorial Sea and the Contiguous Zone) and the newly articulated transit passage regime. See SN Nandan and DH Anderson, note 4, *supra*, 60 BYIL 159, 162-65 (1989).

<sup>24</sup> See SN Nandan and DH Anderson, note 4, *supra*, 60 BYIL 159, 194, n 124.

<sup>25</sup> Off Rec, v III, p 192, UN Doc A/CONF.62/L.16 (proposal by Malaysia, Morocco, Oman and Yemen).

<sup>26</sup> See R Platzöder, *The Third United Nations Conference on the Law of the Sea: Documents*, v IV, at 396.

## VI. THE REGULATORY CONTEXT

Article 43 is not designed to be the source of a regulatory regime for safety of navigation or prevention of pollution from ships in transit passage. This regime is to be found in other provisions. Ships in transit passage must comply with “generally accepted international regulations, procedures and practices” for “safety at sea, including the International Regulations for Preventing Collisions at Sea” and for “the prevention reduction and control of pollution from ships.”<sup>27</sup> Subject to approval by the competent international organisation, straits states may adopt laws and regulations regarding “the safety of navigation and the regulation of maritime traffic,” in particular designating sea lanes and prescribing traffic separation schemes.<sup>28</sup> Straits states also may adopt laws and regulations “giving effect to applicable international regulations regarding the discharge of oil, oily wastes and other noxious substances in the strait.”<sup>29</sup>

If a violation of the foregoing straits state regulations causes or threatens major damage to the marine environment of the straits, the straits states “may take appropriate enforcement measures.”<sup>30</sup> The history of this enforcement provision is closely tied to the Straits of Malacca and Singapore. The provision emerged from consultations in Kuala Lumpur between the United States and Malaysia, represented at the ministerial level. The Kuala Lumpur arrangement was immediately confirmed by consultations in Singapore and Jakarta at the ministerial level, with others in the region, and with the principal maritime states. Pursuant to that arrangement:

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<sup>27</sup> Convention, Art 39(2).

<sup>28</sup> Convention, Arts 41, 42(1)(a). A year ago, at the 29th Annual Conference of the Law of the Sea Institute in Bali, this author expressed the view that “Art 41, while referring explicitly only to sea lanes and traffic separation schemes, should be read liberally so as to permit full implementation under Art 41 of the full substantive scope of the regulatory powers under Art 42(1)(a) that are to be implemented ‘as provided in Art 41’, namely the adoption of any measures consistent with the Convention deemed necessary by the riparian state and IMO for the safety of navigation and the regulation of marine traffic.” BH Oxman, “Environmental Protection in Archipelagic Waters and International Straits – The Role of the International Maritime Organisation”, (1995) 4 Int’l J Marine & Coastal Law 467, at 476-77.

<sup>29</sup> Convention, Art 42(1)(b). This author also expressed the view a year ago in Bali that the “applicable” international discharge regulations the riparian states may implement are not limited to those expressly accepted by the flag state in another instrument, but include all “generally accepted” discharge regulations that the flag state is obliged to apply under Art 39(2)(b) of the Convention itself. BH Oxman, note 28, *supra*, (1995) 4 Int’l J Marine & Coastal Law 467, at 477-78.

<sup>30</sup> Convention, Art 233.

- the maritime states agreed to support both the addition of the new enforcement provision to the Convention text and the approval by the International Maritime Organisation of under keel clearance requirements as part of a traffic separation scheme in the Straits of Malacca and Singapore,<sup>31</sup> and
- the three states bordering those Straits agreed to support the transit passage regime in the Convention as amended pursuant to the arrangement.

The effect was to accept the Malaysian desire to render the under keel clearance requirements binding and enforceable under the Convention both directly and through dispute settlement procedures. This in turn was part of a larger package on both straits and archipelagic waters formulated to accommodate Indonesia and others, a package that included language, considered at the highest level of those governments, designed to entrench in the global "constitution for the oceans" special protection for Malaysian interests in the use of Indonesian archipelagic waters.<sup>32</sup> In light of this history, one might not have expected Malaysia to lag behind its neighbours and other states of the region in ratifying the Convention.

## VII. THE OBJECTIVES OF ARTICLE 43

Article 43 is designed to supplement the regulatory regime governing transit passage with practical measures necessary to promote safety of navigation and prevent pollution. It expressly recognises that such practical measures are matters of concern both to straits states and to user states. In this regard, there are two primary reasons for co-operative arrangements with user states:

- to ensure that the views and interests of the users are taken into account in dealing with aids to navigation and other practical matters; and
- to provide a mechanism for users to assist with expertise and other resources.

The relevance of these objectives to the Straits of Malacca and Singapore is clear. In 1993, an IMO Working Group on the Malacca Strait Area reported the following conclusions, among others:

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<sup>31</sup> The traffic separation scheme and under keel clearance requirements were worked out through intensive co-operative consultations among the Straits states and the principal users, notably Japan.

<sup>32</sup> See Convention, Arts 47(6), 51.

In view of the dense shipping traffic passing through the Malacca Strait, the high proportion of VLCCs and other tankers and the restricted navigational channels, the potential for accidents resulting in major ecological damage, loss of life and disruption to navigation is high.<sup>33</sup> It is, therefore, essential that measures in place ... to assist the safety of navigation and by so doing protect the marine environment against accidental pollution, are not only adequate and up-to-date but address the local conditions and take into account the practical problems facing navigators in the area.

Despite the assurances from the littoral States concerned, it is evident, from reports from ships and other reliable sources, that the availability of aids to navigation in the Malacca Strait cannot be fully relied upon. Notices to Mariners, pilot publications and lists of radio signals all contain warnings regarding the reliability of such aids in the Malacca Strait.

The Group was made aware of the perception of the States bordering the Malacca Strait that an unfair burden is being placed upon their resources requiring them to maintain aids to navigation for shipping, which, in the main part, is not calling at their ports. The Group is of the view that this attitude, combined with limited facilities and expertise, does not produce the efficient aid provision and maintenance régime, which is required in the Strait given its strategic importance and the volume of traffic using it.

The Group emphasises the need for proper training of both shipboard and shore-based (VTS operators and staff manning radio stations, SAR units, pilot stations, *etc*) personnel making use of the Strait of Malacca area in their respective areas of activity.<sup>34</sup>

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<sup>33</sup> [Footnote added.] One wonders whether there are reasonably convenient alternative routes through the Indonesian archipelago that might help lighten the burden on the Straits of Malacca and Singapore, and whether IMO will consider that question in connection with its review of Indonesia's proposals for archipelagic sea lanes pursuant to Art 53 of the Convention.

<sup>34</sup> *Report of the IMO Working Group on the Malacca Strait Area*, MSC 63/INF.3, Feb.28-Mar.10, 1993, at 10-11, paras 12-15. Malaysia expressed its disagreement with some of these observations:

The report alleged that "navigation aids (in the Straits of Malacca) are often unreliable". Malaysia disagrees with the observation.

Malaysia is of the view that the use of the word "attitude" is neither proper nor appropriate .... The Malaysian Authorities on navigation aids have never compromised on matters relating to the safety of navigation in the Straits of Malacca .... We are also not agreeable to the observation that littoral States

### VIII. WHO ARE THE USERS?

The provisions of the Convention that regulate navigation and pollution refer to ships or to their flag States. Article 43, on the other hand, refers to "user States". This textual difference, considered in light of the objectives of Article 43, suggests that it is by no means clear that the term "user States" means flag states and excludes other states, particularly those whose trade is carried through the straits. In the hypothetical case, for example, of a privately owned tanker fleet of Greek registry regularly engaged in carrying oil from Saudi Arabia to South Korea through the Straits of Malacca and Singapore, it is clear that Greece enjoys the relevant rights and duties of the flag state with respect to the operation of the tankers, but it is equally clear that Saudi Arabia and South Korea have economic interests that might justify considering them user states for the co-operative purposes of Article 43.

Article 43 follows the traditional approach of treaties in referring only to states. It should be borne in mind, however, that increasing reliance on market forces and private enterprise is characteristic of the economic policies of an increasing number of states.<sup>35</sup> Implicit in the practical purposes of the article and its reference to user states is the idea that the users themselves should be engaged in the process in a constructive way in order to ensure that their views and interests are considered and in order to provide a mechanism for them to assist with expertise and other resources. Such engagement of the private sector occurs routinely in the maritime field. The job of lawyers involved should be to facilitate the implementation of the practical objectives of Article 43 in light of the traditions of public/private co-operation in maritime affairs, and to demonstrate that the formal reference to user "States" does not preclude imaginative arrangements, whether formal or informal, to secure the constructive co-operation of the private sector.<sup>36</sup>

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have limited facilities and expertise to ensure an efficient management and maintenance regime for these aids.

At the same time, Malaysia supported "the Group's observation on the need for proper training for both shipboard and shore-based personnel ... and would like to suggest that IMO assist the littoral States with experts and financing." *Comments submitted by Malaysia on the report of the Working Group on the Malacca Straits Area*, IMO Doc. MSC 63/17/2, Sep 6, 1993.

<sup>35</sup> This fact is acknowledged by the 1994 Implementing Agreement regarding Part XI of the Convention.

<sup>36</sup> This idea is not limited to situations in which a flag state has only limited abilities to co-operate on its own, but may be of special importance in such situations.

For example, it is evident that the oil companies have a major interest in accident avoidance in the Straits of Malacca and Singapore. The Oil Companies International Marine Forum (OCIMF) has made various recommendations regarding navigation aids in the Straits. These recommendations were supported by the IMO Working Group on the Malacca Straits Area,<sup>37</sup> endorsed by Singapore,<sup>38</sup> and incorporated into the proposal regarding routing measures submitted by Malaysia to the International Maritime Organisation in 1995.<sup>39</sup>

The underlying question in considering who the users are for purposes of Article 43 is to decide whether an inclusive or exclusive approach best achieves the relevant objectives. In this regard, it is imperative to bear in mind that other provisions of the Convention, not Article 43, deal with regulatory and enforcement competence, including international participation in that process. The question under Article 43 is one of practical measures, such as surveys, navigational aids, and the like. There is no doubt that such measures may not be undertaken without the authorisation of the straits state in its territorial sea. Thus, subject to considerations of efficiency and practicality, straits states have much to gain and nothing to lose by taking a broadly inclusive approach to the question of who the users, or at least the principal users, are. So do users.

On the other hand, Article 43 does not require a single system of co-operation including the same states for all purposes. Even if an "umbrella" arrangement embracing many users were deemed desirable, there is nothing wrong with a representative group of straits states and principal users preparing the "umbrella" arrangements, possibly soliciting the views of others in the process, and then leaving the arrangements open to participation by other users. In multi-state straits, there is also nothing wrong with the straits states using their own co-operative mechanism as the basis for dealing with this matter, and inviting users to join their work on an *ad hoc* basis when they are dealing with matters relevant to Article 43. Should they so desire, this would permit the straits states of the Straits of Malacca and Singapore to use their existing Tripartite Technical Experts Group as a mechanism for co-ordinating co-operation with users where appropriate.

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<sup>37</sup> Report of the IMO Working Group on the Malacca Strait Area, MSC 63/INF.3, Feb.28-Mar.10, 1993, at 47, para 70.4.

<sup>38</sup> *Comments by Singapore on the Report of the Working Group on the Malacca Strait Area*, IMO Doc MSC 63/17/Add.1.

<sup>39</sup> IMO Doc NAV 41/4/2, 30 March 1995, at 2, para 6.

For some purposes, the co-operation of one user alone may suffice, or may have to suffice for the moment for practical reasons. Thus, for example,

in May 1966 a joint re-survey of critical areas and investigation of dangerous/unconfirmed shoals and wrecks in the Straits of Malacca and Singapore was agreed upon between the Governments of Indonesia, Malaysia, Singapore and Japan International Co-operation Agency of Japan (JICA), which will probably commence in October 1996 and take approximately 21 months to complete.<sup>40</sup>

The majority of [existing] aids to navigation (buoys/beacons) in the Malacca Strait are funded by the Malacca Strait Council of Japan.<sup>41</sup>

### IX. BURDEN-SHARING

The October 1995 Report to the Maritime Safety Committee of the International Maritime Organisation by the Sub-Committee on Safety of Navigation nicely introduces the question of burden-sharing. It states in pertinent part:

The Malaysian delegation, supported by the delegations of Indonesia and Singapore expressed their appreciation to the Government of Japan for its voluntary support of the hydrographic survey and raised the issue that the financing of such measures by all States which use the waterway should be considered. The Sub-Committee noted that the MEPC had adopted a strategy for extra-budgetary activities relating to environmentally sustainable development. One of the issues included in this strategy is the consideration by IMO of potential mechanisms by which user States and States bordering the Straits used for international navigation could facilitate the development of appropriate financial mechanisms consistent with Article 43 of the United Nations Law of the Sea Convention.<sup>42</sup>

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<sup>40</sup> IMO Sub-Committee on Safety of Navigation, *Draft Report to the Maritime Safety Committee*, IMO Doc NAV 42/WP 3, Jul 17, 1996, p 5, para 4.4. In 1995, Malaysia had reported that the "Government of Japan has agreed to provide technical and financial assistance to re-survey certain areas in the Malacca Strait." *Ibid*, at 2, para 7.

<sup>41</sup> Report of the IMO Working Group on the Malacca Strait Area, MSC 63/INF.3, Feb 28 – Mar 10, 1993, p 40.

<sup>42</sup> [Footnote added by author.] The Marine Environmental Protection Committee of IMO approved the following (footnote omitted):

The Japanese delegation, supporting the Malaysian proposal concerning the financial issue, was of the opinion that the Committee should consider this issue in order to develop an appropriate mechanism for financing the above measures.

The delegations of Greece, the Russian Federation and the United States reiterated their position that they were against the imposition of a tax on shipping as a means of obtaining funds.<sup>43</sup>

The question of who benefits from a highway or improvements to a highway, and to what comparative degree, is an economic problem of sufficient complexity to transcend the capabilities of most diplomats, lawyers and politicians. And yet this presumably would be one of the most significant issues in any debate among diplomats, lawyers and politicians about "equitable" sharing of the burdens of maintaining and improving the highway.

One of the difficulties in approaching this issue is that one cannot consider individual highways in isolation. Under the current system, each coastal state by and large bears the economic burden of providing necessary navigation aids and facilities off its coast, sometimes with significant assistance from one or more maritime powers. But trade is increasingly global. Each state benefits, directly or indirectly, from the maintenance of navigation aids by other states in other parts of the world. The major maritime and trading nations necessarily make huge investments in navigation and port facilities that benefit not only those states but others.

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*Financing of capacity-building for coastal States bordering a strait used for international navigation*

IMO should consider potential mechanisms by which user States and States bordering straits used for international navigation could facilitate the development of appropriate financial mechanisms consistent with Art 43 of the 1982 United Nations Convention on the Law of the Sea to provide for the establishment and maintenance of necessary navigational aids and other safety aids to navigation as well as the prevention, reduction and control of pollution from ships.

Such financial mechanisms shall have due regard to the financial burden on coastal States created by the establishment and maintenance of such navigational aids and pollution prevention, reduction and control activities.

Such financial mechanisms should be designed to achieve an equitable sharing of this burden.

*Report of the Marine Environment Protection Committee on its Thirty-Seventh Session, IMO Doc MEPC 37/22, Oct 11, 1995, p 24, para 10.17, and Annex 11, incorporating text in IMO Doc MEPC 37/10.*

<sup>43</sup> *Report to the Maritime Safety Committee by the Sub-Committee on Safety of Navigation, IMO Doc NAV 41/23, Oct 19, 1995, p 7, paras 4.2-4.4.*

While the "equity" of this system may be only rough, it is far from clear that we can do much better in practice. Before hiring political economists who prove me wrong by devising abstract models that they believe can "do much better", governments and other groups would do well to consider whether a major international confrontation over economic models and economic theory will get them where they want to go when they want to get there. We have yet to recover fully from the consequences of the last such battle over Part XI of the Law of the Sea Convention.

A rational discussion of this issue must seek to identify plausible solutions that are based on a realistic appraisal of the obstacles that must be overcome in arriving at such solutions. The purpose of reviewing the obstacles is not to sow despair or to allocate blame, but to provide a realistic foundation for formulating plausible proposals. Any such proposals would have to recognise and seek to avoid the following obstacles:

- *Transit Passage:* Malaysia has not yet ratified the UN Convention on the Law of the Sea. Informed Malaysian experts have implied that this policy arises from misgivings about the transit passage regime. Given the substantial concessions that were made to Malaysia during the Law of the Sea Conference to secure its support for transit passage, Malaysian non-ratification may heighten the sensitivities and reduce the flexibility of maritime states. One may expect resistance to any solution that could be perceived as a compromise on the principle of transit passage.
- *Tolls:* The fact that influential Malaysians have toyed with the idea of tolls in the Straits is widely known. As a result, one may expect resistance on the part of maritime states and shipping interests to any solution that could be perceived as a compromise on the issue of tolls. Whatever the abstract economic merits of "fees for services", in the context of the Straits of Malacca and Singapore they might smack of a such a compromise and may be resisted for that reason alone. Indeed, the sensitivities created by discussion of tolls may be so great that any precise formula for funding by users, even if voluntary, may be resisted. It is too often forgotten that the struggle for free transit of straits is in part literally that:

a struggle against tolls. One would do well to review the story of the Danish Straits in this regard.<sup>44</sup>

- *Precedent:* The Straits of Malacca and Singapore are not the only straits or major navigation routes in the world. Any arrangement made there will be watched closely by other straits states and coastal states. Accordingly, the principal maritime and trading states can be expected to approach the issue with substantial caution attributable as much to problems of precedent as to immediate budgetary constraints. To the extent that direct or indirect charges on shipping are discussed, the shipping industry and major exporters can be expected to exhibit similar reticence. At the same time, the issue of precedent has a positive aspect. It is in the interests of maritime states, the shipping industry and major exporters to demonstrate that coercive or radical approaches to the problem of burden-sharing are unnecessary.
- *Money:* A number of industrial states are under serious pressure to reduce their budget deficits and to reduce taxes, in part to compete with rapidly expanding Asian economies. Government agencies struggling to maintain funding for existing priorities are likely to be cautious about funding new projects.
- *Misunderstanding among Maritime States:* It is not clear whether, in supporting the financial aspects of the Malaysian proposal in IMO, Japan intended to open a debate about equitable allocation of burdens among the maritime states themselves. A happy ending to such a debate is not readily foreseeable. The principal maritime states have throughout history, with different geographic and functional emphasis, unilaterally assumed the burdens of research, survey, charting, training, informing, predicting, patrolling, policing, and a host of other things. In this broader context, how are we to allocate equitably? Should we, for example, regard naval fleets as users or as providers of services?
- *Legal and Institutional Constraints:* There are no legal or institutional means for compelling contributions from states or ships in the context of Article 43. If one wishes to create them,

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<sup>44</sup> One might also recall that Richard Nixon angrily rejected Franco's clumsy attempt to secure the Rock of Gibraltar in exchange for supporting free transit of the strait.

it will take a treaty to do so. If the treaty contains financial obligations or a procedure for imposing such obligations, negotiation will be difficult and the resulting treaty is likely to be subject to close parliamentary scrutiny. This will take time, and the outcome is uncertain. The parliamentary approval process itself could arouse critics of unrelated policies of one or another state.

More than enough political and legal talent is available to forge approaches to the implementation of Article 43 that could avoid these obstacles. There is, after all, a base of common interest in promoting navigation safety and environmental protection in the Straits. Most if not all of the plausible solutions are likely to build on that base of common interest and to share some characteristics, possibly including the following:

- *Voluntarism*: The prospects for agreement on a mandatory system are probably too remote to justify the effort. This applies to states as well as ships and private companies.
- *Pragmatism*: Whatever their intellectual or political appeal, abstract questions of wealth transfer, distributive justice and environmental economics are likely to divert attention from achieving the objectives of Article 43. Divisive issues of principle need not be addressed or resolved. These include what constitutes an "equitable" allocation of burdens, whether the straits states are "entitled" to assistance in the maintenance and improvement of navigation aids and services, and whether users should pay for the services rendered.
- *Contributions in Kind*: It may be easier, and more useful to the recipients, for some donors to supply equipment, training or other services rather than cash.
- *Private Sector Co-operation*: This is much that the private sector, including the shipping and petroleum industries, has offered, and is in a position to offer, to enhance the maintenance and improvement of navigation aids and services. Whether the private sector regards the contribution of expertise, equipment, training or other services as an opportunity to be embraced or as a burden to be avoided may well depend on how it is approached.
- *Transparency*: Non-governmental organisations and other private groups are not only a useful source of information and ideas, but can help generate political support in user states for an

appropriate commitment of resources. Engaging them in the process is likely to stimulate such interest and support and, at the same time, educate the public about the political and other constraints that must be taken into account if there is to be an agreed and effective result.

## X. CONCLUSION

Regimes of freedom of use depend for their survival on responsible and effective co-operation among users and with those affected by their activities. The case of fisheries is a sad example of failure. It demonstrates that the only alternatives to effective voluntary co-operation are either replacement of freedom with coastal state jurisdiction<sup>45</sup> or express subordination of freedom to mandatory co-operative regimes.<sup>46</sup>

On the other hand, navigation safety and regulation of pollution from ships have proved to be remarkable examples of the successful marriage of freedom and co-operation, due in no small measure to the extraordinary degree of respect for the work of the International Maritime Organisation and the real community of interest that this co-operation reflects. Article 43 attempts to build on this record, and assumes that enlightened self-interest and a mature sense of responsibility will be sufficient to achieve its objectives. A gentle nudge – a reminder that those concerned “should” by agreement co-operate – is deemed sufficient. We should proceed on the assumption this confidence is justified, and that there is no demonstrable need at this time to consider less flexible and more peremptory approaches to the implementation of Article 43.

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<sup>45</sup> The exclusive economic zone removes over 90% of ocean fisheries from the regime of freedom of fishing.

<sup>46</sup> See the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stock and Highly Migratory Fish stocks, Dec 4, 1995, Art 8(3) & (4), pursuant to which only states which are members of or participants in a relevant regional fisheries management organisation or arrangement, or which agree to apply the conservation and management measures established by such organisation or arrangement, shall have access to the fishery resources to which those measures apply.

At the conclusion of his remarks preceding the text of the Convention,<sup>47</sup> Ambassador Koh states, "Finally, we celebrate human solidarity and the reality of interdependence which is symbolised by the United Nations Convention on the Law of the Sea." That spirit should inform our approach to implementing not only Article 43 but all of the Convention.

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<sup>47</sup> *Supra*, note 1, at xxxvii.

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