11

Scope of Article 43: interpretation and suggested implementation

11.1 Fees for service in the territorial sea, straits and archipelagic waters

Article 43 was adopted in order to establish a balance between the interests of the States bordering straits and of the States using the straits.[1] That provision does not expressly address the issue of the recovery of costs associated with establishing aids to navigation and other pollution-prevention measures, and this is not the only matter that can be addressed in agreements under Article 43. It is nevertheless true that the question of costs is central in the literature on the topic and that Article 43 primarily covers the adoption of mechanisms leading to the equitable sharing of the burdens associated with the prevention of risks in straits.[2]

One cannot fail to note that Article 26 is not repeated in Parts III and IV. A Malaysian informal proposal, which contained what was to become Article 43, would have expressly incorporated the provisions of Article 26 into the regime of straits.[3] This was not adopted. Hence, from the structure of the UNCLOS, Oxman concludes that Article 26(2) regarding payment for specific services rendered to a ship is not applicable to ships

[1] See the General Statement by the British Delegate, UNCLOS III, II Official Records, 101.

[2] The question of costs and, hence, fees and burden sharing, is implicit in the opinion that 'the question under Article 43 is one of practical measures, such as surveys, navigational aids, and the like'. B. H. Oxman, 'Observations on the Interpretation and Application of Article 43 of UNCLOS with Particular Reference to the Straits of Malacca and Singapore', 1998(2) *Singapore Journal of International and Comparative Law*, 419. See also 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', 1989(60) *British Year Book of International Law*, 194:

> Sub-paragraph (a) would form a basis for international co-operation to defray the cost of such things as new lighting or buoying schemes, as well as the dredging of new channels for deep draught vessels . . . Sub-paragraph (b) would form a basis for co-operation in the provision of navigational aids in order to prevent the grounding or collision of vessels. That course would reduce the risks of pollution.

[3] Proposal of 1976 on Article 41(1) of the RSNT II, IV Platzöder, 398.

exercising the right of transit passage.[4] He had supported this analysis earlier by noting that the same members of most delegations generally worked on both the innocent passage and straits texts at UNCLOS III and that the delegations of Fiji and the United Kingdom played central roles.[5] However, both the Fijian and the British delegates believe that Part III *does not* prevent the levying by the States bordering straits of charges for specific services rendered as envisaged in Article 26(2).[6] It is thus essential to determine what constitutes a specific service. The negotiating history of Article 26, dating back to 1930, makes it clear that what is prohibited is not simply tolls and fees for passage but also charges to recover the costs of general services to navigation, such as lights, conservancy dues or buoyage; the coastal State is also not prohibited from levying charges for specific services, such as pilotage or towage.[7] Gidel reported that, in reply to a questionnaire sent by the Preparatory Committee for the 1930 Hague Conference, Sweden emphasized that 'services rendered' are not services rendered to navigation in general but services rendered to a specific vessel. This, Gidel wrote, reflected the state of the law at the time.[8]

[4] B. H. Oxman, 'Sub-Regional, Regional and International Co-operation in Responding to and Deterring Transboundary Marine Pollution', 1999(3) *Singapore Journal of International and Comparative Law*, 426. Oxman moderated his approach in an earlier article, writing that '[t]his omission is arguably without prejudice to the rare case in which liability arises under general principles of law regarding *negotiorum gestio* or unjust enrichment'. B. H. Oxman, 'The Regime of Warships under the United Nations Convention on the Law of the Sea', 1984(24) *Virginia Journal of International Law*, 858.

[5] Oxman in n. 2, 414.

[6] E.g. S. N. Nandan, 'Management of Straits Used for International Navigation: International Cooperation in Malacca and Singapore Straits', 1999(3) *Singapore Journal of International and Comparative Law*, 432–433: 'A coastal State may, however, without discrimination, levy a charge upon a foreign ship exercising its right of innocent passage in the territorial sea, but only for "specific services rendered to the ship" . . . There is nothing in the Convention prohibiting charges for similar services in straits which are part of the territorial sea'; Nandan and Rosenne in Chapter 10, n. 40, 383: 'Article 43 does not preclude the levying of charges for specific services rendered to a ship in transit'; D. H. Anderson, 'Funding and Managing International Partnership for the Malacca and Singapore Straits', 1999(3) *Singapore Journal of International and Comparative Law*, 446: 'These rules [Article 26] apply also to those parts of the territorial sea which are included in straits used for international navigation. Charges may be imposed, on a non-discriminatory basis, only for specific services rendered to a ship, such as pilotage or towage'.

[7] See Chapter 10, n. 26 et seq. and accompanying text.

[8] G. Gidel, *Le droit international public de la mer*, 3 vols. (Mellottée, Chateauroux, 1932–1934; reprinted, Topos, Vaduz, 1981), vol. III, 230 (also noting that the Institut de droit international rejected in 1892 a suggestion that a charge could be levied on passing ships in certain cases; ibid., 231, and, for the 1894 work of the Institut, Chapter 10, n. 21).

It is submitted that this is also the interpretation to be given to Article 26 of the UNCLOS. It is improbable to refuse to the State bordering a strait, or to an archipelagic State, the ability to levy a charge for a service rendered to a vessel at the vessel's request. This is even more compelling in the case of archipelagic waters which lie landward of the inner limit of territorial seas where the State has the express right under Article 26(2) to levy charges. One should not draw normative consequences from the absence of Article 26 in Parts III and IV. There is no reason not to believe that the specific service under consideration is a service requested by the vessel itself, that is, a service that includes an element of choice and that is provided, not required, by the coastal State. The service must benefit a particular vessel and must not be compulsory, and the charge must be commensurate to the service.[9] Ünlü correctly distinguishes between such general services as lighting or patrolling straits against piracy and terrorism and specific services, such as pilotage, towing and escort services, which are provided to individual vessels and for which the State can charge. A service that is imposed cannot be considered a specific service.[10]

It is submitted that Article 43 per se does not emasculate the ability of the coastal State to charge for specific services. What Article 43 purports to achieve is to find means, notably financial arrangements, to 'temper, through cooperation, the financial impact of the general obligation of

[9] 'Service' is not a defined term. A useful reference could be made to such legal regimes as contain rules on the provision of services. Thus the European Court of Justice, when interpreting the prohibition to levy customs duties and charges having an equivalent effect (now contained in Article 30 of the Treaty on the Functioning of the European Union), allowed one to conclude that the obligation under Belgian law, upon the importation of diamonds, to pay a contribution to the social funds of diamond workers, was equivalent to a customs duty and declared: 'Although it is not impossible that in certain circumstances a specific service actually rendered may form the consideration for a possible proportional payment for the service in question, this may only apply in specific cases which cannot lead to the circumvention of the provisions of the Treaty'. *Sociaal Fonds voor de Diamantarbeiders v S.A. Ch. Brachfeld & Sons and Chougol Diamond Co.*, Cases 2 and 3/69, ECR (1969), 222–223. It further declared that a charge would not be equivalent to a customs duty if it is 'the consideration for a service actually rendered to the importer or the exporter and is of an amount commensurate with that service'. This was not the case of fees charged by the Dutch postal administration in respect of customs clearance charges and commission on books imported from another member State. *Andreas Matthias Donner v Netherlands State*, Case 39/82, ECR (1983), 34. See also *Commission v. Belgium*, Case 132/83, ECR (1983), 1694.

[10] N. Ünlü, 'Protecting the Straits of Malacca and Singapore against Piracy and Terrorism', 2006 (21) *International Journal of Marine and Coastal Law*, 543.

states bordering straits . . . to give warnings to passing ships of dangers to navigation';[11] it also attempts to get all interested States together in the adoption and funding of mechanisms that ensure the highest possible level of safety in the interest of all. Furthermore, it is necessary to determine whether any normative consequence can be drawn from the absence of Article 43 in Part IV of the UNCLOS. Surely, nothing prevents the States concerned from entering into co-operative agreements in relation to aids to navigation and prevention or control of pollution in archipelagic sea lanes, even without an exhortation to do so. The object and purpose of Part IV clearly imply that the type of co-operation envisaged in Article 43 would be equally welcome in relation to archipelagic sea lanes for the same reasons that co-operation is encouraged vis-à-vis straits.[12] In light of the similarity between transit and archipelagic sea lanes passages, it would be quite fantastic to suggest that Article 43 has no application in Part IV, when Part III applies if the archipelagic State has not drawn archipelagic baselines.[13] Depending on the number and location of routes normally used for international navigation or, if designated, sea lanes and air routes, the conclusion of Article 43 agreements will be beneficial to all.

[11] Anderson in n. 6, 447. The correct assumption here is that the discharge of that duty is more burdensome in straits used for international navigation and even more burdensome in busy straits than it is in the territorial sea in general. This duty may be increased when the State participates in such instruments as SOLAS, which provides in Regulation 13 of chapter V that each Contracting Government 'undertakes to provide, as it deems practical and necessary either individually or in cooperation with other Contracting Governments, such aids to navigation as the volume of traffic justifies and the degree of risk requires'. Gidel agreed that the maintenance of certain navigational aids is a duty of States under international law for which no charge can be levied. However, he also suggested that, if in the interest of navigation the coastal State undertook costly works, it would be fair to enter into international agreements with a view to defraying costs. Gidel in n. 8, 230, 232. He endorsed by analogy, as the minimum obligation of coastal States, Article 10(1) of the Statute on the Regime of Navigable Waterways of International Concern, 7 LNTS 35, opened for signature on 20 April 1921 and entered into force on 31 October 1922: 'Each riparian State is bound, on the one hand, to refrain from all measures likely to prejudice the navigability of the waterway, or to reduce the facilities for navigation, and, on the other hand, to take as rapidly as possible all necessary steps for removing any obstacles and dangers which may occur to navigation'. See also Chapter 10, n. 33 et seq. and accompanying text; on the removal of dangers, see contra Lauterpacht in Chapter 10, n. 37.

[12] See, notably, H. Djalal, 'Funding and Managing International Partnerships for the Malacca and Singapore Straits Consonant with Article 43 of the UNCLOS', 1999(3) *Singapore Journal of International and Comparative Law*, 468; Djalal in Chapter 10, n. 46, 84.

[13] In that case, there are no archipelagic waters, and the right of transit will apply in inter-islands straits used for international navigation. See, generally, Part III, Section 4.3.

In the absence of co-operative agreements under Article 43, and apart from the case of services rendered at the request of the ship for which States bordering a strait or an archipelagic State can request a reasonable fee, the coastal State is not allowed to request payment for the use of general aids, devices, assistance and traffic control. The lawfulness of these measures is assessed under the UNCLOS, which, apart from special regimes that fall under Article 35(c), addresses them in Articles 39, 41 and 42. Measures of marine traffic control have been classified as passive measures, such as traffic separation schemes or deep-water routes, and active measures, such as vessel traffic services and reporting systems.[14] These measures may lawfully be implemented in straits or archipelagic waters, notably through the provisions of SOLAS and COLREG. As was seen in Part IV, the lawfulness of these measures includes a test of their compatibility with the regimes of transit and archipelagic sea lanes passages. It is quite revealing that sub-paragraph 10 of Regulation 11 of SOLAS's chapter V on mandatory ship reporting systems says that the 'participation of ships in accordance with the provisions of adopted ship reporting systems shall be free of charge to the ships concerned'. Anderson notes that this rule is fully consistent with Article 26 of the UNCLOS on the basis that reporting is a general service, similar to lights and buoys, and not a specific service.[15]

What Article 26 does not prohibit, however, are *agreements* among States regarding burden-sharing schemes. Article 43 precisely provides for such co-operative arrangements in straits. This is reflected in a British proposal to the IMO in 1998:

> [M]odern developments such as Vessel Traffic Services (VTS), in straits or off the coast, and counter-pollution provisions, which were clearly not contemplated by the original authors of Article 26 . . . do not fall clearly into the category of specific services. At the same time, the arrangements reached within the IMO with regard to such developments have not been accompanied by rules about the funding of those services, either by their users or by the coastal States. By default, the charges are falling upon the latter. Article 43 of UNCLOS provides for co-operation between user States and coastal States bordering a strait in establishing and maintaining necessary navigational and safety aids or other improvements in aid of

[14] See A. G. Corbet, 'Development of Vessel Traffic Services: Legal Considerations', 1989(16) *Maritime Policy and Management*, 278. Plant notes: 'A VTS is any service implemented by a competent authority, designed to improve safety and efficiency of traffic and the protection of the environment. It may range from the provision of certain information messages to extensive management within a port or a waterway'. G. Plant, 'International Legal Aspects of Vessel Traffic Services', 1990(14) *Marine Policy*, 71.

[15] Anderson in n. 6, 453–454.

> international navigation and to control pollution from ships. Before ships on transit passage could be made the subject of charges for such services, the United Kingdom believes that there would have to be an international agreement following the terms of Article 43.[16]

It has been suggested that, if a mechanism were established pursuant to an amendment to the SOLAS Convention, it might be possible to make the contributions mandatory.[17] This is not the only possible solution and, in fact, not the one implemented in the Straits of Malacca.[18]

11.2 Co-operation by agreement

Article 43 does not establish a duty to co-operate by agreement or a duty to enter into an agreement. The Article uses the verb 'should', not 'shall'. The distinction is not fortuitous. The suggested amendment by Morocco mentioned in Chapter 10 would have replaced 'should co-operate' by 'shall co-operate'.[19] That proposal was not adopted. In informal discussions in the Fiji/UK Group and later in the Second Committee Working Group, when it was discussing the Informal Single Negotiating Text, it was noted that the Article was cast in conditional, non-mandatory terms.[20] The Convention and its Annexes make the distinction between 'shall' and 'should' in other provisions, although the latter is used much more sparingly and, in fact, comparatively rarely.[21] In particular, the Convention differentiates in other Articles between a duty to co-operate or a duty to enter into an agreement and an exhortation to do so.[22] Sometimes the scope of the duty is more complex or composite.[23] The point in Article 43

[16] IMO Doc. LEG/77 10 (1998), paras. 10–11. Oxman correctly notes that Article 43 is not designed to be the source of a regulatory regime for safety or prevention of pollution from ships in transit passage. This regime is to be found in other provisions. Oxman in n. 2, 415. One objective of Article 43 is the funding of such a regulatory regime.

[17] R. C. Beckman, 'Towards Implementation of UNCLOS Article 43 for the Straits of Malacca and Singapore – Rapporteur's Report', 1999(3) *Singapore Journal of International and Comparative Law*, 283.

[18] See Sections 11.4 and 12.

[19] See Chapter 10, n. 56.

[20] Nandan and Anderson in n. 2, 193.

[21] The modal auxiliary verb 'shall' is used 1,430 times; 'should' is used 33 times.

[22] E.g. Article 123 ('should cooperate'); Articles 41(5), 100, 197 and 276(2) ('shall cooperate'); Article 243 ('shall cooperate through the conclusion of . . . agreements'); Article 118 ('shall enter into negotiations'); and Article 51(1) ('shall be regulated by bilateral agreements').

[23] E.g. Article 165(1) ('shall endeavour to ensure'); Article 266(3) ('shall endeavour to foster favourable economic and legal conditions'); and Article 200 ('shall endeavour to participate actively').

is that there is no duty to co-operate by agreement or to enter into an agreement in order to co-operate to achieve a certain result.[24] When no such duty exists, one can conclude that there also exists a reflex right of user States not to enter into agreement embodying co-operation with States bordering a strait. One can also endorse the view that Article 43 is deliberately hortatory in nature in order to ensure that straits States do not unilaterally impose charges on passing vessels.[25]

That said, Article 43 is of a strong normative significance, for it addresses an issue which lies at the core of the right of transit, that is, a balance between the rights and duties of user States and straits States. Whether one believes that co-operation by agreement in Article 43 is encouraged or, adopting an interpretation that lies at the threshold of an obligation, that Article 43 embodies a 'measure of an obligation to cooperate',[26] the point is that neither user States nor straits States have anything to gain, and much to lose at the most pragmatic level, by refusing to co-operate.[27] Indeed, assuming that straits States are faced with user States which refuse to co-operate along the lines indicated in Article 43, the argument has been made that, because the right of transit cannot be impeded, hampered or suspended in any event, and apart from resorting to Part XV of the UNCLOS, States bordering straits may refuse to provide navigational aids if user States do not co-operate.[28] This should not be read as allowing the State bordering a strait to abandon its duty to maintain the minimum aids that accompany the duty to warn of dangers under Article 44; the UNCLOS is characterized by the principle that States' rights and duties are generally independent of each other.[29]

[24] Capon's argument that, by the strength of Article 43, 'UNCLOS contains an affirmative grant of authority to coastal States to implement navigational and safety aids in international straits', does not seem to be correct. See C. J. Capon, 'The Threat of Oil Pollution in the Malacca Strait: Arguing for a Broad Interpretation of the United Nations Convention on the Law of the Sea', 1998(7) *Pacific Rim Law and Policy Journal*, 133.

[25] S. N. Nandan, 'The Provisions on Straits Used for International Navigation in the 1982 United Nations Convention on the Law of the Sea', 1998(2) *Singapore Journal of International and Comparative Law*, 397.

[26] Nandan in n. 6, 433. Oral, who believes that the use of 'should' instead of 'shall' is of interpretative significance, also accepts that Article 43 may provide legal support for user States to contribute financially. N. Oral, 'Straits Used in International Navigation, User Fees and Article 43 of the 1982 Law of the Sea Convention', 2006(20) *Ocean Yearbook*, 584.

[27] E.g. M. L. Pal and G. Göttsche-Wanli, 'Proposed Usage and Management of the Fund', 1999(3) *Singapore Journal of International and Comparative Law*, 480.

[28] Nandan and Rosenne in Chapter 10, n. 40, 383.

[29] B. H. Oxman and V. P. Bantz, 'The M/V "Saiga" (No. 2)', 2000(94) *American Journal of International Law*, 149.

However, if only as a matter of prudence, the maintenance of only minimum aids to navigation is not a reasonable proposition in major straits used for international navigation. Furthermore, legalistic emphasis of the use of 'should' neglects the fact that States have a variety of duties to be found in other parts of the Convention. Oxman rightly emphasizes that, under Article 192, 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 that provision.[30] In addition, even though all States Parties to the UNCLOS have a duty to exercise their rights, jurisdiction and freedoms in a manner which would not constitute an abuse of right, the argument could be made that user States would abuse the right of transit by refusing to co-operate with straits States in the establishment of mechanisms which facilitate the right of transit (Article 43(a)) or alleviate the consequences of the right of transit (Article 43(b)), thereby leaving straits States alone to bear the burdens associated with the exercise of the right of transit. A parallel argument can be made with straits States that would refuse to co-operate with user States.

Article 43 only specifies the objectives of co-operation but not the means or the concrete implementation. The only guidance as to the form of co-operation is that it should take place by 'agreement' ('par voie d'accord' in the French text). It has been noted that the word 'agreement' is sufficiently vague to include either formal written agreements or less formal arrangements.[31] Co-operation can take place on a bilateral basis, on a multilateral basis or within an international conference or an international organization, such as the IMO.[32] In addition, Article 43 does not just contemplate co-operation between user States and States bordering straits; both a literal reading of the first sentence and a sensible, pragmatic approach, dictate that co-operation is possible, and indeed encouraged, among user States themselves and also among the States bordering straits themselves: Article 43 points to the multidimensional aspect of co-operation.[33] The extent and the modalities of co-operation

[30] Oxman in n. 2, 410.

[31] R. Beckman, 'The Establishment of a Cooperative Mechanism for the Straits of Malacca and Singapore under Article 43 of the United Nations Convention on the Law of the Sea', in A. Chircop, T. L. McDorman and S. J. Rolston (eds.), *The Future of Ocean Regime-Building: Essays in Tribute to Douglas M. Johnston* (Nijhoff, Leiden, 2009), 239.

[32] E.g. Djalal in n. 12, 466. The early Maltese proposal only envisaged adopting an agreement between the States bordering straits and the international oceans institutions. See Chapter 10, n. 48.

[33] Pal and Göttsche-Wanli in n. 27, 479.

will therefore depend on each strait, and Article 43 itself refers to 'a' strait, not to straits generally. This indicates that Article 43 is meant to apply on a strait-by-strait basis and that any notion that 'all straits' used for international navigation would be subjected to one, single model of co-operation should be avoided.[34] Nothing prevents a combination of formal and informal agreements, and Article 43 does not envisage the adoption of only one single instrument covering every aspect of co-operation as long as, overall, co-operation covers both aspects in sub-paragraphs (a) and (b).[35] In light of the fact that navigational safety and pollution prevention are often intermingled, it is likely that both aspects will be addressed simultaneously.

11.3 Who are the users?

Both the original British proposal and Article 43 envisage co-operation between States bordering the strait and user States. It has thus been claimed that any existing obligation did not fall directly on user ships but on the States whose ships use the strait.[36] This formulation surely alleviated the fears of those fretting about States bordering straits exacting co-operation directly with user ships. It has also been argued that, had a reference been made to 'users of a strait' only, it could have been taken to mean that only the shipping industry was required to co-operate, with the added connotation that a 'user charge' was being contemplated.[37] This said, Article 43 does not prevent the input of private users, such as P&I clubs or oil companies; nor is Article 43 meant to prevent the agreements concluded from providing that charges will be levied on vessels themselves. Hence, as there is no definition of 'user States', it seems that only a pragmatic approach will deliver satisfactory results. It has been emphasized many times that 'user States' cannot realistically be restricted to flag States. Which other States are included as 'user States' is, however, not fully determined. It has been suggested that a 'user' at large could encompass 'other direct and indirect beneficiaries of the convenience and

[34] Ibid.

[35] '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'. Oxman in n. 2, 419.

[36] See Nandan and Rosenne in Chapter 10, n. 40, 381.

[37] Pal and Göttsche-Wanli in n. 27, 479.

savings afforded by the strait. This could include a wide array of beneficiaries from cargo interests to the ultimate consumers'.[38] It has also been noted that if all ship types were made to participate in an Article 43 agreement, the next question would be whether the participating State would be the State of the owner, operator, charterer or cargo interest and that, in practical terms, the more likely candidate will be the flag State.[39] These concerns are not shared by Nandan, for whom 'user States' must also include nationals of States and, therefore, the flag State, the exporting States, the receiving States, the shipowners and others who benefit from the provision of facilities for safe navigation, such as insurance corporations whose risks and liabilities are minimized and major oil companies whose global trade is facilitated.[40] In a similar vein, Gold argues in terms of 'beneficiaries' of the transit passage and, taking the Straits of Malacca as a case study, he writes that beneficiaries comprise individual shipping companies as well as States, such as Japan and the Republic of Korea, which rely on the 'oil lifeline' for their economic well-being.[41] There are also indirect beneficiaries, such as the IMO and its membership, and the shipping and oil industries, represented by, for example, the International Chamber of Shipping, the International Union of Marine Insurers, the International Group of P&I Clubs, the Oil Companies International Marine Forum, the International Oil Pollution Claims Fund and the

[38] Oral in n. 26, 590. See also, e.g., B. A. Hamzah, 'Funding Services in the Straits of Malacca: Voluntary Contribution or Cost Recovery?', 1999(3) *Singapore Journal of International and Comparative Law*, 508.

[39] Ibid., 590–591.

[40] Nandan in n. 6, 435 (including, at 436–443, tables showing in the Straits of Malacca and Singapore transits by flag nationality, by shipowner nationality, by vessel types, by shipper nationality and by import shares by commodity). See also S. Tiwari, 'Legal Mechanisms for Establishing a Fund', 1999(3) *Singapore Journal of International Law*, 471:

> It does not seem unreasonable to take the position that user States should include States whose nationals own the ships, States whose nationals own the cargo, States whose nationals are the recipients of the cargo, and States from which the cargo originates. In addition, the other parties who should participate in the co-operative arrangements are the shipping industry, the marine insurance industry and the oil industry.

See also the study undertaken by Japan, Malaysia, Singapore and Indonesia in O. Matsumoto, 'Who Are the Contributors? Littoral States, User States and Stakeholders? Or Who Are the Users?', 1999(3) *Singapore Journal of International and Comparative Law*, 499–500.

[41] Gold in Chapter 10, n. 42, 233. He adds that the littoral States also derive some benefit from their straits proximity; their economic development depends on participating in international shipping and trade.

International Tank Owners Pollution Federation.[42] This broad approach is confirmed by practice; it is not surprising that, when invitations were sent out to participate in the 1996 Singapore Conference relating to the safety of navigation in the Straits of Malacca and Singapore, the various stakeholders identified included the shipping industry (including tanker owners), major users, such as the oil industry, the insurance industry, the salvage industry and various governmental and non-governmental organizations dealing with maritime affairs, such as port authorities and representatives of predominantly ship-owning States.[43]

It is perhaps inapposite to devote complex analyses to whether 'user States' encompass only States themselves and, if so, which ones or if it includes non-State entities as well.[44] An interpretation that puts too much emphasis on 'State' would imply that the State of nationality, or residence, of nationals benefiting from the use of a strait should always be involved in negotiating Article 43 agreements, but nothing suggests that this is necessarily the case in practice, and the industry has, *sua sponte*, declared itself ready to make financial contributions under certain

[42] Ibid. See also N. Oral, 'User Fees for Straits', in B. Öztürk and R. Özkan (eds.), *The Proceedings of the Symposium on the Straits Used for International Navigation, 16–17 November 2002, Istanbul* (Turkish Marine Research Foundation, Istanbul, 2002), 116.

[43] L. L. Theng, 'Safety of Navigation in the Straits of Malacca and Singapore – Modalities of Co-operation – Rapporteur's Report', 1998(2) *Singapore Journal of International and Comparative Law*, 258. In 1960, the ICJ had to decide what the phrase 'the largest ship-owning nations' meant in relation to election to the Maritime Safety Committee of the IMO (formerly the IMCO) under Article 28(a) of the IMCO Constitution. The Court concluded that Article 28(a) 'can only have in mind a comparative size vis-à-vis other nations owners of tonnage'. *Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization (Advisory Opinion)*, ICJ Rep. (1960), 166. The Court came to the conclusion that this could only mean 'registered tonnage'. Ibid., 170.

[44] It is evident that, at the very least, user States include not just the flag State which is the recipient of the right of transit but also other States which indirectly benefit from this right. Khee-Jin reported on the 1996 Singapore Conference:

> Defining criteria for 'user states' was discussed. The various criteria suggested included major flag states, exporting states, importing (recipient) states, port states, and trading states. Private sector 'users' were considered to include the oil, shipping and marine insurance industries, and vessel and freight owners. Several delegates felt that the types of cargo to be included within the definition criteria of 'users' should be widened to cover hazardous materials. It was further thought that all cargo ships with a potential to pollute the oceans should also be included, including passenger vessels . . . It became apparent that the list is potentially endless.

A. T. Khee-Jin, 'Control of Pollution in the Straits of Malacca and Singapore: Modalities of Co-operation – Rapporteur's Report', 1998(2) *Singapore Journal of International and Comparative Law*, 271.

conditions.[45] Article 43 is not prescriptive in nature and encourages co-operation among all those concerned, in particular because co-operation with the industry cannot be dispensed with if it is decided that ships themselves will be charged. In addition, it is also perhaps appropriate to associate not only the direct beneficiaries of a safe passage but also other interests affected by the safety of navigation.[46] Oxman rightly concludes:

> [T]he formal reference to user 'States' does not preclude imaginative arrangements, whether formal or informal, to secure the constructive co-operation of the private sector . . . [S]ubject 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.[47]

A broad approach to the concept of 'user' is fully consistent with the notion that a strait constitutes a social good, the consumption of which can no longer be considered non-rival, for users impose on one another externalities which grow with the increase in the use of the strait itself.[48]

11.4 Burden sharing and implementation of Article 43

Although most academic comments and official attention have been given in the context of the Straits of Malacca and Singapore, methods of the implementation of Article 43 have also been suggested that could be

[45] E.g. INTERTANKO, the Tankers Owners' Association, has indicated a willingness to pay for improved safety, provided that the WORLDSCALE rates can be revised to reflect increased costs and that their members not be discriminated against. See P. B. Marlow, 'Financing Straits Management: Inherent Problems', in A. Hamzah (ed.), *The Straits of Malacca* (Pelanduk, Kuala Lumpur, 1997), 171–172. For WORLDSCALE rates, see www.worldscale.co.uk

[46] E.g. H. Djalal, 'Pointers on the Safety of Navigation in the Straits of Malacca and Singapore', 1998(2) *Singapore Journal of International and Comparative Law*, 440 (mentioning the exploitation of living resources in the Straits, local peace and tranquillity and the preservation of the marine environment); G. Peet, 'Financing Straits Management: Policy Options', in A. Hamzah (ed.), *The Straits of Malacca* (Pelanduk, Kuala Lumpur, 1997), 153–155 (mentioning oil and gas activities off the Indonesian coast, mangrove and coral reef areas).

[47] Oxman in n. 2, 418–419. See also Khee-Jin in n. 44, 271–271: '[I]t was suggested that some measure of prioritisation was necessary. Some participants thought that the littoral states must initiate some form of prioritisation to identify the most significant users and enter into consultations with them'. The open-ended nature of the group of users also reflects the nature of the agreements concluded. See n. 35.

[48] See R. Mesznik, 'Transit Fees for Ocean Straits and Their Impact on Global Economic Welfare', 1980(8) *Ocean Development and International Law*, 344–345; Marlow in n. 45, 167–168.

of general relevance. Ambassador Koh reminded the participants of a 1999 Conference on the Straits of Malacca co-organized by the IMO: '[T]hrough these discussions we are testing Article 43 and . . . there is a lot at stake in our collective endeavor. There is no other international strait which is seeking to find an implementing mechanism under Article 43. If we succeed in at arriving at a consensus on how to implement Article 43, we can be a paradigm case'.[49] There is no doubt that the issue of burden sharing and financing of aid to ensure the safety of navigation and the prevention or control of pollution have been at the centre of discussions.[50] The argument was made that a global community of unequal nation-States demands very different approaches for rich States and poor States.[51] The costs of risk management have been well-documented in the Straits of Malacca and Singapore,[52] but it has also been claimed that the transit passage regime has failed to incorporate certain compensatory mechanisms to defray the cost to coastal States for the provision of services in straits and that the free-of-charge situation needs to be reviewed in light of the changed circumstances.[53] It is no secret that the Malaysian Prime Minister openly addressed the need to levy a toll on passing ships.[54] The soundness of levying tolls has also been justified in economic terms.[55] Furthermore, in light of the open-ended nature of the

[49] Beckman in n. 17, 285.

[50] E.g. Oxman in n. 2, 420 (citing a 1993 report of an IMO Working Group on the Malacca Strait, MSC 63/INF.3).

[51] E. Gold, 'Preventing and Managing Marine Pollution in the Malacca and Singapore Straits: Framework for Cooperation', 1999(3) *Singapore Journal of International and Comparative Law*, 359.

[52] E.g. M. R. bin Ahmad, 'The Financial Cost of Risk Management in the Straits of Malacca', in A. Hamzah (ed.), *The Straits of Malacca* (Pelanduk, Kuala Lumpur, 1997), 187.

[53] B. A. Hamzah, 'Global Funding for Navigational Safety and Environmental Protection', in A. Hamzah (ed.), *The Straits of Malacca* (Pelanduk, Kuala Lumpur, 1997), 130, 133. The changed circumstances for him include the end of the Cold War, because during the Cold War, '[m]any countries which controlled access to strategic waterways were prepared to tolerate the United States or the Soviet Union for security reasons. Burden sharing was not a problem as the contribution from coastal states seen in a larger strategic context was minimal'. Ibid., 132 (also noting that it has cost the Malaysian government RM 1 billion since 1984 to keep the straits safe for international navigation: ibid., 136).

[54] Ibid., 137.

[55] Mesznik in n. 48, 345 (emphasis in original):

> The presence of externalities implies that, even if the management costs equal zero, *a price of zero is no longer compatible with an optimal utilization of the strait.* Without an explicit transit fee, the strait will be over-used and the costs will be borne by all users in a non-optimal way, through implicit costs in the form of waiting time and complex regulations. This situation, with the resulting non-price rationing, is a perennial problem of many social goods.

co-operation recommended in Article 43, the aggregation of costs may greatly exceed what is immediately associated with practical measures; it has been noted that co-operation under Article 43 may encompass measures such as institution building, capacity building of relevant institutions, capacity building of human resources, assistance in ratifying or implementing pertinent international conventions, rules and standards, and assistance in developing national laws or preparation of strategies and action plans.[56] In particular, the cost of pollution abatement could arise from pollution response and contingency expenses, costs of cleaning up oil spills and payment of compensation.[57] Therefore, in October 1995, the Marine Environmental Protection Committee (MEPC) of the IMO indicated that the 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 to be consistent with Article 43. Such financial mechanisms should be designed to achieve an *equitable* sharing of burdens.[58] Greece, the United States and Russia reiterated their position that they were against the imposition of a tax on shipping as a means of obtaining funds.[59]

Several regimes contain mechanisms for the collection of charges on shipping.[60] Article 3 of the Statute on Freedom of Transit says:

> Traffic in transit shall not be subject to any special dues in respect of transit (including entry and exit). Nevertheless, on such traffic in transit there may be levied dues intended solely to defray expenses of supervision and administration entailed by such transit. The rate of any such dues must correspond as nearly as possible with the expenses which they are intended to cover.[61]

[56] Pal and Göttsche-Wanli in n. 27, 489 (and the comprehensive list at 490–491). It has also been noted that co-operation could be used to have a strait (in the case at hand, the Straits of Malacca) designated as a MARPOL Special Area. R. M. Sunardi, 'Prospects for Sub-Regional, Regional and International Cooperation in Implementing Article 43 of UNCLOS', 1998(2) *Singapore Journal of International and Comparative Law*, 446.

[57] Khee-Jin in n. 44, 271.

[58] IMO Doc. MEPC 37/22, para. 10.17 and Annex 11, quoted in Oxman in n. 2, 421 (emphasis added).

[59] IMO Doc. NAV 41/23, paras. 4.2–4.4, quoted in Oxman, ibid.

[60] The UNCLOS knows other systems of payments or contributions in kind; see Article 82 and Part XI.

[61] 7 LNTS 11, opened for signature on 20 April 1921 and entered into force on 31 October 1922. But see Article 127 of the UNCLOS. Article 7 of the Statute on the Regime of Navigable Waterways of International Concern in n. 11, says:

> No dues of any kind may be levied anywhere on the course or at the mouth of a navigable waterway of international concern, other than dues in the nature of

The Montreux Convention, which comes within the ambit of Article 35(c) of the UNCLOS, enables Turkey to levy taxes and charges on merchant vessels when passing in transit without calling at a port in the Turkish Straits.[62] Tolls apply for the passage through the Suez Canal,[63] as well as the Panama Canal.[64] Anderson also mentions an Agreement of 1962 among 15 States for the maintenance of certain lights on islands and rocks in the southern part of the Red Sea, north of Aden and the Straits of Bab-el-Mandeb; annual contributions were collected by the Foreign and Commonwealth Office on the basis of registered tonnage of shipping passing through the Red Sea.[65] Also, the North Atlantic ice patrol service has been in existence since 1914 and is described in the SOLAS Convention. The scheme is managed by the United States with the assistance of Canada, and the US Department of State collects the payments from the participating governments.[66] Mechanisms are also known, notably in the United Kingdom and Ireland, where the coastal States charge ships visiting their

> payment for services rendered and intended solely to cover in an equitable manner the expenses of maintaining and improving the navigability of the waterway and its approaches, or to meet expenditure incurred in the interest of navigation. These dues shall be fixed in accordance with such expenses, and the tariff of dues shall be posted in the ports. These dues shall be levied in such a manner as to render unnecessary a detailed examination of the cargo, except in cases of suspected fraud or infringement of regulations, and so as to facilitate international traffic as much as possible, both as regards their rates and the method of their application.

See also ibid., Article 10(2).

[62] Convention Regarding the Regime of the Straits, 1937(31)(Supp.) *American Journal of International Law*, 1, opened for signature on 20 July 1936 and entered into force on 9 November 1936, Article 2. Annex I to the Convention specifies the general amounts of charge, payable in gold Francs or in Turkish currency, that are levied on each tonne of net registered tonnage in respect of a return voyage through the Straits. The charges may only apply in respect of sanitary control, lighthouses, lights, channel buoys and lifesaving services. The charges can only be increased by amendment of the Convention in Article 29. Charges and taxes can be levied for optional services, such as pilotage and towage.

[63] See www.suezcanal.gov.eg/TollCirculars.aspx for the toll amounts and www.suezcanal.gov.eg/Treaties.aspx for the legal regime.

[64] See www.acp.gob.pa/eng/maritime/tolls.html.

[65] Anderson in n. 6, 451. The scheme ended in 1990. Ibid.

[66] Ibid., 448–449. Revised rules came into effect in 2002. Under Regulation 6(1) of chapter V of SOLAS, 'ships transiting the region of icebergs guarded by the Ice Patrol during the ice season are required to make use of the services provided by the Ice Patrol'. Para. 2 of the Appendix to chapter V says: 'Each Contracting Government specially interested in these services whose ships pass through the region of icebergs during the ice season undertakes to contribute to the [United States] its proportionate share of the costs for the management and operation of the ice patrol service'. The method of determining contributions is explained in paras. 2 and 3.

ports light dues designed to defray the costs of the lighthouse authorities in respect of lights, buoys, the operation of the Decca Navigator System and radio beacons. They are a form of port State jurisdiction.[67]

Following up on the suggestions made by the MEPC,[68] the United Kingdom indicated at the 66th session of the MSC in 1997 that:

> [I]ncreasing need for navigational aids and other services on important shipping routes could overstretch the ability of particular coastal States to provide such services . . . It would be helpful to all parties if a recognised framework for cost recovery were developed. The levying of such charges outside a framework of arrangements agreed internationally could be detrimental to traditional navigational rights and freedoms and to the orderly development of world maritime trade.[69]

The criteria suggested by the United Kingdom for a set of fair and equitable principles which would encourage the establishment of future charging systems were as follows:

- the system must be consistent with the UNCLOS;
- the system must not discriminate among vessels of different Member States participating in the scheme, nor between them and vessels of third countries which might transit the area;
- the charges raised by the system should be related clearly to the costs of providing the service, including the costs of investment in its initial provision or subsequent improvement. The charges should be transparent, so as to avoid suspicion of overcharging or the imposition of indirect taxation on transiting trade;
- the services charged for should be provided at a level that is consistent with the IMO or other similar international agreements.[70]

[67] D. H. Anderson, 'The Imposition of Tolls on Ships: A Review of International Practice' (1998)2 *Singapore Journal of International and Comparative Law*, 403. In the United Kingdom, the light dues are levied on commercial vessels calling at ports in the British Isles, on the basis of the net registered tonnage of the vessel. The rate is set by the Department of Transport, and it is annually reviewed. Light dues are charged at 43 pence per net registered tonne, subject to a maximum charge of £17,200 per voyage in 2010. See www.trinityhouse.co.uk/about_us/financial/index.html. In the aftermath of the *Braer* incident, Lord Donaldson delivered in 1994 several recommendations, including 'paying for pollution prevention': see, e.g., Anderson, ibid., 403–406. In 1997, the Merchant Shipping and Maritime Security Act was adopted, which allows charges to be levied in relation to prevention of pollution from ships but only on ships which have entered a UK port or are anchored off a UK port or an installation in UK waters: see Schedule 2. For the dues levied for aids of navigation within the Gulf, see Marlow in n. 45, 183.

[68] See n. 58. [69] IMO Doc. LEG 76/INF. 2 (1997). [70] Ibid.

Commenting on that scheme, Anderson wrote that the system could be installed by means of an international agreement for the particular strait or pursuant to an arrangement reached within the IMO; the system could also extend to the question of charges on users, whether they are user States or individual ships using the system. A charge on each participating government, assessed according to the extent of the use of the service by ships flying the flag of the State concerned, may be appropriate where ships are in transit. The direct imposition of a charge on each ship would be appropriate when ships are making a port of call in the vicinity of the service area. The scheme would, overall, serve to transfer part of the costs from the taxpayers of coastal States to the users, and the latter would, in turn, pass on their added costs to the passengers and owners of the goods being transported and, ultimately, to the consumers.[71] The MSC reacted cautiously to the United Kingdom's proposal, with some delegates suggesting that the IMO was not the competent body to consider the issue.[72] In response, the United Kingdom indicated that the IMO was an appropriate body to consider issues with commercial implications under Article 1 of its Constitution. The United Kingdom believed that, before ships on transit passage could be made the subject of charges for such services, there would have to be an international agreement following the terms of Article 43 of the UNCLOS. In principle, charges should apply to all ships benefiting from a particular service, although the application of charges would need to be considered on a case-by-case basis depending on the type of service being charged for and in relation to the principles established.[73] The United Kingdom referred to the arrangements for air traffic control services adopted by the ICAO under Article 15 of the Chicago Convention.[74] However, it has been noted that aviation control is

[71] Anderson in n. 6, 454–456.

[72] IMO Doc. LEG 76/INF. 2 (1997), para. 4. Some MSC delegates concluded that the issue went beyond the scope and mandate of the IMO, which focuses on technical, not commercial, matters and that the issue should be left to national Administrations and that the proposal might give rise to complex legal issues which would need to be clarified (for example, the types of vessels which should be charged fees). IMO Doc. LEG 77/10 (1998), para. 3.

[73] IMO Doc. LEG 77/10 (1998), paras. 11–12.

[74] Ibid., para. 11. Article 15 refers to the charges that may be imposed or may be permitted to be imposed by a contracting State for the use of such airports and air navigation facilities by the aircraft of any other contracting State. It also specifies that no fees, dues or other charges shall be imposed by any contracting State in respect solely of the right of transit over, entry into or exit from its territory of any aircraft of a contracting State or persons or property thereon. Convention on International Civil Aviation, as amended, 15 UNTS 295, opened for signature on 7 December 1944 and entered into force on 4 April 1947. This

traditionally absolute and total, but marine control has limited potential, and the two industries are not directly comparable in the context of navigational aids and safety.[75] No further action was taken.

Charging users has also been envisaged in literature, on the basis of a user-pays-principle.[76] Its concrete implementation, however, may involve complex economic determinations. Oral notes that the principle that inspired the user-pays-principle, the polluter-pays-principle, remains unclear and its actual implementation has focused on post-pollution liability rather than it being used as a method to prevent pollution.[77] A user-pays-principle implemented through agreements has been considered to achieve co-operative collection of uniform dues, in a way that is similar to light dues, or to design user- or benefit-based cost-sharing schemes. But there, too, the principal issues include defining the users, estimating users' benefits, deciding on the level of adequate (incremental) funding and designing mechanisms to distribute the funding.[78] The problems associated with mandatory payments by users to finance the recovery of costs have also been raised by Hamzah, who wondered who should contribute and to whom, what the mode and scale of contribution should be and what the formula for the contribution would be.[79] For the Straits of Malacca in particular, he singled out oil tankers as major contributors and proposed that 'Hong Kong, China, South Korea, Taiwan, Thailand, the Philippines and Liberia be persuaded to make appropriate contributions'; it would be more practical if such contributions were made to an existing fund, the Revolving Fund.[80] Compulsory

has been implemented in Europe in a uniform way by the creation in 1962 of Eurocontrol, which bills the airline on a cost-recovery basis. Administrative costs and the capital cost of new radars and computer equipment can be included in the assessment of the total costs to be recovered from the beneficiaries or consumers of the service. No element of profit or return on capital is included. Anderson in n. 6, 448. See www.eurocontrol.int.

[75] Marlow in n. 45, 172–173.

[76] On the user pays principle in general, see C. S. Pearson, 'Testing the System: GATT + PPP=?', 1994(27) *Cornell International Law Journal*, 553.

[77] Oral in n. 26, 593, 598.

[78] T. A. Grigalunas, Y.-T. Chang and J. Opaluch, 'Sustainable Financing for Controlling Transboundary Pollution by Shipping in the Malacca Straits – Options and Implications', 2000(2) *Maritime Economics and Logistics*, 340, 341.

[79] Hamzah in n. 38, 502. Suggestions were made in 2007 to collect contribution of US $0.01 for each ton of oil and gas transiting the Straits of Malacca; but this was not positively and favourably considered by shipping and oil companies. See H. Djalal, 'The Development of Cooperation on the Straits of Malacca and Singapore', Kuala Lumpur, 24 November 2008, www.nippon-foundation.or.jp/eng/current/malacca_sympo/6.doc, para. 47.

[80] Ibid., 508–509. See also Grigalunas et al. in n. 78, 333–335. On the Revolving Fund, see Chapter 12, n. 13 and accompanying text.

contributions have also been suggested through the IMO either by amendment to SOLAS or in a new convention in relation to specific straits.[81] But the collection of mandatory contributions is not the only solution envisaged and may not be the primary solution. A voluntary approach, by definition, does not ensure the solving of the free-rider problem, but it has been noted that the prospects for agreement on a mandatory system are probably too remote to justify the effort.[82] When the matter was discussed at a Conference in Singapore in 1996, it was generally presumed that the computation and allocation of specific proportions of financial responsibility would be based on criteria such as the number of vessels or the amount of tonnage going through the strait. Alternatives to transit fees, which could only be established by agreement, were suggested and included a special fund to which users would be requested to make contributions, whether monetary or in the form of technical assistance and the provision of pollution-abatement equipment.[83] It was suggested that all major beneficiaries should contribute to a fund that was managed by a committee of members from littoral States or that a fund be established from aid from international funding agencies. It was also considered that regional organizations or the IMO itself could maintain and implement agreements entered into under Article 43.[84] At a similar Conference in 1999, Nandan argued that it might be useful, in the first instance, for States bordering straits to invite user States to make voluntary contributions to a trust fund established to compensate for the burden they have to bear.[85] The Singapore Minister for Communication and Information Technology expressed the view that a fund should be established and managed by an international entity, which would include representatives from the coastal States, user States, other users and the IMO, and that contributions should be based on a cost-recovery basis.[86] However, the proposal that the fund should be managed by an international entity met with a cool response from the representatives of Indonesia and Malaysia, who emphasized the sovereignty of the coastal States.[87] The most

[81] Tiwari in n. 40, 474.

[82] Oxman in n. 2, 424. See also Khee-Jin in n. 44, 273: '[A]ny mandatory system of collecting contributions would require the mechanism of a treaty which could take a long time to negotiate . . . An alternative that was suggested was a voluntary system pursuant to an MOU or a declaration by the relevant littoral or stakeholder states'.

[83] Khee-Jin in n. 44, 274. [84] Theng in n. 43, 265–266. [85] Nandan in n. 6, 435.

[86] Y. C. Tong, 'Opening Address', 1999(3) *Singapore Journal of International and Comparative Law*, 298.

[87] Beckman in n. 17, 285. Their position was that the Straits of Malacca are not 'international straits' but 'straits used for international navigation'. This view dates back to a tripartite

extensive proposal suggested that the fund could be an 'umbrella' fund or a financial mechanism to fund specific projects and would be operated under a market-oriented approach.[88] The fund would be managed by one committee or board instead of an assembly plus an executive committee. Representation in the board would be by all interested parties, including stakeholders, and decision making would be by consensus as a general rule. The IMO would also have a role in the fund.[89]

All of these proposals surely testify to the increased interest in the issue of burden sharing, although the schemes to be agreed upon have yet to be fleshed out. Although the marked preference is for a strait-by-strait approach, the proposals developed in the context of the Straits of Malacca and Singapore, which could inspire arrangements in other straits, reveal, at the very least, a broad approach to the concept of 'users', a voluntary approach to the issue of contributions and institutional mechanisms which would both involve the IMO and assign a central role to the littoral States, perhaps by resorting to several funds. There seemed to be no discernable consensus on the calculation of contributions, and one could therefore assume that concrete arrangements would favour donations in an amount determined by the donor or in proportion of estimated costs of actual projects, instead of contributions based on actual interests in shipping or tonnage that navigate through a given strait. These conclusions are confirmed by the solutions found for the Straits of Malacca.

official statement (including Singapore) of 1971, although that statement occurred at a time when they only envisaged innocent passage in the straits. See Chapter 12, n. 2 and accompanying text.

88 Pal and Göttsche-Wanli in n. 27, 484. 'The issue of levying a toll or fee or charge also loses its meaning because goods and services collectively in demand would be purchased collectively at market price'. Ibid., 485.

89 Ibid., 492–493.