Sub-regional, Regional and International Co-operation in Responding to and Deterring Transboundary Marine Pollution

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Sub-regional, Regional and International Co-operation in Responding to and Deterring Transboundary Marine Pollution

Bernard H Oxman

I. INTRODUCTION

This is the second conference on the Malacca and Singapore Straits jointly sponsored by Singapore’s Institute of Policy Studies and the International Maritime Organization. It is indeed an honour to speak at both.

The question of international co-operation to prevent accidents and to prevent, reduce and control pollution of the marine environment in the Malacca and Singapore Straits, including co-operation within the framework of article 43 of the UN Convention on the Law of the Sea (UN Convention), is a basic theme of both conferences. The title of the particular topic assigned to me by the organizers of this Conference, namely Sub-Regional, Regional and International Co-operation in Responding to and Deterring Transboundary Marine Pollution, could itself be read as broad enough to invite comment on the entire scope of both conferences. Fortunately, I have been advised to construe it more narrowly, and to confine my remarks, with a view to advancing the goals of the Conference without unnecessary repetition or duplication, to a few specific matters regarding ships transiting the Malacca and Singapore Straits. In this connection, I observe at the outset that serious pollution of the Malacca and Singapore Straits is likely to be transboundary pollution in that it affects, or threatens to affect, the waters of more than one of the straits states.

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1 The first Conference was held in Singapore in September 1996. Papers presented at the first conference have been published in volume 2 of the Singapore Journal of International and Comparative Law as a special feature for the International Year of the Oceans 1998.

2 It should be noted that limiting the scope of the discussion to ships excludes the much broader question of transboundary pollution arising, for example, from activities on land or from offshore drilling and installations.
For both legal and practical reasons, no single framework for co-operation is likely to suffice for purposes of responding to and deterring transboundary marine pollution from ships in the Straits. The question of whether the appropriate framework is global, regional or sub-regional depends in large measure on the particular object of co-operation. Moreover, in many circumstances, the options are not mutually exclusive. For example, a global forum may offer general guidance on particular matters that are dealt with in greater detail on a regional or sub-regional basis.

II. STANDARD SETTING FOR SHIPS: GLOBAL FRAMEWORK

It is generally acknowledged that the International Maritime Organization (IMO) is the focus for most of the global co-operation regarding standards for ships. In a few cases, another specialised global organization may be the focus. For example, the International Labor Organization has taken an active interest in protecting the crew.

III. TRANSIT PASSAGE AND FREEDOM OF NAVIGATION

As a legal matter, in accordance with the UN Convention on the Law of the Sea, all ships enjoy a right of transit passage through the territorial sea in the Malacca and Singapore Straits and enjoy freedom of navigation beyond the territorial sea. Their flag states are bound to ensure that, in exercising those rights, the ships comply with generally accepted international standards regarding safety at sea and prevention of pollution from ships.

In addition, special provision is made for riparian states:

1. to designate sea lanes and prescribe traffic separation schemes in straits with the approval of the competent international organization, and

2. to designate areas in the exclusive economic zone for pollution prevention purposes to which the competent international organization's international rules and standards regarding 'special areas' apply, and also to adopt additional requirements regarding discharges and navigational prac-

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3 See UN Convention on the Law of the Sea, art 38 (hereinafter cited as UNCLOS).
4 UNCLOS, arts 58(1), 87. As the focus of this Conference is on the Malacca and Singapore Straits, this paper will not address questions of the regulation of innocent passage in the territorial sea outside the Straits.
5 UNCLOS, arts 39(2), 58(2), 94(5), 211(2).
6 See UNCLOS, arts 41, 42(1)(a).
ties in such areas, if the competent international organization determines that the proposed areas qualify and agrees to any additional requirements.\footnote{UNCLOS, art 211(6). The additional requirements may not compel foreign vessels 'to observe design, construction, manning or equipment standards other than generally accepted international rules and standards.' \textit{Ibid.} Where operational discharges are concerned, the relevant inquiry will frequently turn on the availability of alternatives, including shore reception facilities.}

The straits states have no right to prescribe safety or pollution standards other than these generally accepted international standards or internationally approved measures for ships exercising the freedom of navigation beyond the territorial sea or the right of transit passage. Accordingly, it is evident that, for legal reasons, the framework for international co-operation is global for the adoption of standards for safety of navigation and prevention of pollution from ships while they are exercising these navigation freedoms and rights.

\section*{IV. PORT ENTRY AND OTHER MATTERS}

Even where there is no legal requirement for using a global framework, there may be practical reasons for doing so. Ships travel around the world. Thus, for example, while as a legal matter, absent treaty obligations to the contrary, states may establish their own requirements for ships entering their ports, if this right is pressed too far a situation might develop in which different states, or states in different regions, impose different construction, manning, equipment, or design requirements for port entry. This could prove unwieldy. If the requirements were inconsistent with each other or with the generally accepted international regulations applicable to ships while at sea, it might become unworkable.

Accordingly, we may conclude that the appropriate forum for international co-operation with respect to setting construction, manning, equipment and design standards for ships, including training requirements, is preferably global.

Many other issues involving shipping are similar in different parts of the world. IMO, and the delegates participating in its work, have substantial accumulated data, knowledge, and expertise. On many matters, even if not legally or practically required, uniform guidelines may be desirable for economic or other reasons. On some matters, for practical reasons, a globally co-ordinated response is likely to work better. Rules regarding liability for pollution are one example. Rules to protect seamen are another.
It is principally with respect to matters where the framework is not global that the question arises of identifying an appropriate regional or sub-regional framework. The appropriate framework, and the identification of participants, will depend to a significant degree on the object of co-operation.

V. STANDARD SETTING FOR SHIPS: REGIONAL AND SUB-REGIONAL FRAMEWORKS

As previously indicated, for legal or practical reasons, a global framework is appropriate for co-operation on most questions of standard setting for ships. But in some cases this may be supplemented.

VI. REGIONAL AND SUB-REGIONAL PREPARATION

Even where the framework is global, states may co-operate on a regional or sub-regional basis in formulating proposals for submission to the global organization. This was done, for example, in the case of traffic regulation in the Malacca and Singapore Straits: the riparian states consulted among themselves and with other states principally concerned prior to submission of their proposals to IMO. Common sense alone would suggest such a procedure. Since the purpose of such advance consultation is to simplify the task and enhance the prospects for adoption once a proposal reaches IMO, it would seem that no fixed sub-regional or regional framework for consultation is necessarily required. Participation, beyond the riparian states, might well depend on the nature of the particular proposal and the interests specially affected. Needless to say, where an institutional framework does exist and meets the need, it can of course be used. The Tripartite Technical Experts Group created by Indonesia, Malaysia and Singapore is an obvious example of such an institutional framework for co-ordinating the work of the three riparian states.

VII. DUMPING

The London Dumping Convention\(^8\) establishes global rules and standards for deliberate disposal of wastes and other matter at sea. National regulations must be no less effective than global rules and standards.\(^9\) However, they may be stricter.

Because dumping is defined to exclude 'the disposal of wastes or other matter incidental to, or derived from the normal operations of

\(^{8}\) 29 Dec 1972, 1046 UNTS 120.

\(^{9}\) UNCLOS, art 210(6).
vessels,'10 dumping so defined is not properly regarded as an incident of navigation, and is subject to 'the express prior approval of the coastal State' within the territorial sea and the exclusive economic zone.11 In my view, this includes straits subject to the regime of transit passage, either on the grounds that entry into the strait for the purpose of dumping there falls outside the definition of transit passage because it is not an 'exercise ... of freedom of navigation ... solely for the purpose of continuous and expeditious transit of the strait,'12 or on the grounds that ships, 'while exercising the right of transit passage,' must 'refrain from any activities other than those incident to their normal modes of continuous and expeditious transit.'13

The exercise of the right of the coastal state to permit, regulate and control dumping in its territorial sea or exclusive economic zone requires 'due consideration of the matter with other States which by reason of their geographical situation may be adversely affected thereby.'14 To the extent that any dumping at all is contemplated there, application of this rule within the Malacca and Singapore Straits would seem to suggest a tripartite mechanism among the riparian states for consultation in this regard.15

**VIII. SUPPLEMENTAL FLAG STATE STANDARDS**

Flag state laws and regulations regarding safety at sea 'must conform to generally accepted international regulations.'16 Flag state laws and regulations regarding pollution from ships must 'at least' have the same effect as that of generally accepted international rules and standards.17 It is possible that, for particular reasons relevant to specific problems

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10 UNCLOS, art 1(1)(5).
11 UNCLOS, art 210.
12 UNCLOS, arts 34(1), 38(2).
13 UNCLOS, art 39(1)(e).
14 This may be regarded as a specific application of the general duty of states to 'take all measures necessary to ensure that activities under their jurisdiction or control are so conducted as not to cause damage by pollution to other States and their environment, and that pollution arising from incidents or activities under their jurisdiction or control does not spread beyond' their waters. UNCLOS, art 194(2).
15 Of course in certain areas, such as the western end of the Straits, application of the rule might require consultation with other coastal states.
16 UNCLOS, art 94. While this provision is expressly applicable both on the high seas and in the exclusive economic zone, its text is not so limited, and in any event there are comparable duties in the territorial sea generally and in straits. See UNCLOS, arts 21(4), 39(2)(a).
17 UNCLOS, art 211.
in a region, states might wish to co-ordinate the application of stricter standards to particular types of ships flying their flag. For practical reasons, this is likely to occur only where all or most of the ships giving rise to the concern use, and are required to continue to use, the flags in question. Thus, this is unlikely to be a particularly useful tool except in very specific circumstances, such as the regulation of ships used only in a local context. Ferries are one example. In such situations, supplemental port state standards might be equally effective, especially where third-state flags are an option.

IX. SUPPLEMENTAL PORT STATE STANDARDS

While other treaties may accord rights of port entry, and while customary international law unquestionably establishes obligations in this regard in cases of force majeure or distress, the UN Convention itself articulates no right of port entry. The Convention recognises, and does not restrict, the right of a state to control use of its ports and offshore terminals (including roadsteads). The exercise of the right of transit passage 'for the purpose of entering, leaving or returning from a State bordering the strait' is 'subject to the conditions of entry to that State.' In the case of pollution control regulations, the UN Convention not only assumes but expressly requires notice of port entry requirements.

Accordingly, to the extent consistent with their other treaty obligations, states have the right under the UN Convention to establish conditions for port entry regarding matters such as construction, manning, equipment or design of ships. Port states are most likely to do so in order to implement international standards in their municipal laws and regulations regarding port entry. But, if they regard the international standards as inadequate in some respect, they may do more.

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18 The Convention does expressly apply the underlying principle at sea, however: innocent passage includes stopping or anchoring rendered necessary by force majeure or distress. UNCLOS, art 18(2).

19 UNCLOS, art 38(2). In the case of innocent passage, this right may even be enforced while the ship is in passage: the coastal state 'has the right to take the necessary steps to prevent any breach of the conditions to which admission of those ships to internal waters or such a call is subject.' UNCLOS, art 25(2).

20 'States which establish particular requirements for the prevention, reduction and control of pollution of the marine environment as a condition for the entry of foreign vessels into their ports or internal waters or for a call at their offshore terminals shall give due publicity to such requirements and shall communicate them to the competent international organization.' UNCLOS, art 211.
In the United States, for example, the Oil Pollution Act of 1990,\textsuperscript{21} enacted in the wake of the \textit{Exxon Valdez} disaster off Alaska, generally requires that large tankers transporting oil to or from the United States 'shall be equipped with a double hull'\textsuperscript{22} (with a phase-out period for older tankers). By way of exception, until January 1, 2015, the Act permits certain large tankers with single hulls to transfer oil at an offshore deepwater port facility or by lightering more than 60 miles from the US coast.\textsuperscript{23}

Needless to say, ships can rarely if ever alter their construction, manning, equipment and design during a voyage. Thus, port entry requirements dealing with such matters can protect not only the waters of the port, but indirectly all waters traversed by the ship. Whether this affords significant protection to waters in the vicinity of the port state, but outside its ports, depends in large measure on whether the ports of destination of most ships (or most ships of a particular type) using those waters also impose the supplemental requirements.

Moreover, in considering supplemental requirements for port entry, governments are likely to weigh the costs and benefits: Would more stringent unilateral port entry requirements reduce the capacity necessary to carry their exports or imports or render them more expensive? Would such requirements affect the competitiveness of their ports?\textsuperscript{24}

Global standards are ordinarily the best means for ensuring that most, if not all, port states apply the relevant standards, and for minimising potential economic costs. But if more stringent standards are deemed important in some respect, regional co-ordination among port states can help secure their observance by many, perhaps most, ships using the relevant area and help minimise the costs of imposing supplemental standards. Which states need to be included depends at least as much on traffic patterns and economic issues as on geography. Accordingly, there are no \textit{a priori} means for identifying the states that need to be included in any co-operative effort where the

\textsuperscript{21} Pub L 101-380.
\textsuperscript{22} 46 \textit{USC} §3703a(a). This was followed by the introduction of double hull requirements by IMO in 1992 amendments to MARPOL 73/78 (Regulations 1/13F and 1/13G).
\textsuperscript{23} 46 \textit{USC} § 3703a(b)(3). This requirement applies both to new and to older single-hulled tankers under the statute's carefully modulated phase-out of the right enjoyed by older tankers to enter the natural ports of the United States and to lighter close to shore. 46 \textit{USC} § 3703a(c)(3).
\textsuperscript{24} In his third annual policy speech, Tung Chee-Hwa, Hong Kong's Chief Executive, called for carrying out a long-term strategy that will prevent Hong Kong from losing business opportunities to rival ports, such as Shanghai and Singapore, \textit{International Herald Tribune} (Singapore edition), Oct 13, 1999, p 4.
The purpose is to use port entry requirements to protect the waters traversed en route to and from ports and to minimise any adverse economic effects of imposing stricter port entry requirements.

X. ENFORCEMENT OF INTERNATIONAL STANDARDS:
REGIONAL AND SUB-REGIONAL FRAMEWORKS

The international law of the sea relies almost exclusively on individual states for enforcement of both international and national standards for ships. Responsibility for ensuring compliance with international safety and environmental norms traditionally rests with the flag state. This has been supplemented by according limited enforcement rights to coastal states, with respect to ships navigating off the coast, and by according increasing enforcement responsibilities (and some additional rights) to port states, with respect to ships using their ports, offshore terminals, and anchorages.

According to the principle of legality, states will impose penalties only for violation of norms incorporated into their own law. The capacity of a state to co-operate constructively in regional or sub-regional enforcement efforts depends, as a legal matter, on whether it own laws incorporate and permit enforcement of the relevant international norms. As a practical matter, although not necessarily as a legal matter, that may depend on whether the state is party to the treaty pursuant to which the norm is established. It should be borne in mind, however, that a fair number of norms established through IMO treaties are in effect incorporated by reference into the UN Convention on the Law of the Sea by virtue of the duty under the Convention to respect, and the right to enforce, generally accepted international safety and pollution standards; thus the UN Convention may itself form the basis for incorporation of relevant international standards into municipal law, at least pending ratification of the relevant IMO treaty.

XI. SHIPS AT SEA

Straits states have the right to take appropriate enforcement measures against a foreign ship that causes or threatens major damage to the marine environment of the straits resulting from the violation of their laws and regulations giving effect to:

25 UNCLOS, arts 94(5)-(7), 217. Compliance with this duty is subject to compulsory dispute settlement. Ibid, arts 286, 297(1)(b).
26 Warships and other ships entitled to sovereign immunity generally are not subject to the enforcement jurisdiction of a foreign state.
(1) sea lanes and traffic separation schemes (including related regulations, such as the underkeel clearance rules in the Malacca and Singapore Straits) approved by IMO, and

(2) applicable international regulations regarding the discharge of oil, oily wastes and other noxious substances.  

This right is exercised by the enforcement personnel of each straits state in its own territorial sea. The reality, however, is that at least two, and more likely all three, riparian states probably will have a significant interest in any violation that causes or threatens major damage to the marine environment of the Malacca and Singapore Straits. There is no reason why the straits states should not enter into co-operative arrangements with each other to enhance the preparedness, efficiency and effectiveness of their enforcement efforts.

The three states could, for example, share information or allocate surveillance responsibilities. It should be borne in mind in this regard that surveillance may reveal possible violations (such as those concerning construction, manning, equipment, or design standards) that do not give rise to a right of arrest in the strait, but that are subject to enforcement by flag states and port states. Thus, surveillance in the strait may in part relate to a trilateral co-operative framework, and in part relate to a broader co-operative framework.

Given the particular geography of the Malacca and Singapore Straits, an interesting question that arises in connection with co-operation in enforcement is whether a straits state that has a right to arrest a ship in transit passage through its territorial sea in the Straits may, for reasons of safety or convenience, ask its neighbour to make the arrest when the ship, continuing on the same voyage, reaches the latter's territorial sea in the Straits.

There is little doubt that the straits states, if they wish, could authorise each other's enforcement authorities to continue pursuit into each other's territorial sea. But chasing a ship in a crowded strait could pose risks to other ships and the environment. In some cases, it might make more sense to ask the neighbouring state to be ready to catch the ship when it crosses into the neighbour's territorial sea.

Apart from the question of port state jurisdiction over discharges at sea, the UN Convention does not address the issue explicitly. The Convention is however replete with references to co-operation between

27 UNCLOS, arts 41, 42, 233.
28 The special question of port state jurisdiction over discharges outside its waters will be discussed infra.
states to protect the marine environment\textsuperscript{29} and co-operation between states in the exercise of their rights in enclosed and semi-enclosed seas.\textsuperscript{30} Viewed from the perspective of the ship, permitting the arrest puts it in no worse a position than if the strait were bordered by only one state. Viewed from the perspective of international community interests, arrangements that increase the safety or convenience of efforts to enforce international pollution standards and internationally approved traffic systems are generally desirable. In principle, there would appear to be no reason why states, particularly with reference to a shared body of water, cannot share some jurisdiction if they wish (whether or not, like members of the European Community with respect to fisheries, they choose to establish a supra-national entity to exercise the delegated competence).\textsuperscript{31}

\textbf{XII. SHIPS IN PORT: CONSTRUCTION, MANNING, EQUIPMENT AND DESIGN}

As a practical matter, from the perspective of both the ship operator and the inspector, ports of call are the most efficient place to inspect ships for compliance with international safety and pollution standards, especially those concerning construction, manning, equipment, and design. The practice of flag states and insurance companies provides ample evidence of this fact.

As previously noted, ships can rarely if ever alter their construction, manning, equipment and design during a voyage. Thus, port entry requirements dealing with such matters can protect not only the waters of the port, but indirectly all waters traversed by the ship. It has already been observed that the UN Convention places no limitations on the authority of states to require compliance with such standards as a condition of entry to their ports (including offshore terminals and anchorages). The same holds true of their authority in their ports to

\begin{itemize}
\item \textsuperscript{29} See UNCLOS, arts 194(1), 197-201.
\item \textsuperscript{30} UNCLOS, art 123. The Malacca and Singapore Straits can be regarded as an enclosed or semi-enclosed sea (or a part thereof) as defined in art 122.
\item \textsuperscript{31} A curious drafting characteristic of the UN Convention might also be noted in this regard: while its innocent passage provisions refer to the 'coastal State' in the singular, and its provisions regarding archipelagic waters likewise refer to the 'archipelagic State' in the singular, the straits articles refer to 'States bordering straits' in the plural. While this surely does not mean that one straits state may exercise jurisdiction in another's waters without consent, it might lend some textual reinforcement to the idea that states bordering the same strait are free to share some competence in the strait if they wish.
\end{itemize}
enforce their laws regarding unlawful entry.\textsuperscript{32} Port state enforcement thus can be an exceedingly effective tool.

In addition to developments in IMO regarding port state enforcement with respect to IMO Conventions dealing with safety and pollution, regional arrangements have emerged to co-ordinate implementation of this tool,\textsuperscript{33} including the Paris Memorandum of Understanding\textsuperscript{34} (focused on European trade) and the Tokyo Memorandum of Understanding\textsuperscript{35} (focused on Asian trade). The states bordering the Malacca and Singapore Straits are participants in the Tokyo MOU.\textsuperscript{36} The European Community has issued significant directives to its member states regarding the exercise of port state authority and the implementation of the Paris MOU.\textsuperscript{37} Apart from these systems, the United States – a major destination for ships – maintains a vigorous inspection system in port. Recent efforts have been made to co-ordinate the

\textsuperscript{32} To the extent that the conditions of entry being enforced conform to generally accepted international standards, it is also less likely that non-discriminatory enforcement of those conditions would run afoul of other treaties, including multilateral trade agreements.


\textsuperscript{34} Memorandum of Understanding on Port State Control in Implementing Agreements on Maritime Safety and Protection of the Marine Environment, Paris, Jan 26, 1982, (1982) 21 ILM 1; <http://www.parismou.org> (website visited 1 Sep 1999). In addition to the coastal state members of the European Community, the members include Canada, Croatia, Norway, Poland, and the Russian Federation. <http://www.parismou.org> (website visited 1 Sep 1999).

\textsuperscript{35} Memorandum of Understanding on Port State Control in the Asia Pacific Region, Tokyo, 1 Dec 1993, <http://www.iijnet.or.jp/tokymou> (website visited 1 Sep 1999).

\textsuperscript{36} The Memorandum was signed on December 1, 1993 by Australia, Canada, Fiji, Hong Kong, Indonesia, Japan, Korea (Republic of), Malaysia, New Zealand, Papua New Guinea, the Philippines, the Russian Federation, Singapore, the Solomon Islands, Thailand and Vietnam. It was signed at Beijing on 11 April 1994 by China and Vanuatu. <http://www.iijnet.or.jp/tokymou> (website visited 1 Sep 1999).

workings of these two MOU's with each other, with the co-operation of the United States.

These arrangements identify the international safety and environmental regulations with respect to which inspections will be carried out in port and set goals for the proportion of ships in port that should be inspected by authorities of the port state. Implementation of the arrangements by all or most major port states in a region would generally ensure that most ships navigating in the broader region are captured by the inspection system, would generally allocate inspection burdens fairly among port states, and would generally minimise competitive risks among ports. (It is much easier to offer a flag of convenience than a port of convenience.) Thus, for example, enforcement of relevant international standards in their ports pursuant to the Tokyo MOU by China, Japan, South Korea and Russia as well as the three straits states could be expected to have a decisive effect on ships transiting the Malacca and Singapore Straits, whatever their flag.

In my opinion, these MOU's are, and should be, the wave of the future with respect to enforcement of international standards for ships. It is a good thing that more responsibility for inspection has gradually shifted to port states, so that they emerge as full partners with flag states in this regard. Port state enforcement represents a rational and balanced solution to the problem of substandard ships and the related problem of flags of convenience. The interest of port states in keeping substandard ships away from their coasts suggests a greater interest in enforcement than some open-registry flag states may have. At the same time, the interest of port states in avoiding unreasonable burdens on their own trade suggests a more balanced approach to enforcement

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than some coastal states may have with respect to the trade of third states moving along their coast.\footnote{Indeed, one of the oddities of law-of-the-sea rhetoric in recent decades has been the support for primary coastal state authority in some circles in North America: neither Canada nor the United States has significant numbers of merchant ships off most of its coast that are not entering its own ports or those of its two NAFTA partners.}

Port state inspection rationally may be modulated to reflect a variety of risk factors. This includes the general record of the flag state in fulfilling its duties to ensure compliance with international safety and pollution standards under the UN Convention and other treaties. I do not believe that taking such factors into account in determining the frequency and nature of port state inspections would necessarily contravene non-discrimination requirements in the UN Convention\footnote{UNCLOS, art 227.} or other treaties. The UN Convention expressly contemplates such a distinction by denying the flag state the option of pre-empting proceedings instituted by another state where the flag state has 'repeatedly disregarded its obligation to enforce effectively the applicable international rules and standards in respect of violations committed by its vessels.'\footnote{UNCLOS, art 228(1).} There is no suggestion that this is regarded as an exception to, rather than entirely compatible with, the Convention's non-discrimination rule.\footnote{Moreover, even if modulated port state enforcement based on the record of the flag state were regarded as discriminatory in principle, there would be a reasonable argument that it constitutes a proportional and otherwise lawful countermeasure to a breach of duty by the flag state evidenced by its poor enforcement record.}

There are of course problems regarding allocation of burdens of inspection. Some ports, such as Singapore, handle a volume of ships far exceeding that necessary to transport their own country's trade.\footnote{This statement would not be true of Rotterdam to the extent that the relevant unit is regarded as the European Community rather than The Netherlands.} On the other hand, this activity benefits the port state's economy.

The question of cost-sharing is rarely far beneath the surface. If it is recognised that the costs of inspection by flag states and insurance companies are borne, directly or indirectly, by the ship owners and operators, who in turn generally pass them on to the consumer through their customers, the question of whether the public should share in the costs of port state inspections as consumers or as taxpayers may become less controversial.
Like other co-operative endeavours, port state enforcement poses a 'free rider' problem. States may get the benefits of the system without sharing in the burdens; they may do so either by staying out of the system or by not doing their part to implement it. Political persuasion is the answer to the first problem and, to some extent, to the second. Still, even among those within the system, there are likely to be suspicions that some ports or port states are doing a better job than others. Every enforcement system faces the challenge of inspecting the inspectors. The problem is not unique to port state enforcement arrangements, and is amenable to reasonable solutions.

XIII. SHIPS IN PORT: DISCHARGES AT SEA

The UN Convention gives a port state the authority to prosecute for discharges in violation of international standards that occur:

1. in its own territorial sea and exclusive economic zone,
2. outside the internal waters, territorial sea or exclusive economic zone of any state,
3. within the internal waters, territorial sea or exclusive economic zone of another state at the request of that state, the flag state, or a state damaged or threatened by the discharge, or if the discharge causes or threatens pollution of the waters of the port state.

Unlike enforcement actions at sea, there is no requirement of major damage or threat of major damage as a pre-requisite to enforcement in port. All that is required is a discharge in violation of applicable international standards. In my view, with respect to transit passage, the 'applicable' international discharge standards are the ones made applicable to ships in transit passage by the straits regime itself, namely those contained in 'generally accepted' international regulations, procedures and practices for the prevention, reduction and control of pollution from ships.

45 UNCLOS, art 220(1). This logically includes its own internal waters or archipelagic waters as well.
46 UNCLOS, art 218(1). This logically excludes archipelagic waters as well. See following note.
47 UNCLOS, arts 218(1)-(2). This logically includes archipelagic waters as well.
Port state enforcement of discharge standards is an important tool, and a significant alternative to arrest at sea. The straits state can ascertain the destination of the ship. The port state can be requested to conduct an investigation. The port state is obliged, as far as practicable, to comply with requests for investigation either by the flag state or by a state in whose waters the discharge occurred. Even if the port state decides to go forward with proceedings, the straits state may request suspension of those proceedings and transfer of the records of the investigation and any bond posted by the ship with the port state.

The potential for co-operation among the three straits state, and with other port states, is clear.

It should be noted that the port state's authority with respect to discharges at sea is set forth in section 6 of Part XII of the Convention. According to the Convention, 'Nothing in sections 5, 6 and 7 affects the legal régime of straits used for international navigation.' In my view, this exclusion does not affect the authority of the port state to enforce international discharge standards. It is evident that the enforcement authority itself is not exercised in straits, but in port. Moreover, international discharge standards—the object of enforcement—are applicable to ships in transit passage of straits under the regime of straits itself. It would be difficult to justify an interpretation of the text that permits the port state to investigate and institute proceedings for discharges in violation of international standards anywhere beyond 12 miles, where all ships enjoy freedom of navigation, but not within 12 miles in straits, where that freedom is limited to continuous and expeditious transit.

XIV. STRAITS STATES AND USER STATES: ARTICLE 43

Active co-operation among the straits states is desirable with respect to the installation and maintenance of aids to navigation and related traffic management systems. User states have an obvious interest in such matters as well. Co-operation between the straits states and the user states, apart from being mandated by article 43 of the UN Convention, would serve the interests of both. Such co-operation of course raises the question of reasonable sharing of burdens by users, especially states with substantial interests in the safe and efficient movement.
of their imports and exports through the Straits. (This is not necessarily the same thing as flag states.)

Article 43 of the UN Convention 'was put forward with straits such as Malacca particularly in mind,\(^{53}\) and appears in a Convention to which the three riparian states as well as most other states are party. It identifies one overall framework for co-operation that is of unquestionable relevance, particularly in the context of burden sharing in the maintenance of navigation aids and traffic systems. This doubtless explains why the entire Plenary Session following this one is devoted to article 43, and why article 43 was also considered at the first IPS-IMO Conference. Having had the opportunity myself to discuss article 43 at some length at the first Conference,\(^{54}\) I will limit myself here to recapitulating a few highlights that may be of particular interest in the context of this panel.

First, quite apart from article 43, the UN Convention establishes a clear duty of states to co-operate to protect and preserve the marine environment from pollution from all sources, including accidents.\(^{55}\) In this context, it would be a mistake to place too much emphasis on the use of the word 'should' rather than 'shall' in article 43.

Second, it is entirely appropriate to involve the private sector in the process as a source of both expertise and resources.\(^{56}\)

Third, the structure of the UN Convention makes clear that the regime of transit passage of straits is entirely separate from the regime of innocent passage otherwise applicable to the territorial sea and certain internal waters. The provisions of the Convention regulating innocent passage are not applicable to the exercise of the right of transit passage. Many rules contained in Part II, Section 3, of the Convention regarding innocent passage are not repeated in Part III, Section 2, on transit passage. This was deliberate. The reverse is also true. On the most fundamental level, the regime of transit passage was devised precisely because of an unwillingness to accept, in most straits used for international navigation, the limitations on transit contained in the rules regarding innocent passage. The provisions regarding payment for specific services rendered to a ship contained


\(^{54}\) Bernard H Oxman, 'Observations on the Interpretation and Application of Art 43 of the UNCLOS with Particular Reference to the Straits of Malacca and Singapore' (1998) 2 SJICL 408, at pp 409-11 (hereinafter Oxman, 'Art 43').

\(^{55}\) See, eg, UNCLOS, arts 192, 194, 197, 199, 211(1).

\(^{56}\) See Oxman, Art 43, supra note 54, pp 418-19, 424.
in article 26(2) of Part II of the Convention regarding innocent passage are not repeated in Part III, Section 2, of the Convention regarding transit passage. Accordingly, the provisions of article 26(2) are not applicable to ships exercising the right of transit passage.

This conclusion also follows from the nature of the transit passage regime. Absent agreement to the contrary, or emergency or other extraordinary situations governed by general principles of unjust enrichment or negotiorum gestio, there is no occasion, under the regime of transit passage, for the straits states unilaterally to impose a charge for a service they alone decide to render to ships in transit passage not entering or leaving their ports. The question of burden sharing is to be resolved by agreements implementing article 43. In that context, it is of course incumbent upon the user states to negotiate in good faith, as expressly required by article 300 of the Convention. A refusal to do so would, in my view, afford the riparian states a right to appropriate remedies under the Convention and international law.

I feel constrained to express my disagreement with views to the contrary regarding article 26(2), not only as a legal matter but as a practical matter. Because misunderstanding on this question could well prejudice attempts to strengthen international co-operation with regard to the Malacca and Singapore Straits, pursuant to article 43 or otherwise, I believe it is useful to repeat two points I made in 1996:

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.

... 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.

58 The imposition of service charges in connection with port entry is an entirely different matter.
59 Oxman, Art 43, supra note 54, p 422.
60 Ibid, p 423.
XV. CONTINGENCY PLANS

Apart from co-operation in enforcement, which has already been discussed, the question of co-operation in responding to pollution of the Straits is largely a question of co-operation in devising contingency plans to deal with casualties and other pollution emergencies. Political authorities will certainly understand that an inadequate response to an environmental emergency, as a result of poor planning or otherwise, can undermine public confidence in the government.

The International Convention on Oil Pollution Preparedness, Response and Co-operation establishes a framework for general international co-operation in this regard. The appropriate framework for co-operation with specific reference to the Malacca and Singapore Straits is almost certainly an arrangement among the three straits states. The arrangement may, among other things, identify the lead government or agency in different situations.

As with all emergency planning, the key however is not just a document that identifies all plausible contingencies and the response thereto, but the actual state of readiness and availability of personnel and equipment, and the identification and maintenance of channels of communication to be used by those in charge of the response. There is no substitute for regular, close and carefully co-ordinated planning among the agencies of the three governments that will be responsible in the event of an emergency.

In the course of such co-ordination, the agencies concerned also can identify sources outside the region with the necessary expertise that could be called upon in the event the straits states were unable to deal with the problem themselves. Identifying such sources in advance could save precious time during a pollution emergency.

XVI. CONCLUSION

The appropriate framework for international co-operation can be determined only with reference to the purpose of the co-operative undertaking. To the extent the framework is global, adequate institutional arrangements already exist, notably in the International Maritime Organization.

To the extent the framework is sub-regional, institutional arrangements among the three riparian states of the Straits of Malacca and Singapore already exist. Whether they are the most appropriate for
all relevant purposes is another matter. It is however important that the three states maintain mechanisms for co-operation and co-ordination in all the different contexts in which this may be needed. Depending on their function, different agencies and individuals are likely to participate in their work.

To the extent the framework is regional, different institutional mechanisms will be needed for different purposes. The Tokyo Memorandum of Understanding provides a good framework for region-wide co-operation on enforcement questions. It is not clear however that all participants in the Tokyo MOU would have a particular interest in arrangements regarding the Malacca and Singapore Straits, or that all states that do have such an interest are participants in the Tokyo MOU. Accordingly, the relevant group of user states for purposes of arrangements under article 43 of the Law of the Sea Convention might be different.

To the extent that the underlying problem stimulating interest in article 43 arrangements is one of resources and burden sharing from the perspective not only of the straits states but of Japan, which has been generous in its assistance, it should be borne in mind that maritime frameworks are not the only relevant ones. ASEAN brings together a significant number of Southeast Asian states. While its composition is not representative of states with an interest in the Straits, certain meetings also include observers from other states.

At the 1996 IPS-IMO Conference, a suggestion was made by a participant from the United States Government that perhaps APEC could take an interest in the matter. Since then, APEC has shown increased attention to questions of protection and preservation of the marine environment. Because the three straits states as well as major user states are participants, and in light of the fact it enjoys high level attention from many governments, APEC may be a promising forum for consideration of the issue.

Whatever the formal framework, it would seem that informal consultations that bring together representatives of the Straits states and a few user states could be helpful in considering how best to proceed. It has worked before. There is reason to believe it can work again.