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The Navigational Rights of Nuclear Ships

Marco Roscini*

Keywords: archipelagic sea lanes passage; innocent passage; Montego Bay Convention; nuclear ships; transit passage.

Abstract. Even though Article 23 of the 1982 Convention on the Law of the Sea explicitly acknowledges the right of innocent passage through the territorial sea to nuclear vessels, many coastal states have recently forbidden or submitted to authorization the passage of ships carrying radioactive materials: this reveals a trend towards a more restrictive concept of “innocent passage.” As to straits used for international navigation and archipelagic sea lanes, the *ius communicationis* is still prominent and every measure that might prejudice the navigational rights of nuclear ships would not be consistent with the Montego Bay Convention.

1. THE TERRITORIAL SEA AND THE RIGHT OF INNOCENT PASSAGE OF NUCLEAR SHIPS: THE MONTEGO BAY RÉGIME

In the last decade, the number of vessels carrying dangerous radioactive substances has considerably increased. There have been several shipments of highly toxic materials (high level nuclear wastes, irradiated nuclear fuel and plutonium¹) from Japan to France and the United Kingdom for reprocessing and then being employed again in civil nuclear power plants once back in the Far East.² In their routes, these vessels hug the coast of states which strongly protested and claimed the right to deny permission to enter their national waters. The question is: do nuclear vessels enjoy the rights of innocent, transit and archipelagic sea lanes passage?³ A stricter régime of navigation might contribute to avoid disasters which hang right on the head of the coastal states like a modern sword of Damocles and the outcome of which is unpredictable and, unfortunately, often irreparable. The answer to this question, which seems to be of capital importance, must be found in the Montego Bay Convention of the Law of the Sea, opened for

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1. Plutonium oxide, plutonium-uranium mixed oxide (‘MOX’), or vitrified high level nuclear waste.
2. See The United Nations and Nuclear Non-Proliferation, The United Nations Blue Books Series, Vol. III, 187 *et seq.* (1995).
3. By “nuclear vessels” we mean nuclear propelled ships and vessels carrying radioactive materials, which are both taken into account by Art. 23 of the Montego Bay Convention.

signature in 1982 and entered into force in November 1994, taking also into account the most recent practice in this field.

If the 1958 Geneva Convention on the Territorial Sea does not deal with vessels carrying nuclear material,⁴ the Montego Bay Convention contains two norms which specifically regulate their passage. According to Article 22, the coastal state may, where necessary having regard for the safety of navigation, require nuclear-powered ships and ships carrying nuclear or other inherently dangerous or noxious substances or materials by sea to use such sea lanes and traffic separation schemes as it may designate or prescribe for the regulation of the passage of ships; nevertheless, under no circumstances can this have the practical effect of denying or impairing the right of innocent passage, or discriminate in form or in fact against any ships.⁵ Article 23 explicitly acknowledges the right of innocent passage through the territorial sea to vessels carrying nuclear materials, providing that they carry documents and observe special precautionary measures established for such ships by international agreements (*e.g.*, the 1972 Convention on the International Regulations for Preventing Collisions at Sea, the 1973 Convention for the Prevention of Pollution from Ships, and the 1974 Convention on Safety of Life at Sea).

But there is more. The 1958 Convention on the Territorial Sea and the Contiguous Zone has been generally interpreted as establishing the importance of passive characteristics such as cargo, while the Montego Bay Convention affirmed an “objective” concept of “innocence”: the coastal state can refuse the passage if the foreign vessel carries out certain *activities* (partially listed in Article 19(2)) not strictly connected to navigation, which must occur in the territorial sea. Therefore, the question of whether the passage is innocent is to be determined taking into account the conduct of a particular vessel in transit and not on the basis of a subjective judgment by the coastal state concerning the character of the vessel or the presence on board of dangerous substances. Accordingly, a ship carrying nuclear substances cannot be denied entry into the territorial waters but may only be directed to take a safe route. This is confirmed by the joint declaration issued by the United States and the Soviet Union on 23 September 1989, according to which “all ships, including warships, regardless of cargo, armament or means of propulsion, enjoy the right of innocent passage through the territorial sea in accordance with interna-

4. The problem was not prominent at the time, since the first voyage of the US submarine *Nautilus* (30 September 1954) is generally considered the beginning of nuclear navigation (W. Bischof, *Nuclear Ships*, in R. Bernhardt (Ed.), *Encyclopedia of Public International Law*, Vol. 11, 240, at 241 (1982)).

5. Art. 24(1).

tional law, for which neither prior notification nor authorization is required.”⁶

In this author’s opinion, however, an obligation of previous *notification* is fully compatible with the Montego Bay Convention. This obligation – which can now be considered a general principle of international environmental law⁷ – does not compromise the right of passage of the foreign vessel, while the necessity of the previous authorization entitles the coastal state to decide case by case whether this right exists or not.⁸ The notification, far from challenging the navigation, wipes out the secrecy of the passage and allows the coastal state to face possible risks for the environment and the population, preparing adequate emergency plans and recommending the safest routes.⁹ The Montego Bay Convention itself requires the contracting parties to adopt all necessary measures to minimize pollution from vessels to the fullest possible extent:¹⁰ the notification can be easily qualified as one of these measures. Moreover, Article 198 requires a state which becomes aware of cases in which the marine environment is in imminent danger of being damaged or has been damaged by pollution to notify immediately the other states it deems likely to be affected and the competent international organizations. Interestingly, the Japanese Government announced the route of the British cargo *Pacific Swan*, which was carrying radioactive wastes, at the moment of its departure from the French coast¹¹ and the United Kingdom notified in advance to the Panama Canal Commission the transit of the same vessel through that international

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6. 28 ILM 1444–1447 (1989). The declaration ended the diplomatic incident caused by the ramming by Soviet naval units of two US vessels which entered the Russian territorial sea off the Crimean coast (1988). See also the declaration issued by the Italian Government in signing the Convention on the Law of the Sea (5 Law of the Sea Bulletin 39 (July 1985)) and the objection presented by The Netherlands against the declarations according to which the passage of nuclear ships was submitted to the prior consent of the coastal state (R.S. Lee & M. Hayashi (Eds.), *New Directions in the Law of The Sea: Regional and National Developments*, Binder 2, VIII.1.b(3)).
 7. This is the opinion of D.G. Partan, *The “Duty to Inform” in International Environmental Law*, 5–6 Boston University International Law Journal 43 and 63 (1987–1988) and U. Leanza, *Il diritto degli spazi internazionali*, Vol. II, at 370 (1999).
 8. Nonetheless, according to Díez-Hochleitner, even the request for authorization would be compatible with the Montego Bay Convention (J. Díez-Hochleitner, *Régimen de navegación de los buques de guerra extranjeros por el mar territorial español y de sus escalas en puertos españoles*, 38 *Revista española de derecho internacional* 554–559 (1986)).
 9. Art. 22(2) of the Montego Bay Convention. In signing the Montego Bay Convention, Finland and Sweden declared that prior notification of the entry of government ships into the territorial sea was fully compatible with the Convention, because the request of information does not deny or impair the passage. Nevertheless, the two states did not renew their declarations at the ratification (24 Law of the Sea Bulletin 28, 36 (December 1993)). The International Court of Justice acknowledged the existence of an obligation to inform the concerned states of a dangerous situation in the famous Corfu Channel case (*United Kingdom v. Albania*) (see the text of the Judgment (Merits) of 9 April 1949 in 1949 ICJ Rep. 4–38).
 10. Art. 194(3).
 11. U.S. State Department PM Press Guidance, 14 January 1998, 4.

waterway (the environmental organization *Greenpeace* was thus able to carry out protests during the passage).¹²

Some countries (United Arab Emirates,¹³ Yemen,¹⁴ Djibuti,¹⁵ Pakistan,¹⁶ Poland¹⁷ and Canada¹⁸) expressly require nuclear propelled vessels and ships carrying dangerous and polluting substances to notify their passage, while Ireland is steadily lobbying within International Maritime Organisation ('IMO') for prior notification in the territorial sea.¹⁹ France requires ships transiting through its territorial waters to report the nature of their cargo before entering them.²⁰ Moreover, there are many international instruments, legally binding or not, that provide for an obligation of prior notification, such as Principle 19 of the 1992 Rio Declaration on Environment and Development,²¹ the 1992 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal,²² the 1991 Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa,²³ the 1990 International Atomic Energy Agency ('IAEA') Code of Practice on the International Transboundary

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12. See <http://www.greenpeace.org/~nuclear/transport/wasteshipment.html> (6 February 1998).
 13. Law no. 19/1993, Art. 5(4) (25 Law of the Sea Bulletin 95 (1994)).
 14. Act no. 45/1977, Art. 8 (United Nations Legislative Series – National Legislation and Treaties Relating to the Law of the Sea 21, at 24 (1980)).
 15. Law no. 52/AN/79, Art. 7, which can be found in R.W. Smith, *Exclusive Economic Zone Claims: An Analysis and Primary Documents* 112 (1986).
 16. Territorial Waters and Maritime Zones Act, 1976, Sec. 3(3), United Nations Legislative Series – National Legislation and Treaties Relating to the Law of the Sea 22, 85 at 86 (1980).
 17. Act Concerning the Maritime Areas of the Polish Republic and the Marine Administration, 21 March 1991, Arts. 10 and 11.
 18. Transportation of Dangerous Goods Regulations, 27 June 1989.
 19. E.J. Molenaar, *Navigational Rights and Freedoms in a European Regional Context*, in D.R. Rothwell & S. Bateman (Eds.), *Navigational Rights and Freedoms and the New Law of the Sea* 22, at 30 (2000). Several meetings in the IMO (particularly in the Sub-Committee on Safety of Navigation of the Marine Safety Committee) have discussed the question of prior notification, without the states being able to reach a common position on the issue (see D.E.J. Currie & J.M. Van Dyke, *The Shipment of Ultrahazardous Materials in International Law*, 8 *Review of European Community and International Environmental Law* 117–118 (1999)).
 20. Decree no. 78-421 on Sea Pollution Caused by Shipping Incidents (24 March 1978), Art. 1.
 21. Text in 3 *Yearbook of International Environmental Law* 835–838 (1992).
 22. Art. 6 of the Basel Convention (28 ILM 657-686 (1989)). See, however, the Japanese interpretative declaration presented at the moment of the ratification of the Basel Convention, according to which the Convention does not require “notice to or consent of any State for the mere passage of hazardous wastes on a vessel of a Party exercising its navigation rights under international law” (text quoted by B. Kwiatkowska & A.H.A. Soons (Eds.), *Transboundary Movements and Disposal of Hazardous Wastes in International Law: Basic Documents* 32 (1993)). Similar declarations were issued by the Federal Republic of Germany, the United Kingdom and Italy.
 23. Text in 30 ILM 773–799 (1991). Art. 6(4) of the Convention requires the ship to obtain the written consent of the coastal state before transiting in its territorial waters. Art. 4(4), however, preserves the rights of any state under international law connected with the freedom of the seas.

Movement of Radioactive Waste,²⁴ the 1996 Izmir Protocol on the Prevention of Pollution of the Mediterranean Sea by Transboundary Movements of Hazardous Wastes and Their Disposal,²⁵ the Draft articles on prevention of transboundary harm from hazardous activities adopted by the International Law Commission in 2001.²⁶ They all suggest that the preservation of the (marine) environment is not subject to freedom of navigation.

2. TOWARDS A MORE RESTRICTIVE CONCEPT OF INNOCENT PASSAGE?

After the opening for signature of the Montego Bay Convention, the increased number of nuclear ships and the greater ecological sensitivity of the public opinion have contributed to the emergence of a stricter practice. There are now many legislations which submit the passage of nuclear ships to the previous consent of the coastal state. It is the case of countries situated on the most important routes, like Oman,²⁷ Iran,²⁸ Egypt,²⁹ Guinea,³⁰ Malaysia,³¹ Malta,³² Spain,³³ Peru,³⁴ Saudi Arabia,³⁵ Yemen:³⁶ because of the great number of vessels transiting near their coasts, they face the high risk of pollution deriving from accidents at sea. Other states (*e.g.*, the Philippines,³⁷ Venezuela,³⁸ Haiti, Fiji and several

24. Clauses 3 and 5, text *in* 30 ILM 560–564 (1991).

25. Art. 6(4) (text available from <http://www.ban.org/Library/izmir.html>).

26. Art. 8 (text available from <http://www.un.org/law/ilc/texts/prevention/preventionfra.htm>).

27. Declaration issued in ratifying the Montego Bay Convention (17 August 1989), *in* K.R. Simmonds (Ed.), *New Directions in the Law of the Sea*, Binder IV, U.5, 34.

28. Act on the Marine Areas of the Islamic Republic of Iran in the Persian Gulf and the Oman Sea (1993), Sec. 9, 24 *Law of the Sea Bulletin* 10 (December 1993).

29. Declaration issued in ratifying the Montego Bay Convention (26 August 1983), *in* K.R. Simmonds, *supra* note 27, Binder IV, U.5, 29.

30. Presidential Decree no. 336, 30 July 1980.

31. *See* the declaration presented by the Malaysian Government in ratifying the Montego Bay Convention *in* Lee & Hayashi, *supra* note 6, Binder 1, II.1.b(4).

32. Act no. XXVIII of 1981 (UN Doc. LE 113 (3-3) (16 November 1981)). However, in the declaration issued at the moment of the ratification of the Montego Bay Convention, authorization is required only for the entry into internal waters and not also for the passage through the territorial sea (25 *Law of the Sea Bulletin* 16 (June 1994)).

33. Law no. 25 of 29 April 1964, Art. 69 *et seq.* (United Nations Legislative Series – National Legislation and Treaties Relating to the Law of the Sea, at 45 (1974)). In 1969, France adopted an analogous legislation, rejected in 1982 (Decree 69-690 of 19 June 1969, abrogated by the Decree 82-5 of 5 January 1982: *see* 28 AFDI 900-901 (1982)).

34. Decree no. 027-77-EM, 16 November 1977.

35. Declaration issued at the moment of the ratification of the Montego Bay Convention (24 April 1996), *in* Lee & Hayashi, *supra* note 6, Binder 1, IV.1.b(3).

36. Declaration issued in signing the Montego Bay Convention, reiterated at the moment of ratification (*in* Simmonds, *supra* note 27, Binder IV, U.5, 22–23).

37. Philippines Republic Act no. 6969 of 1990.

38. Art. 54 of Presidential Decree no. 2/211 on Norms on the Control of the Generation and Management of Hazardous Wastes (23 April 1992).

Caribbean states³⁹) go even further and forbid *una tantum* the transit of vessels carrying dangerous materials through their waters. In other cases, the prohibition of transit only covers particularly fragile or dangerous areas, where the risk of accidents is higher.⁴⁰

A régime of previous authorization is contained in most of the conventions on nuclear ships, such as the 1962 Brussels Convention on the Liability of Operators of Nuclear Ships, according to which nothing in the Convention affects any right which a contracting party may have under international law to deny access to its waters and harbours to nuclear ships licensed by another contracting party, even when it has formally complied with all the provisions of the Convention.⁴¹ The bilateral agreements between Germany and the United States and each coastal state concerning the nuclear propelled ships *Otto Hahn* and *Savannah* require the prior authorization not only for the entry into ports or internal waters, but also for the passage through the territorial sea.⁴²

Interestingly, the ships carrying the Japanese plutonium have tried to pass through the Exclusive Economic Zone ('EEZ') of several en route states but, because of their protests, they had to give up and avoid them.⁴³ Therefore, these ships have never attempted to claim a right of passage through the territorial sea. Several Caribbean and Latin American states forbade the entrance of the *Pacific Pintail* into their territorial waters, as did Malaysia with respect to the *Pacific Tail*.⁴⁴ Papua-New Guinea considered the plutonium sea shipments forbidden by the 1986 Treaty of Rarotonga, which established a nuclear-weapon-free zone in the South Pacific Ocean.⁴⁵ More recently (July 1999), South Africa ordered two ships

39. As far as Haiti is concerned, see the *note verbale* of 18 February 1988 by the Ministry of the Interior, Decentralization, the General Police Force and the Civil Service, in 11 Law of the Sea Bulletin 13 (July 1988).

40. It is the case of the waters (up to a distance of 50 nautical miles off the coast) which surround the Galapagos Islands (IMO Doc. NAV. 34/3 of 21 May 1987).

41. Art. XVII (text in B. Rüster & B. Simma (Eds.), *International Protection of the Environment – Treaties and Related Documents*, Vol. I, 405–421 (1975)).

42. Not always, however, is the reference to the territorial waters clear from the text of the agreement (L. Lucchini & M. Vælcckel, *Passage dans les eaux territoriales et séjour dans les ports du navire à propulsion nucléaire*, in *Droit nucléaire et droit océanique* 39, at 47 (1977)).

43. M. Roscini, *La zone dénucléarisée du sud-est asiatique: questions de droit de la mer*, 105 RGDIP 628–633 (2001). The *Akatsuki Maru*, the first plutonium ship ever (1992), carefully avoided transiting through the territorial sea and the EEZ of the coastal states (with the only exception of French Polynesia) during its voyage from France to Japan.

44. According to the Malaysian Ministry of the environment,

as a party to the Nuclear Non-Proliferation Treaty and under its Atomic Energy Licensing Act, Malaysia had the legal right to control the movement of nuclear material within its national jurisdiction

(*Malaysia Bans Ship Carrying Nuclear Waste to Japan*, Reuter News Service, 15 January 1997, <http://www.nci.org/c/cs-malay.htm>).

45. *Shipment of Vitrified High Level Nuclear Waste Must Respect Concerns of Forum Islands Countries*, Press Release, 24 January 1997, at <http://www.nci.org/c/cs-png.htm>.

carrying a great amount of MOX to Japan not to enter its territorial sea⁴⁶ and, in January 2001, an Argentine court ordered the Government to prevent a British ship (the *Pacific Swan*) carrying an 80-ton cargo of highly radioactive spent nuclear fuel to Japan from entering waters under its control, arguing it would put the country's shoreline at risk from a toxic spill.⁴⁷ Pending the constitution of an arbitral tribunal under Annex VII of the Montego Bay Convention, on 9 November 2001, Ireland started legal action in front of the International Tribunal for the Law of the Sea in order to have the British Government suspend its decision to let the MOX plant at Sellafield begin work, because of the risks involved in the transport of radioactive material to and from the plant.⁴⁸ On 3 December 2001, the Tribunal rejected Ireland's request, but only because, *inter alia*, the provisional measure was not urgent: the United Kingdom, in fact, had stated that there would be no movements of MOX fuel to or from the plant until summer 2002.⁴⁹

This stricter practice has caused a "modernization" of the concept of innocent passage because "*la mer territoriale dont l'intérêt économique diminue devient moins une zone d'exploitation économique qu'une zone de défense et de sécurité.*"⁵⁰ According to the Montego Bay Convention, the coastal state shall tolerate the passage of the foreign ship in its territorial sea providing that it is not prejudicial to the peace, good order or security of the coastal state and take place in conformity with this Convention and with other rules of international law.⁵¹ A modern concept of "security" should have not only a political-military meaning, but also

46. *UK Nuclear Fuel Ships Asked to Stay Out of South Africa's Waters*, BBC Summary of World Broadcasts, Report by the South African news agency, 26 July 1999, at <http://www.nci.org/k-m/moxbox.htm>.

47. *Court Blocks Nuclear Ship from Argentine Waters*, Reuter News Service, 11 January 2001, at http://www.enn.com/news/wire-stories/2001/01/01112001/reu_nukeship_41289.asp (Art. 41 of the Argentine Constitution forbids the presence of radioactive waste into the country).

48. According to the Irish request, the UK should not allow any movement of radioactive materials or wastes connected to the operation of the Sellafield plant into or out of the waters over which it has sovereignty or exercises sovereign rights. Two environmental groups (*Friends of Earth* and *Greenpeace*) have also started legal action against the UK Government in the High Court in London. The two groups claimed, *inter alia*, that the plant would increase the risk of the proliferation of nuclear weapons (A. Kirby, *Nuclear Plant Faces Legal Challenge*, http://news.bbc.co.uk/hi/english/sci/tech/newsid_1641000/1641543.stm).

49. See the Judgment at http://www.itlos.org/start2_en.html. According to the Separate Opinion of Judge Mensah,

a finding by the Tribunal that the evidence before it does not convince it that irreparable prejudice of rights or harm might occur before the constitution of the arbitral tribunal does not in any way imply that the Tribunal is saying or even suggesting that such prejudice or harm might not occur at any time during the pendency of the dispute. It certainly does not mean that the Tribunal has found that such damage will not occur (at 4).

50. "The territorial sea has lost much of its economical importance and it is gradually turning from a zone of resource exploitation into a security or defence zone," Lucchini & Væelckel, *supra* note 42, at 45.

51. Art. 19(1).

an ecological one: the environment, in fact, is a fundamental aspect of territorial sovereignty and its protection is a basic feature of national self-defence. The risk of pollution in a sensitive marine area of a coastal state economically dependent on fishing industry or on tourism can be as serious as the threat of an aggression to its territorial integrity or political independence.⁵² It is not surprising, therefore, that several states officially consider the protection of their natural environment as an integral part of national security and perceive the passage of a nuclear ship close to their shore as a threat to it. A régime of previous authorization would thus allow the coastal authorities to assess the specific circumstances of the passage: if there are no considerable risks, it should be authorized, while if a nuclear ship intends to sail through particularly fragile ecosystems or waterways where navigation is highly dangerous, the denial of the passage cannot be considered illicit, especially if there are routes of similar convenience.⁵³ It is worth remembering that, in a joint communiqué of 21 December 2000, Argentina, Brazil and Uruguay pleaded the vulnerability of the antarctic and subantarctic ecosystems and the adverseness of the physical and meteorological conditions (strong currents, presence of icebergs) to oppose the transit of a ship carrying nuclear wastes through Cape Horn.⁵⁴ It should also be noted that, according to Article 19(2) of the Montego Bay Convention, among the activities which constitute non-innocent passage is “any act of wilful and serious pollution contrary to this Convention.”⁵⁵ One could object that the discharge of radioactive substances caused by an accident at sea can hardly be considered “wilful”: in most cases, this happens because of unforeseen and unforeseeable events such as bad weather conditions. Pollution, in fact, unlike the other activities listed in Article 19(2), can occur without any element of intent.⁵⁶ In this author’s

52. See the declaration of the Secretary of State for Foreign Affairs of the Dominican Republic, in occasion of the passage of the plutonium loaded ship *Pacific Swan* through the Caribbean Sea:

The Dominican Republic depends in a large part on tourism, tourism to our sunny beaches. The quality of the water of our coasts is of vital importance for the development sector, and any damage, even unintentional, of radioactive material could cause a significant disruption of this important national economic sector

(Dominican Republic, Secretary of State for Foreign Affairs, Press Release, 2 January 1998). Indonesia and Malaysia had already declared that the passage of supertankers cannot be considered innocent, because the peace, good order and security of the coastal states is threatened by the environmental risks that those ships imply (A.M. Rieman, *Creating a Nuclear Free Zone Treaty That is True to Its Name: The Nuclear Free Zone Concept and a Model Treaty*, 18 *Denver Journal of International Law and Policy* 236 (1990)).

53. This assessment is proposed by G. Badiali, *La tutela internazionale dell’ambiente* 101 (1995), and G. Cataldi, *Il passaggio delle navi straniere nel mare territoriale*, at 107–108 (1990).

54. Read the communiqué at <http://www.nci.org/3img/abcu-span-1221.gif>. The three governments stated, *inter alia*, that the Montego Bay Convention recognizes the right of the coastal state to protect and to preserve the marine environment and its EEZ.

55. Art. 19(2)(h).

56. J. Van Dyke, *Sea Shipment of Japanese Plutonium Under International Law*, 24 *Ocean Development and International Law* 399, at 408 (1993) (with respect to Art. 19(2)(h)).

opinion, however, the wilfulness must be understood in a different sense and referred not to the consequence of the conduct, but to the conduct itself. Therefore, the conscious passage of a ship carrying ultra-hazardous materials not far from the coast, in a stretch of sea where navigation is particularly dangerous, cannot be considered “innocent,” because the high risk of an accident is not taken into account by the vessel.⁵⁷

3. THE TRANSIT PASSAGE THROUGH STRAITS USED FOR INTERNATIONAL NAVIGATION

The transit passage régime applies only to straits used for international navigation between two parts of high sea or EEZ.⁵⁸ All other straits (*i.e.*, the so called “dead end straits,” which connect a part of the high seas or an EEZ with the territorial sea of a coastal state, and those straits formed by an island of a state bordering the strait and its mainland, where there is seaward of the island a route through the high seas or EEZ of similar convenience with respect to navigational and hydrographical characteristics⁵⁹) are submitted to the innocent passage régime, Articles 22 and 23 included, but with an important difference with respect to the territorial sea: the bordering state cannot suspend the passage (Article 45).⁶⁰

In straits used for international navigation, the contrast between the *ius communicationis* and the right of the coastal state to protect its own security is even more evident than in the territorial sea. The risks that the former jeopardizes the latter are in fact higher: suffice it to remind the denseness of the maritime traffic which crosses the most important straits, the proximity of the passage to the coast and the difficulties of navigation because of shoals and rocks (as in the Torres Strait between Australia and Papua-New Guinea, where navigation is confined in a narrow sea lane and pilotage is strongly recommended). The transit can therefore obstruct other uses of that stretch of sea by the coastal state, *e.g.*, for fishing purposes, and facilitate potential attacks or interferences by foreign ships.

Nonetheless, it can be upheld that in straits used for international navigation the *ius communicationis* is still prominent, at least when there are

57. R. Albano, *Accès des navires à propulsion nucléaire dans les eaux territoriales et dans les ports étrangers*, 9 Nuclear Law Bulletin 58 (April 1972); U. Leanza, *La sicurezza delle navi nucleari e la Convenzione di Londra sulla salvaguardia della vita umana in mare*, 1 Annuario di diritto internazionale 168 (1965); Lucchini & Vælcckel, *supra* note 42, at 45.

58. Art. 37 of the Montego Bay Convention. The transit régime applies to the whole strait, included the territorial waters of the coastal states (Lucchini & Vælcckel, *supra* note 42, at 407).

59. Arts. 38(1) and 45 of the Montego Bay Convention.

60. Moreover, Art. 35(c) excludes from the transit régime those straits in which passage is regulated in whole or in part by long-standing international conventions in force specifically relating to such straits. In these cases, the problem of the navigational rights of nuclear ships must be solved according to each competent convention.

no routes of similar convenience. The free transit through the so called “choke points,” in fact, is a fundamental interest of the international community as a whole, not only of the maritime powers.⁶¹ The Montego Bay Convention itself suggests this conclusion: nuclear ships enjoy the right of transit passage as any other vessel, since the phrase “all ships” leaves no room for doubt. Besides, the transit passage through straits used for international navigation cannot be suspended for any purpose, including military exercises, and even the innocent passage through the straits indicated in Article 38(1) and Article 45 cannot be impeded by the coastal state.⁶² Besides, in the transit régime, there is no norm affirming the right of the riparian state to prevent a non-innocent passage.⁶³ The state bordering the strait may only designate sea lanes and prescribe traffic separation schemes for navigation whether it is necessary to promote the safe passage of ships, and it may adopt laws and regulations relating to transit passage through straits, in respect of the safety of navigation and the regulation of maritime traffic, the prevention, reduction and control of pollution, the prevention of fishing, and the loading or unloading of any commodity, currency or person in contravention of the customs, fiscal, immigration or sanitary laws and regulations of states bordering straits: however, these laws and regulations shall not discriminate among foreign ships or have the practical effect of denying, hampering or impairing the right of transit passage.⁶⁴ These rules seem to be the consequence of the obsessive concern of the international community to grant and to reaffirm free passage through the straits which are essential for international navigation and to limit the jurisdiction of the coastal states.⁶⁵ Interestingly, during the third Conference on the Law of the Sea the Japanese Government, in spite of the adoption of the well-known “three non-nuclear principles” policy, supported the transit régime through international straits instead of that of innocent passage: it goes without saying that its maritime

61. According to US President Lyndon B. Johnson, “[t]he right of free, innocent passage of the international waterways is a vital interest of the entire international community” (quoted in C.F. Salans, *Gulf of Aqaba and Strait of Tiran: Troubled Waters*, in J.N. Moore (Ed.), *The Arab-Israeli Conflict, Readings and Documents* 185, at 195 (1977)).

62. Art. 44.

63. The straits régime is thought to be closer to the high seas than to the territorial sea (W. Riphagen, *La navigation dans le nouveau droit international de la mer*, 84 RGDIP 167 (1980)). The opposite opinion is however sustained by W.M. Reisman, *The Regime of Straits and National Security: An Appraisal of International Lawmaking*, 74 AJIL 70 (1980).

64. Arts. 41-42 (see T. Treves, *La navigation*, in R.-J. Dupuy & D. Vignes (Eds.), *Traité du nouveau droit de la mer* 800-802 (1985)).

65. According to Molenaar,

[t]here are [...] indications of a growing acceptance of a coastal State right of prior notification for ships carrying hazardous cargoes in lateral passage through the territorial sea, but not beyond or in straits used for international navigation

(Molenaar, *supra* note 19, at 44).

interests were considered prominent.⁶⁶ The question of the applicability of its anti-nuclear policy to some international straits because of the expansion of the breadth of the territorial sea from 3 to 12 nautical miles was set aside by the Government.⁶⁷ The United States and the Soviet Union strongly reacted to the joint declaration of Malaysia and Indonesia of November 1971, which refused to consider the Malacca Straits an international waterway and applied to them the innocent passage régime.⁶⁸ In September 1988, Indonesia closed temporarily the Lombok and Sonda Straits for naval exercises with a unilateral decision which raised vigorous protests from Australia, the United States, West Germany and the United Kingdom.⁶⁹ The United States and the European Union strongly protested against the Act on the Marine Areas of the Islamic Republic of Iran in the Persian Gulf and the Oman Sea (1993), which required prior authorization for passage through the Iranian side of the Strait of Hormuz by nuclear-powered ships and vessels carrying nuclear substances.⁷⁰ Moreover, according to the United States, the Yemen Arab Republic “may not legally condition the exercise of the right of transit passage through or over an international strait, such as Bab-el-Mandeb, upon obtaining prior permission,” because “[t]ransit passage is a right that may be exercised by ships of all nations regardless of type or means of propulsion, as well as aircraft, both state and civil.”⁷¹ There are only two contrary cases: the *Akatsuki Maru*, which transported the Japanese plutonium, avoided the

66. See the declaration of the Ministry of Foreign Affairs:

Japan is participating in this conference [on the law of the sea] based on the basic position that navigation in the international straits should be ensured as free as possible, considering that Japan is one of the largest in maritime shipping among the countries of the world and that Japanese economy depends heavily upon international trade for the survival of the country

(quoted in 27 *The Japanese Annual of International Law* 100–101 (1984)).

67. S. Yanai & K. Asomura, *Japan and the Emerging Law of the Sea*, 21 *The Japanese Annual of International Law* 61 (1977).

68. The text of the declaration is in 77 *RGDIP* 271–274 (1973); see also K. Kantaatmadja, *Various Problems and Arrangements in the Malacca Straits (an Indonesian Perspective)*, in J.M. Van Dyke, L.M. Alexander & J.R. Morgan (Eds.), *International Navigation: Rocks and Shoals Ahead?* 167–170 (1988). However, the prohibitions to transit for supertankers through the Malacca Straits, although repeatedly threatened, have never been put into practice (Cataldi, *supra* note 53, at 107).

69. D.R. Rothwell, *Navigational Rights and Freedoms in the Asia Pacific Following Entry into Force of the Law of the Sea Convention*, 35 *Virginia Journal of International Law* 624 (1994–1995) (hereinafter ‘*Navigational Rights*’); D.R. Rothwell, *The Indonesian Straits Incident. Transit or Archipelagic Sea Lanes Passage?*, 14 *Marine Policy* 492–494 (1990). The United States claimed that

[n]o nation may, consistent with international law, prohibit passage of foreign vessels or aircraft or act in a manner that interferes with straits transit or archipelagic sea lanes passage

(83 *AJIL* 559–561 (1989)).

70. B.B. Jia, *The Regime of Straits in International Law*, at 181 (1998).

71. *Id.*, at 194.

Malacca and Singapore Straits because of the strong protests of the coastal states (Malaysia, Indonesia and Singapore) and changed its course towards Australia and New Zealand, while the transit of the *Pacific Pintail* through the Canal de la Mona was prohibited by Puerto Rico and the Dominican Republic (1995).⁷² It is also worth remembering that, in January 1994, Turkey adopted the Maritime Traffic Regulations for the Turkish Straits and the Marmara Region, Article 30(1) of which provides that “nuclear-powered vessels or vessels carrying nuclear cargo or waste [...] must obtain permission, in accordance with the relevant regulations from the Undersecretariate for Maritime Affairs at the planning stage of the passage.”⁷³ After obtaining the authorization and before entering the Straits, masters, owners or agents of the vessels carrying dangerous cargos and which are 500 gross tons must notify all relevant information about the passage (*e.g.*, tonnage, flag, cargo, ports of departure and arrival, whether a pilot is requested, deficiencies).⁷⁴ The Regulations, which do not seem to be consistent with Articles 1 and 2 of the 1936 Montreux Convention,⁷⁵ have been strongly criticized by the states that have been using the Straits, such as the Russian Federation, Bulgaria, Ukraine, Cyprus and Greece.⁷⁶ Trying to reach a compromise, IMO adopted the Rules and Recommendations on navigation through the Strait of Istanbul, Marmara Sea and the Strait of Canakkale, which “strongly advise” (but not require) vessels intending to pass through the Straits to give prior information on whether they carry any hazardous and noxious cargo and which do not submit the transit to any authorization at all.⁷⁷ As a result, in 1998, Turkey partly amended the 1994 Regulations, maintaining, for vessels carrying nuclear or other dangerous materials, only the duty to notify the type of cargo and eliminating the duty to obtain prior permission to transit through the Straits.⁷⁸

4. THE ARCHIPELAGIC WATERS

Generally speaking, the archipelagic waters are submitted to the same régime as the territorial sea, *i.e.*, the suspendible right of innocent passage

72. M. Roscini, *supra* note 43, at 631; Rothwell, *Navigational Rights*, *supra* note 69, at 615; J. Van Dyke, *supra* note 56, at 411. There have been several accidents in the Malacca Straits, the most serious one being that of the Japanese tanker *Showa Maru*.

73. See the text of the Regulations in 27 *Law of the Sea Bulletin* 62 *et seq.* (1995).

74. Art. 7, Maritime Traffic Regulations.

75. On this problem, see M. Fornari, *La nuova disciplina della navigazione attraverso gli stretti turchi: conformità al diritto internazionale?*, 56 *La Comunità internazionale* 3, at 40–51 (2001).

76. *Id.*, at 25–27. According to the Turkish Government, the Regulations are consistent with the 1989 Basel Convention, which requires the consent of the state of transit for the trans-boundary movement of hazardous waste (*id.*, at 35).

77. Recommendation 2.2 (text available at <http://www.mfa.gov.tr/grupa/ad/adb/navigate.htm>).

78. Regulation 26 (available at http://www.turkishpilots.org/documents/yenituzuk_eng.html).

for foreign vessels.⁷⁹ Nuclear-powered vessels and ships carrying nuclear substances may thus be required to pass through specific sea lanes and must carry documents and observe the precautionary measures established by international agreements.⁸⁰ Nonetheless, the archipelagic state can designate, together with the competent international organization,⁸¹ sea lanes and air routes there above, suitable for the continuous and expeditious passage of foreign ships and aircraft through or over its archipelagic waters and the adjacent territorial sea: such sea lanes are submitted to a régime (the “archipelagic sea lanes passage”) which is essentially identical to the transit passage through straits used for international navigation.⁸² Like transit passage, the archipelagic sea lanes passage cannot be suspended (Article 54, in fact, refers to Article 44) and submarines must navigate on surface and show the flag. All ships and aircraft enjoy the right of archipelagic sea lanes passage, meaning that no distinctions can be made according to the nature of the vessel or its cargo.⁸³ Furthermore, no provision in the Convention requires to take into account the special characteristics of the ships when designating the sea lanes.

Bearing in mind these considerations, the problem of the passage of nuclear ships is easy to solve. In the archipelagic waters submitted to the innocent passage régime, one should apply the same conclusions reached with regard to the territorial sea: the most recent practice shows a trend to consider non-innocent the passage of ships carrying nuclear material and to submit it to the prior consent of the coastal state.⁸⁴ This inference is even more suitable (with the exception of the designated sea lanes) for the archipelagic waters, which are often marked by shoals, rocks and coral reefs: navigation is far more dangerous and the risk of accidents higher than in the territorial sea. The economy of a small developing archipelagic state may entirely depend on fishing and tourism and the passage of a ship carrying nuclear substances could be easily qualified as prejudicial

79. This feature distinguishes archipelagic waters from internal waters. The suspension must be non-discriminatory and duly published (Art. 52(2) of the Montego Bay Convention).

80. Arts. 22 and 23.

81. Art. 53(9). The “competent international organization” is IMO, which is dominated by the maritime Powers. If the archipelagic state and IMO are not able to reach an agreement when designating the sea lanes or air routes, the right of archipelagic sea lanes passage may be exercised through the routes normally used for internal navigation (Art. 53(12)).

82. Art. 54 provides that Arts. 39, 42, 40 and 44 also apply to archipelagic sea lanes passage. According to Kwiatkowska, however, the archipelagic sea lanes passage and the transit through international straits are very different régimes and their supposed similarity is the consequence of an erroneous interpretation of the Montego Bay Convention (B. Kwiatkowska, *The Archipelagic Regime in the Practice of the Philippines and Indonesia – Making or Breaking International Law?*, 6 *International Journal of Estuarine and Coastal Law* 25–26 (1991)).

83. Art. 53(2). *But see* H.W. Jayewardene, *The Regime of Islands in International Law* 161–162 (1990), who believes that this topic remains a source of controversy.

84. *See supra* Section 2.

to its peace, good order or security.⁸⁵ Many states, in fact, have expressed their concern and Indonesia, the Philippines and Fiji, whose coasts were lapped by the *Pacific Pintail*, did not give their consent to the vessel to enter their waters.

As to the sea lanes designated by the archipelagic state, it has to be applied the archipelagic sea lanes passage régime, which is equivalent to the transit through international straits. In this case also, the interest of the maritime powers in freedom of navigation through important waterways prevailed over the territorial claims of the coastal states. Travel between and through these groups of islands (*e.g.*, Indonesia), in fact, could be the only practicable route to reach certain destinations: a detour around the archipelago may necessitate an enormous deviation from the normal voyage.⁸⁶ It is worth noting that, even if it protested against the passage of the Japanese plutonium shipments through its archipelagic waters, Indonesia declared that it could not prevent them from transiting through the sea lanes.⁸⁷ The archipelagic state could only prescribe traffic separation schemes for the safe passage of ships through narrow channels and adopt laws and regulations relating to archipelagic sea lanes passage, just as it happens for straits.⁸⁸

5. CONCLUSIONS

To sum up, according to the letter of the Montego Bay Convention, ships carrying nuclear materials enjoy the right of innocent passage as any other vessel, notwithstanding the particular nature of their cargo. However, the claim of some coastal states to require the previous notification of the passage seems to be consistent with the Convention on the Law of the Sea, because it does not jeopardize the right of passage and enables the coastal state to face potential accidents. Besides, the recent practice shows a clear trend towards a more restrictive concept of “innocence” and a broader notion of “security,” which could eventually lead to submit the passage of this kind of ships through the territorial sea to the previous authorization of the coastal state. The same conclusion applies, *mutatis mutandis*,

85. According to Munavvar,

[t]he nature of archipelagic waters and the ecological fragility of smaller archipelagic states whose existence depends on the proper protection and preservation of their environment require something more than the jurisdiction of a coastal state in territorial waters with respect to innocent passage

(M. Munavvar, *Ocean States: Archipelagic Regimes in the Law of the Sea* 166 (1995)).

86. Should the Montego Bay Convention be applied, the Java Sea, for instance, would be entirely included in the Indonesian archipelagic waters.

87. *Malaysia Reports Concerns over Plutonium Shipment*, Kyodo News Service, 16 October 1992.

88. Arts. 53(6) and 54 of the Montego Bay Convention.

to the archipelagic waters, with the exception of the archipelagic sea lanes designated by the archipelagic state: here, as in straits used for international navigation, the *ius communicationis* is still more important than the right of the coastal state to protect its security and its environment, and the rights of archipelagic sea lanes passage and of transit passage cannot be denied to any vessels, even if they are carrying highly dangerous substances.