

ARTICLES

Right of innocent passage of ships carrying ultra-hazardous cargoes

by Miguel Sousa Ferro*

I. Introduction

For several years now, a significant number of coastal states have claimed a right to deny passage through their territorial seas, or even through their exclusive economic zones (EEZ), to ships carrying ultra-hazardous cargoes. The issue was particularly brought into the limelight with the trips of the Pacific Teal and the Pacific Pintail, in the framework of a nuclear fuel recycling programme between the UK/France and Japan. But claims in this direction have been expressed since at least the negotiation of the 1982 United Nations Convention on the Law of the Sea (LOS Convention).¹

The purpose of this paper is to analyse the legitimacy of such claims (contrary, *prima facie*, to the principle of freedom of navigation) under international law. For this purpose, the relevant rules of international law and the arguments invoked by doctrine and states in favour of a right to refuse passage to such ships shall be presented and discussed. This analysis will focus, therefore, on possible limits to the right of innocent passage, through the EEZ and territorial sea of third party states, of commercial ships carrying ultra-hazardous cargoes, such as highly radioactive material. It will exclude, however, military vessels and passage through international straits. The right of coastal States to require prior notification of passage (without implying a request for authorisation) will also be addressed.

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1. The text of this convention is available at:
www.un.org/Depts/los/convention_agreements/convention_overview_convention.htm.

II. Right of innocent passage as negotiated at UNCLOS III²

A. *Before UNCLOS III*

To say that freedom of navigation has been a binding principle of international customary law since Grotius published his famous and initially anonymous *De Mare Liberum*³ would seem a somewhat simplistic approach, neglecting the political-military reality of the time and the counter arguments of Selden⁴ and Serafim de Freitas.⁵ Still, it is undisputed that, at least since the early nineteenth century,⁶ freedom of navigation (including innocent passage through the territorial sea) has been a renowned principle of international law. The right of innocent passage was recognised at the failed attempt to codify the Law of the Sea at the Hague, at the beginning of the twentieth century, and later on by the International Court of Justice (ICJ)⁷ and in UNCLOS I.⁸

By 1974, it was settled that the breadth of the territorial sea should be understood to be 12 nautical miles,⁹ which implied a significant reduction of the surface of the ocean where total freedom of navigation applied. Naturally, this made it all the more relevant to define in what way, and to what extent, coastal States could intervene or prevent the passage of foreign ships through their territorial sea.

In this respect, the 1958 Territorial Sea Convention (which never managed to gather an impressive number of ratifications) left much room for improvement. According to its Article 14(4), commercial ships were free to exercise innocent passage through the territorial sea as long as such passage was not “prejudicial to the peace, good order or security of the coastal state”. This collection of undefined concepts left far too much room for disputes between flag states and coastal states.

B. *The Montego Bay Convention*¹⁰

Not surprisingly, therefore, one of the major changes introduced by the 1982 United Nations Convention on the Law of the Sea (LOS Convention) was to add to that same general principle

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2. UNCLOS III was the third United Nations Conference on the Law of the Sea, which took place from 1973 to 1982. Over 160 nations participated in the 9-year convention, which finally came into force on 14 November 1994, 21 years after the first meeting of UNCLOS III and one year after ratification by the sixtieth state.
 3. Grotius, Hugo, *Mare Liberum Sive De Jure Quod Batavis Competit Ad Indicana Commercia Dissertatio*, Leiden, Ludovic Elzevier, 1609.
 4. Selden, John, “*De Mare Clausum*”, 1618 (first published in London, in 1635).
 5. Freitas, Frei Serafim de, “*De Ivsto Imperio Lvsitanorum Asiatico*”, Valladolid, 1625.
 6. Telesca, Thomas A., “Sovereignty Or the Precautionary Principle: Which Will Save Our Fish”, 12 (2003) *Southeastern Environmental Law Journal* 23.
 7. Corfu Channel case (United Kingdom/Albania), I.C.J. Reports 1949, p. 4. The full text of this case is also available at: www.icj-cij.org/icjwww/idecisions.htm.
 8. 1958 Convention on the Territorial Sea and the Contiguous Zone [hereinafter “1958 Territorial Sea Convention”], Arts. 1 and 14 to 17.
 9. ICJ, *Fisheries Jurisdiction* (United Kingdom and Federal Republic of Germany v. Iceland), *Judgement of 25 July 1974 (Merits)*, para. 52 onwards.
 10. The 1982 LOS Convention was opened for signature in Montego Bay (Jamaica) on 10 December 1982.

(phrased identically in Article 19(1)), a list of situations in which passage would be deemed to be “non-innocent”. According to Article 19(2), insofar as is relevant to the issue at hand:

“Passage of a foreign ship shall be considered to be prejudicial to the peace, good order or security of the coastal State if in the territorial sea it engages in any of the following activities: (...)

h) any act of wilful and serious pollution contrary to this convention; (...)

l) any other activity not having a direct bearing on passage”.

The first thing that stands out from this list is that it is unclear, from the phrasing of Article 19(2), whether this was supposed to be an exhaustive enumeration. Two of the world’s major maritime powers took the view that the list had to be exhaustive, as that had been precisely the objective of the negotiations – to eliminate legal uncertainty as to which activities rendered passage “non-innocent”.¹¹

Nonetheless, the International Law Association has held that there is at least one case which was not included in that list, but which must nonetheless be understood to render passage “non-innocent”: “a ship whose condition is so utterly deplorable that it is extremely likely to cause a serious incident with major harmful consequences, including to the marine environment”.¹² If we accept this suggestion, we must recognise that Article 19(2)’s enumeration is not exhaustive, and this makes it particularly important to ascertain the principles or main guidelines defining the balance between the right of innocent passage and the right (obligation) of coastal States to protect the marine environment. However, one might also argue that an extreme situation such as that which was envisaged by the International Law Association could be dealt with otherwise, without necessarily resorting to classifying the passage as “non-innocent”. Indeed, Art. 220(2) of the LOS Convention allows coastal States which suspect that a certain vessel is not complying with national regulations implementing international safety standards to inspect the vessel and even to detain it, in order to institute appropriate procedures in the most serious cases.

Article 19(2)(h) clarifies that any act of wilful and serious pollution may be contrary to the peace, good order or security of the coastal State. However, this and the remaining provisions require an activity to be carried out – this is particularly clear in the language of Article 19(2)(l) (“any other activity...”). In other words:

“Without serious harm, (...) a coastal state may not deprive the right of innocent passage from a vessel merely carrying ultra-hazardous substances, such as nuclear materials and highly toxic chemicals.”¹³

The mere nature of the cargo is insufficient to render passage “non-innocent”. As long as vessels comply with applicable safety standards, the coastal state cannot rely on the potential of

11. Uniform Interpretation of Rules of International Law Governing Innocent Passage, USA-USSR Agreement (adopted at Jackson Hole, Wyoming, on 23 September 1989) 28 (1989) ILM 1444, paras. 3 and 4.

12. www.ila-hq.org/pdf/Coastal.pdf, p. 51.

13. Tanaka, Mari, “Lessons from The Protracted MOX Plant Dispute: A Protected Protocol On Marine Environmental Impact Assessment to The United Nations Convention on The Law of The Sea”, 25 (2004) *Michigan Journal of International Law* 337, 350.

environmental damage, even of great proportions, to refuse passage. A different interpretation would entirely negate the right of innocent passage to ships carrying ultra-hazardous cargoes.

The proof that the LOS Convention intended to include ships carrying ultra-hazardous cargoes within the category of vessels enjoying the right of innocent passage is that specific provisions were inserted to regulate this passage. This also shows that, contrary to widespread belief, concerns regarding the risks of such shipments were already present in the minds of the negotiators of the convention.

Firstly, Article 22(2) allows coastal states to set up sea lanes for ships carrying hazardous cargoes, taking into account *inter alia* customs and the recommendations of the International Maritime Organization (IMO). Secondly, Article 23 requires these same vessels to “carry documents and observe special precautionary measures established for such ships by international agreements” when traversing the territorial sea of a third state. This provision refers directly to “foreign nuclear-powered ships and ships carrying nuclear or other inherently dangerous or noxious substances”.

The coastal state’s sovereign rights are limited, in so far as required, by the right of innocent passage of foreign vessels. This is made clear in Article 24(1)(a), developing the principle set out in Article 2(3):

“The coastal State shall not hamper the innocent passage of foreign ships through the territorial sea except in accordance with this Convention. In particular, in the application of this Convention or of any laws or regulations adopted in conformity with this Convention, the coastal State shall not: impose requirements on foreign ships which have the practical effect of denying or impairing the right of innocent passage; (...)”.

This provision might be read to suggest that innocent passage may be hampered, but it appears to be undisputed that it should simply be read to mean that coastal States cannot restrict innocent passage beyond that which is allowed by the convention (e.g. designating sea lanes), perhaps also suggesting that any passage which is “non-innocent” may be prevented or brought to a halt by the coastal state, as is better stated in Article 25(1).

Article 220(2) further sets out the limits of coastal state intervention in the exercise of innocent passage, in this case specifically in relation to protection of the marine environment:

“Where there are clear grounds for believing that a vessel navigating in the territorial sea of a State has, during its passage therein, violated laws and regulations of that State adopted in accordance with this Convention or applicable international rules and standards for the prevention, reduction and control of pollution from vessels, that State, without prejudice to the application of the relevant provisions of Part II, section 3, may undertake physical inspection of the vessel relating to the violation and may, where the evidence so warrants, institute proceedings, including detention of the vessel, in accordance with its laws, subject to the provisions of section 7”.

According to Article 25(3):

“The coastal State may, without discrimination in form or in fact among foreign ships, suspend temporarily in specified areas of its territorial sea the innocent passage of foreign ships if such suspension is essential for the protection of its security, including weapons exercises. Such suspension shall take effect only after having been duly published.”

Having its historical foundation in precedents relating to nuclear weapons exercises,¹⁴ this provision can clearly not be used to prevent the passage of specific ships, as this measure must be non discriminatory. The provision is meant to be used in light of events taking place within the territorial sea, not in light of the characteristics of vessels approaching it, and it must be based on objective and worthy criteria. For concerns surrounding individual vessels, Article 19(2) should be invoked. It is, nonetheless, interesting to note that only Mexico has notified the use of Article 25(3), at each time briefly invoking a military exercise as a justification and, on two occasions, invoking no reason whatsoever.¹⁵

While some argue that the coastal state is entitled to define its own “standards to preempt willful or negligent spills or discharges”,¹⁶ it should be highlighted that Article 21(2) of the LOS Convention limits national regulations on design, construction, manning and equipment of ships to the mere enforcement of “generally accepted international rules or standards”, i.e. the standards set out by the International Maritime Organization (IMO) and the International Atomic Energy Agency (IAEA). On the other hand, Article 211(4) seems to extend this power of coastal States, as it refers back to that provision mentioning only the non-hampering of innocent passage, and not the limit set by international standards. Furthermore, Article 211(5) does mention this limit, but in relation to the EEZ. Nonetheless, to the best of my knowledge, there has been no serious controversy in the international community concerning the safety standards of shipments of ultra-hazardous cargoes. They are generally recognised to be sufficient, and the safety record of these shipments is impressive by any account.

In the exclusive economic zone, an area that extends 200 nautical miles from the baselines, the coastal state was given jurisdiction over the “protection and preservation of the marine environment” by Article 56(1)(b)(iii). However, and insofar as is relevant to the subject at hand, the EEZ was designed to be an area where freedom of navigation applies in the same manner as on the high seas. Indeed, Article 58(1) refers explicitly to the freedoms listed in Article 87, covering *inter alia* freedom of navigation on the high seas. It is therefore hard to contend that the text of the convention allows the passage of foreign vessels through the EEZ to be hampered.

States are responsible for ensuring that vessels flying their flag comply with national safety standards, which in turn should comply with international standards [Article 94]. Article 192 establishes the general obligation of all states to protect and preserve the marine environment, which is further developed in the remaining articles of Part XII [*maxime* Article 194 and Article 217].

III. Discussion of arguments and claims by coastal States

A. Refusal of passage to ships carrying ultra-hazardous cargoes

The first disputes on the interpretation of this aspect of the regime of innocent passage emerged from the declarations made by several states upon signature or ratification. Diametrically opposing

14. ICJ, “Nuclear Tests” (Australia and New Zealand v. France), Judgement of 20 December 1974 (Merits).

15. See: www.un.org/Depts/los/convention_agreements/innocent_passages_suspension.htm.

16. Draper, Randon H., “Resuscitating The Victims of Ship Pollution: The Right of Coastal Inhabitants to a Healthy Environment”, 15 (2004) *Colorado Journal of International Environmental Law and Policy* 181, p. 191.

positions were expressed concerning the possibility of denying passage through the territorial sea to ships carrying “inherently dangerous” cargoes.¹⁷

Generally, the main arguments put forward by states who favoured a limitation of the freedom of passage of this type of vessel were:

- freedom of passage will not be granted until the international agreements referred to in Article 23 of the LOS Convention (concerning carriage of documents and special precautionary measures for ships carrying nuclear substances) are concluded (Egypt and Saudi Arabia added the requisite that they should have themselves become parties to those international agreements);
- Article 22(2) of the LOS Convention could serve as a basis for such a right of coastal States;
- there has been an evolution of international customary law, based on events subsequent to the adoption of the LOS Convention, which grants coastal states the right in question.

The first argument entails a complex discussion with little legal certainty. Two questions should be distinguished. First, is the right of innocent passage of ships carrying ultra-hazardous cargoes suspended as long as the international agreements referred to in Article 23 of the LOS Convention are not concluded? And in the affirmative, have such international agreements already been concluded?

Would the negotiators of the Montego Bay Convention or, better still, would the spirit of the convention suggest that passage of ships with ultra-hazardous cargoes could be refused as long as Article 23 had not been executed? The first evidence against this position is found in the drafting of this provision. If such a meaning had been intended, Article 23 would surely have been drafted differently. Its current language suggests more its nature as an onward-looking clause rather than an *a priori* condition for the exercise of that right. The latter solution would have been unacceptable for flag-states, as it would effectively allow for indefinite suspension of the right of innocent passage for the ships in question.

A further point which could be made, and has indeed been argued by Egypt and Saudi Arabia, is that the suspension effect of Article 23 would only be lifted once the coastal state in question had itself adhered to the international treaties in question. This reading, however, seems to contradict the *pacta sunt servanda* principle – essentially, a state party to the LOS Convention would be able to eternally postpone the “activation” of the right of innocent passage of ships carrying ultra-hazardous cargoes simply by never adhering to the international agreements mentioned in Art. 23. The reading of Art. 23 suggested by those two states would therefore deprive Articles 17 and 19 of their *effet utile* with regard to ships carrying ultra-hazardous cargoes, and would not be in accordance with the criteria set out in Article 31 of the 1969 Vienna Convention on the Law of Treaties.

Even if one disagrees with this conclusion, it must be noted that there is already an extensive international regime governing the safety and security of shipments. This includes the mandatory International Maritime Dangerous Goods Code,¹⁸ combined with the Model Regulations of the United

17. Against: see Declarations of Bangladesh (27 July 2001), Egypt (26 August 1983), Malaysia (14 October 1996), Malta (20 May 1993), Oman (17 August 1989), Saudi Arabia (24 April 1996) and Yemen (21 July 1987); in favour: see Declarations of Germany (14 October 1994), Italy (7 December 1984; 13 January 1995), Netherlands (28 June 1996), and United Kingdom of Great Britain and Northern Ireland (25 July 1997), all available at: www.un.org/Depts/los/convention_agreements/convention_declarations.htm.

18. Information on this code is available at: www.imo.org/Safety/mainframe.asp?topic_id=158.

Nations¹⁹ and the IAEA Regulations for the Safe Transport of Radioactive Material.²⁰ To this one should add the Joint Convention on the Safety of Spent Fuel Management and on the Safety of Radioactive Waste Management²¹ and, to some extent, even the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal,²² along with its implementing regional treaties. Finally, one should not forget the Convention on the Physical Protection of Nuclear Material.²³

Clearly, these instruments include both precautionary measures and requirements to carry special documents, but it would always be arguable that these are not the measures referred to in Article 23 of the LOS Convention. For this reason, if one chooses to interpret Article 23 as having a suspensive effect over the right of innocent passage, it then easily becomes a loophole in the treaty. Ultimately, it would be up to the appropriate international jurisdiction to settle a dispute on the interpretation of this Article.

As for the second argument, that Article 22(2) of the LOS Convention allows coastal states to refuse passage through their territorial seas to ships carrying ultra-hazardous cargoes, it is quite clear from the letter of that provision that it is not to be used to **prevent** passage, but rather to **control** it through the designation of sea lanes and traffic separation schemes.

While not relating to ultra-hazardous materials per se (this fact makes it all the more interesting), it should also be mentioned that, after the Prestige spill,²⁴ France, Spain and Portugal agreed on a co-ordinated policy of expelling from their EEZ single-hulled ships older than 15 years and bearing certain other characteristics, invoking for this purpose Article 56 of the LOS Convention.²⁵ This action is clearly in contradiction with the letter of the Montego Bay Convention. This was made even clearer by the fact that this policy decision was not implemented into domestic legislation or in any form of bilateral or multilateral agreement. Nonetheless, it has been systematically applied since then, despite mild protests from other states.

This brings us to the third argument, which is based on an evolution in international customary law. It is my understanding that the basis for the pretensions of coastal states is not to be found within the LOS Convention, and can therefore only be found in an ulterior evolution of international law.

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19. The 14th edition of the United Nations Recommendations on the Transport of Dangerous Goods – Model Regulations (Model Regulations) was published in 2005.
 20. The text of these regulations is available on the IAEA Web site at: www-pub.iaea.org/MTCD/publications/PDF/Pub1225_web.pdf.
 21. The text of this convention is available on the IAEA Web site at: www.iaea.org/Publications/Documents/Conventions/jointconv.html.
 22. The text of this convention is available online at www.basel.int/text/con-e.htm.
 23. The text of this convention is available on the IAEA Web site: at: www.iaea.or.at/Publications/Documents/Infcircs/Others/inf274r1.shtml.
 24. The *Prestige* was an oil tanker whose sinking on 19 November 2002 off the Galician coast caused a large oil spill. The spill polluted thousands of kilometers of coastline and caused great damage to the local fishing industry. (http://en.wikipedia.org/wiki/Prestige_oil_spill).
 25. See: www.ifremer.fr/envlit/actualite/20021127.html, and www.polmar.com/prestige/portugal.htm.

This argument has been advanced by both coastal states and some doctrine, amongst which Van Dyke²⁶ and Currie²⁷ stand out.

In order for customary law to be formed, there must be constant and uniform practice within the international community and the conviction that this practice is rendered obligatory by the existence of law requiring it.²⁸ International jurisdictions require clear and sufficient evidence of a generally accepted custom, with some level of uniformity.²⁹

There is certainly a substantial number of coastal states claiming the right to refuse passage of ships through their territorial seas and even exclusive economic zones. These claims were most evident during the voyages of the Pacific Teal and the Pacific Pintail. Some even say that exporting states have consented to these claims, instructing their vessels to stay clear of the waters of those states. It must be conceded that the Pacific Teal and the Pacific Pintail most often stayed clear of third states' waters. However, the United Kingdom also promised some states, such as South Africa, that the ships would not enter their waters, even though they did. More important, however, are the reasons for which exporting states are assenting, even if only partially, to these claims. This behaviour seems to be based solely on the desire to maintain friendly diplomatic relations, rather than on a sense of legal obligation. In other words, even if all evidence of consistent international practice could be gathered – which, in my view, is still lacking, even in relation to the territorial sea alone – the *opinio juris* element would be lacking.

That is not to say that this cannot change. But the current situation is still one where exporting states believe it is their right to see vessels carrying their flag traverse the territorial sea of third states, even if they choose not to exercise it. This was made quite clear by the recent journey of several decommissioned vessels from the USA to Europe.³⁰ These vessels, which were radioactively contaminated, entered the Portuguese territorial sea around the islands of Azores, and were then expelled by the local navy.

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26. See e.g. van Dyke, “The Legal Regime Governing Sea Transport of Ultrahazardous Radioactive Materials”, 33 (2002) *Ocean Development and International Law*, 77.
 27. See e.g. Currie, “The International Law of Shipments of Ultrahazardous Radioactive Materials: Strategies and Options to Protect the Marine Environment”, 1998, available at: www.globelaw.com/Nukes/Nuclear%20Shipment%20Paper.htm.
 28. Statute of the International Court of Justice (26 June 1945) Can. T.S. 1945 No. 7, Art. 38(1)(b); North Sea Continental Shelf Cases (Germany/Netherlands/Denmark), I.C.J. Reports 1969, paras. 74 and 77; Militia and Paramilitary Activities in and against Nicaragua (Nicaragua v. USA), I.C.J. Reports 1986, p. 14, at para. 184; Brownlie, “*Principles of Public International Law*”, fourth edition, Clarendon Press, Oxford, 1990, p. 4-11; Nguyen Quoc Dinh, Daillier, Pellet, “*Droit International Public*”, fourth edition, Paris, L.G.D.J., 1992, p. 310-335; Roberts, “Traditional and Modern Approaches to Customary International Law: A Reconciliation”, 95 (2001) *American Journal of International Law*. P. 757.
 29. Fisheries case, I.C.J. Reports 1951, p. 116, at p. 131; Asylum case, I.C.J. Reports 1950, at p. 276-277; “Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion”, I.C.J. Reports 1996, p. 226, S.O. Guillaume, at p. 291; Nicaragua case, *supra* note 42, at p. 106-109, and D.O. Schwebel, at p. 303; Brownlie, “*Principles of Public International Law*”, fourth edition, Clarendon Press, Oxford, 1990, p. 5; Aceves, “The Freedom Of Navigation Program: A Study of The Relationship Between Law and Politics”, 19 (1996) *Hastings International and Comparative Law Review*, 259, 303.
 30. *Lusa News Agency*, “Navios americanos tóxicos entram em águas territoriais nacionais nos Açores”, 11 November 2003, www.ecosfera.publico.pt/noticias2003/noticia2828.asp).

The arguments brought forward by the doctrine in favour of the evolution of customary law to favour the interests of coastal states seem to ignore the protests and behaviour of exporting states. Ironically, the only way to acknowledge the creation of such customary law would probably be to recognise persistent objector status on the part of countries who regularly export radioactive materials, which would render this custom useless to a large extent.

Nonetheless, it is fair to highlight that little work has been done (or at least is available) on state practice in this regard. Most of the studies available³¹ try to ascertain states' positions from comparative analysis of their national legislation. This is insufficient. As has been demonstrated in the France-Spain-Portugal decision to exclude certain tankers transporting heavy fuel oil from their EEZs, national regulations and national practice are not necessarily in tune with one another. There are not many States around the world whose laws explicitly restrict the right of innocent passage beyond that which is allowed under the LOS Convention, but this does not prevent a significant number of them from making the above-mentioned claims. This situation creates a lack of transparency, would cause obvious difficulties for litigation before an international tribunal, and it makes well-informed opinions in this respect particularly difficult.

Other arguments have been advanced. One author suggested³² that the right to refuse entry into the territorial sea of ships carrying ultra-hazardous cargoes derives from the balancing of two conflicting obligations set out in the LOS Convention: the obligation not to hamper innocent passage and the obligation to protect the marine environment. While this duality is clearly present in the Montego Bay Convention, the text itself solves the issue by stating that environmental protection measures may go only so far as allowed by the convention [Article 194].

Another argument that has been built up by doctrine is that the suspension of the right of innocent passage for such ships would derive from the application of the precautionary principle. However, it is hard to find any substance to this approach. To begin with, the international community has still to agree on the exact content of the precautionary principle.³³ One possible interpretation is that the content of the precautionary principle must correspond to something beyond the general principle of prevention (which has been recognised by international jurisdictions in different contexts and is explicitly mentioned in the LOS Convention). This would reduce the precautionary approach to an implication that when scientific data is uncertain as to the risks of an activity, one should err on the side of caution and of the environment. If one accepts this premise, it becomes obvious that the precautionary principle has very little relevance in this context. The risks inherent in the shipping of ultra-hazardous cargoes have been identified and analysed; the adoption of safety measures has been made mandatory to ensure the minimization of those risks.

But the truth is that the content of the precautionary principle will probably remain disputed for quite some time. Some argue that the adoption of different formulations of the principle in the legal

31. See e.g. Hakapää & Molenaar, "Innocent Passage – Past and Present", 23-2 (1999) *Mar. Pol.*, p. 131, p. 138 *et seq.*

32. Van Dyke, "The Legal Regime Governing Sea Transport of Ultrahazardous Radioactive Materials", 33 (2002) *Ocean Development and International Law*, 77.

33. The MOX Plant case (No. 10) – Provisional Measures (ITLOS, December 2001), S.O. Judge Wolfrum and S.O. Judge Ad Hoc Székely; KNOX, "The myth and reality of transboundary environmental impact assessment", 96 (2002) *American Journal of International Law* 291, p. 293-294; Vanderzwaag, "The Precautionary Principle and Marine Environmental Protection: Slippery Shores, Rough Seas, and Rising Normative Tides", 33 (2002) *Ocean Development and International Law*, p. 165.

instruments that embody it is a conscious effort on the part of some states to prevent this principle from becoming binding as customary law.

This brings us to the main reason why the precautionary principle has little to contribute to the present analysis – it is not a binding principle of international law, or at least it has not been recognised as such by any international jurisdiction, although this argument has been put forward on several occasions. As one Judge stated in the MOX Plant Dispute case, it “is still a matter of discussion whether the precautionary principle ... has become part of international customary law”.³⁴

Finally, even if the precautionary principle were applied to this issue, it is hard to contend how it would imply a right to refuse passage to ships carrying ultra-hazardous cargoes. It would mean interpreting the principle as prohibiting an activity simply because it is dangerous, even if its risks have been calculated and measures have been taken to minimise them as far as reasonably achievable. This solution would be unrealistic, to say the least.

Having examined all of the arguments presented by certain authors to defend the right of coastal states to prohibit transit through their territorial seas of ships carrying ultra-hazardous cargoes, and arriving at the conclusion that none of them carry enough substance, it must be recognised that international law, as it stands today, does not allow for such a restriction on the right of innocent passage.

However, this answer is disconcerting when one takes into account that more and more coastal states are refusing passage of ships carrying dangerous cargoes (not only radioactive cargoes, but also heavy fuel oil, as was the case with the above-mentioned Malaga decision), and flag states are opposing these claims only to a certain extent. There has been, to the best of my knowledge, no litigation before an international tribunal concerning such refusals, and it is not unimaginable that issues of state responsibility could be explored in this connection.

The policy of coastal states seems to be to claim the right to refuse passage, even though no precise legal basis or precedent can be quoted in favour of their position. In so doing, it is possible that the ultimate goal is precisely to cause the evolution of international customary law. And while coastal states are clearly pressing in the direction of this evolution, shipping states do not seem to be doing all they can to resist. Does this imply recognition by the shipping states that times are changing? Could we soon observe an even further reduction of their opposition to the claims of coastal states, so much so that an international tribunal would feel at ease to say that this tolerated practice would have given rise to a new custom, opening a new exception to the right of innocent passage as foreseen in the LOS Convention?

These questions must remain unanswered for now. And governments deciding national policy on this issue must be aware of the inherent risks (in terms of international litigation) of a strategy to promote an evolution of customary law. On the other hand, attempts to refuse passage are often handled at a more subtle diplomatic level, where pros and cons are weighed by the shipping state, which may agree to instruct its ships to stay clear of the waters without this implying an acceptance of such an evolution.

34. The MOX Plant case (No. 10) – Provisional Measures (ITLOS, December 2001), available at: www.itlos.org, S.O. Judge Wolfrum.

B. Requiring prior notification

An issue which usually goes hand-in-hand with refusal of passage through the territorial sea of ships carrying ultra-hazardous cargoes is the requirement, now fairly widespread among coastal states, that the passage of such ships should be previously notified to them, so that appropriate precautions may be considered. Calls for such notifications were voiced by several States at the time of signature or ratification of the LOS Convention, and are now present in a number of national legislative instruments³⁵ and are also applied in practice without a clear national regulatory framework.

It should first be noted that, during the negotiation of the LOS Convention, there were several attempts to introduce the right of prior notification in cases of hazardous shipments, and all were rejected.³⁶ This is enough to conclude that the negotiators of the LOS Convention agreed on a text which did not grant coastal states the right of prior notification.

Before analysing the requisites for the formation of international customary law in this sense, to derive an obligation of prior notification from the LOS Convention implies accepting an objectivist and “actualist” method of interpreting international law (pursuant to which the correct interpretation of a treaty may evolve over time). While I would personally tend to admit such a method, it must be recognised that it is not in line with a classic approach to international law. It might even be argued that such a method of interpretation would reduce the border between written law and customary law to an imperceptible difference – a result which would fit oddly with the substantial difference in proving the existence of one and the other kind of international law.

An interesting attempt to derive the obligation of notification from the letter of the LOS Convention is the argument that **not** to provide prior notification would be a violation of the duty to consult affected states, including specifically the duty under Article 199 of the LOS Convention. This consultation is supposedly necessary to “ensure that that these dangerous cargoes pass through the safest sea lanes and to ensure that contingency plans are prepared to deal with accidents that may occur en route”.³⁷ But Article 199 only refers to situations of imminent or actual damage. Prior notification would not improve the protection of the environment or the response capability of coastal states.³⁸ Contingency plans are developed without regard to individual shipments, and sea lanes are established generally, not individually.

Several treaties negotiated since 1982 contain an obligation of notification in case of transit through the territorial sea of ships with cargoes of a pernicious nature. The most notable example is the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal³⁹ and its implementing regional treaties (Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa;⁴⁰ Waigani Convention to Ban the Importation into Forum Island Countries of Hazardous and

35. See e.g. Hakapää & Molenaar, “Innocent Passage – Past and Present”, 23-2 (1999) *Mar. Pol.*, p. 131, p. 142.

36. Nordquist (ed.), “United Nations Convention on the Law of the Sea: A Commentary”, *Martinus Nijhoff Publishers*, VI Vols., 1985-2002, Vol. II, paras. 23.2, 23.3, 19.6 and 19.8.

37. Van Dyke, “The Legitimacy of Unilateral Actions to Protest the Ocean Shipment of Ultrahazardous Radioactive Materials”, 1996, available at: www.nci.org/i/ib121396.htm.

38. Pedrozo, “Transport of Nuclear Cargoes by Sea”, 28 (1997) *J. Mar. L. & Com.* 207, 220-221.

39. See footnote No. 22.

40. The text of this convention is available at: www.ban.org/Library/bamako_treaty.html.

Radioactive Wastes and to Control the Transboundary Movement and Management of Hazardous Wastes within the South Pacific Region;⁴¹ *Acuerdo Regional sobre Movimiento Transfronterizo de Desechos Peligrosos*;⁴² Protocol on the Prevention of Pollution of the Mediterranean Sea by Transboundary Movements of Hazardous Wastes and their Disposal;⁴³ Agreement between the government of the United States of America and the government of Canada concerning the transboundary movement of hazardous waste⁴⁴).

While these treaties exclude radioactive waste (to the extent that they have subsequently been regulated by other instruments of international law), one might be tempted to advance an *ad majoris* argument: if states feel they should notify each other in relation to these cargoes, surely they should feel the same about cargoes of an even more dangerous nature. An obvious counterargument is that states may have purposefully decided to exclude such cargoes, e.g. for security reasons. Indeed, when specifically regulating radioactive waste, States have restricted the obligation of prior notification to the destination state.⁴⁵

Another frequent argument is that the obligation to provide prior notification has become customary international law. However, proving this entails the usual problems, commencing with scarcity of information. In addition, there seem to be several examples of shipping States expressly refusing to give prior notification, usually invoking the maintenance of secrecy as fundamental for the safety of the shipment.⁴⁶ Also, in relation to cases where notification is provided, it would probably be arguable that this is done out of diplomatic courtesy rather than out of a sense of legal obligation (*opinio juris*).

In my view, the best way to defend the existence of an obligation of prior notification, even though it is by no means flawless, is to argue that it is the necessary corollary of the obligation of environmental damage prevention imposed on states. There are two ways to approach this argument – the first is to sustain a systematic interpretation of the LOS Convention in that sense; the second is to derive it from a general obligation of prevention in international law.

The first approach implies accepting the abovementioned objectivist method of interpreting international law. According to this approach, notifying the transit state is the minimum you can do to allow for emergency preparedness, which would contribute to decreasing the damage to the environment if an accident were to occur. A fundamental component is that to give prior notification does not hamper innocent passage. In other words, it is a small concession to one principle which significantly contributes to another principle.

The second approach is substantively very similar to the first, except that it relies on an ensemble reading of international law – it is based on a general principle of international law. The

41. The text of this convention is available at: www.forumsec.org.fj/docs/Gen_Docs/wc.htm.

42. The text of this convention is available at: www.sieca.org.gt/publico/Reuniones_Presidentes/xiii/acuerdo.htm.

43. The text of this protocol is available at www.basel.int/article11/mediterranean.doc.

44. The text of this agreement is available at www.basel.int/article11/canada-us-e.doc.

45. Joint Convention on the Safety of Spent Fuel Management and on the Safety of Radioactive Waste Management, IAEA INFCIRC 546 (1997).

46. Hakapää & Molenaar, “Innocent Passage – Past and Present”, 23-2 (1999) *Mar. Pol.*, 131, 142; Keyuan, Zou, “Navigation of foreign vessels within China’s jurisdictional waters”, 29-4 (2002) *Marit. Pol. Mgmt.* 351, 362-363.

above mentioned waste treaties could contribute to the demonstration of the existence of this principle. More importantly, it has already been declared by international jurisdictions, in cases such as Strait of Corfou⁴⁷, Trail Smelters⁴⁸ and Lake Lanoux.⁴⁹

Both approaches, however, run into difficulty in justifying the “secrecy for reasons of security” claim. On the other hand, one may wonder whether the legitimacy of this claim is reduced at a time when shipments of ultra-hazardous cargoes are widely publicised by environmental protection NGOs.

More importantly, both these approaches try to establish a specific implicit or customary obligation by seeking general obligations from which it could be derived. In so doing, they fail to tackle the fact that a general rule can have exceptions. In order to determine whether there is an obligation under international law of prior notification of shipments of ultra-hazardous substances, one cannot escape analysing the specific state practice and *opinio juris*, which, as has already been mentioned, are not sufficiently uniform to be favourable to the interests of coastal States.

It has also been suggested that this entire discussion has become somewhat moot, precisely because national governments are usually informed, from different sources, of ultra-hazardous shipments. This is not very convincing, however. Not all shipments of ultra-dangerous cargoes receive the same media or civil society attention, and not all are covered by general mandatory information systems. The obligation to notify transit states would ensure the possibility of readiness, eliminating any uncertainty as to the availability of information.

It seems that in the academic world, the opinions in favour⁵⁰ are clearly outweighed by the opinions against⁵¹ the existence of this obligation. One author suggested that the favourable opinions “must be understood more as advocacy than as a disinterested appraisal of the current state of international law”.⁵² While one may be inclined to agree, it is hard to do so without hesitation, essentially

47. Corfu Channel (United Kingdom/Albania), I.C.J. Reports, 1949, p. 4.

48. Trail Smelter Arbitration (United States/Canada) (1905), UNRIAA, vol. III, p. 1965.

49. Lake Lanoux Arbitration (France/Spain), UNRIAA., vol. XII, p. 281.

50. Currie, “The Right to Control Passage of Nuclear Transport Vessels under International Law”, 1995, and “The International Law of Shipments of Ultrahazardous Radioactive Materials: Strategies and Options to Protect the Marine Environment”, 1998, both available at: www.globelaw.com/Nukes/Nuclear%20Shipment%20Paper.htm; Van Dyke, “The Legitimacy of Unilateral Actions to Protest the Ocean Shipment of Ultrahazardous Radioactive Materials”, 1996, available at: www.nci.org/i/ib121396.htm, “The Legal Regime Governing Sea Transport of Ultrahazardous Radioactive Materials”, 33 (2002) *Ocean Development and International Law*, 77 and “Active Sonar & Shipments of Radioactive Materials”, 2002 *Colorado Journal of International Environmental Law and Policy* 1; Marin, “Oceanic Transportation of Radioactive Materials: The Conflict Between the Law of the Seas, Right of Innocent Passage and Duty to the Marine Environment”, 13 (2001) *Fla. J. Int’l L.* 361.

51. Chircop, “Ships in Distress, Environmental Threats to Coastal States”, and “Places of Refuge: New Directions for an Ancien Regime?”, 33 (2002) *Ocean Development and International Law*, 207, 211; Hakapää & Molenaar, “Innocent Passage – Past and Present”, 23-2 (1999) *Mar. Pol.*, 131, 141; Fidell, “Maritime transportation of plutonium and spent nuclear fuel”, 31 (1997) *Int’l L.* 757; Pedrozo, “Transport of Nuclear Cargoes by Sea”, 28 (1997) *J. Mar. L. & Com.* 207, 220-221; Rothwell, “Navigational rights and freedoms in the Asia Pacific following entry into force of the Law of the Sea Convention”, 35 (1995) *Virginia Journal of International Law* 587, 602.

52. Fidell, “Maritime transportation of plutonium and spent nuclear fuel”, 31 (1997) *Int’l L.* 757.

because this is much more of a borderline case compared to the right to refuse passage to ships carrying ultra-hazardous cargoes.

As regards an obligation of prior notification in cases of transit through the EEZ of a third state, the arguments are essentially the same as for the territorial sea, especially when one considers that in both areas the coastal state has an equal obligation to protect the marine environment. It can nonetheless be noted that the Basel Convention doesn't seem to provide for prior notification in cases of transit through the EEZ, since by using the expression "through which" [Article 2(12), read together with Article 2(13) and Article 4(2)(f)], that convention seems to be referring to the territory of states, the same being applicable to its implementing treaties.

IV. Conclusion

The analysis carried out in this paper suggests that coastal states would probably fail to persuade an international tribunal of the existence of the right to deny passage of ships carrying ultra-hazardous cargoes through their territorial seas, much less through their exclusive economic zones. The same applies to the obligation to provide (or right to require) prior notification of such passage. This may partly explain why no international litigation concerning these issues has so far taken place, even though there have been a number of conflicts between coastal states and shipping states, widely publicised in the media.

Still, evidence suggests that officers at the head of authorities in several coastal states, often non-legal experts, firmly believe in the existence of these rights and obligations, at least insofar as concerns the territorial sea. The gap between the law and practice seems to be widening. At the same time, several states are clearly pursuing a policy of pushing for an evolution of customary law, either by claiming that this evolution has already taken place, or that the letter of this or that treaty already allows for their claims. It would not be surprising if this strategy should succeed eventually. For the time being, however, one must not be too hasty to confuse diplomatic concessions with an evolution of the law.