

CHAPTER ONE

History of the dispute

The Caribbean threat

In October of 1992 there was a great outcry in the usually peaceful Caribbean Islands. Word was out that the Japanese planned to ship one ton of plutonium¹ through Caribbean waters, apparently the largest single shipment of plutonium in history. According to reports the plutonium was to leave the port of Cherbourg in France on board the Japanese ship the *Akatsuki-Mar* en route to Japan. These reports indicated that if the *Akatsuki-Mar* followed the same route Japanese irradiated nuclear fuel transport ships had taken in the past the shipment would cross the Atlantic, pass through the Mona Passage between the Dominican Republic and Puerto Rico, cross the Caribbean sea, pass through the Panama Canal and travel across the Pacific to Japan.² This shipment it was argued posed a threat to the entire Caribbean Region.

¹. Plutonium is a highly radioactive element produced in the course of operating nuclear power plants. It is one of the most toxic and dangerous substances in existence. A single microgram, smaller than a speck of dust, can cause fatal cancer if inhaled or ingested - extract from the article, "Plutonium Trafficking is Deadly Business," appearing in The Labour Spokesman, Oct. 14, 1992, at 3, col. 1. (The Labour Spokesman is a newspaper published in the Caribbean State of St.Christopher (St.Kitts) and Nevis).

². *Id.*

Caribbean Governments react

The Heads of Government of the Caribbean Community assembled for a Special Session of their Conference in late October to consider these reports of the possible shipments of plutonium through the Caribbean sea. In this regard, the Heads decided to sponsor a resolution at the United Nations by all CARICOM Members aimed at achieving the following:

1. that shipments of plutonium and other radioactive or hazardous materials should not traverse the Caribbean sea;
2. that the Caribbean should not be used for the testing of nuclear devices; and
3. that the Caribbean Sea should be declared a nuclear free zone for purposes of shipment, storing or dumping of any radioactive or hazardous substances or toxic waste. They agreed that the support for and co-sponsorship of this resolution should be sought from all countries within and bordering on the Caribbean Sea.

However by the 23rd of November 1992 all the excitement was over for it was discovered that the ship would now be taken a different route away from the Caribbean Sea.

The Democrat, Nov. 7, 1992, at (page not numbered), col. 3. (The Democrat is a newspaper published in the Caribbean State of Saint Christopher and Nevis).

On the 23rd of November 1992 the Caribbean Conservation Association issued a Press release (No. 366) indicating that, "The Japanese plutonium-laden ship the *Akatsuki-Maru* was at

The protests of Caribbean Governments bring to mind the protests in the 1960's where States refused or opposed the passage of nuclear-powered ships. In the 1960's ports in Turkey and Japan refused entry to the American nuclear-powered ship the *Savannah* and before the *Savannah* visited the United Kingdom in 1964, an elaborate agreement regulating its passage through British territorial waters was concluded between the two Governments. Spain, for example, enacted legislation in 1964 stating that the passage of nuclear ships through territorial waters was to be considered an exception to the right of innocent passage. The building of other nuclear-powered vessels - the *Otto Hahn* (Federal German Republic) and *Mutsu* (Japan) prompted several States to draw up international liability Conventions and by the mid-1970s there was hardly a port in the Pacific that would accept nuclear ships. What we are seeing in the 1990's is really an old problem raising its head once again, namely, coastal States interfering with freedom of navigation in order to protect

11.00 a.m. Eastern Standard Time Tuesday November 18 1992
located 840 nautical miles NE of Cape Sao Roque, Brazil and
825 nautical miles WSW of Monrovia, Liberia. The direction in
which it is travelling takes it away from the Caribbean Sea."

Pugh, *Nuclear warship visiting: storms in ports*, 45 World Today 180, (1989).

Id.

R.R. Churchill & A.V. Lowe, The Law of the Sea 76 (New, rev. ed. 1988).

Pugh, *supra*, note 5, at 180.

their environment.

The scope of this essay

This essay will suggest various measures that Caribbean States may take to in order to protect their environment from the dangers posed by the passage of ships carrying nuclear and hazardous materials. The measures suggested will be measures that maintain a balance between freedom of navigation on the one hand and coastal States' rights on the other.

CHAPTER TWO

Internal waters

Definition

Internal waters are those waters which lie on the landward side of the baseline from which the territorial sea and other maritime zones are measured. Within internal waters, the coastal State enjoys full territorial sovereignty in much the same way as it does over its land territory. Consequently there is no right of innocent passage such as exists through the territorial sea. The single exception to this rule is that where straight baselines are drawn along and indented coast, enclosing as internal waters areas which had not previously been considered as such, a right of innocent passage continues to exist through

1958 Convention on the Territorial Sea and Contiguous Zone, art. 5(1) and 1982 Law of the Sea Convention, art. 8(1).

Churchill & Lowe, *supra* note 7, at 51.

those waters. Internal waters mostly comprise bays, estuaries, ports and other waters falling on the landward side of the baseline. In this chapter the primary point for consideration is whether there exists any right of access to ports and if so to what extent a coastal

State can restrict this right in order to protect itself from the danger posed by ships carrying radioactive or hazardous cargoes. The question of whether denial of access to ports infringes freedom of navigation will also be discussed. The right of innocent passage through internal waters will be addressed in the next chapter when innocent passage through the territorial sea is discussed.

The right of access to ports

Is there a right of access to ports? There are various views on this subject. Some authors are of the view that there is a general right of access to ports. These authors find support for their view in Saudi Arabia v Aramco where the Arbitrator stated,

According to a great principle of public international law, the ports of every State must be open to foreign merchant vessels and can only be closed when the vital interests of the State so

1958 Convention on the Territorial Sea and Contiguous Zone, art. 5(2); 1982 Law of the Sea Convention, art. 8(2).

require.

Provision for access to ports is commonly made by agreement between States in treaties of "Friendship, Commerce and Navigation." Because of the multiplicity of these agreements with substantial similar content, some observers have concluded that they have established a customary right of access. But these commentators, who assert that there is a general right of access to ports and try to establish that this is a rule of customary international law, represent the minority viewpoint.

The majority opinion is that there is no general right of access to ports; that although right of entry exists almost everywhere as a matter of usage and by agreement no customary rule of law has yet come into being. Even the International Court of Justice in the Nicaragua Case noted that internal waters are subject to sovereignty of the State and it is, "By virtue of its sovereignty that the coastal state may regulate access to its ports." After having done a survey of the recent writers one author was able to conclude that, "Even those authors who assert a right of access recognize the right of a littoral State to

27 *ILR* 167, at 212.

Myres S. McDougal & William T. Burke, The Public Order of the Oceans 110 (1987).

Id., at 110.

Id.

[1986] ICJ Rep. 14, at 111.

regulate such access, even to the point of exclusion." In addition these treaties of Friendship, Commerce and Navigation which secure rights of access to ports usually contain provision that access is conditioned upon adherence to the rules and regulations of the port of entry; and in many the right to regulate and to prohibit entry for the protection of public health and safety is specified. In view of the limitations in these treaties, the proposition that there exists a customary rule of law permitting free access to ports is untenable.

From the authorities presented above one may safely conclude that there is no right of access to ports under international law. Caribbean Governments may therefore enact legislation forbidding ships carrying nuclear or hazardous material from entering their ports and thereby protect themselves from the danger posed by these ships. But before enacting such legislation a State should first examine its treaties regarding access to its ports to ascertain whether it has reserved to itself authority to regulate access to ports for protecting public health and safety. Haiti, for example, has already enacted legislation denying entry into its ports of all vessels carrying wastes or any other substances likely to pose hazards to human health and the

Lee M. Hydeman & William H. Berman, International Control of Nuclear Maritime Activities 136 (1960).

Id., at 137.

Hydeman & Berman, *supra* note 17, at 137-138.

environment.

What if all Caribbean Governments enact legislation forbidding entry into their ports of ships carrying nuclear or hazardous cargoes? Foreign nations may argue that this joint measure has interfered with freedom of navigation through the Caribbean Sea as there are no ports where such ships can visit to take on supplies. But as one leading author noted:

Denying a right of access to ports does not derogate directly from freedom of navigation. The exercise of the freedom may only be rendered more expensive because the vessels whose trade routes pass closed ports will have to carry a higher ratio of supplies to cargo.

The foreign nations may also argue that freedom of navigation through the Caribbean is hindered in that there are no ports open to these ships should they be in distress. But this all depends on whether or not under international law a coastal state can deny access to its ports of a ship in distress. This matter will be addressed in the next section.

Ships in distress

"Note verbale" of 18 February 1988 from the Ministry of the Interior, Decentralization, the General Police Force and the Civil Service of Haiti, communicated to the United Nations by a letter dated 29 February 1988, *Law of the Sea Bulletin* No.11, (July 1988), 13.

Hydeman & Berman, *supra*. note 17, at 132.

Can a coastal State deny access to its ports of a ship in distress? What if the ship is carrying nuclear or hazardous cargoes? What if the ship in its distressed condition poses a threat to the coastal States environment? These are some of the matters that will be addressed in this section but first it is necessary to give a little background information on the Caribbean. Special reference will be made to Saint Christopher and Nevis which is the State from which this writer hails.

Saint Christopher (St.Kitts) and Nevis is a twin island State in the Caribbean. St.Kitts is 68 square miles in area while Nevis is about half the size. In fact some Caribbean States are not much bigger. In St.Kitts there is only one port as is the case in many other Caribbean States. This single port is the major link with the outside world. The port is used to bring in food and other essentials and to take out exports. Raw materials for the manufacturing industry are brought in through the port and the finished product leaves via this port. The port also accommodates cruise ships bringing tourists. The fishing industry provides numerous jobs and also supplies fresh fish for the many tourist visiting the Island. Protecting this single port and the environment as a whole from pollution from radioactive or toxic materials is therefor essential. The Caribbean Islands are so small and so close together that a nuclear incident in one island could probably affect the entire region. Then to in St.Kitts, as is probably the case throughout the rest of the Caribbean region,

there is no equipment nor personnel available in the event of a major radioactive or toxic incident. A Caribbean State would therefore be put in an awkward situation if a plutonium laden ship in distress sought to enter that country's only port.

This dilemma was raised by the President of the Republic of Nauru His Excellency Bernard Dowiyogo in his address at the Asia-Pacific forum on "Sea Shipments of Japanese Plutonium" held on 4 October 1992 where he stated:

Finally we are informed that the risk of accident is real and perhaps even precedented. In the past two years alone, three ships on their way between Japan and the United Kingdom had to make unscheduled stops in Honolulu and Bermuda. One of these involved the same ship that recently left Yokohama to retrieve the plutonium from France - the *Akatsuki Maru* - which made an unexpected stop in Honolulu on March 2 1991. One of these ships was reported to have had an unspecified "industrial accident". Did the accident involve a nuclear cargo? if it did, was the affected public informed? And because radiation is invisible, would the affected public ever know?

In the event of such an accident, the ship in distress would feel the desperate need to put in to port in the nearest country. Would it be our country, Nauru? In this

We must go back now to the essential points for discussion. Is there a right of access to any port of a ship in distress? There are several leading opinions on this point. According to one author,

The existence of sovereignty over internal waters and

case we would have a terrible conflict. It is of course our strong instinct to assist fellow humans in distress. But we are not prepared to handle a nuclear accident, or even the possibility of one in our small country. Indeed, such an accident in Nauru's only port could render our small island country unfit for habitation for the duration of the toxicity of plutonium - literally tens of thousands of years.

the absence of any general right of innocent passage through them logically implies the absence of any right in customary international law for foreign ships to enter States's ports. There is, indeed, very little support in State practice for such a right, except for ships in distress seeking safety, which enjoy a right of entry recognized in cases such as the *Creole* (1853) and the *Rebecca* (1929).

Another leading author had this to say:

The one customary right of access, quite universally accepted, arises from the humanitarian obligation to admit vessels in distress because of the weather or damage to the vessel. A threat to the safety of the vessel, or persons aboard, is generally considered to require the suspension of coastal laws prohibiting or severely penalizing entry into port without coastal consent. Coastal competence to exclude is not completely overridden, however; if the entry of a vessel in distress would threaten the health and safety also of the port and its populace, exclusion may still be permissible.

Then another author stated:

Nations have the absolute right to restrict access to their ports. See, for instance, Article 211(3) of the 1982 Law of the Sea Convention. Although an exception is frequently made to this principle for force majeure situations, that exception need not apply in the context of an environmental disaster because the

Churchill & Lowe, *supra* note 7, at 52.

McDougal & Burke, *supra*. note 13, at 110.

coastal nation would have the right to protect its citizens and its marine environment.

But what may be classed as the leading opinion on this issue is this:

In international law, a right of free access to ports exists for ships which are in such real and irresistible distress that entry is necessary to save the lives of persons or property on the vessel involved. A considerable burden of proving distress is placed on the vessel....However, since the concept of distress is an exception to the basic sovereignty of the coastal state over its internal waters, it would not appear to be inconsistent with existing law to permit the exclusions of such a vessel where the potential damage to the coastal State is greater than the threat to the vessel. Of course, the threat to the interests of the littoral State should be quite compelling.

The authorities quoted above state that ships in distress have a right of access to ports so long as the danger to the coast is not greater than the danger to the ship. But what is the

Jon M. Van Dyke, *Sea Shipments of Japanese Plutonium: Liability and Law of the Sea Ramifications*, 12-13, (available at the University of Hawaii Law School).

Hydeman & Berman, *supra* note 17, at 161 -162.

test of distress? The test of distress was laid down by Lord Stowell in The Eleanor as follows:

It must be an urgent distress; it must be something of grave necessity, such as is spoken of in our books, where a ship is said to be driven in by stress of weather. It is not sufficient to say it was done to avoid a little bad weather, or in consequence of foul winds, the danger must be such as to cause apprehension in the mind of an honest and firm man...Then again, where the party justifies the act upon the plea of distress, it must not be a distress which he has created himself by putting on board an insufficient quantity of water or of provisions for such a voyage, for the distress is only a part of the fraud, and cannot be set up in excuse for it; and in the next place the distress must be proved by the claimant in a clear and satisfactory manner.

Then in The New York the Supreme Court of the United States

stated: The necessity must be urgent and proceed from such a state of things as may be supposed to produce in the mind of a skilful mariner a well grounded apprehension of the loss of the vessel and

(1809) Edw. 135.

cargo or of the lives of the crew.

The authorities above establish that even where a port is closed to certain ships such ships may enter if they are in distress. The distress however must be real and not fanciful and the port State may deny entry where the danger to the coast is greater than the danger to the ship. If Caribbean Governments enact legislation forbidding access to their ports of ships carrying nuclear or hazardous material these ships will still be entitled to pull into Caribbean ports if they are in distress and if the danger posed to the ship is greater than the danger posed to the coast. The argument, that freedom of navigation is hindered in that there are no ports open to these ships should they be in distress, is therefore untenable. The major problem however is that most Caribbean States have no trained persons on shore who will be able to assess the distress message and determine whether or not the danger posed to the coast is greater than the danger posed to the ship. If the coastal State is uncertain and denies access a disaster may result that could otherwise have been avoided. This is why it is essential for there to be emergency planning before such shipments are made.

During the recent controversy over the shipment of plutonium through the Caribbean, Greenpeace advised the Caribbean Conservation Association that, "national and regional authorities

3 Wheat. 59 (1818).

should enact resolutions and, if necessary, legislation denying the offer of or participation in emergency planning for such shipments making clear that the only way to protect against such a radiological disaster is by stopping the transports." It is this writer's view that this is not sound advice. States ought to adhere to the rules of international law on freedom of navigation and not seek to stop the transports. Caribbean Governments should rather insist that the States involved in the shipments arrange emergency plans for these shipments. In fact it may be argued that States involved in shipping nuclear or hazardous cargoes have a duty to make emergency plans for such shipments. This duty can be said to arise out of that basic norm of international law that - States have a duty to act in such a way as to avoid causing injury to others. It may also be argued that States that are party to the 1982 Law of the Sea Convention have a duty to arrange emergency plans for their shipments of nuclear and hazardous wastes and that Caribbean Governments that are party to the 1982 Convention have a duty to cooperate in the preparation of these plans. This cooperation should not entail any financial

Report prepared by Greenpeace International for the Caribbean Conservation Association entitled, "The Transport of Plutonium through the Caribbean" (August 26-28, 1992) (available at the Caribbean Conservation Association).

Van Dyke, *supra* note 25, at 2.

Articles 192, 194, 199, and 203 of the 1982 Law of the Sea Convention provide as follows: "States have the obligation to protect and preserve the marine environment...(and)... shall

responsibility on the part of the coastal state, but could include allowing one's State (at the shipper's expense) to be used as a base to store equipment, and personnel for distress situations. In short, coastal states should sit down and negotiate emergency plans with the shipping states, remembering that under international law they cannot always deny access to their ports of ships in distress.

Conclusion

In order to protect themselves from the danger posed by ships carrying nuclear or hazardous cargoes Caribbean Governments may enact legislation denying such ships access to their ports. This measure cannot be seen as hindering freedom of navigation as ships can simply carry more supplies to counteract not being able to pull into Caribbean ports and to the extent that the ship has an urgent need to pull into port the special rule of distress protects it.

take all measures necessary to ensure that activities under their jurisdiction or control are so conducted as not to cause damage by pollution to other States and their environment... These measures shall include those designed to minimize to the fullest possible extent pollution from vessels in particular measures for dealing with emergencies...States...shall cooperate in eliminating the effects of pollution and preventing or minimizing the effects of pollution...To this end, States shall jointly develop and promote contingency plans for responding to pollution incidents in the marine environment....Developing States shall for the purpose of prevention, reduction and control of pollution be granted preference by international organizations in the allocation of funds and technical assistance."

CHAPTER THREE

The territorial sea

Introduction

In the first part of this chapter the discussions will center around the right of innocent passage as laid down in the 1958 Convention on the Territorial Sea and Contiguous Zone, and the 1982 Law of the Sea Convention. Then in the second part of the chapter we will examine State practice in relation to innocent passage with a view to determining the position under customary international law. One issue that will be discussed is whether States may enact legislation making the passage of ships carrying nuclear or hazardous material an exception to the right of innocent passage. We will also examine the legality of legislation that makes prior notification or prior authorization a prerequisite to the exercise of the right of innocent passage.

The right of innocent passage under the 1958 & 1982 Conventions

The Conventions provide that the sovereignty of a State extends beyond its land territory and its internal waters, to a belt of sea adjacent to its coast, known as the territorial sea.

hereinafter referred to as the 1958 Convention or TSC.

hereinafter referred to as the 1982 Convention or LOSC.

Art. 1(1) TSC; Art.2(1) of the LOSC is worded a bit different. It provides that, "The sovereignty of a coastal State extends beyond its land territory and internal waters and, in the case of an archipelagic State, its archipelagic

However, the sovereignty of the coastal State in its territorial waters is not absolute under the Conventions, as they provide that ships of all States, whether coastal or not, enjoy the right of innocent passage through the territorial sea. Innocent passage may therefore be described as a limitation on the sovereignty of a coastal State within its territorial waters. Furthermore this right is not limited to territorial waters. The Conventions provide that where the establishment of a straight baseline has the effect of enclosing as internal waters areas which previously had been considered as part of the territorial sea or of the high seas a right of innocent passage shall exist in those waters. For ease of reference, these internal waters will be referred to as "exceptional" internal waters in this chapter.

What is innocent passage? Innocent passage is passage which is not prejudicial to the peace, good order or security of a coastal State. The Conventions do not define the terms

waters, to an adjacent belt of sea, described as the territorial sea."

Art. 14(1) TSC; Art. 17 of the LOSC is worded a bit different. It provides that, "Ships of all States, whether coastal or land-locked, enjoy the right of innocent passage through the territorial sea."

Art. 5(2) TSC; Art. 8 (2) of the LOSC has a slightly different wording. It provides that, "Where the establishment of a straight baseline...has the effect of enclosing as internal waters areas which had not previously been considered as such, a right of innocent passage as provided in this Convention shall exist in those waters."

Art. 14(4) TSC; Art. 19(1) LOSC.

"prejudicial," "peace," "good order," and "security," however the 1982 Convention lists a number of activities that are to be considered prejudicial to the peace, good order or security of the coastal State.

See *infra* notes 48 and 49 for a discussion of the methods that may be used to interpret these terms.

Article 19(2) of the 1982 Convention provides as follows: "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: (a) any threat or use of force against the sovereignty, territorial integrity or political independence of the coastal State, or in any other manner in violation of the principles of international law embodied in the Charter of the United Nations; (b) any exercise or practice with weapons of any kind; (c) any act aimed at collecting information to the prejudice of the defence or security of the coastal State; (d) any act of propaganda aimed at affecting the defence or security of the coastal State; (e) the launching, landing or taking on board of any aircraft; (f) the launching, landing or taking on board of any military device; (g) the loading or unloading of any commodity, currency or person contrary to the customs, fiscal, immigration or sanitary laws and regulations of the coastal State; (h) any act of wilful and serious pollution contrary to this Convention. (i) any fishing activities; (j) the carrying out of research or survey activities; (k) any act aimed at interfering with any systems of communication or any other facilities or installations of the coastal State; (l) any other activity not having a direct bearing on passage."

Under the Conventions the term "passage" means navigation through the territorial sea for the purposes either of traversing that sea without entering internal waters, or of proceeding to internal waters, or of making for the high seas from internal waters. Passage includes stopping and anchoring, but only in so far as the same are incidental to ordinary navigation or are rendered necessary by *force majeure* or by distress.

Having briefly considered the definition of innocent passage, the next issue for discussion is whether States that are parties to these Conventions may enact legislation forbidding the passage through their territorial seas (or "exceptional" internal waters) of ships carrying nuclear or hazardous material.

Art. 14(2) TSC; Art.18(1) of the LOSC is worded a bit different. It provides that, "Passage means navigation through the territorial sea for the purpose of: (a)traversing that sea without entering internal waters or calling at a roadstead or port facility outside internal waters; or (b) proceeding to or from internal waters or a call at such roadstead or port facility."

Art. 14(3) TSC; Art. 18(2) of the LOSC is worded a bit different. It provides that, "Passage shall be continuous and expeditious. However, passage includes stopping and anchoring, but only in so far as the same are incidental to ordinary navigation or are rendered necessary by *force majeure* or distress or for the purpose of rendering assistance to persons, ships or aircraft in danger or distress."

Banning passage

Can Caribbean States that are party to the 1982 Convention enact legislation forbidding the passage through their territorial waters (or "exceptional" internal waters), of ships carrying nuclear or hazardous material? In the 1982 Convention it is clear that the right of innocent passage may be exercised by ships carrying nuclear or hazardous material for article 23 of the Convention provides that:

Foreign nuclear-powered ships and ships carrying nuclear or other inherently dangerous or noxious substances shall, when exercising the right of innocent passage through the territorial sea, carry documents and observe special precautionary measures established for such ships by international agreements.

It would therefore be contrary to the 1982 Convention to enact legislation that makes the passage of ships carrying nuclear or hazardous material an exception to the right of innocent passage. The 1982 Convention has not yet come into force. What then is the position of those States who have become party to that treaty or who have simply signed the treaty? Article 18 of the 1969 Vienna Convention on the Law of Treaties provides that:

A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when:

(a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it

shall have made its intention clear not to become a party to the treaty; or
(b) it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed.

It seems therefore that although the 1982 Convention is not yet in force, Caribbean States that have signed the treaty or become party thereto ought not to enact legislation making the passage of ships carrying nuclear or hazardous material an exception to the right of innocent passage for such legislation would defeat the object and purpose of the treaty.

In the 1958 Convention there is no provision similar to article 23 of the 1982 Convention. The 1958 Convention does provide that the rules on innocent passage are applicable to all ships, but then goes on to provide that the passage must not be

The following countries are located in or border the Caribbean Sea and are party to the 1982 Law of the Sea Convention:- Bahamas, Belize, Cuba, Jamaica, Mexico, St. Lucia and Trinidad. The following countries are located in or border the Caribbean Sea and are signatories to the 1982 Law of the Sea Convention:- Antigua, Barbados, Colombia, Costa Rica, Dominica, Dominican Republic, Guatemala, Grenada, Guyana, Haiti, Honduras, Nicaragua, Panama, St. Kitts & Nevis, St. Vincent. The following countries are located in or border the Caribbean Sea and are party to the 1958 Convention:- Dominican Republic, Haiti, Jamaica, Trinidad, Venezuela. See M.J. Bowman & D.J. Harris Multilateral Treaties, Index and Current Status 227 & 476 (1984), and M.J. Bowman & D.J. Harris Multilateral Treaties, Index and Current Status 155 (6th Cum. Supp. 1989).

Section III of the 1958 Convention, which is the section dealing with innocent passage, is subheaded "Rules applicable

prejudicial to the peace, good order or security of the coastal State. Can Caribbean States that are party to the 1958 Convention enact legislation making the passage through their territorial waters (or "exceptional" internal waters) of ships carrying nuclear or hazardous cargo an exception to the right of innocent passage?

Ships carrying nuclear material are a desirable target for any nation or subnational group wanting to engage in nuclear blackmail. In assessing this threat, a 1987 US Department of Defence Study concluded that, "Even if the most careful precautions are observed, no one can guarantee the safety of the cargo from a security incident." As such, an argument may be made that the passage of a ship carrying nuclear or hazardous material is "prejudicial" to the "security" of a coastal State. Then even

to all ships."

Art. 14(4) TSC.

Supra note 42.

The Labour Spokesman, *supra* note 1. (For instance, if a large shipment of plutonium is hijacked by terrorists these terrorists can blackmail countries by threatening to pollute the environment with the cargo if their demands are not met.

Greenpeace, *supra* note 29, at 3.

The term "security" is not defined in the 1958 Convention but assistance can be found in Article 31 and 32 of the 1968 Vienna Convention on the Law of treaties. Article 31 provides that: A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.

The term "security" is defined in the Concise Oxford

Dictionary of Current English as, "The safety of a State against espionage, theft or other danger," and the term prejudicial is defined as, "Causing prejudice; detrimental." Then term "prejudice" is defined as, "Harm or injury that results or may result from some action," and the term "detrimental" is defined as, "Harmful; causing loss." These dictionary definitions throw some light on the ordinary meaning of the terms "security" and "prejudicial."

Then Article 32 of the Vienna Convention provides that, Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

- (a) leaves the meaning ambiguous or obscure, or
- (b) leads to a result which is manifestly absurd or unreasonable.

A discussion on the preparatory work leading up to the 1958 Convention can be found in McDougal & Burke *supra* note 13, at 251-252 where the author states:

On the one hand, the United States and others sought to restrict the discretion of the coastal state by proposing that the sole test for determining the innocence of passage be the security of the coastal state;...In the statement of the United States representative on the First Committee... the term, "`security' had no exact or precise meaning but...should be regarded as implying that there should be no military or other threats to the sovereignty of the coastal State. It did not regard the word `security' as relating to economic or ideological security."...The other attitude in opposition to the U.S. proposals...were those amendments which referred only to the "interests" of the coastal state, (such as the eight-power proposal of the Latin American states). The test of innocence according to these proposals would be whether passage was prejudicial to the, "interests of the coastal state," the object being to accord practically unlimited discretion to the coastal state to determine what those interests might be... Neither the United States proposal...nor the eight-power proposal was adopted. At the suggestion of India the words "peace" and "good order" were added to security as interests for whose protection the coastal state might prohibit passage as non innocent. While no effort was made at the conference to give operational indices to these terms, it is nevertheless important to note that they signify a

if all possible safety measures are taken no one can guarantee that a ship will not be involved in a collision. A collision, grounding or onboard fire could lead to the release of the nuclear or hazardous cargo which could affect both the marine and terrestrial environment leaving large areas uninhabitable and calling for widespread evacuation. As such it may be argued that the passage of these ships is prejudicial to the "peace" and

position between the extremes mentioned above, giving a greater measure of competence than is conveyed by reference to security alone, but less than that intended by some states in the suggestion that the coastal state be authorized to protect its "interest," without qualification of the latter.

In Hydeman & Berman, *supra* note 17 at 172-173 the author outlines the preparatory work leading up to the 1958 Convention and concludes that, "Certainly it is difficult to interpret "security" broadly since it normally has been used in international law to denote defense interests."

The Corfu Channel case also throws some light on the meaning of the term "security".

One meaning of the term "peace" in the Concise Oxford Dictionary of Current English is, "Civil order." This definition it may be argued is the ordinary meaning of the term peace as appears in the 1958 Convention. Then it may be argued that the passage of ships carrying nuclear or hazardous material is "detrimental" to the "civil order" for such passage could result in an accident necessitating widespread evacuation which could result in large scale looting and massive disorder.

The term "good" is defined in the Concise Oxford Dictionary as "having the right or desired qualities; satisfactory; adequate," and the term "order" is defined as "a state of peaceful harmony under a constituted authority." A spillage of nuclear or hazardous material in the vicinity of a small Caribbean State could render the entire State uninhabitable and result in the entire populace having to be evacuated. As such it may be argued that the passage of ships carrying nuclear or hazardous material is prejudicial to the coastal State's, "Adequate state of peaceful harmony under a constituted authority."

"good order" of the coastal State. It may be argued that States should not have to wait until there is actual harm, but the possibility of harm is sufficient to make passage non innocent. Support for this argument can be found in the words of one author who states:

Firstly, the words 'prejudicial.. to the coastal' are not referring to acts committed only in the territorial sea. The paragraph permits the coastal

In Hydeman & Berman, *supra* note 17 at 172-173 the author outlines the preparatory work leading up to the 1958 Convention, stating:

The addition of the words "peace" and "good order" resulted from a proposal by India. U.N. Doc. No. A/CONF.13/C.1/L.73(1958). In presenting this proposal, Mr.Sikri of India pointed out that his delegation shared the doubts of other nations that security was not as broad as suggested by the United States. Unfortunately, Mr.Sikri did not attempt to define "peace" and "good order" other than by reference to Art.20 of the ILC's final draft. U.N. Doc. No. A/CONF.13/39, at 84-85 (1958). The words were used only to describe the circumstances under which a person could be arrested for committing a crime aboard a foreign vessel. ILC's 8th Sess. Rep. 199. ... Thus the meaning of the words used to describe conditions where passage is not to be deemed innocent are far from satisfactory...The words "peace" and "good order," derived from the arrest provision, have no precise meaning from the standpoint of regulations to protect public safety. However, as used in the arrest situation they normally describe any effect beyond the vessel itself...A persuasive argument, therefore, can be made that any regulation to prevent any damage or injury, or risk of damage or injury beyond the vessel itself is permissible under these words."

Id.

state to consider passage as non-innocent on the ground that the coastal state disapproves generally of the voyage because of... its possible consequences which might have repercussions that would be prejudicial to or might indirectly affect, the coastal State.

The above arguments may be used to justify legislation banning the passage of ships carrying nuclear or hazardous cargo.

Some may argue that the above interpretation of the 1958 Convention is not an interpretation made in good faith for the Convention is drafted in such a way as to maintain a balance between coastal States' rights on the one hand and navigational rights on the other. As one author stated, "The Convention on the Territorial Sea and the Contiguous Zone of 1958 represents an accommodation between the interests of coastal States and the

Francis Ngantcha, The Right of Innocent Passage and the Evolution of the International Law of the Sea 47 (1990).

See also McDougal & Burke, *supra* note 13, at 258 where the author states:

One other change, perhaps of major import, made by the Conference was to delete the Commission phrase, "a ship does not use the sea for committing any acts."...Without this limiting phrase, Convention Article 14(4) no longer restricts coastal competence to prohibit passage to considerations arising from incidents occurring in the territorial sea. It is now open to the coastal state to take other factors into account, including, for example, the purpose of the projected passage, the cargo carried, and destination in a third state.

requirements of international navigation." That the Convention seeks to balance these two competing rights is clear from its provisions. The Convention provides that the coastal State must not hamper innocent passage but also provides that foreign ships exercising the right of innocent passage must comply with coastal laws. But not with any coastal laws but rather those coastal laws in conformity with the provisions of the Convention on innocent passage and with rules of international law and with such laws relating to transport and navigation.

It is this writer's view that the parties to the 1958 Convention should not enact legislation banning the passage of ships carrying nuclear or hazardous material. Such legislation, in this writer's view, conflicts with the whole scheme of the 1958 Convention, that of, maintaining a balance between coastal States' rights on the one hand and navigational rights on the other. Coastal States should rather take measures aimed at protecting their environment which at the same time do not hamper innocent passage.

There are numerous measures coastal States may take in order to protect their environment which do not at the same time hamper innocent passage. For instance coastal States may enact legislation requiring vessels carrying nuclear or hazardous

Grammig, *The Yoron Jima Submarine Incident of August 1980: A Soviet Violation of the Law of the Sea*, 22 Harv. Int'l L.J. 331, 332 (1981).

material to confine their passage to specific sealanes. In this way these vessels are taken out of busy sealanes where the risk of collision is greater. A coastal State may also wish to implement vessel traffic services whereby ship traffic is subject to the supply or exchange of information or the giving of advice or, possibly, of instructions by coastal stations with a view to enhancing safety and efficiency of that traffic. Coastal states

Such legislation appears to be permitted, under article 17 of the 1958 Convention which provides that, foreign ships exercising the right of innocent passage shall comply with such laws and regulations relating to "transport and navigation," and under article 22(2) of the 1982 Convention which specifically provides that ships carrying nuclear or other inherently dangerous or noxious substances or materials may be required to confine their passage to designated sea lanes. However, article 22(3) the 1982 Convention provides that in designating sea lanes and prescribing traffic separation schemes, the coastal state shall take into account the recommendations of the competent international organization (IMO); any channels customarily used for international navigation; the special characteristics of particular ships and channels and the density of traffic. Article 22(4) of the 1982 Convention provides that the coastal state shall clearly indicate such sea lanes and traffic separation schemes on charts to which due publicity shall be given. Legislation may also prescribe that such ships must comply with "all generally accepted international regulations relating to the prevention of collisions at sea." Such legislation is permitted under article 21(4) of the 1982 Convention and under article 17 of the 1958 Convention (foreign ships exercising the right of innocent passage shall comply with such laws and regulations relating to navigation). The most important regulations are those in the 1972 Collisions Regulations Convention.

"VTS systems appear to be permitted, because passing ships must comply with coastal State laws and regulations relating to 'transport and navigation' (Article 17 CTS) or, in the words of the equivalent provisions in the LOSC "safety of navigation and regulation of maritime traffic" (Art.

may also enact legislation providing that ships carrying nuclear or hazardous material shall, when exercising the right of innocent passage, observe special precautionary measures established for such ships by international agreement.

21(1)(a)). In addition, under the terms of Article 21(1)(f) LOSC, the coastal state may adopt laws and regulations in respect of 'the protection and preservation of the environment of the coastal State and the prevention reduction and control of pollution thereof. Such VTS laws or regulations must, however, comply with the requirements of the Conventions themselves and with the 'other rules of international law' relating to innocent passage, and they must not have the effect in practice of 'hamper(ing)' (Article 15(1) CTS) or, 'denying or impairing' (Article 24(1)(a) LOSC) innocent passage." This is an extract from - Plant, *International Legal Aspects of Vessel Traffic Services*, Marine Policy, 71, January (1990).

Such legislation appears to be permitted under article 17 of the 1958 Convention which provides that, "Foreign ships exercising the right of innocent passage shall comply with...such laws and regulations relating to transport." Such legislation is also permitted under article 23 & article 21 (1)(f) of the 1982 Convention. Such legislation should not apply to the design, construction, manning or equipment of foreign ships unless they are giving effect to generally accepted international rules or standards (Art.21(2) of the LOSC). All such legislation should be checked to ensure that it does not hamper innocent passage. It must be remembered that the breach of a coastal state law does not automatically make passage non innocent (the single exception being the breach of laws and regulations aimed at preventing foreign vessels from fishing in territorial waters - article 14(5) TSC). Passage will only be non innocent where it is prejudicial to the peace, good order or security of the coastal state. So the coastal State's legislation may provide for simple penalties or fines for the breach of a coastal State laws where the breach does not result in passage being prejudicial to the peace good order or security of the coastal state. The draftsman should look at articles 19(1) 20(2) which outline the criminal and civil jurisdiction of coastal State's in relation to vessels in innocent passage. Some International Conventions and Regulations in this field are: The Convention on the Physical Protection of Nuclear Material, The

Prior notification or prior authorization

Can coastal States enact legislation making the exercise of the right of innocent passage of ships carrying nuclear or hazardous material subject to the prior notification of the coastal state? It is all well and good to say that coastal States should not ban the passage of ships carrying nuclear and hazardous material but in order to maintain a proper balance between coastal States' rights on the one hand and navigational rights on the other it is necessary that coastal States be in a position to ensure that the ships are complying with the international safety standards and that contingency plans are in place. As one author put it:

A right of exclusion, or even regulation, may not be very effective unless the coastal State also has a

International Maritime Dangerous Goods Code, The IMO Code for the Construction and Equipment of Ships Carrying Dangerous Chemicals In Bulk, IAEA Regulations for the Safe Transport of Radioactive Material, IAEA Schedules of Requirements for the Transport of Specified Types of Radioactive Material Consignments, IAEA Emergency Response Planning and Preparedness for Transport Accidents Involving Radioactive Material.

Section 5(2) of The Territorial Waters and Contiguous Zone Act, Chapter 226, of the Laws of Malta provides that: In the application of any regulations made under subsection (1) of this section to warships or to nuclear powered ships or to ships carrying nuclear or other inherently dangerous or noxious substances, their passage through territorial waters may, by any such regulation, be made subject to the prior consent of, or prior notification to, such authority as may be specified therein.

right to obtain advance and detailed information relating to the safety of a vessel proposing to enter its territorial waters. This is particularly true of nuclear vessels, about which a determination of whether to exclude because of an undue risk of nuclear accident may require a complex analysis involving a considerable period of time....An argument could be made that protecting peace and good order requires prior evaluation of nuclear-powered vessels. If the nuclear power plant of a vessel is inherently unstable, the coastal State would be subjected to an unreasonable risk of harm at least as early as the time that the vessel enters the territorial sea.

Although the opinion above deals with nuclear powered ships, it is this writer's view that this argument may be extended to ships carrying nuclear or hazardous cargo. Another author who addressed this issue had this to say:

Japan has a duty under international law to inform and consult with the countries along the route of its plutonium shipments because of the significant environmental harm that would occur if the vessel has an accident or mishap at sea...International law requires prior consultation whenever the activity of

Hydeman & Berman, *supra* note 17, at 178.

one nation creates a significant risk of harm to another nation... Before embarking on an activity with significant risk, the acting State should notify the potentially affected states of its plans in sufficient time to permit consultations if the risk of harm is arguably significant, and...engage in consultations if the potentially affected state or states make a plausible case that the risk of harm is indeed significant.

In short a coastal State has a right to protect itself against the actual presence of an unreasonable risk of harm within its territorial waters. With respect to vessels carrying nuclear or hazardous material the only practicable means for the coastal State to protect itself from a risk of substantial damage is by imposing a requirement of prior notification so that the risks can be evaluated in advance and entry can be prevented if an unacceptable risk of harm exists. Unless the coastal State is on notice of such a vessel's entry it may have been exposed to a substantial risk of injury by the time the vessel is located and inspected.

Can a coastal State enact legislation making the exercise of the right of innocent passage by ships carrying nuclear or

Van Dyke, *supra* note 25, at 3.

Hydeman & Berman, *supra* note 17, at 181-182.

hazardous material subject to the prior authorization of the coastal State? In the Corfu Channel case an attempt to impose the requirement of prior authorization on the passage of vessels through territorial waters was contested. The Court in this case stated that:

It is...generally recognized and in accordance with international custom that States in time of peace have a right to send their warships through straits used for international navigation between two parts of the high seas without the previous authorization of a coastal State, provided that the passage is innocent.

Although this case can be regarded as applying solely to straits it is this writers view that it also applies to territorial waters not comprising straits. Clearly a requirement of prior authorization amounts to a hampering of innocent passage. With prior notification states simply have to notify and then they can begin there journey but with prior authorization the journey is

[1949] ICJ Rep. 1.

The contest involved a requirement by Albania that any military vessel obtain a prior authorization to pass through the Corfu Channel. British warships entered the Corfu Channel without prior authorization and, and two were damaged by mines. The matter of liability for damages was submitted to the International Court of Justice. One defense raised by Albania was that the ship had violated Albanian sovereignty by failing to obtain the prior authorization required. The Court rejected this defense.

Supra note 61, at 28.

held up or hampered while waiting for this authorization.

The 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal does not allow an exporting State to authorize a transfrontier movement of hazardous waste without the previous written consent of every transit State party to the Convention:

Each State of transit which is a Party shall promptly acknowledge to the notifier receipt of the notification. It may subsequently respond to the notifier in writing, within 60 days, consenting to the movement with or without conditions, denying permission for the movement, or requesting additional information. The State of export shall not allow the transboundary movement to commence until it has received the written consent of the State of transit.

But the Convention also states that:

Nothing in this Convention shall affect in any way ... the exercise by ships ... of all States of navigational rights and freedoms as provided for in international law and as reflected in relevant international instruments.

Certain States that have become party to this convention

Article 6(4).

Article 4(12).

expressly excluded the duty of prior authorization in the case of the transit in marine coastal areas. For instance Japan, the United Kingdom and the Federal Republic of Germany all indicated that:

Nothing in this Convention shall be deemed to require notice to or consent of any State for the mere passage of hazardous wastes on a vessel of a party exercising its navigational rights under international law.

This is yet another instance of State opposition to the requirement of prior authorization.

The German Republic declared that, "...proceeds from the fact that the convention does not interfere with the fundamental principles and standards of international law, including those, as for instance, the right to freedom of navigation and innocent passage of the territorial sea." See the Final Act of the 1989 Basel Convention published by UNEP, at pages 19 & 35. See also F. Francioni & T. Scovazzi, International Responsibility for Environmental Harm 303.

See also Francioni & Scovazzi, *supra* note 66, at 309 where the author states: "In the absence of an express provision, the claim of the coastal State to subject the passage of ships carrying hazardous wastes through its territorial sea to prior authorization could be considered to be in contrast with the rules of the (1982) Convention, according to which the right of a coastal State to regulate the passage of ships within its territorial sea is not to be exercised in such a manner as to hamper the exercise of the rights of navigation of other States...On the other hand, the case of a request of prior notification might be a little different. This claim cannot be considered to be an obstacle to innocent passage if the only effect of notification consists in excluding the secrecy of the passage and in making the coastal State aware of what will happen in its territorial sea, also in order to assess whether special precautionary measures (Article 23) are being observed...Moreover,...the idea of prior notification was not alien to the works of the Third Conference on the Law of the Sea...the informal working papers prepared by the officers of

Innocent passage under customary international law

It is clear that the right of innocent passage exists in customary international law. As noted by Jessup, this limitation on the sovereignty of the coastal State within its territorial seas is so well accepted in international law that it requires no citation of authority. Furthermore, the extension of the right of innocent passage to voyages to and from ports was regarded by the International Court in the *Nicaragua* case as now being established in customary law. Recent State practice shows that a number of States have enacted legislation requiring foreign ships carrying nuclear or other noxious substances to obtain prior notification or authorization before exercising the right of innocent passage. Then to, upon the ratification of the 1982

the Second Committee on 22 July and 1 August 1974...expressly contained the hypothesis that the coastal State could require information on the passage of ships carrying dangerous or noxious wastes provided that this procedure should not cause undue delay...Obviously it is also possible to think that the elimination of the prior notification was expressly intended to abolish any duty of notification."

Hydeman & Berman, *supra* note 17, at 169.

[1986] ICJ Rep. 12, at 111.

See for instance section 3 (3) of the Territorial Waters and Maritime Zones Act, 1976, Act LXXXII of 1976 of the Central Statutes of Pakistan which states that: "Foreign super tankers, nuclear powered ships and ships carrying nuclear or other inherently dangerous or noxious substances or materials may enter or pass through the territorial waters after giving prior notice to the Federal Government. See also section 5(2) of the Territorial Waters and Contiguous Zones Act, Chapter 226 of the Laws of Malta *supra* note 57 and "Note Verbale" of Haiti *supra* note 20. Venezuela has also enacted legislation

Convention Egypt declared that it would require foreign nuclear-powered ships and ships carrying nuclear or other inherently dangerous and noxious substances to obtain authorization before entering the territorial sea of Egypt, until the international agreements mentioned by article 23 are concluded and Egypt becomes a party to them. A similar declaration was also made by Oman upon ratification. However the United States and the Soviet Union have shown strong opposition to the requirement of prior authorization and notification. In their joint declaration done at Jackson Hole, Wyoming, on 23 September 1989 they stated that :

All ships, including warships, regardless of cargo, armament or means of propulsion, enjoy the right of innocent passage through the territorial sea in

according to which the transit of ships carrying hazardous wastes within its coastal areas is explicitly forbidden-see Francioni & Scovazzi, *supra* note 66, at 312. Ivory Coast has enacted legislation that provides that: "Throughout the whole national territory, all acts relating to the buying, selling, importing, transiting, depositing, and stocking of toxic and nuclear waste and noxious substances are forbidden"- Art. 1 of Law No. 88-651 of 7 July 1988, *ILM* (1989), 391. Under the Transportation of Dangerous Goods Regulations of 27 June 1989, the Canadian government requires prior notification of any hazardous waste shipment imported into Canada - see Francioni & Scovazzi, *supra* note 66, at 313.

Law of the Sea Bulletin, Special Issue (1987), 3.

Law of the Sea Bulletin, No. 14 (December 1989), 8 - which states: "With regard to foreign nuclear-powered ships and ships carrying nuclear or other substances that are inherently dangerous or harmful to health or the environment, the right of innocent passage, subject to prior permission, is guaranteed to the types of vessel, whether or not warships, to which the descriptions apply..."

accordance with international law, for which neither prior notification nor authorization is required.

But in all, State practice seems to weigh heavily in favour of prior notification. This conclusion was reached by an author who did a survey of the recent State practice. Whether this State practice has developed into customary law is not clear, but clearly the trend emerging is that States cannot prohibit the passage of ships carrying nuclear or hazardous material but they have a right to be informed of the passage.

Conclusion

Caribbean States should not enact legislation making the passage of ships carrying nuclear and hazardous material an exception to the right of innocent passage. Nor should they enact

"The existence of a trend towards a more stringent control of the transit of ships, a trend to which the same 1989 Basel Convention contributes as well, cannot be ignored...Besides the Basel Convention - which provides for a duty of prior notification even to States which are not parties to the convention - an obligation to inform can be inferred on a broader basis from general rules of international environmental law. According to these rules, States planning to carry out or permit activities which may entail serious interference with the environment of other States are deemed to be obliged to give prior notice to the States concerned...The current trend does not consist of an absolute prohibition, but in requiring prior notification...The spirit of the 1989 Basel Convention, the international law of the environment at large and a consistent State practice show a trend towards an obligation of prior notification at least as an aspect of the duty to co-operate. In other word, a solution seems to be emerging: if the transit of wastes is allowed and the coastal State cannot prohibit it, the coastal State has the right to be informed." - extract from Francioni & Scovazzi *supra* note 66, at 314-315.

legislation which makes the exercise of the right of innocent passage by such ships subject to their prior authorization. Such legislation conflicts with the main scheme of the 1958 and 1982 Convention, that of, maintaining a balance between coastal States' rights on the one hand and navigational rights on the other. It also conflicts with current State practice. A balance between navigational rights on the one hand, and coastal States' rights on the other, may be secured by enacting legislation providing for prior notification to the coastal State including the submission of information necessary to permit the coastal State to assess the safety requirements.

CHAPTER FOUR

Straits and the exclusive economic zone

Straits

A strait is a narrow natural passage or arm of water connecting two larger bodies of water. Numerous straits exist in the Caribbean region. In fact, in order to enter the Caribbean Sea a vessel has only two options. It must either enter through the Panama Canal, or through one of the many straits created by the fringe of Caribbean Islands. In this chapter we will examine the measures that strait States may take in order to prevent pollution by ships navigating these straits.

Two regimes exist in relation to straits, the regime of non-

suspendable innocent passage and the regime of transit passage.

A non-suspendable right of innocent passage through straits used for international navigation is laid down in the 1958 Convention (Art. 16(4)) and in the 1982 Convention (Art. 45). A non-suspendable right of innocent passage through straits used for international navigation also exists under customary international law (this was recognized in the Corfu Channel case *supra* note 61). All the arguments set out in chapter three are equally applicable to non-suspendable innocent passage and we will therefor concentrate on transit passage in this section.

The regime of transit passage is laid down in Part III of the 1982 LOSC. This regime applies to "straits which are used for international navigation between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone (Art.37 LOSC). Excluded from this definition are, first, cases where a high-seas route or a route through an exclusive economic zone of similar convenience with respect to navigational and hydrographical characteristics exist through the strait (Art.36 LOSC), secondly, cases where the strait is formed by an island bordering the strait and its mainland and a route of similar convenience exists through the exclusive economic zone or high seas seaward of the island (Art. 38(1) LOSC), and thirdly, cases where the strait connects an area of the high sea or an exclusive economic zone with the territorial sea of a third State (Art. 45 LOSC). A discussion of the meaning of the phrase "strait used for international navigation" can be found in Ngantcha, *supra* note 51, at 83-88. In the *Corfu Channel* case, *supra* note 61, the Court laid down a test for determining whether a strait is used for international navigation. On this point the Court made it clear that: "It may be asked whether the test is to be found in the volume of traffic passing through the strait or in its greater or lesser importance for international navigation. But in the opinion of the Court, the decisive criterion is rather its geographical situation as connecting two parts of the high seas and the fact of its being used for international navigation." See also K.L. Koh, Straits in International Navigation, Contemporary issues 24 (1982) where there is a list of straits that qualify as international straits according to a survey done by Smith. The following Caribbean straits are included in this list: Florida Strait (East), Florida Strait (West), Caicas Passage, Turks Island Passage, Windward Passage, Mona Passage, Guadeloupe Passage, Dominica Passage, Martinique Passage, St.Lucia Passage, St.Vincent Passage, Jamaica Channel (East)

Transit passage is the exercise of freedom of navigation and overflight solely for the purpose of continuous and expeditious transit of the strait between one part of the high sea or an exclusive economic zone and another part of the high seas or an exclusive economic zone. Can this right of transit passage be exercised by ships carrying nuclear and hazardous material? Article 38(1) of the 1982 Convention provides that "all ships" enjoy the right of transit passage. No distinction is made on the

and Jamaica Channel (West).

To date the regime of transit passage has not developed into customary law. Authority for this is found in Churchill & Lowe, *supra* note 7, at 94 where the author states: "The conclusion which emerges is that a general right of transit passage has not yet become established in customary international law."

"However the requirement of continuous and expeditious transit does not preclude passage through the strait for the purpose of entering, leaving or returning from a State bordering the strait, subject to the conditions of entry to that State." - Art. 38 (2) LOSC.

basis of the particular cargo the ship is carrying. Ships carrying nuclear or hazardous material may therefor exercise the right of transit passage.

There are a number of measures that coastal States may take, in relation to ships in transit passage, in order to protect their environment. The 1982 Convention provides that ships in transit passage shall:

- (a) comply with generally accepted international regulations, procedures and practices for safety at sea, including the International Regulations for Preventing Collisions at Sea;
- (b) comply with generally accepted international regulations, procedures and practices for the prevention, reduction and control of pollution from ships.

This duty to comply with international safety and pollution standards is independent of coastal legislation. States may wish to implement these international standards into national legislation so that they can become directly enforceable by the coastal State authorities, for, the duty of compliance would allow only an international claim through diplomatic channels

The meaning of the phrase "generally accepted international regulations, procedures and practices" is not clear however Churchill & Lowe *supra* note 7, at 93, suggests that, "Standards in for example SOLAS conventions and the IMO pollution conventions would be applicable to ships in the strait even if their flag States were not parties to those conventions."

Art. 39(2) LOSC.

for breach of the treaty obligation. Coastal States may also prescribe sea lanes and traffic separation schemes in the strait, but these must first have been adopted by the competent international organization that is IMO. Coastal States may also wish to enact laws in conformity with Article 42 of the 1982 Convention which provides that:

1. States, bordering straits may adopt laws and regulations relating to transit passage through straits in respect of all or any of the following:
 - (a) the safety of navigation and the regulation of maritime traffic as provided in article 41;
 - (b) the prevention, reduction and control of pollution by giving effect to applicable international regulations regarding the discharge of oil, oily wastes and other noxious substances in the straits.
2. Such laws and regulations shall not...in their application have the practical effect of denying , hampering or impairing the right of transit passage.
4. Foreign ships exercising the right of transit passage shall comply with these laws.

As to the enforcement of these laws one author had this to say:

The Convention is silent on the matter of the

This view is expressed in Churchill & Lowe *supra* note 7 at 92.

Art. 41 LOSC.;

On the meaning of "applicable international regulations" see Plant, *supra* note 55 at 76 where he states, "'Applicable' in the context of Article 42(1)(b) should in the author's opinion, be taken to mean applicable by virtue of the rules of international law; ie the standard must represent customary law standards or be applicable to particular states, meaning in this case the relevant user (flag) states and the strait state, by virtue of their specific adherence to a treaty."

enforcement of these laws against such ships. It may be argued that the general territorial sea rules apply (LOSC Art 34) under which enforcement should only be exercised where the good order of the territorial sea or coastal State is disturbed or the flag State requests assistance. On the other hand the express provision for the exercise of enforcement jurisdiction in case of pollution causing or threatening major pollution (LOSC art.233) may be evidence of a general understanding that enforcement must be confined to such cases, notwithstanding the wider coastal State powers enjoyed under the territorial sea regime. Were this interpretation to prove correct coastal state laws could in general be enforced against foreign ships only when they put into the State's port. There is however a general duty to comply with all laws made within the legislative competence allowed under the Convention to straits States (LOSC art 42).

In this author's opinion the general territorial sea rules apply in relation to enforcement of coastal State laws under the transit passage regime.

The exclusive economic zone

The exclusive economic zone is a zone extending up to 200

Chruchill & Lowe, *supra* note 7, at 92-93.

miles from the baseline, within which the coastal State enjoys extensive rights in relation to natural resources and other jurisdictional rights, and third States enjoy the freedoms of navigation, overflight by aircraft and the laying of cables and pipelines. With a growing number of Caribbean States claiming exclusive economic zones, the position might soon be that it will be impossible to enter the Caribbean Sea without passing through some State's EEZ. As such the EEZ is an important tool which countries bordering the Caribbean sea may utilize in order to protect their environment.

The coastal States' rights and duties in the EEZ are set out in broad terms in article 56 of the 1982 Convention. In this Chapter we will not examine all of these rights and duties but only those that are relevant to the discussion. Article 56(1)(b)(iii) of the 1982 Convention confers on the coastal State, "Jurisdiction as provided for in the relevant provisions of this Convention with regard to...the protection and

See part V of the 1982 LOSC; In the Libya/Malta Continental Shelf case [1985] ICJ Rep. 13, at 33 the International Court of Justice said that it is, "incontestable that...the EEZ...is shown by the practice of States to have become part of customary law."

See the world map displaying the exclusive economic zones in existence as of May 1985 in the following book:- Robert W. Smith, Exclusive Economic Zone Claims, An Analysis and Primary Documents 482 (1986). This map shows that it is impossible to enter the Caribbean sea without passing through an EEZ.

preservation of the marine environment." The "relevant provisions" of the Convention are to be found in Part XII. This part gives the coastal State legislative and enforcement competence in its EEZ to deal with pollution from vessels. Article 211(5) provides that

"coastal States, for the purpose of enforcement as provided for in section 6, may in respect of their exclusive economic zones adopt laws and regulations for the prevention, reduction and control of pollution from vessels conforming to and giving effect to generally accepted international rules and standards established through the competent international organization or general diplomatic conference."

What laws can Caribbean States enact under article 211(5) in order to protect their environment from the threat posed by ships carrying nuclear and hazardous material. This all depends on the meaning of the phrase "generally accepted international rules and standards established through the competent international organization or general diplomatic conference." The Convention does not explain what are "generally accepted international rules and standards". It only states that they should include *inter alia*, those relating to notification of accidents likely to cause pollution. Several authors are of the view that the 1973/1978

Art. 211(7) LOSC.

MARPOL Convention fall in this category. But in all the meaning of the phrase is not clear. The question of enforcement of these laws is another issue. The coastal States enforcement powers are nicely summarized by one author as follows:

Coastal States are not given full jurisdiction to enforce international regulations against ships in passage in the EEZ. They can do so if the vessel voluntarily enters port but otherwise their powers in the EEZ are graduated according to the likely harm. Only when there is "clear objective evidence" of a violation of applicable international regulations resulting in a discharge of pollution which causes or threatens to cause "major damage" to the coastal state are arrest and prosecution permitted, but where the

See Patricia Birnie & Alan Boyle, International Law and the Environment 267 (1992) where the authors state: "This convention, first adopted in 1973, was substantially revised in 1978 to facilitate entry into force. The parties presently comprise over 85 per cent of the gross registered tonnage of the world's merchant fleet. It is thus beyond question that it is now included in the 'generally accepted international rules and standards' prescribed by Article 211 of the 1982 UNCLOS as the minimum content of the flag state's duty to exercise diligent control of its vessels in the prevention of marine pollution....There are strong grounds for treating the MARPOL Convention as a customary standard to be complied with by the vessels of all states, whether or not they have chosen to ratify." See also Boyle, 79 *AJIL* (1985) 347 at 361 where the author states, "The difficulty of deciding what constitutes 'generally accepted international rules and standards' applies here as well, but most delegations at the conference appear to have had the 1973 marine pollution Convention in mind."

Art. 220(1) LOSC.

violation has resulted only in a "substantial discharge" causing or threatening "significant pollution", the vessel may be inspected for "matters relating to the violation", that is, in effect, for evidence of the illegal discharge, provided this is justified by the circumstances, including information already given to the ship. The ship may in this case only be detained if necessary to prevent an unreasonable threat of damage to the marine environment. Where none of these conditions exist the coastal state is confined to seeking information concerning the ship's identity and its next port of call. The port state may then be asked to take appropriate action.

Under Article 58(1) of the 1982 Convention all States enjoy in the EEZ the high-seas freedom of navigation. However in the exercise of this right the coastal State must comply with the laws and regulations adopted by the coastal State in accordance with the provisions of this Convention. The Convention clearly seeks to maintain a balance between navigational rights on the

Articles 220(5) and (6) LOSC.

Article 226(1)(c) LOSC.

Article 220(3) LOSC.

Birnie & Boyle, *supra* note 86 at 281.

one hand and coastal State rights on the other. Legislation that provides that nuclear ships shall not traverse the EEZ will conflict with the whole scheme of the 1982 Convention.

Conclusion

Coastal States have no power to set national standards to control pollution discharges in relation to ships in transit passage or ships traversing the EEZ. Their power to regulate pollution discharges is limited to the application of international rules and standards. The particular laws that may be enacted all depend on the correct interpretation of the phrases "applicable international regulations" and "generally

What is the position at customary international law? According to Churchill & Lowe *supra* note 7, at 146, "It would seem that what is part of customary international law are the provisions of articles 56 and 58 of the Law of the Sea Convention." According to Attard, "Most EEZ claimants assert jurisdiction with regard to the protection and preservation of the marine environment within the zone. However, the extent of this jurisdiction varies. A number of States do not place any limits on the environmental measures that they may take. Furthermore, they do not appear to provide for the sharing of this competence with other interested States or organizations. Consequently, they have not generally adopted any environmental provisions similar to those found in the 1982 Convention."- David Attard, The Exclusive Economic Zone in International Law 292 (1987). then at page 83 Attard states, "Whilst most States are prepared to recognize the freedoms of navigation and overflight, this is without prejudice to the exercise of their EEZ rights. Even the United States, which had stressed throughout the EEZ negotiations at UNCLOS III that the zone should be part of the high sea, has adopted this approach. The 1983 EEZ Proclamation states that within the zone the freedoms are to be enjoyed 'without prejudice to the sovereign rights and jurisdiction of the United States.'" It seems that customary law recognizes both freedom of navigation and coastal States' rights to protect their environment.

accepted international rules and standards".

CHAPTER FIVE

Conclusion

Summary

The basic theme of this essay has been that a balance must be maintained between coastal State's rights on the one hand and navigational rights on the other. Throughout this essay it has been stressed that coastal States should respect freedom of navigation. Banning passage of ships carrying nuclear and hazardous material was denounced and the navigational rights of these ships were outlined. But to tell coastal States to respect the navigational rights of ships carrying nuclear and hazardous material is not enough. These States will probably be curious about whether they will be entitled to compensation should harm occur.

This matter of compensation was addressed by one author who

stated that:

Whenever a State engages in activities that result in damaging consequences, that State will be responsible in international law for the harm. Strict liability has been found by the International Court of Justice in the Corfu Channel Case, by an Arbitral Tribunal in the Trail Smelter dispute, and has been inferred from the Fukuryu Maru case...Strict liability has been the standard that appears to be followed in international situations when the activity is ultrahazardous. One commentator has noted that "strict liability may result eventhough the activity does not involve a high degree of risk if the risk carries with it the possibility of such widespread harm that it becomes abnormally dangerous"...International law sources provide strong support for a theory of strict liability for an ultrahazardous activity such as transporting plutonium across the high seas from Europe to Japan. Even if the transportation of plutonium is viewed as permissible under international law, under the strict liability theory, Japan would be liable for any harm that resulted from this activity."

Caribbean governments may rest assured that if harm results the

Van Dyke, *supra* note 25, at 13-28.

shipping State will be held strictly liable to provide compensation for the harm that occurs.