I. Introduction

In the last decade we have witnessed an intense debate regarding the transshipment of radioactive materials through the territorial and Exclusive Economic Zone (EEZ) waters of objecting coastal states. During this period, a handful of powerful nations (including France, Japan, the United Kingdom, and, to some extent, the United States) have imposed the continued transportation of radioactive materials by sea against the sovereign will of over a hundred smaller and less powerful nations. More particularly, coastal nations have persistently and strenuously objected to the passage of ships carrying radioactive materials through their territorial and EEZ waters due to the threat such passage poses to the security and well-being of their people and environment.

It is no coincidence that the conflicting positions in this debate polarize on one end traditional imperial powers, and on the other end many newly formed nations previously colonized by the first. Viewed within this context, the Convention on the Law of the Seas (UNCLOS) stands as a legal construct that perpetuates through its traditional doctrines the colonization of a large segment of the world. Thus, the proper resolution of this battle should serve to advance the yet unfinished de-colonization process in Latin American, Africa and the Pacific Region.

Strong economic interests fuel the transshipment of radioactive materials. For natural resources-strapped Japan, nuclear power accounts for approximately 35% of Japanese electricity generation, thereby reducing

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1 See Permanent Council of the Org. of Am. States, Comm. Hemispheric Sec., OEA/Ser.G, A Study on Defense and Security Planning for Small Island States to Adequately
their dependence on imported oil. Meanwhile, for Britain and France
the reprocessing of nuclear fuel has represented significant economic
activity.\footnote{2}

The nuclear fuel used in Japan to generate electricity is subsequently
transported for reprocessing at a plant in La Hague, France, owned
by the French government’s COGEMA (now Areva NC) or at a plant
in Sellafield, Great Britain, owned by the British government’s British
Nuclear Fuels Ltd. (now British Nuclear Group). Once reprocessed,
the separated plutonium along with high levels of radioactive wastes, is
shipped back to Japan. The above French and British reprocessing com-
panies, along with the Overseas Reprocessing Committee (comprised
of ten Japanese energy corporations), in turn, own the British-based
shipping firm Pacific Nuclear Transport LTD.\footnote{3}

Since 1969, over 140 shipments of radioactive materials have transited
through the Panama Canal.\footnote{4} The constant shipping of radioactive wastes
across the oceans allows Japan’s nuclear industry to deflect account-
ability for the accumulation of nuclear pollution in the Asian state.\footnote{5}
In their view, the presumed right of “innocent passage” grants them the
international legal authority to continue to ship nuclear materials even
through other nation’s Exclusive Economic Zones.

The traditional or conventional analysis of this issue has produced
unsatisfactory and conflicting results for coastal states, as it has relied
on a narrow interpretation of the “freedom of navigation on the high
seas” and the “innocent passage” doctrines codified in articles 87 and
17, respectively, of UNCLOS.\footnote{6} The methodology frequently used by
most international law scholars in evaluating the controversy at hand
has been the traditionalist or consensual approach, which is based on
the general proposition that international norms are required to evince

\footnote{2}{See, e.g., British Nuclear Fuel Ltd, “BNFL Announces 2.3 billion profit,” Press

\footnote{3}{See Nic Maclellan, “The Nuclear Superhighway: Japanese Aid and the Tranship-
ment of Radioactive Materials Through the Pacific,” in T. Teiwa, S. Tarte, N, Maclel-
lan & M. Penjueli (eds.), Turning the Tide: Towards a Pacific Solution to Conditional
pp. 25–26.}

\footnote{4}{See OEA/Ser.G, supra note 1, at p. 6, note 5.}

\footnote{5}{See Macellan, supra note 3.}

21 I.L.M. 1261 (1982), arts. 17 and 87.}