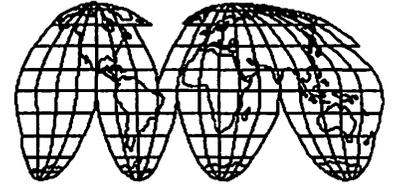


L.O.S. Lieder

Professional correspondence from the Law of the Sea Institute
William S. Richardson School of Law, University of Hawaii
2515 Dole Street, Honolulu, Hawaii, U.S.A., 96822
Tel: (808)956-3300 Fax: (808)956-6402 Telex: 743-1895 Sealaw
Email: scott@uhunix.uhcc.Hawaii.Edu (Internet)
LOS Lieder #27 Vol. 5, No. 4, October, 1992
Editor: Scott Allen Contributing Editor: Philomène Verlaan



Sea Shipment of Japanese Plutonium: Liability and Law of the Sea Ramifications

Jon Van Dyke
Wm. S. Richardson School of Law
University of Hawaii

The following is an abbreviation of a study completed by Professor Van Dyke during September, 1992.

In late 1992, Japan plans to begin the first of a series of shipments of plutonium from France to Japan by sea. The one metric ton in the first shipment will be stored in a cask and the ship will be accompanied by an armed Japanese Coast Guard cutter. The plutonium has been extracted from waste from Japanese nuclear power plants, reprocessed in France. The movement of this ultrahazardous material on the sea is expected to take about ten weeks, along a route that is to be kept secret. Observers outside Japan are concerned about (1) dangers from lax port security, (2) vulnerability to attack, especially when near straits or coastlines, and (3) risk of sabotage or terrorism by disloyal crew members. They are also concerned about the ability of the shipping cask to survive and prevent leakage of the plutonium in case of sinking, fire, or collision.

Because plutonium is a deadly substance that could cause an environmental catastrophe if even a small amount were to escape into the atmosphere or ocean, the proposed Japanese shipments of some 50 tons over the next several years have created great concern. The risks of an accident, attack, sabotage, or hijacking and a resulting fire, seizure of the cargo, or sinking of the ship and cargo have raised questions of Japan's liability.

The 1982 U.N. Convention on the Law of the Sea states that transit passage and archipelagic sea lanes passage may not be suspended or impeded, but affected coastal states have nonetheless asserted the right to prohibit such a shipment from entering archipelagic straits or straits within their territorial sea. Should the shipment experience an accident, threatening to pollute the sea and atmosphere, port states would have the authority to prohibit the shipment from entering ports or territorial seas for repair.

When states engage in ultra-hazardous activity and harm results, they can be held liable under a theory of

strict liability. Liability may also be established for a breach of an international obligation such as due diligence. In either case, the state conducting the risk-creating activity must provide compensation for the resulting injuries. There is precedent in international law for state liability in such cases.

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 even though 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.'" (Kelson, "State Liability," etc., 15 *Harvard Int'l L.J.*, 197 (1972). "A State is under a duty to notify any other State which may be threatened by harm from the abnormally dangerous activities which the State permits to be conducted within its jurisdiction." (Corfu Channel Case). Nuclear activity is a prime example of an ultrahazardous activity. The legal systems in a number of countries including the United States, Russia, and France recognize strict liability for activities that are unusually dangerous. Treaties establish strict liability in the areas of space exploration and nuclear activity. Examples of treaties on nuclear activity include the 1960 and 1963 treaties on third-party liability for nuclear damage and the 1962 Brussels Convention on the Liability of Operators of Nuclear Ships. The activities for which these treaties establish liability are dangerous but not unlawful.

The International Law Commission of the United Nations has attempted to codify international legal principle related to the harmful effects of lawful acts in its "Draft Articles on International Liability for Injurious Consequences Arising Out of Acts not Prohibited by International Law," adopting a standard of strict liability.

Thus, 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.

Japan could be also held liable if a due diligence theory were used. It has been reported that the shipping cask would not withstand temperatures of a serious ship fire or the pressure of 10,000 feet below

serious ship fire or the pressure of 10,000 feet below the sea for long periods of time. If the cask were to fail, there could be a violation of the duty of due diligence to protect against foreseeable accidents.

Because the proposed shipment of plutonium across the high seas has the potential of causing catastrophic damage to the marine environment and to humans living in coastal areas, it is essential that the strictest standards of care be applied to such activity. Coastal nations adjacent to the proposed route have a right to be informed of the route, and to be consulted regarding the proposal. They also have a right to examine an environmental impact assessment that has been prepared by Japan using interdisciplinary experts and revised again after public input.

Nations adjacent to straits that may be used by this ship have a special reason to be concerned. Traffic separation schemes can certainly be imposed on the ship, and other precautions may also be appropriate. No nation would be required to allow the vessel to come into port in case of an emergency involving the cargo, and nations could also bar the ship from their territorial seas if an accident involving the cargo raised the possibility of pollution to the marine environment.

If any accident should occur involving the plutonium which causes harm to the marine environment or to humans, Japan would be held strictly liable to provide compensation for the harm that occurs without regard to fault or negligence. The strict liability regime is appropriate because this cargo is ultrahazardous.

Aboriginal Sea Rights in Australia

Victor Prescott
Department of Geography
University of Melbourne

On 3 June 1992, the High Court of Australia handed down its decision in the case of *Mabo and others v. Queensland*. In this case the Meriam people on the tiny Murray Islands in Torres Strait sought ownership of the islands under a concept of native title. (Readers by now might have realized that the writer is a geographer, not a lawyer, and they should be prepared to forgive him if he doesn't always use the correct legal terms.)

Prior to this judgement, it was assumed by courts that at the time of European settlement in 1788 Australia was *terra nullius*. In this case the majority of judges decided that at the time of European settlement the Meriam people possessed clear rules and customs dealing with the ownership and use of land that constituted native title. They also held that the native title of the Meriam group had not been extinguished at any time. The judgement produced a

spectrum of interpretations. At one end fears were expressed that Aboriginals could now lay claim to most parts of Australia. At the other end the uniqueness of the Meriam claim was stressed in suggesting that very few other cases would meet the conditions found in the Murray Islands. It is likely that the definitive interpretation of the significance of the judgement to Aboriginal claims in the rest of Australia will emerge only in the next two years.

In the meantime, two main points can be made by geographers that bear on the judgement. First, it has been known for many years that in extensive areas of mainly tropical Australia it is still possible to define exactly the limits of territories for which Aboriginal communities had exerted primary political influence (Davis and Prescott, 1992).

Second, Aboriginal coastal territories were defined so that some adjacent seas were included. In those seas would be found sites of special cultural significance where the ancestral being had performed acts when the seascape, landscape, and people were being formed.

Since 1978, Aboriginals in the Northern Territory have been able to claim waters within two kilometers of the low-water line of Aboriginal land. The requirement is that they should be persons entitled by Aboriginal traditions to enter and use those seas. Up to 1992 there had been two successful applications to close the seas for Aboriginal use along the coast of Arnhem Land.

It is safe to predict that the judgement in the Mabo case will stimulate new claims to land and to adjacent seas. There is already a major claim in train on behalf of three groups on the Kimberley Coast north of King Sound. It includes adjacent seas and reefs.

Aboriginals are unlikely to be able to claim wide coastal waters because it is assumed that they were not traditionally blue water sailors. Nevertheless, those claims could be significant in the vicinity of major archipelagos and the Great Barrier Reef.

Reference: S. D. Davis and J. R. V. Prescott, 1992, *Aboriginal frontiers and boundaries in Australia*, Melbourne University Press.

Legal Protection of South Africa's Living Marine Resources

Jeremy Cole
Oceana Fishing Group, Ltd.
Cape Town, South Africa

South Africa's 3000 km long coastline is almost unequalled in its variety of topography, seas, and climate. From tropical Mozambique in the east to the much colder shores of Namibia in the west, widely divergent environments occur, each offering a suitable