

The Legitimacy of Unilateral Actions
to Protest the Ocean Shipment
of Ultrahazardous Radioactive Materials

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A standoff and stalemate has occurred regarding the international-law regime that governs the ocean shipments of ultrahazardous radioactive materials. Coastal and island nations have issued substantial protests during the recent shipments, and the ships have altered their courses. The International Maritime Organization convened a Special Consultative Meeting in March 1996, and thirteen nations called for additional action to establish a regime to govern these shipments. The Chair of that meeting indicated that these concerns would be addressed, but the relevant IMO committees have thus far declined to do so. And now a second shipment of vitrified radioactive waste is about to begin the long sea voyage from France to Japan. What should the concerned coastal and island nations do?

When the principles of international law are unresolved or in dispute, it is commonplace for countries to take appropriate unilateral actions to convey and protect their views. In one of the seminal international law articles,¹ the law of the sea is described as "not a static body of absolute rules, but rather a living, growing, customary law, grounded in the claims, practices, and sanctioning expectations of nation-states..." The law

¹ Myres S. McDougal and Norbert A. Schlei, The Hydrogen Bomb Tests in Perspective: Lawful Measures for Security, 64 Yale L. J. 648 (1955).

governing the seas is thus developed by the "continuous process of interaction in which the decision-makers of individual nation-states unilaterally put forward claims of the most diverse and conflicting character" and decision-makers in other nation-states "weigh and appraise these competing claims...and ultimately accept or reject them."

In the debate over ocean shipments of ultrahazardous radioactive cargoes, a few nations assert that they have the freedom to take these cargoes through any part of the ocean under the traditional doctrines of innocent passage, transit passage, and freedom of the high seas. Other nations argue that the strong environmental provisions in the 1982 United Nations Law of the Sea Convention and the 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal require nations shipping ultrahazardous cargoes to prepare environmental assessments and then to provide notification to and seek authorization of affected coastal and island nations before passing through their territorial seas and exclusive economic zones. These nations argue that this consultation process is necessary to ensure that these dangerous cargoes pass through the safest sea lanes and to ensure that contingency plans are prepared to deal with accidents that may occur en route. Because of these sharp disagreements, it is to be expected that nations will take unilateral or coordinated actions to assert or protect their positions while international efforts to build a comprehensive regime continue.

This give-and-take process occurred in late 1992 when the Japanese freighter Akatsuki Maru shifted course and avoided all 12-nautical-mile territorial seas and all 200-nautical-mile exclusive economic zones (EEZs) (except those of French Polynesia) during its transport of plutonium from France to Japan.² It also occurred in early 1995, when the British vessel Pacific Pintail carrying 28 logs of high-level vitrified nuclear waste altered its course to avoid the EEZs of Brazil, Argentina, Chile, and other countries in response to their strong protests.³ Chile went so far as to send ships and aircraft to intercept the Pacific Pintail in order to enforce its ban and require the ship to change its route.

In October 1996, the government of Argentina tabled a proposal to the Legal Committee of the International Maritime Organization that would have required vessels transporting irradiated nuclear fuel to avoid territorial seas and exclusive economic zones of other nations unless permission for transit has been secured. The Legal Committee did not act on this proposal, however, leaving the matter in limbo.

Also in October 1996, the Mediterranean nations adopted a "Protocol on the Prevention of Pollution of the Mediterranean Sea by Transboundary Movements of Hazardous Wastes and Their Disposal" which explicitly prohibits the transportation of hazardous wastes

² See generally Jon M. Van Dyke, Sea Shipment of Japanese Plutonium under International Law, 24 Ocean Dev. & Int'l L. 399 (1993).

³ See generally Jon M. Van Dyke, Applying the Precautionary Principle to Ocean Shipments of Radioactive Materials, 27 Ocean Dev. & Int'l L. 279 (1996).

through territorial seas without prior notification to and consultation with the affected coastal state (Article 6(4)). This development is extremely significant because France is a Mediterranean nation, and its acceptance of this provision sharply undercuts the position of the maritime nations that such notification and consultation requirements are inconsistent with passage rights under the freedom-of-the-seas doctrine. This duty to notify and consult appears to be written into the Basel Convention and other regional conventions, and a number of countries--including Egypt, Haiti, Iran, Oman, the Philippines, Saudi Arabia, and the United Arab Emirates--require prior permission before nuclear materials can be transported through their territorial waters. Now that this obligation has been explicitly recognized in the Mediterranean Protocol, no further ambiguity should remain on this issue.

During the forthcoming shipment of highly radioactive vitrified reprocessing waste, therefore, it would be entirely appropriate for concerned coastal and island nations to assert that they have the right to block any passage through their territorial seas and that they have the right to prior notification and consultation before any vessel can pass through their 200-mile EEZs. They can argue that they have the right to protect the resources and environment of their EEZs, that the 1982 U.N. Law of the Sea Convention requires nations to prepare and circulate environmental impact assessments prior to actions that may cause serious pollution to the marine environment, and that the duty to

consult affected nations is one that has deep roots in international law. They can also argue that the refusal of the IMO committees to address this issue requires them to take unilateral action to protect their interests.

If the shipping nations refuse to comply or cooperate, then the coastal nations will have proper grounds to use force to prevent these ships from passing through their maritime zones. In fact, the coastal nations may feel obliged to use force, because their failure to block the passage of these ships through their maritime zones may later be interpreted as acquiescence and acceptance of the vessels' rights of passage.

In the past, the shippers tried to keep their routes secret, but these efforts proved to be unsuccessful. During the 1992 and 1995 shipments, for instance, the efforts of the shippers to keep their routes secret was thwarted by nongovernmental groups, which were able to monitor the ships' movements. Now, the shippers have announced that they are prepared to give public notice of a shipment two days before it departs and to reveal the route one day after departure. But this procedure is grossly inadequate because it involves no advance consultation with en-route states.

The right of the coastal nations to use force as an appropriate countermeasure to protect their populations and coastal environment makes it all the more desirable and imperative to reach an accommodation and agreement on the creation of an international set of rules to govern the transport of ultrahazardous cargoes.

The procedures governing notification and consultation and the preparation of environmental assessments and contingency response plans (including developing and proving the ability to salvage highly radioactive cargoes), as well as the rules governing routing, liability, and compensation, need to be developed. The International Maritime Organization is the appropriate forum for the dialogue that must take place, and the two sides should begin without further delay to codify the rules governing the shipments of these extremely poisonous materials.