The Ultrahazardous Radioactive Cargo Case  
(Vanuatu v. United Kingdom and Japan)  

Position Paper for the Vanuatu Ministry for Foreign Affairs  
by Jon M. Van Dyke and Duncan Currie  
January 2003  

Introduction. This paper is written to outline and explain the issues that would be raised and resolved by the proposed lawsuit to be filed by the Republic of Vanuatu against the United Kingdom of Great Britain and Northern Ireland and the Republic of Japan based on their violations of international law in the conduct of their shipments of ultrahazardous radioactive cargo through and near the exclusive economic zone of Vanuatu.

The Factual Situation. Ships flying the flag of the United Kingdom have been transporting plutonium, mixed-oxide fuel (MOX), and high-level nuclear wastes through and adjacent to the exclusive economic zone (EEZ) of Vanuatu. These ships travel between the United Kingdom or France and Japan. Because of the nature of these cargoes, the risks created by possible sinkings, collisions, and terrorist attacks are greater than for any comparable cargoes that have ever traveled through the oceans. The shipment from Japan to Europe in the summer of 2002 did pass through the EEZ of Vanuatu, and this fact has been documented by aerial photography taken by Greenpeace. Vanuatu subsequently sent official letters of protest to Japan and the United Kingdom seeking consultations, to meet its obligations to exchange views under Article 283 of the 1982 United Nations Law of the Sea Convention, but no responses have been received. Japan and the United Kingdom have stated that these shipments will continue on a

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1 Risk is commonly calculated as a function of hazard severity and hazard probability.
regular basis during the coming decades.

Vanuatu wrote to the United Kingdom on 20 August stating that shipments should not take place through EEZs of Pacific Island states until the requirements of consultation, environmental impact assessment, information about shipments, security from terrorist attacks and liability are adequately satisfied. The United Kingdom replied on 24 September, stating that the shipments are carried out in compliance with international standards and referring to the IAEA report of June 2002. Ironically, that report suggested that the UK Government should continue multilateral liaison with neighbouring States, stating that “such liaison agreements could prove beneficial in the event of an emergency in waters surrounding the UK involving ships carrying radioactive material.” 2 There was no such suggestion about non-neighbouring, en-route states such as Vanuatu.

The UK also claimed that the recent shipment did not enter Vanuatu’s EEZ, but maintaining their right to passage.

**The Claim.** The claim to be brought by Vanuatu will contend that Japan and the United Kingdom have violated:

(A) their duties under Articles 204-06 of the 1982 United Nations Law of the Sea Convention to prepare and disseminate an environmental impact statement (because “planned activities under their jurisdiction or control may cause substantial pollution of or significant and harmful changes to the marine environment”),

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(B) their duty under Article 197 to consult and cooperate with Vanuatu, which is an affected state, including the duty to provide Vanuatu with all relevant information regarding these shipments and the more particularized duty under Article 199 of the Convention to “jointly develop and promote contingency plans for responding to pollution incidents in the marine environment,” which will include the identification of ports that can receive a crippled ship carrying radioactive cargoes and tugboats and helicopters that can assist in emergencies, as well as planning to deal with possible terrorist attacks,

(C) their general duty under Article 192 and 235 to “protect and preserve the marine environment,” including the more specific duty under Article 194(5) “to protect and preserve rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species and other forms of marine life,” and

(D) their specific duty under Article 235(3) to create an appropriate liability regime, including the “development of criteria and procedures for payment of adequate compensation, such as compulsory insurance or compensation funds.”

The claim will seek an order declaring that it is unlawful to continue the shipments until these obligations are complied with, plus an order requiring Japan and the United Kingdom to compensate Vanuatu for all present and anticipated expenses incurred in order to deal with the risks created by these shipments, as well as attorneys fees and costs incurred in connection with this litigation.

Where Is the Claim to Be Filed? This claim will be filed pursuant to the new procedures established by the Law of the Sea Convention, which Vanuatu ratified on August 10, 1999. Article 297(1)(b) of the Convention authorizes coastal and island states to bring claims
against shipping nations whenever “it is alleged that a State in exercising [its navigational]
freedoms, rights, or uses has acted in contravention of this Convention or of laws or regulations
adopted by the coastal State in conformity with this Convention and other rules of international
law not incompatible with this Convention.” The claim would assert that the shipments of
ultrahazardous radioactive cargoes are “inconsistent” with “other rules of international law”
found in the Convention itself, as explained in the previous section. Under Article 296, decisions
rendered by a court or tribunal under these procedures “shall be final and shall be complied with
by all the parties to the dispute.”

Under Article 287, each contracting party is instructed to choose one or more of four
possible “means for the settlement of disputes,” (a) the International Tribunal for the Law of the
Sea (ITLOS), (b) the International Court of Justice (ICJ), (c) a five-member arbitral tribunal
established pursuant to Annex VII of the Convention, or (d) a “special arbitral tribunal”
established pursuant to Annex VIII (designed for specialized disputes requiring scientific
expertise, including “protection and preservation of the marine environment” and “navigation,
including pollution from vessels and by dumping”). If a contracting party does not indicate its
preference, it shall be deemed, under Article 287(3), to have accepted the Annex VII arbitral
tribunal. The United Kingdom has indicated its choice for the ICJ. Japan has not yet indicated
any preference, nor has Vanuatu.

Article 287(5) says that: “If the parties to a dispute have not accepted the same procedure
for the settlement of the dispute, it may be submitted only to arbitration in accordance with
Annex VII, unless the parties otherwise agree.” Under the present situation, therefore, the claims
against the United Kingdom and Japan would be submitted for decision to an arbitral panel
organized pursuant to Annex VII. Alternatively, Vanuatu could agree to bring its procedure against the United Kingdom in the ICJ and maintain a separate proceeding against Japan in an arbitral panel, or could ask Japan if it wished to have the proceedings consolidated before the ICJ. Separate proceedings would not be desirable or advisable, however, because of the additional expense and the possibility of conflicting rulings, and it is unlikely that Japan would agree to a proceeding before the ICJ (because it has no history of accepting such third-party judicial rulings). It would appear, therefore, that the Annex VII arbitral tribunal will be the available and appropriate venue for this claim.

**Annex VII of the Law of the Sea Convention.** Articles 1 and 3(b) of Annex VII explain that proceedings before an arbitral tribunal can be brought by any party by written notification to the other parties stating the nature of the claim, the grounds on which it is based, and the name of one arbitrator to be appointed to the five-member arbitral panel. According to Article 3(b), this individual could be a national of Vanuatu, and apparently could be anyone else in the world, but should “preferably” be chosen from the list of arbitrators that is maintained by the United Nations based on appointments made by contracting parties. (This list is comprised of experts in maritime affairs appointed by the contracting parties. Each country is entitled to nominate up to four individuals, but at the present time only 18 countries have submitted nominees and a total of 53 individuals are now listed.) Ideally, the arbitrator to be appointed by Vanuatu should be someone from the Pacific Island region who is fully familiar with the concerns of the Pacific Islands. Possibilities to consider might include, for instance, Satya Nandan from Fiji, who has long played a leading role in developing the law of the sea and has a long history of concern for protection of the environment and the fishery resources of the sea;
Kilifoti Eteuati from Samoa, who played a leading role in negotiating the South Pacific Regional Environmental Treaty; and Mere Pulea from Fiji, who is now teaching at the University of the South Pacific Law Center. Other ideas can be canvassed. Vanuatu will have to pay half the costs of arbitrators in advance, as is standard arbitration practice. This consideration will be relevant in selecting arbitrators, in an effort to keep costs down.

The opposing party or parties then have 30 days to respond by appointing one arbitrator, who can be a national and should “preferably” be from the U.N.-maintained list of arbitrators. Because two countries will be named as defendants, it is possible that they will think that they will have “separate interests” under Article 3(g), in which case they can apparently each appoint an arbitrator, and the size of the arbitral panel would then increase from five to seven members. If the defending countries fail to appoint an arbitrator within 30 days, the President of the International Tribunal for the Law of the Sea (now L. Dolliver M. Nelson from Grenada in the Caribbean) is required by Article 3(c) to make the appointment. Once these initial arbitrators are appointed, the parties then are supposed to reach agreement on the remaining three arbitrators (or four if Japan and the United Kingdom insist on each appointing an arbitrator), who, according to Article 3(d) “shall be chosen preferably from the list and shall be nationals of third States unless the parties otherwise agree.” If the parties cannot agree, Article 3(e) says that the President of the Tribunal should make the remaining appointments.

Most of the persons that are on the U.N.-maintained list of nominees are from the industrialized world and many will not be ideal for this case, from the perspective of Vanuatu.\(^3\)

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\(^3\) Considerable thought and consultation would need to be entered into to choose arbitrators. In recent arbitrations, the arbitrators have not been limited to those on the list, but have also
Article 5 of Annex VII says that each arbitral tribunal determines its own procedures “assuring to each party a full opportunity to be heard and to present its case,” and Article 7 says that unless the tribunal determines otherwise “because of the particular circumstances of the case, the expenses of the tribunal, including the remuneration of its members, shall be borne by the parties to the dispute in equal shares.” Article 11 says that: “The award shall be final and without appeal...”

**Provisional Measures.** Article 290 of the Convention allows a court or tribunal to “prescribe any provisional measures” pending a final outcome, but because no shipment is currently pending, and also to avoid any early ruling that might exclude a full development of the facts, we do not recommend seeking any provisional measures in this case.

**The Evidence to Be Presented.** Once the tribunal is empaneled, a hearing will be scheduled, and the parties will be allowed to present written and oral evidence. Part of the claim included judges on the International Tribunal for the Law of the Sea, former judges of the International Court of Justice, and distinguished international law professors. Among the judges on the International Tribunal for the Law of the Sea that might be appropriate are Alexander Yankov from Bulgaria, who played a leadership role in crafting the environmental provisions of the Law of the Sea Convention; Tullio Treves of Italy, who has written favorably about the precautionary principle. Judge David Anderson might be appropriate as part of a compromise package, because he appears to be open-minded on environmental issues. Ideally, the arbitrator to be appointed by Vanuatu should be someone from the Pacific Island region who is fully familiar with the concerns of the Pacific Islands.
that Vanuatu will present will be a straight legal claim that will draw upon language in the Law of the Sea Convention and decisions made in recent cases to establish the principles listed above in the section describing the claim to be presented. Vanuatu will emphasize that a customary international norm is emerging that allows coastal and island countries to regulate shipping in its adjacent areas based on the cargoes being carried by the ships. This can be documented most dramatically by the recent regulations issued by Spain and France after the breakup of the oil tanker *Prestige* near the Spanish coast, which decree that:

A. All oil tankers traveling through these two countries’ EEZs will have to provide advance notice to the coastal countries about their cargo, destination, flag, and operators.

B. All single-hulled tankers more than 15 years old traveling through the EEZs of Spain and France will be subject to spot inspections by coastal maritime authorities while in the adjacent EEZs and will be expelled from the EEZs if they are determined, after inspection, to be not seaworthy.

Also, Chile has very recently enacted legislation which effectively bans shipments from its Exclusive Economic Zone around Cape Horn. This is another very good development for the case.

It may be appropriate for Vanuatu to prepare a paper explaining this emerging norm, with examples such as these one from around the world.

In addition, Vanuatu will present testimony from experts who will describe the nature of the risks created by these shipments. These experts will include an expert on radioactive materials who can testify regarding all the potential risks created by the cargoes, an expert on shipping who can discuss the risks presented by any transport at sea, and an economist who can testify on the impact on the fishing and tourism industries of Vanuatu should any sort of accident take place in or near Vanuatu’s EEZ. A marine biologist may have to be consulted, if not called
as an expert witness. These experts should prepare written narratives of their testimony and will also present their views orally and respond to cross-examination by the other parties. It will also be appropriate for Vanuatu government officials to present testimony about the fishing and tourism industries in Vanuatu, with specifics about the amount of revenues involved in these industries, and the impact on Vanuatu if these industries were to collapse because of fears generated by an accident involving the radioactive cargoes.

Annex VII does not anticipate any “discovery” process whereby the parties would be able to examine the evidence of the other party in advance of the hearing, but such an exchange could be agreed upon by the parties. Article 6(b) of Annex VII does indicate that each nation must make available its own employees whose testimony might be relevant and thus Vanuatu could require employees of Japan or the United Kingdom to testify if their testimony would help develop the case regarding the potential risks created by the transports.

Conclusion. It is recommended that preparations be made aiming to file this claim in May 2003. At that time, a full legal statement of the case should be ready for filing along with the notice and appointment of the first arbitrator. We should also have our experts lined up by that time, as well as the anticipated fees and costs to pursue the case vigorously. The process of picking the remaining arbitrators could take as long as three months, after which a hearing date would be set, which might be set for six months later. The hearing would probably take about one week, but could take longer depending on how the defendant nations approach the matter.
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The Evidence to Be Presented. Once the tribunal is empaneled, a hearing will be scheduled, and the parties will be allowed to present written and oral evidence. Part of the claim that Vanuatu will present will be a straight legal claim that will draw upon language in the Law of the Sea Convention and decisions made in recent cases to establish the principles listed above in the section describing the claim to be presented. Vanuatu will emphasize that a customary international norm is emerging that allows coastal and island countries to regulate shipping in its adjacent areas based on the cargoes being carried by the ships. This can be documented most dramatically by the recent regulations issued by Spain and France after the breakup of the oil tanker *Prestige* near the Spanish coast, which decree that:

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It may be appropriate for Vanuatu to commission a legal expert to prepare a paper explaining
the Tribunal should make the remaining appointments.

Most of the persons that are on the U.N.-maintained list of nominees are from the industrialized world and many will not be ideal for this case, from the perspective of Vanuatu. Two that might be appropriate are Tullio Scovazzi from Italy, who has written widely on the importance of the environmental provisions of the Convention, and Hasjin Djalal from Indonesia, who has long been sympathetic to the position of coastal and island states. In other recent arbitrations, the arbitrators have not been limited to those on the list, but have also included judges on the International Tribunal for the Law of the Sea, former judges of the International Court of Justice, and distinguished international law professors. Among the judges on the International Tribunal for the Law of the Sea that might be appropriate are Alexander Yankov from Bulgaria, who played a leadership role in crafting the environmental provisions of the Law of the Sea Convention; Tullio Treves of Italy, who has written favorably about the precautionary principle; and possibly Thomas A. Mensah of Ghana, depending perhaps on how the tribunal sitting on the *MOX Plant Case* rules. (Mensah is one of the arbitrators on that case, which raises some issues similar to those raised in the present case; its decision is expected during the coming year). Professor James Crawford, who is also sitting on the *MOX Plant Case* may also be an appropriate arbitrator to consider for the present case. The United Kingdom may propose ITLOS Judge David Anderson as an arbitrator, and might be appropriate to accept him as part of a compromise package, because he appears to be open-minded on environmental issues.

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concerns of the Pacific Islands. One possibility to consider might be Satya Nandan from Fiji,
who has long played a leading role in developing the law of the sea and has a long history of
concern for protection of the environment and the fishery resources of the sea. Another idea
might be either Geoffrey Palmer or Bill Mansfield of New Zealand, both of whom have strong
records of concern for the environment. (Palmer, the former Prime Minister of New Zealand,
has served as an ad hoc judge on the International Court of Justice; Mansfield is now a member
of the International Law Commission.)

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Under Article 287, each contracting party is instructed to choose one or more of four possible "means for the settlement of disputes," (a) the International Tribunal for the Law of the Sea (ITLOS), (b) the International Court of Justice (ICJ), (c) a five-member arbitral tribunal established pursuant to Annex VII of the Convention, or (d) a "special arbitral tribunal" established pursuant to Annex VIII (designed for specialized disputes requiring scientific expertise, including "protection and preservation of the marine environment" and "navigation, including pollution from vessels and by dumping"). If a contracting party does not indicate its preference, it shall be deemed, under Article 287(3), to have accepted the Annex VII arbitral
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