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THE 2005 PHILIP C. JESSUP INTERNATIONAL LAW MOOT COURT COMPETITION

CASE CONCERNING THE VESSEL *THE MAIRI MARU*

IN THE INTERNATIONAL COURT OF JUSTICE

REPUBLIC OF APPOLLONIA,

Applicant

versus

KINGDOM OF RAGLAN,

Respondent

MEMORIAL FOR THE APPLICANT

January 2005

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STATEMENT OF JURISDICTION

The Republic of Appollonia and the Kingdom of Raglan have submitted the present dispute to the International Court of Justice pursuant to Article 36(1) of the *Statute of the International Court of Justice*, which provides that the Court's jurisdiction comprises all cases referred to it by the parties concerned. The parties have jointly prepared a Special Agreement and transmitted it to the Court pursuant to the procedure established in Article 40(1). There is no dispute as to the Court's jurisdiction to hear this matter.

QUESTIONS PRESENTED

On the basis of the relevant facts and on the rules and principles of general international law, as well as any applicable treaties:

1. Whether Raglan is responsible for the attack upon and wreck of *The Mairi Maru* and all consequences thereof by virtue of its failure to respond appropriately to pirate activities in its archipelagic waters and the acts of Thomas Good, which are imputable to Raglan;
2. Whether Raglan is responsible for the loss of *The Mairi Maru* and the MOX and other cargo that she carried because its scuttling of the vessel was illegal, and therefore owes compensation to Appollonia on behalf of its citizens who suffered direct financial and other losses;
3. Whether Raglan has standing to seek compensation for economic losses resulting from acts that occurred wholly outside of its territorial waters and exclusive economic zone; and
4. Whether Appollonia owed any obligations Raglan under international law in transporting MOX through the waters of the Raglanian Archipelago.

STATEMENT OF FACTS

1. The States involved in this dispute are the Republic of Appollonia, a small coastal nation, and the Kingdom of Raglan, an archipelago nation lying between Appollonia and the Republic of Maguffin.

2. In 1995, several bands of technologically advanced pirates began preying upon ships in the Raglanian archipelago. The frequency of the attacks increased during the next few years. Forty separate instances of pirate attacks were reported by the International Maritime Bureau for 1997.

3. On October 15th 1999, the Prime Minister of Raglan announced his government's new "comprehensive anti-piracy program". Upon request of any vessel sailing the Raglanian archipelagic waters, the Royal Navy would provide a naval officer to serve as pilot. The Navy would electronically monitor the progress of these ships, and the pilot would be in constant contact with appropriately armed navy vessels. Raglan Prime Minister affirmed that the Royal Navy would be able to respond with air and naval support within 30 minutes to a distress call.

4. The program proved to be effective during the next two years. No more pirate attacks occurred in the center of the archipelago. But by November 30th 2001, the Royal Navy was no longer able to provide enough officers. The Navy began selecting and training private contractors to serve as pilots. These contractors were paid by the Raglanian government and used interchangeably with naval officers in the anti-piracy program. As naval officers, they were able to request armed intervention by the Navy.

5. *The Mairi Maru* was an Appollonian-flagged private vessel and one of the largest double-hulled ocean-going cargo ships in Appollonia. On July 26th 2002, it left the Appollonian port headed for Maguffin. The planned route passed through Raglanian archipelagic waters by

use of sea lanes designated by Raglan for passage of foreign ships. The ship's Captain had planned his route to minimize the risk of pirate attack, adhering to a schedule that would not require *The Mairi Maru* to travel at night. The captain was experienced at transporting nuclear materials, and the vessel itself had been used for this purpose on six previous occasions, without reported incident, including at a time when the Insurers of Lading and Shipping Association had issued a "five-point warning". The craft was laden with several canisters of MOX.

6. Three years earlier, in 1995, the Appollonian Ministry of Energy had envisioned that MOX could be used as a nuclear fuel source. In April 1997, the Appollonian Ministry of Energy entered a five-year agreement to sell surplus MOX to the Maguffin Atomic Recycling Company, Ltd. This agreement was duly reported to the IAEA by both Appollonia and Maguffin, as were all shipments of MOX made pursuant to it. Appollonia had concluded in 1996 a "safeguards agreement" with the IAEA in the fulfillment of its obligations under article III.1 of the Nuclear Non-Proliferation Treaty. In March 1997, in anticipation of the MOX export agreement, Appollonia had entered into separate Safeguards Agreements with the IAEA concerning the transfer of MOX from Appollonia. The IAEA in a report of 1999 concluded that the nuclear program of Appollonia was in compliance with international standards. However this report expressed some concerns in respect to the protection of MOX during its transportation and the non notification of Raglan. The Appollonian Energy Minister responded explaining that "Appollonia's navy is not equipped to protect the MOX shipments in any meaningful way. It is our belief that the specialist private carriers we use are in a better position to fund and coordinate the transport and protection of MOX. We notify the IAEA of shipments as required. But in order to maintain the highest level of security, we do not otherwise publicize the shipments or identify

the cargo". The Energy Minister also indicated that there had been no pirate attacks against more than 20 MOX shipments from Appollonia to Maguffin in the previous two years.

7. On July 26th 2002, as *The Mairi Maru* was approaching the Raglanian archipelago, it was delayed by a severe storm. Now forced to travel the archipelago by night, the captain requested a pilot from the Raglanian Royal Navy. Thomas Good, a private contractor, along with two men, arrived two hours later and boarded the ship. He displayed a specially-designed flag, indicating that they were under naval protection.

8. At 23h00 on July 27th 2002, that is one hour after the vessel entered Raglanian archipelagic waters, Thomas Good revealed to the captain he had brought on board a small explosive device which he threatened to detonate if the captain and crew did not surrender control of the ship. After Mr. Good locked the crew in the galley, he steered the vessel out of the sea lanes and navigated the ship to a predetermined rendezvous location where he met other confederates. There, they removed all the technical navigation and communication equipment form the vessel and disabled the aft, making impossible to safely steer the ship under its own power. Having disembarked form the vessel, and still navigating in Raglanian archipelagic waters, Mr. Good and his confederates let *The Mairi Maru* drift on a south-easterly course.

9. On July 28th 2002 the vessel crashed aground a partially submerged sandbar in the Norton Shallows, an area composed of several sandbars unclaimed by any nation, and located approximately 250 nautical miles southeast of the southernmost Raglanian island. Due to the crash, the canisters were damaged and the MOX leaked into the surrounding waters.

10. Two days after the pirate attack, on July 29th, a Raglanian patrol boat was conducting training near the sandbar. It spotted the grounded ship and approached *The Mairi Maru* to offer assistance. Naval reports indicate that several members of crew of *The Mairi Maru* were dead,

and others were exhibiting signs of acute radiation syndrome. Royal Navy doctors rescued the surviving crew of *The Mairi Maru*.

11. Two days later, on July 31st, the Raglanian Prime Minister announced to Appollonia's president the presence of radioactive materials and hundreds of dead fish and sea birds in the area surrounding the sandbar. He indicated that "Raglan has no choice but to quickly isolate the radioactive danger and, to the extent possible, to clean up the area surrounding the sandbar" because of winds and ocean currents that would spread the contamination. However, decontamination efforts did not begun until immediately prior to the removal and scuttling of *The Mairi Maru*. The Raglanian Prime Minister also requested Appollonia to pay for the cleanup.

12. Four days later, on August 4th, the Raglanian Prime Minister sent a diplomatic note to the Appollonian President indicating that Raglan had determined to scuttle the vessel to put the MOX out of the reach of winds and currents. The note alleged that cleanup was impossible in a short time-span. Later that week, a destroyer, acting under the direct order of Prime Minister Price, towed *The Mairi Maru* less than a kilometer to the southeast and scuttled it in the Sand Deep, located in the High Seas.

13. On or about August 11th, the Foreign Ministry of Appollonia sent a cable to its counterpart in Raglan, which stated: "Furthermore, your government was aware that MOX had been transported through your territory in the past, and has never objected. In such circumstances, Appollonia owes Raglan no duties under these treaties. Furthermore, the harm you allege occurred outside of Raglan's territorial waters. No state is responsible for hypothetical or remote damages under international law, whether or not its actions were lawful."

14. In October and November 2002, the owners and insurers of *The Mairi Maru*, as well as the surviving crew members and the families of those who dies initiated a lawsuit against the

Raglanian government for the loss of the vessel. The trial court dismissed their actions upon the judicial immunity traditionally enjoyed by the Raglanian armed forces in actions seeking money damages for actions taken as part of national defense activities. The decision concerning the owners and insurers of *The Mairi Maru* was upheld by the Supreme Court of Raglan, and no further appeal was available. The surviving crew members and the families of those who dies appealed to the Raglanian civil court of last resort, which summarily affirmed the trial court's determination.

15. As of June 1st , 2004, the contamination was concentrated in a radius of approximately 30 kilometers from the sandbar where *The Mairi Maru* had run aground, and traces of radiation were not detected closer than 25 kilometers from Raglan's Exclusive Economic Zone.

SOMMAIRE DES PLAIDOIRIES

1. Raglan est responsable de l'attaque sur le *Mairi Maru* car elle a manqué à son obligation conventionnelle d'assurer la protection et la sécurité du navire. Les mesures de protection adoptées dans le cadre du programme anti-piraterie étaient nettement insuffisants car le niveau d'avertissement du ILSA n'a été baissé que d'un seul grade. Le Raglan n'a pas pratiqué la diligence requise en ne prévoyant pas de manière adéquate le besoin en officiers pour escorte sur une période d trois ans. Lorsque le besoin en officiers est devenue critique, le Raglan a engagé des entrepreneurs privés qui sont, par ce fait, devenus des agents de ce dernier. Les actions de Thomas Good sont constituent des actes de piraterie notamment en vertu de l'article 15 de la *Convention des Nations Unies sur le droit de la mer* ainsi que d'autres normes internationales. La Royal Navy avait un contrôle effectif sur Monsieur Good et en tant qu'agent étatique, ses actions ainsi que ses conséquences sont imputables à Raglan.
2. Le sabordage du *Mairi Maru* est un acte illicite. Le Raglan a contrevenu à son obligation conventionnelle stipulée à l'article 195 de la *Convention des Nations Unies sur la mer* de ne pas transférer de quelque manière que ce soit le dommage d'une Partie à une autre ou d'une forme à une autre. De plus, elle a enfreint à la *Convention de Londres sur la prévention de la pollution marine par le déversement de déchets et d'autres matières* en sabordant le navire ce qui constitue, considérant la nature de la cargaison, l'immersion de déchets. Il a ainsi contribué à la pollution maritime. L'Appollonia a le droit d'exercer la protection diplomatique car elle les victimes ont la nationalité appollonienne, ont subi un dommage moral et matériel et ont épuisé tous les recours internes possibles. Pour ces raisons, l'Appollonia est en droit d'exiger des réparations pour des dommages moraux et matériels.

3. Raglan does not have standing to seek compensation because the area of damage, the Norton Shallows, are beyond the waters under Raglan's jurisdiction and they are uninhabited and unclaimed by any nation. Raglan has never occupied or asserted authority over the Norton Shallows. The area therefore qualifies as *terra nullius* and cannot form the basis for a claim to jurisdiction. Lost earnings in a touristic exploitation amount to a violation of an interest and not violation of a substantive legal right, and therefore cannot form the basis for a demand in compensation.
4. Appollonia did not violate any obligations it owed to Raglan in crossing its waters with a shipment of MOX because *The Mairi Maru* had planned to transit through Raglan's designated archipelagic sea lanes. The right of archipelagic sea lanes passage is equivalent to the right of transit in international straits, and is therefore broader than the right of innocent passage. Because the right of archipelagic sea lanes passage cannot be suspended by the coastal State, *The Mairi Maru* had a right to traverse the Raglanian waters with a carriage of ultrahazardous substances. Furthermore, Appollonia has transported MOX through the Raglanian archipelago several times before without Raglan objecting and can argue that there is a prior course of dealings between both countries regarding this practice. Appollonia exercised diligence in the manner it transported MOX and did not breach its duty of care because the pollution was caused by an intervening third party act.

PLAIDOIRIES

I. LE RAGLAN EST RESPONSABLE POUR L'ATTAQUE ET LE NAUFRAGE DU MAIRI MARU

A) Le Raglan n'a pas adéquatement contrôlé les activités de piraterie dans ses eaux pélagiques

1. Le Raglan et ses obligations sur ses eaux territoriales

La *Charte des Nations Unies* reconnaît explicitement le principe de la souveraineté de tous les États.[1] La notion de souveraineté étatique définit l'État comme l'instance politique et/ou législative suprême possédant tous les pouvoirs et exerçant son indépendance.[2] Le juge Max Huber a déjà reconnu que la souveraineté territoriale engendrait un droit exclusif d'exercer des activités étatiques mais a noté que « ce droit a pour corollaire un devoir : l'obligation de protéger, à l'intérieur du territoire, les droits des autres États en particulier leur droit à l'intégrité et à l'inviolabilité en temps de paix et en temps de guerre, ainsi que les droits que chaque État peut réclamer pour ses nationaux en territoire étranger ».[3]

Autrement dit, bien que le Raglan possède la souveraineté territoriale sur ses eaux pélagiques, le droit international lui impose la responsabilité de respecter les droits et obligations des autres Etats. En l'espèce, la *Convention des Nations Unies sur le droit de la mer* reconnaît au Raglan la souveraineté sur les eaux territoriales qu'a emprunté le *Mairi Maru* et, par extension un devoir de protection du vaisseau qui battait le pavillon appollonien.[4] D'ailleurs, la Convention

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[1] *Charte des Nations Unies*, 26 juin 1945, Can. T.S. 1945 No 7, art 2(1).

[2] William R. Slomanson, *Fundamental Perspectives on International Law,* New York, Publishing Company, 1990, p.184.

[3] *Arrêt relatif à la souveraineté sur l'île de Palmas*, arbitrage par Max Huber, (Etats-Unis d'Amérique c. Pays-bas) dans *Affaire de l'île de Palmas* 4 avril 1928, R.S.A., vol. II, p. 839.

sur le droit de la mer permet au Royaume de Raglan d'adopter des lois et mesures assurant la sécurité de navigation et du trafic maritime.[5]

2. L'insuffisance des mesures de protection constitue une faute du Raglan

Les mesures adoptées par le Raglan étaient nettement insuffisantes et cela a eu pour conséquence l'attaque et le naufrage de la *Mairi Maru*. L'avertissements du 30 septembre 1998 provenant du « Insurers of Lading and Shipping Association (ILSA) » adressait un « avertissement de cinq points » sur une échelle de cinq points.[6] Or le « programme anti-piraterie nouveau et exhaustif » du Raglan n'a fait que temporairement baisser le niveau d'alarme à un « avertissement de quatre points ».[7] Nous pouvons en déduire que le niveau d'activités de piraterie dans les eaux Raglaniennes demeurait élevé et que le Royaume du Raglan manquait ainsi à son devoir d'assurer le passage sécuritaire des vaisseaux étrangers, incluant ceux provenant de l'Appollonia.[8]

Par ailleurs, le 30 novembre 2001, le premier ministre Price reconnaissait que le programme anti-piraterie n'aurait plus assez d'officiers pour répondre à la demande d'escorte.[9] On constatait ainsi une insuffisance de ressources indispensables pour garantir un passage sécuritaire aux vaisseaux. Nous soumettons que le Raglan, en administrant son programme anti-

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[4] *Convention des Nations Unies sur le droit de la mer*, 10 December 1982, 1833 R.T.N.U. 3, arts 2 et 3. (ci-après « Convention sur le droit de la mer »).

[5] *Convention des Nations Unies sur le droit de la mer*, *supra* note 4, art.21(1)(a).

[6] *Compromis* par. 7.

[7] *Ibid.* par. 12.

[8] S. A. Scharfenberg, « Regulating Traffic Flow in the Turkish Strait: A Test for Modern Internaitonal Law », 10 Emory Int'l L. Rev. 359, p.359.

[9] *Compromis* par. 13.

piraterie, a agit de manière non dilligente en ne prévoyant pas de manière adéquate le besoin en officiers pour escorte sur une période de gestion de trois ans.

Ce fait illicite est imputable à l'organe exécutif, soit le gouvernement du premier ministre Price. La jurisprudence reconnaît que la responsabilité d'un État est mise en cause en cas d'actes ou, comme dans le présent cas, d'omissions de ses organes exécutifs et administratifs.[10] Dans l'alternative, ce manquement de *due care* est imputable au Raglan car ce dernier n'a pas pris tous les moyens pour s'acquitter adéquatement de son obligation en vertu de la *Convention sur la mer*.[11]

B) La responsabilité du Raglan quant aux actes de Thomas Good

1. Les actes de Thomas Good

L'article 15 de la *Convention sur la haute mer* donne une première définition de la piraterie.[12] Une définition quasiment identique figure à l'article 101 de la *Convention sur le droit de la mer* qui qualifie la piraterie de « tout acte illicite de violence ou de détention ou toute dépradation commis par (…) des passagers d'un navire ».[13] Cette définition est reprise dans le *Recueil de règles pratiques pour la conduite des enquêtes sur les délits de piraterie et de vols à main armée à l'encontre de navire*.[14]

[10] J.-M. Arbour, *Droit international public*, 4e éd., Cowansville, Yvon Blais, 2002, p.518.

[11] J.-M. Arbour, *supra* note 10; R. Wedgwood, « Responding to Terrorism: The Strikes against bin Laden », 24 Yale J. Int'l L. 559, p.564.

[12] *Convention sur la haute mer*, (1958) 450 R.T.N.U. 82, art. 15.

[13] *Convention des Nations Unies sur le droit de la mer*, *supra* note 4, art.101; R. C. Beckman, «Issues of Public International Law Relating to Piracy and Armed Robbery against Ships in Malacca and Singapore Straits», 3 Sing. J. Int'l & Comp. L. 512, p.513.

[14] *Résolution* A.922(22) adoptée le 29 novembre 2001 par l'Assemblée de l'Organisation maritime internationale à sa vingt-deuxième session, section « définitions ».

Thomas Good avait apporté à bord un engin explosif et avait menacé le capitaine de le faire exploser si on ne lui cédait pas le contrôle du navire.[15] De plus, l'équipage et le capitaine furent détenus dans la cuisine.[16] Il n'est nullement contesté que ce sont les actes commis par M. Good qui ont mené au naufrage du *Mairi Maru* dans les Northern Shallows.

A la lumière des définitions et des normes conventionnelles et coutumières internationales, les actes commis le 27 juillet 2002 par Thomas Good constituent des actes de piraterie.

2. Thomas Good est un agent du Raglan

La règle générale dit que les actes illicites commis par une personne engagent sa responsabilité personnelle.[17] Cependant, le droit coutumier reconnaît aux États une certaine responsabilité à l'égard des personnes agissant pour leur propre compte.[18]

Suite à l'annonce du 30 novembre 2001 du premier ministre Price, la Royal Navy, incapable d'assurer le passage sécuritaire des navires à cause de la pénurie d'officiers pour escorte, a recruté et formé des entrepreneurs privés qui serviraient de pilotes.[19] Thomas Good était un de ces « entrepreneurs » et était au service de la Royal Navy au même titre que les officiers réguliers.[20] Notons au passage que Thomas Good est venu à bord du *Mairi Maru* suite à

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[15] *Compromis* par. 17.

[16] *Ibid.* par. 17.

[17] I. Brownlie, *System of the Law of Nations : State Responsability, Part 1*, Clarendon Press, Oxford, 1983, p.26.

[18] P. Malanczuk, *Akenhurst's Modern Introduction to International Law*, Routledge, London, 1997, p.257; M.G. Bochenek, « Compensation for Human Rights Abuses in Zimbabwe», 26 Colum. Hum. Rts. L. Rev. 485, p.511.

[19] *Compromis* par. 13.

une demande du capitaine auprès de la marine raglanienne pour l'envoi d'un pilote et qu'il est monté à bord en cette capacité.[21] Plus tard, les tribunaux raglaniens ont d'ailleurs reconnu que le statut de M. Good était assimilable à celui des officiers de la Royal Navy, puisqu'ils ont jugée irrecevable des requêtes en réparation en vertu du principe de l'immunité judiciaire des forces armées raglaniennes.[22]

Les travaux de la *Commission du droit international sur la responsabilité de l'État pour fait internationalement illicite* reconnaît que les actes d'une personne habilitée par le droit d'un État sont considérées comme un fait de l'État.[23] Ainsi, Thomas Good a obtenu accès au *Mairi Maru* en sa qualité d'agent de la Royal Navy et ses actions subséquentes, mêmes si elles dépassent le cadre des ses pouvoirs, lient le Raglan quant à leurs conséquences.[24] A titre subsidiaire, nous soumettons que Thomas Good agissait sous le contrôle et/ou la direction du Raglan par le biais du programme spécial anti-piraterie et ce, même en l'absence des autorités officielles.[25]

La Royal Navy est un organe qui agit pour le compte du Raglan à des fins publiques.[26] En tant que membre de la Royal Navy, Thomas Good est devenu représentant du Raglan et ce

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[20] *Compromis* par.13.

[21] *Ibid.* par. 16.

[22] *Ibid.* par. 30; H. H. Perritt, « Policing International Peace and Security: International Police Forces », 17 Wis. Int'l L.J. 281, p.311.

[23] *Projet d'articles sur la responsabilité de l'État pour fait internationalement illicite*, Doc. Off. AGNU, 56ème Sess., Annex, Agenda Item 162, Doc. NU. A/RES/56/83 (2001) art. 5.

[24] *Ibid.* art 7.

[25] *Ibid.* arts 8, 9.

[26] *Convention de Genève relative au traitement des prisonniers de guerre*, 12 août 1949, 75 R.T.N.U.135, partie III, art 127 et partie IV, arts 29 et 144.

dernier est responsable dès que son agent agit comme pilote dans le cadre du programme anti-piraterie.[27]

3. Les actes de Thomas Good sont imputables à Raglan

Ayant établi que les actes de Thomas Good constituent des actes de piraterie, lesquels sont illicites au regard du droit international, et qu'il agissait en tant qu'agent du Raglan, nous traiterons maintenant la question de l'imputabilité de ces actes à l'État.

Selon la doctrine, l'État est responsable seulement si les actes en question lui sont imputables.[28] Le Raglan ne peut pas limiter sa responsabilité en soutenant que Thomas Good a outrepassé ses fonctions.[29] L*'Affaire Youmans* est une bonne illustration d'une situation où un État a été reconnu responsable des actes non-autorisés d'un de ces agents.[30] En fait, Thomas Good travaillait dans une unité spécialisée dédiée au programme anti-piraterie et sous le commandement de la Royal Navy, un organe de l'État.

Dans l'affaire *Nicaragua c. Etats-Unis*, la Cour internationale de Justice a trouvé que « le comportement de simples individus peut être attribuable à un État si ces individus agissent sous les instructions ou sous le contrôle de cet État. »[31] Par ailleurs, la Cour dit que « pour que la responsabilité juridique de ces derniers soit engagée, il devrait en principe être établi qu'ils

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[27] J. Salomon, *La responsabilité internationale*, 4e éd., Presse Universitaire de Bruxelles, 1996, p.13.

[28] P. Malanczuk, *supra* note 18, p.258; T. Meron, « The Humanization of Humanitarian Law », 94 AM. J. Int'l L. 239, p.259-61.

[29] P. Malanczuk, *supra* note 18, p.258.

[30] *Thomas H. Youmans (États-Unis)* c. *États-Unis Mexicains*, (1926) 4 R.I.A.A. 110.

[31] J.-M. Arbour, *supra* note 10; A. Carrillo-Suarez, « Hors De Logique: Contemporary Issues in International Humanitarian Law as Applied to Internal Armed Conflict », 15 Am. U. Int'l L. Rev. 1, p.102.

avaient le contrôle effectif des opérations (…) ».[32] Par analogie, nous pouvons dire que la responsabilité juridique du Raglan est engagée dans le présent cas car la Royal Navy avait un contrôle effectif sur Thomas Good, notamment par le biais de la surveillance électronique du navire.[33]

Nous soumettons qu'en vertu du droit international coutumier, conventionnel et jurisprudentiel, le Raglan est responsable des conséquences des actes illicites commis par Thomas Good .

II. LE RAGLAN EST RESPONSABLE DE LA PERTE DU *MAIRI MARU* ET DE SA CARGAISON

A) Le caractère illégal du sabordage du *Mairi Maru*

1. Acte illicite international

Le projet d'articles établi deux conditions pour qu'un fait engage la responsabilité internationale d'un État. La première est que ce fait doit être attribuable à un État en vertu du droit international, et la seconde est qu'il doit constituer une violation d'une obligation internationale de l'État.[34] En fait, même si les action du 29 juillet 2002 du Raglan furent de porter secours, le sabordage du *Mairi Maru* dans la semaine du 4 août 2002 constitue un acte illicite.[35]

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[32] *Affaire des activités militaires et paramilitaires au Nicaragua et contre celui-ci* (Nicaragua c. Etats-Unis d'Amérique), [1984] C.I.J. Rec.275.

[33] A. Carrillo-Suarez, *supra* note 31.

[34] *Projet d'articles sur la responsabilité de l'État pour fait internationalement illicite*, *supra* note 23, art. 2.

[35] *Compromis* par. 24.

2. Manquement aux obligations conventionnelles

Selon la note diplomatique, le premier ministre Price maintient que la seule solution afin de faire cesser le supposé déversement de matières nocives est le sabordage du *Mairi Maru*.[36] Cependant, l'article 195 de la *Convention sur la mer* stipule que lorsqu'un État agit de manière à contrôler la pollution marine, il ne peut pas agir de manière à transférer le dommage d'une Partie à une autre ou d'une forme à une autre.[37] Or, le Raglan a remorqué le *Mairi Maru* et, suite au sabordage, les restes du navire se sont déposés dans la fosse de Sand Deep, à plus de 9000 mètres de fond.[38] Le Raglan, qui a endossé le sabordage du navire par note diplomatique, a enfreint à son obligation conventionnelle à ne pas transférer le dommage d'une région et d'une forme à une autre.

Le Royaume de Raglan a aussi contrevenu à la *Convention de Londres sur la prévention de la pollution marine par le déversement de déchets et d'autres matières* en ne prenant pas « toutes les mesures possibles pour prévenir la pollution des mers par l'immersion de déchets et d'autres matières ».[39] Le terme « immersion » comprend le sabordage en mer de navires.[40] Soulignons la ratification de cette convention par le Raglan le 31 mai 1990.[41]

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[36] *Compromis* par. 24.

[37] *Convention des Nations Unies sur le droit de la mer*, *supra* note 4, art.195.

[38] *Compromis* par. 24.

[39] *Convention de Londres sur la prévention de la pollution marine par le déversement de déchets et d'autres matières* (1972), 1046 R.T.N.U. 120, arts.1,2.

[40] *Ibid*. art. 3.

[41] *Compromis* par. 35.

L'article 26 de la *Convention de Vienne* codifie la coutume internationale et établit le principe de la bonne foi, ou *pacta sunt servanda*, dans l'application des traités.[42] Or, le sabordage du *Mairi Maru* fut commis en dépit des obligations conventionnelles du Raglan.

Si la Cour reconnaît que le Raglan devait composer avec une situation d'urgence, nous soumettons qu'il a failli à son obligation d'obtenir un « permis spécifique en dérogation à l'article IV, paragraphe 1), alinéa a), dans des cas d'urgence qui présentent des risques inacceptables pour la santé de l'homme et pour lesquels aucune autre solution n'est possible »[43] Selon la formule délimitée à l'article 5(2), une consultation des parties impliquées, dont l'Appollonia et de l'Organisation aurait aboutit à des recommandations afin de gérer la situation de manière efficace et la moins préjudiciable.[44]

B) L'exercice de la protection diplomatique par Appollonia

Le droit international public reconnaît le droit à un État d'exercer son pouvoir de protection diplomatique de ses citoyens.[45] En fait, la protection diplomatique permet à l'État de faire valoir son droit interne, c'est-à-dire « le droit qu'il a de faire respecter en la personne de ses ressortissants le droit international.»[46] Notons que ce droit de protection diplomatique appartient de manière exclusive à l'État car il est le seul sujet de droit international reconnu sur la scène

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[42] *Convention de Vienne sur le droit des Traités*, 22 mai 1969, 155 R.T.N.U. 331, art 26.

[43] *Convention de Londres sur la prévention de la pollution marine par le déversement de déchets et d'autres matières*, *supra* note 39, art.5(2).

[44] *Ibid.*

[45] I. Brownlie, *The Protection of Individuals and Groups : Part 9*, 5e ed, Oxford, Oxford University Press, 1998, par. 522.

[46] *Affaire du Chemin de fer Panevezys-Saldutiskis,* (Estonie c. Lituanie), C.P.J.I., série A/B, no. 76, arrêt du 28 février 1939.

international en matière civil.[47] Ce droit vise à engager la responsabilité d'un autre État, en l'espèce, celle du Royaume de Raglan.

Pour se prévaloir du principe de la protection diplomatique, il faut satisfaire trois conditions. La première est l'existence d'un lien de nationalité entre la victime et l'État. La deuxième est qu'un préjudice ait été causé. Finalement, il faut que tous les recours internes aient été épuisés.[48]

1. Nationalité appollonienne des victimes du Mairi Maru

Le principe de la protection diplomatique exige, dans un premier temps, l'existence d'un lien de nationalité entre la victime et l'État réclamant réparation.[49] En fait, dans l'affaire Barcelona Traction, la Cour a dit que « c'est le lien de nationalité entre l'État et l'individu qui seul donne à l'État le droit de protection diplomatique ».[50] Il a été établi que les survivants et les familles des victimes du *Mairi Maru* sont des citoyens d'Appollonia d'où la présence d'un lien de nationalité.[51] La même logique est applicable pour les entreprises commerciales propriétaires ainsi que les assureurs du navire, lesquels sont enregistrés et basés à Appollonia.[52]

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[47] *Affaire Mavrommatis*, C.P.J.I., Série A, No. 2, 12 (1924).

[48] I. Brownlie, *supra* note 45 par. 522.

[49] *Affaire relative à la Conventionne de Vienne sur les relations consulaires,* (Allemagne c. Etats-Unis d'Amérique), C.I.J., 3 mars 1999

[50] *Affaire Barcelona Traction* (Belgique c. Espagne) C.I.J. (1970) 290-4.

[51] *Compromis* par. 30.

[52] *Compromis* par. 31; K.E. Sealing, « State Sponsors of Terrorism are Entitled to Due Process Too: The Amended Foreign Sovereign Immunities Act is Unconstitutional », 15 Am. U. Int'l. L. Rev. 395, p.401.

2. Dommages subis par les citoyens d'Appollonia

La deuxième condition pour invoquer le droit à la protection diplomatique est la nécessité d'avoir subi un dommage. En l'espèce, deux types de dommages ont été subis : (1) matériel et; (2) moral.

Les sociétés commerciales propriétaires appolloniennes ainsi que les assureurs du *Mairi Maru* ont subi des dommages matériels se chiffrant à approximativement 15 millions d'euros en monnaie locale.[53] Cette perte matérielle inclut la perte du navire due à l'attaque, le naufrage et le sabordage par la Royal Navy et la perte de la cargaison incluant le coffre-fort et le MOX.[54]

De plus, les dommages subis par les survivants et les familles des victimes de l'équipage du *Mairi Maru* sont tant moral que matériel. Plusieurs des survivants ont été diagnostiqués comme souffrant d'irradiation aigue due à l'exposition au MOX.[55] Et les familles dont les membres ont péri à bord du *Mari Maru* ont subi un dommage moral.[56]

3. Épuisement des recours internes par les citoyens d'Appollonia

La troisième condition à considérer lorsqu'on applique le principe de la protection diplomatique provient du droit coutumier. La coutume veut que les États tentent de régler leurs différends au niveau national avant de saisir un tribunal international.[57]

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[53] *Compromis* par. 30.

[54] *Ibid.* par. 18.

[55] *Ibid.* par. 20.

[56] R. Sullivan, « Challenges of Interpreting Multilingual, Multijural Legislation », 29 Brook. J. Int'l L. 1009, p.1048.

[57] J. Chappez, *La règle de l'épuisement des voies de recours internes*, Pedone, Paris, 1972, p.28.

Les faits de la présente cause démontrent que les propriétaires et assureurs du *Mairi Maru* ont intenté une poursuite contre le gouvernement du Raglan, d'abord devant un tribunal civil raglanien et, ensuite devant la Cour suprême du Raglan. Dans les deux cas, la requête fut jugée irrecevable en vertu du principe de l'immunité judiciaire des forces armées raglaniennes.[58] Lorsque les membres survivants de l'équipage du navire et les familles concernées ont intenté une poursuite similaire, les tribunaux raglaniens ont rejeté les recours pour les mêmes raisons.[59]

4. L'Appollonia a droit à la réparation

Un des principes fondamentaux du droit international est que dès qu'un État commet un acte illicite à l'égard d'un autre État, la responsabilité internationale est établie.[60] Ainsi, la violation d'une obligation internationale exige réparation.[61] Les articles 1, 2 et 3 du projet d'articles sur la responsabilité étatique de la Commission du droit international réaffirment la règle selon laquelle la commission d'un acte illicite engage la responsabilité des Etats.[62] Ce principe a également été reconnu dans *l'Affaire Chorzow Factory* où la Cour a dit : « it is a principle of international law, and even greater conception of law, that any breach of an engagement involves an obligation to make reparation ».[63] Nous avons déjà établi que le comportement du Raglan a mené à l'attaque, au naufrage et au sabordage du *Mairi Maru* et

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[58] *Compromis* par. 30.

[59] *Ibid.* par 31.

[60] Nguyen Quoc Dinh, P. Daillier and A. Pellet, *Droit international public*, Librairie générale de droit et de jurisprudence, Paris, 1994,) p. 794.

[61] Malcolm N. Shaw, *International Law*, Cambridge University Press, Cambridge, 1997, p. 541.

[62] *Ibid.* p.62.

[63] *Affaire Chorzow Factory*, (Allemagne c. Pologne), (indemnité) (Mérites), (1928), C.P.I.J. série A. no.17.

constituent des actes illicites. Ainsi, le Raglan devra être tenu de réparer les dommages subis tant au niveau matériel que moral.

En premier lieu, en conformité avec la jurisprudence, le principe de *restiutio in integrum* s'applique : ainsi les dommages subis à la fois par les sociétés et assureurs du navire devront être réparés.[64] L'Appollonia demande que le Raglan répare le préjudice subi sous la forme de la perte du navire et de sa cargaison, lequel se chiffre à approximativement 15 millions d'euros.

En deuxième lieu, il a été bien établi en droit international que le *damnum emergens* résultant directement d'un acte illicite doit être réparé par l'État responsable.[65] Ainsi, plusieurs arrêts appuient la règle de la réparation pour le préjudice subi par la perte de revenu pécunier futur.[66] Appollonia demande au Raglan réparation pour le préjudice subi par les survivants et les familles concernées pour les pertes de revenus à venir.

Nous réitérons, tant pour les dommages matériels que moraux, le principe selon lequel « la réparation doit autant que possible effacer toutes les conséquences de l'acte illicite et rétablir l'état qui aurait vraisemblablement existé si cet acte n'avait pas été commis ».[67]

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[64] *Affaire Chorzow Factory*, *supra* note 63.

[65] N. Quoc Dinh, *supra* note 60, p.583.

[66] Brigitte Bollecker-Stern, *Le préjudice dans la responsabilité internationale*, Éditions Pedone, Paris, 1973, p.220.

[67] D. Ruzé, *Droit international Public*, Éditions Dalloz, Paris, 2004, p.100.

III. RAGLAN DOES NOT HAVE STANDING TO SEEK COMPENSATION FOR ECONOMIC LOSSES RESULTING FROM ACTS THAT OCCURRED WHOLLY OUTSIDE OF ITS TERRITORIAL WATERS AND EXCLUSIVE ECONOMIC ZONE

A) The Norton Shallows cannot form a basis for the territorial jurisdiction of Raglan

1. The Norton Shallows are terra nullius

Raglan's territorial jurisdiction does not extend to the Norton Shallows. The said area is a group of uninhabited islands, unclaimed by any nation[68], and as such, qualifies as *terra nullius*.[69]

While it is known that private Raglanian firms conduct touristic activities in the sandbars, there is no evidence the Raglanian government ever appropriated them. A state acquires territory not already forming part of the dominions of any other state through effective occupation[70]. Discovery or economic exploitation alone do not suffice to establish a legal title.

The Permanent Court of International Justice has asserted that sovereignty over territory requires the proof of two elements: the intention and will to act as sovereign, and the exercise of such authority.[71] This authority has been defined as encompassing a lawful power to define and enforce rights and duties. It also includes the control of conduct of natural and juridical persons[72].

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[68] *Special Agreement* at para. 2 and 19

[69] Bryan A. Garner (ed.), *Black's Law Dictionary*, 7th ed. (St.Paul, Minnesota: 1999) at "res nullius"; Eric Aristide Belgrad, *The Theory and Practice of Prescriptive Acquisition in International Law* (Ann Arbor, MI: University Microfilms, Inc., 1969) at 27.

[70] *Legal Status of Eastern Greenland (Denmark v. Norway)* (1933) P.C.I.J. (ser. A/B) No. 43, at 45-46; *Case concerning Western Sahara*, Advisory Opinion, [1975] I.C.J. Rep. 12 ; Seokwoo Lee, "Continuing Relevance of Traditional Modes of Territorial Acquisition in International Law and a Modest Proposal", 16 *Conn. J. Int'l. L.* 1, 3-6

[71] *Legal Status of Eastern Greenland*, *supra* note at 45; *Western Sahara supra* note 45 at 43.

From the facts available at hand, it can clearly be deduced that the Republic of Raglan never undertook such measures over the Norton Shallows through the exercise of legislative, executive, or penal authority Absent such evidence, and as long as the Republic of Raglan does not effectively occupy, take possession of, and establish an administration over, the Norton Shallows, the sandbars remain *terra nullius* and cannot be said to be under Raglanian territorial jurisdiction.

2. Raglan suffers from damages to its interests and not to its rights, and as such, cannot demand compensation from Appollonia

Appollonia accepts and recognizes the principle stated by the International Court of Justice [hereinafter ICJ] in the *Chorzów Factory* case that any breach of an engagement involves an obligation to make reparation.[73] However, Appollonia respectfully submits that this principle is inapplicable in the present case due to the fact that the Kingdom of Raglan has no territorial jurisdiction on the area damaged by the MOX leakage, and therefore cannot argue that its rights were violated. The Respondent confuses its economic interests in the tourism industry of the Norton Shallows with territorial rights it clearly has never legally acquired.

A legal damage can be said to exist as a source of international responsibility only if the violation of a legal right has occurred.[74] The International Court of Justice has asserted that

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[72] L. Oppenheim, *International Law: A Treatise*, 7th ed. by H. Lauterpacht, vol. 1 (London: Longmans, Green and Co., 1952), at 506-514; Julio A. Barberis, "Jurisdiction of States" in Rudolf L. Bindschedler et al. (ed.), *Encyclopedia of Public International Law*, vol. 10, (Amsterdam: North-Holland, 1987) at 277-282; Garner, *supra* note 2, at "jurisdiction".

[73] *Case concerning the Factory at Chorzów*, (1928) P.C.I.J. (ser. A) No. 17, at 29.

[74] Attila Tanzi, "Is Damage a Distinct Condition for the Existence of an Internationally Wrongful Act?", in Marina Spinedi and Bruno Simma, *United Nations Codification of State Responsibility*, (New York: Oceana Publications, 1987) at 11-13

injury in respect of a right and injury to a simple interest are two distinct ideas:[75] "Not a mere interest affected, but solely a right infringed involves responsibility…"[76] Therefore, in order to be granted *locus standi*, Raglan must invoke the violation of one of its substantive interests, namely, an interest protected by a legal right[77]. Since Raglan never asserted sovereignty and dominion over the Norton Shallows, it cannot be considered as exercising a legal right on the sandbars.

In sum, the legal status of the Norton Shallows as *terra nullius* and their location beyond the scope of Raglanian territorial jurisdiction exclude the Kingdom of Raglan from demanding any compensation for damage resulting from the leaking of MOX by the vessel *The Mairi Maru*.

IV. APPOLLONIA DID NOT VIOLATE ANY OBLIGATIONS OWED TO RAGLAN UNDER INTERNATIONAL LAW IN TRANSPORTING MOX THROUGH THE WATERS OF THE RAGLANIAN ARCHIPELAGO

A) Appollonia benefits from a right of archipelagic sea-lanes passage

1. Archipelagic sea lanes are regulated by the same legal regime as international straits

In accordance with international customary and conventional law, foreign vessels are permitted a right of passage in a variety of maritime zones under coastal State control[78]. The

[75] *Barcelona Traction, Light and Power Co. Ltd. (Belgium v. Spain)* , [1980] I.C.J. Rep. 3, at para. 44-46; Pierre-Marie Dupuy, *Droit international public*, 5th ed., (Paris : Dalloz, 2000) at 455-456.

[76] *Barcelona Traction, Light and Power Co. Ltd.* , *supra* note 75, at para. 46; Nguyen, *supra* note 60 at 766-767.

[77] Tanzi, *supra* note 74, at 13.

[78] *United Nations Convention on the Law of the Sea*, December 10 1982, 1833 U.N.T.S. 3, art. 17, 45, 52, 53 [hereinafter *UNCLOS*]

waters of the Republic of Raglan are regulated by two distinct regimes[79]. The first regime pertains to archipelagic waters. Those waters are enclosed within the baselines connecting the outermost points of the outermost islands of the archipelago.[80] *The Mairi Maru* had not planned to traverse these archipelagic waters[81].

The intended route of *The Mairi Maru* passed through Raglan's waters by use of sea lanes specifically designated by Raglan for the passage of foreign ships.[82] These archipelagic sea lanes are regulated by provisions distinct from those pertaining to archipelagic waters.[83] The most important of these differences is set out in Article 54 of UNCLOS, which states that the duties of ships during their archipelagic sea lanes passage and the duties of the archipelagic State relating to archipelagic sea lanes passage are governed *mutatis mutandis* by Articles 30, 40, 42 and 44 concerning international straits. The intended voyage of *The Mairi Maru* must therefore be considered as if it were a passage through international straits.

2. The right of passage through archipelagic sea lanes cannot be suspended

Pursuant to Article 54 of UNCLOS, navigational rights are considerably broader in archipelagic sea lanes than they are in archipelagic waters. Foreign vessels enjoy a right to innocent passage in archipelagic waters in the same manner they would in territorial seas.[84] Ships are consequently bound by an obligation to abstain from harming the coastal State or threatening

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[79] René-Jean Dupuy and Daniel Vignes, eds., *A Handbook on the New Law of the Sea*, vol. 2 (Dordrecht: Martinus Nijhoff Publishers, 1991) at 957.

[80] *UNCLOS* art. 47 (1).

[81] *Special Agreement Clarification* No. 10.

[82] *Ibid.*

[83] *UNCLOS* art. 53.

[84] *UNCLOS* art. 19.

its peace, good order or security,[85] failing which the coastal State may temporarily suspend innocent passage, albeit after due publicity and without discrimination.[86]

The right of innocent passage must be contrasted with the right of transit, which is the regime applicable in the case at hand. Doctrine has come to recognize the latter as an autonomous institution of passage, or alternatively, as a compromise between the principle of freedom of navigation and the right of innocent passage.[87] The right of transit is so liberal that it has been equated, in peacetime at least, to high seas passage[88].

The corollary to the aforementioned interpretations is that the right of transit through archipelagic sea lanes is so crucial to international navigation that coastal States cannot suspend it.[89] This rule was recognized as international custom by the International Court of Justice [hereinafter ICJ] in the *Corfu Channel Case*.[90]

While Raglan argues that it would have denied *The Mairi Maru* passage had it known in advance of Appollonia's plans to ship MOX through its archipelagic waters,[91] Appollonia

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85 *UNCLOS* art. 14; Francis Ngantcha, *The Right of Innocent Passage and the Evolution of the International Law of the Sea* (London: Pinter Publishers, 1990) at 47; D.P. O'Connell, *The International Law of the Sea*, vol.1 (Oxford: Clarendon Press, 1982) at 272; Clive Ralph Symmons, *The Maritime Zones of Islands in International Law* (The Hague: Martinus Nijhoff Publishers, 1979) at 75.

86 *UNCLOS* art. 52.

87 Dupuy and Vignes, *supra* note at 960; O'Connell, *supra* note at 314; Arnd Bernaerts, *Bernaert's Guide to the 1982 United Nations Convention on the Law of the Sea* (Coulsdon, Surrey, England: Fairplay Publications Ltd., 1988) at 32.

88 O'Connell, *supra* note 85 at 327.

89 *UNCLOS* art. 44.

90 *Corfu Channel case (United Kingdom v. Albania)*, [1949] I.C.J. Rep. 4 at 28; Ngantcha, s*upra* note 85 at 80-81; O'Connell, *supra* note 85 at 314-317.

submits that in accordance with UNCLOS provisions, international customary law, and ICJ caselaw, Raglan was at no liberty to do so. International law guarantees a right of archipelagic sea lanes passage to ships regardless of their cargo or means of propulsion.[92] Even though *The Mairi Maru* was carrying ultrahazardous substances, absent any serious harm, the Respondent did not have discretion or authority to deprive the vessel of its right of passage.[93] If a right of innocent passage is recognized to nuclear-powered ships and ships carrying hazardous substances in territorial waters, *a fortiori* the navigational right recognized to the same category of ships must be equal if not broader in a maritime zone governed by a more liberal legal navigational regime.[94]

Appollonia cannot be deemed to have violated any obligation owed to Raglan since it was exercising a right with the full respect of conventional stipulations. In effect, it reasonably expected that the Republic of Raglan was bound by its own obligation not to hamper, deny, impair or suspend the right of passage as it was exercised by *The Mairi Maru*.[95]

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[91] *Special Agreement* at para.22.

[92] Raul A. F. Pedrozo, "Transport of nuclear cargoes by sea" (1997) 28 J. Mar. L. & Com. 207 at 223.

[93] Maki Tanaka, "Lessons from the protracted MOX plant dispute: a proposed protocol on marine environmental impact assessment to the United Nations Convention on the Law of the Sea" (2004) 25 Mich. J. Int'l L. 337at 350.

[94] *UNCLOS* art 23.

[95] *UNCLOS* art. 24, 44.

B) Appollonia did not owe duties to inform, consult and/or obtain approval from Raglan regarding its passage

1. Duties of consultation, notification and/or obtention of approval are not codified and are not recognized as binding international customs

In defense of its right to carry MOX via Raglan's archipelagic sea lanes, Appollonia points out that many publicists recognize that the duties associated to and deriving from, the precautionary principle do not yet amount to a rule of positive international law.[96] Indeed, the precautionary principle is not popularly accepted or old enough to be custom.[97] In other words, the status of the duty to inform, consult and obtain prior approval has not yet risen to a norm of customary international law because it is relatively novel.

Appollonia's belief is further reinforced by the fact that UNCLOS, the leading convention on the law of the sea, lacks any explicit reference to prior notification and consultation.[98] The closest related provision, Article 198, requires the notification of affected States and international organizations in case of "imminent or actual damage". Clearly, this refers to situations of temporal urgency where pollution is either impending or has already occurred. It creates a duty of prompt notification in the event of emergency, and not a duty of prior notification.[99] Consequently, Article 198 can be distinguished from the case at hand and

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[96] Lawrence Marin, "Oceanic Transportation of radioactive materials: the conflict between the law of the seas' right of innocent passage and duty to the marine environment" (2001)13 Fla. J. Int'l L. 361 at 374-375; Allen L. Springer, *The International Law of Pollution : Protecting the Global Environment in a World of Sovereign States* (Westport, CT: Quorum Books, 1983) at 146-152.

[97] Marin, *supra* note 96 at 374-375.

[98] Tanaka, *supra* note 93 at 357; Jon M. Van Dyke, "Sea shipment of Japanese plutonium under international law" (1993) 24 Ocean Devel. & Int'l L 399 at 408; Pedrozo, *supra* note 92 at 236.

cannot in any way be said to have bound Appollonia to a duty of notifying, consulting and/or obtaining approval.

2. Appollonia and Raglan have established a prior course of dealings whereby consultation, notification, and/or prior approval are not required

As per the cable sent by the Foreign Ministry of Appollonia to its counterpart in Raglan, the shipment of MOX carried by *The Mairi Maru* was not the first shipment of its kind to traverse the Raglanian archipelago.[100] *The Mairi Maru* alone had effectuated this voyage with similar cargo six (6) times.[101] Although Raglan was not ignorant of this practice, it nevertheless never objected in the past.[102]

Raglan's failure or omission to object must be analyzed through the prism of the principle of tacit consent as it is recognized by international law.[103] In various legal contexts, qualified silence such as that of the Respondent in the case at hand has been equated to consent.[104] In other words, if a State does not openly and expressly object to the development of a usage or

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[99] Jon M.Van Dyke, "Applying the Precautionary Principle to Ocean Shipments of Radioactive Materials" (1996) 27 Ocean Devel. & Int'l L 379 at 382; Tanaka, *supra* note 93 at 357.

[100] *Special Agreement*, at para. 29.

[101] *Special Agreement Clarification* No. 11.

[102] *Special Agreement*, at para. 29.

[103] Charles Rousseau, *Principes du droit international public*, vol.1 (Paris: Éditions A. Pedone, 1944) at 828; Hersch Lauterpacht, *International Law*, E. Lauterpacht, ed., vol. 3 (Cambridge: Cambridge University Press, 1977) at 161-162.

[104] *Case concerning the Temple of Preah Vihear (Cambodia v. Thailand)*, [1962] I.C.J. Rep.6; *Case concerning the right of passage over Indian Territory (Portugal v. India),* [1960] I.C.J. Rep. 6; *Case concerning Anglo-Norwegian fisheries (United Kingdom v. Norway)*, [1951] I.C.J.116.

practice, it may be said to have given its implicit consent to that usage or practice.[105] The weight of tacit consent is such that it can even modify or supersede treaties.[106]

Inasmuch as the Respondent was aware of the carriage of MOX fuel through its archipelagic waters, it is clear from the facts available at hand that it did not at any point take advantage of the persistent objector rule. Indeed, had Raglan opposed the Applicant's practice consistently and without interruption[107], Appollonia may have complied with its neighbor's demands to obtain approval.

Significantly however, the Respondent formulated its objection to the shipment of MOX only after *The Mairi Maru*'s accident. The objection was voiced too late to affect the presumption of acquiescence on Raglan's part.[108] Consequently and in light of the demonstrated chronology, the Respondent should not be permitted to invoke its own error, omission, willful blindness, or belatedness as invalidating its consent to Appollonia's practice.[109]

It is submitted that Raglan's behavior reveals tacit consent to the situation and that furthermore, it is unable to invoke the available defenses to vitiate such consent. The Applicant is therefore justified in believing that a prior course of dealings has developed between Raglan

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[105] *Case concerning the delimitation of the maritime boundary in the Gulf of Maine area (Canada v. United States)*, [1984] I.C.J. Rep. 246 at 305; Jianming Shen, "The Basis of International Law: Why Nations Observe" (1999) 17 Dick. J. Int'l L. 287 at 314-318.

[106] Daniel Bodansky, et al., "The ILC's Articles on Responsibility of States for Internationally Wrongful Acts: A Retrospect" (2002) 96 A.J.I.L. 874 at 886.

[107] David P. Fidler, "Dinosaur, Dynamo, or Dangerous? Customary International law in the Contemporary International System" in Ellen G. Schaffer and Randall J. Snyder, ed., *Contemporary Practice of International Law* (Dobbs Ferry: Oceana, 1997) 40 at 64-65; Jon M. Van Dyke, *supra* note 99 at 379 and 386.

[108] *Case concerning land, island and maritime frontier dispute (El Salvador v. Honduras, Nicaragua intervening)*, [1992] I.C.J. Rep. 351 at 577.

[109] *Case concerning the Temple of Preah Vihear*, *supra* note 104 at 26; *Vienna Convention on the Law of Treaties*, *supra* note 42 at art. 48.

and itself whereby Appollonia is not required to consult with, obtain approval from, or inform Raglan of its MOX shipments.

3. Appollonia demonstrated due diligence

Despite not needing to obtain Raglan's approval, and despite its quasi-absolute right of transit through archipelagic sea lanes, Appollonia's conduct prior and during the carriage of MOX is nonetheless indicative of its diligence. The use of a double-hulled vessel for the shipment points to an awareness by the Applicant that single-hulled tankers are less safe and subject to more stringent inspection and regulation by States.[110] The shipmaster's careful planning of the vessel's course, his notification to the IAEA, and his request for escort from the Respondent's Navy equally prove Appollonia's diligence.[111]

The Applicant asserts that it took every measure necessary to prevent the potential harm in accordance with the precautionary principle.[112] Additionally, Appollonia at all times until its hijacking, acted in observance of Principle 21 of the Stockholm Declaration and Principle 2 of the Rio Declaration, both of which stipulate that States are obligated not to cause environmental

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[110] *International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978 relating thereto (MARPOL 73/78)*, Annex ; Jon M. Van Dyke, "Balancing Navigational Freedom with Environmental and Security Concerns" (2003) 14 Colo. J. Int'l Envtl. L. & Pol'y 19 at 23-24.

[111] *Compromis* at para. 15-16.

[112] Mary Elliott Rollé, "Unraveling accountability: contesting legal and procedural barriers in international toxic tort cases" (2003) 15 *Geo. Int'l Envtl. L. Rev.* 135 at 190-191

harm.[113] In light of the above, Raglan cannot pretend that Appollonia breached a duty of care, *ergo* it cannot establish a cause of action in negligence.

Appollonia stresses and reiterates the fact that the leaking of MOX was caused through no volition of its own but by an intervening third party attack. It further contends that its obligations to the Kingdom of Raglan did not extend beyond that which encompassed the general duty of due diligence. Appollonia therefore pleads its duty of care is fulfilled and considers itself to be relieved from liability towards Raglan.

Appollonia has fulfilled its obligations with due diligence *erga omnes*. Its obligations towards Raglan were limited due to the existence of a right of transit through archipelagic waters. Appollonia further considers itself exempt from any responsibility towards Raglan due to the fact that third party actions intervened in the classic causality between act and injury. These facts and arguments are germane to this case and paramount in the consideration of the events surrounding *The Mairi Maru*.

[113] *Stockholm Declaration of the United Nations Conference on the Human Environment*, June 16, 1972, Principle 21, U.N. Doc. A/CONF.48/14/Rev.1 (1973), 11 I.L.M. 1416 at 1420; *Rio Declaration on Environment and Development*, June 13, 1992, Principle 15, U.N. Doc. A/CONF.151/26 (vol. I), 31 I.L.M. 874 at 879.

CONCLUSIONS AND PRAYER FOR RELIEF

For all the aforementioned reasons argued in this Memorial, the Republic of Appollonia respectfully requests that this honorable Court:

1. **Declare** that Raglan is responsible for the attack upon and wreck of *The Mairi Maru* and all consequences thereof in virtue of its failure to respond appropriately to pirate activities in its archipelagic waters and the acts of Thomas Good, which are imputable to Raglan;
2. **Declare** that Raglan is responsible for the loss of *The Mairi Maru* and the MOX and other cargo that she carried, because its scuttling of the vessel was illegal, and therefore owes compensation to Appollonia on behalf of its citizens who suffered direct financial and other losses;
3. **Declare** that Raglan does not have standing to seek compensation for economic losses resulting from acts that occurred wholly outside of its territorial waters and exclusive economic zone; and
4. **Declare** that Appollonia did not violate any obligations owed to Raglan under international law in transporting MOX through the waters of the Raglanian Archipelago.