IN THE INTERNATIONAL COURT OF JUSTICE

AT THE PEACE PALACE
THE HAGUE, THE NETHERLANDS

THE CASE CONCERNING QUESTIONS RELATING TO A NUCLEAR ACCIDENT AND SOVEREIGN DEBT

THE FEDERAL STATES OF AMUKO,
APPLICANT

v.

THE REPUBLIC OF RENTIERS,
RESPONDENT

MEMORIAL FOR THE RESPONDENT

THE 2011 STETSON INTERNATIONAL ENVIRONMENTAL MOOT COURT COMPETITION

NOVEMBER 2011

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STATEMENT OF JURISDICTION

The Republic of Rentiers and the Federal States of Amuko, by special agreement pursuant to Article 40, paragraph 1, of the Statute of the International Court of Justice, hereby submit this dispute to the International Court of Justice for resolution. Statute of the International Court of Justice, art. 40, T.S. No. 993 (1945). The parties signed said special agreement and submitted it to the Registrar of the Court on June 6, 2011, and the Registrar addressed notification to the parties on June 20, 2011. *See* Special Agreement Between The Federal States of Amuko and the Republic of Rentiers for Submission to the International Court of Justice of Differences Between Them Concerning Questions Relating to a Nuclear Accident and Sovereign Debt, June 6, 2011.

QUESTIONS PRESENTED

I. **WHETHER RENTIERS OWES REIMBURSEMENT TO AMUKO FOR PAYMENTS MADE PURSUANT TO THE ROBELYNCH COMPENSATION FUND.**

II. **WHETHER THE ACTIONS OF RENTIERS AS TO ITS SOVEREIGN BONDS WAS CONSISTENT WITH INTERNATIONAL LAW.**

STATEMENT OF FACTS

The Republic of Rentiers ("Rentiers") and the Federal States of Amuko ("Amuko") share a common border. (R.6). Both are industrialized countries with highly diversified economies. (R.6). Rentiers has a population of approximately 70 million. (R.6). Rentiers lacks natural resources and relied on nuclear power for 75% of its electricity production until recently. (R.6). Amuko has a population of approximately 10 million and its economy is known for its financial sector. (R.6). Nuclear power constitutes 25% of its electricity production. (R.6).

Amuko investment companies purchased approximately 3 billion tenge (the currency of Rentiers) of sovereign bonds issued by Rentiers: 1 billion tenge in November 2000, and 2 billion tenge in November 2005, all with a maturity date of November 30, 2010. (R.6). One tenge is equal to one euro. (R.6). The two countries signed the Rentiers-Amuko Bilateral Business Investment Treaty (RABBIT) in March 2002. (R.7).

On February 5, 2010, an earthquake struck along the Diablo Canyon fault line, running through central Rentiers. (R.6, 8). Significant damage resulted in the Nihon, Rentiers, including damage to one of two reactors at the Nihon Nuclear Power Plant. (R.8). The damaged reactor had a partial meltdown and the containment building was irradiated. (R.8). The Rentiers Nuclear Regulatory Agency (RNRA) assumed control and discovered a leak in spent fuel rod storage pools. (R.9). On February 8, 2010, Rentiers requested that Amuko assist by removing fuel rods from the pools and transporting them to a more secure storage facility in Amuko. (R.9).

Amuko responded, but on February 12, 2010, a vehicle carrying the fuel rods crashed in Amuko due to the driver's negligence, killing the driver and a security guard. (R.9). Radioactive gases and particles were released into the environment, and Amuko ordered the village of Robelynch, located two kilometers from the crash site, evacuated. (R.9). The Amuko Congress subsequently established a compensation fund for citizens affected by the crash. (R.9-10).

Amuko requested that Rentiers reimburse Amuko for payments made through the fund, but Rentiers contested its obligation. (R.10-11).

After the earthquake, RNRA inspected the rest of Rentiers' nuclear plants. Finding that five plants near the Diablo Canyon posed an unreasonable risk to human health and the environment in the even of another earthquake, RNRA ordered these plants closed, resulting in rolling blackouts throughout Rentiers. (R.11).

On November 24, 2010, the President of Rentiers announced that the earthquake and power plant closure had damaged the Rentiers economy to the point that Rentiers would default on its bonds, resulting in a 20% decline in the stock market. The Rentiers Parliament enacted the Fresh Start Act on December 1, 2010, restructuring the bonds so that investors would receive 10% of what they would have been entitled to otherwise. (R.11-12). The affected investors, including Amuko investment companies, sought compensation in the Rentiers domestic courts, and their claims were denied. (R.13).

The parties, unable to resolve the dispute, agreed to submit the matter to the International Court of Justice. (R.13).

SUMMARY OF ARGUMENTS

Amuko is not entitled to reimbursement for payments made pursuant to the Robelynch compensation fund. The IAEA Assistance Convention does not provide compensation for damages occurring outside the territory of the requesting State, nor for reimbursement to an assisting State for payments it makes voluntarily. Nor does customary law entitle Amuko to reimbursement, because Rentiers exercised all due diligence in relation to the Nihon plant.

Rentiers' bond actions were consistent with international law. Under treaty and customary international law, the actions are not an expropriation as they did not destroy investors' rights under the bonds and did not contravene the investors' legitimate expectations. Even if the bond actions were an expropriation, they were necessary to protect Rentiers' economy from a grave and imminent peril. Necessity precludes the international wrongfulness of the actions and does not require compensation.

ARGUMENT

I. RENTIERS IS NOT RESPONSIBLE FOR AMUKO'S EXPENSES RELATED TO THE ROBELYNCH NUCLEAR WASTE SPILL.

A. RENTIERS IS NOT RESPONSIBLE FOR AMUKO'S EXPENSES UNDER THE IAEA ASSISTANCE CONVENTION.

According to the Vienna Convention on the Law of Treaties, which binds this Court, treaties are to be interpreted in good faith in accordance with the ordinary contextual meaning of their terms.[1] While Amuko claims it is entitled to reimbursement under the IAEA Assistance Convention,[2] neither the plain language nor purpose of the convention support its position.

1. The treaty precludes imposing liability for extraterritorial damages on a requesting State.

Amuko's claimed damages are expressly excluded from compensation under Article 10 of the Assistance Convention. That article mandates that a requesting State shall hold an assisting State harmless[3] and provide certain compensation[4] "in respect of death or of injury to persons, damage to or loss of property, or damage to the environment caused within its territory or other area under its jurisdiction or control in the course of providing the assistance

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[1] Vienna Convention on the Law of Treaties, art.31(1), May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT]. This Court is directed to apply international conventions and custom and general recognized principles of law by Article 38 of the Statute of the International Court of Justice. Statute of the International Court of Justice, art. 38, T.S. No. 993 (1945) [hereinafter ICJ Statute].

[2] International Atomic Energy Agency, Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency, *opened for signature* Sep. 26, 1986, 1457 U.N.T.S. 133 [hereinafter Assistance Convention].

[3] *Id.*, art. 10(2)(a).

[4] *Id.*, art. 10(2)(b)-(d).

requested."[5] Amuko's claimed damages are not compensable, because they occurred outside Rentiers' territory, jurisdiction, and control.

Amuko argues that the phrase 'within its territory' only applies to environmental damage, but this interpretation is not reasonable in context. The third and final clause of the sentence in question contains three legal statements: "damage to the environment," "caused within its territory or other area under its jurisdiction or control" (the "territorial restriction"), and "in the course of providing the assistance requested" (the "relation restriction"). If the territorial restriction applies only to environmental damage, then the relation restriction applies only to environmental damage as well: The restrictions are syntactically identical, and treating them differently would be purely arbitrary. Amuko's interpretation would render a requesting party liable for all legal actions brought against an assisting state by any person, regarding any personal or property damages, forever. It also would forever bar the requesting State from bringing any legal action of any kind against the assisting State. This absurd result could not be what the signatories to the Assistance Convention intended.[6]

While Amuko argues that this "restrictive interpretation" would discourage states from asking for assistance under the convention, the same argument could be made about any restriction on the indemnity provided by the Convention. If the signatories intended to provide maximal indemnity, they would have omitted the territorial restriction, rather than arbitrarily limiting it to environmental damage. Amuko's interpretation would eviscerate the Convention, imposing an impossible burden on a requesting States, such that no State would ever request

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[5] *Id*., art. 10(2).

[6] *See also* A. O. ADELE, THE IAEA NOTIFICATION AND ASSISTANCE CONVENTIONS IN CASE OF A NUCLEAR ACCIDENT: LANDMARKS IN THE MULTILATERAL TREATY-MAKING PROCESS 101 (1987) (draft on which final language was based did not consider environmental damage, but did apply territorial restriction to personal and property damage).

assistance. The territorial restriction should therefore be applied to personal, property, and environmental damage, thus barring Amuko's claim.

2. No compensable "proceedings or claims" were brought against Amuko.

Even if recovery was not barred by the territorial restriction, Amuko would not be entitled to reimbursement for the Robelynch recovery fund, because no "legal proceeding or claim" was ever brought against Amuko.[7] Article 10 of the Assistance Convention only requires a requesting state to:

> (b) assume responsibility for dealing with legal proceedings and claims brought by third parties against the assisting party or against persons or other legal entities acting on its behalf; [and]
> (c) hold the assisting party or persons or other legal entities acting on its behalf harmless in respect of legal proceedings and claims referred to in sub-paragraph (b).[8]

The Amuko Congress established the Robelynch Compensation Fund before any legal action could be brought by any person against the State of Amuko. Instead, Amuko seeks reimbursement for the funds it has voluntarily disbursed through the compensation fund. Such disbursements are not discussed in the Assistance Convention, and need not be reimbursed by the requesting nation.

Amuko's position would require this court to treat the disbursement of funds from the compensation funds as "legal proceedings" or "claims." To do so would be inconsistent with the legal meanings of those terms, and further would create an incentive for assisting States to improperly inflate their damages through post-hoc legislation. While neither "legal proceeding" or "claim" are defined in the treaty, Black's Law Dictionary defines "legal proceeding" as "[a]ny

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[7] Rentiers concedes that if the territorial restriction did not apply to personal injuries, Amuko would be owed some amount of compensation for the death of its driver under the Assistance Convention, art. 10(2)(d).

[8] *Id.*, art. 10(2)(b)-(c).

proceeding authorized by law and instituted in a court or tribunal to acquire a right or to enforce a remedy."[9] "Claims" are "1. … a right enforceable by a court," "2. The assertion of an existing right … to payment or to an equitable remedy, even if contingent or provisional," or "3. A demand for money, property, or a legal remedy to which one asserts a right."[10] The payments in question were affirmatively made by the government without court order. The beneficiaries of the compensation fund had no right to that money; it was granted at the discretion of the Congress of Amuko subsequent to the accident in question. No definition of "legal proceeding" or "claim" would include these payments.

Even if disbursements from the fund were considered "claims," they would not be the type of claim compensable under the Assistance Convention, because such disbursements are not claims "against" Amuko. The word "against" implies an adversarial proceeding. Conversely, Amuko has affirmatively provided compensation to the citizens of Robelynch.[11] By design,[12] an assisting State's right to reimbursement for a claim[13] comes only subsequent to the Requesting State's right to "deal with" that claim.[14] If the residents of Robelynch had brought legal proceedings against Amuko, Rentiers would have had the right and responsibility to "deal with" those proceedings by defending Amuko in court, possibly establishing that no payments were

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[9] BLACK'S LAW DICTIONARY 915 (8th ed. 2004).

[10] *Id.* at 264.

[11] *See also* NICOLAS DE SADELEER, ENVIRONMENTAL PRINCIPLES 59 (2002) ("The notion of liability is totally absent from the idea of such liability funds, which are based on solidarity rather than liability.")

[12] ADELE, *supra* note 6, at 104.

[13] Assistance Convention, art. 10(2)(c).

[14] *Id.*, art. 10(2)(b).

due.[15] Because Amuko denied Rentiers the right to contest the appropriateness of Amuko's disbursements, Amuko cannot now demand reimbursement for those disbursements.

Finally, even if the right to reimbursement did apply to non-adversarial proceedings, it could not have been intended to apply to non-adversarial proceedings instituted under a law enacted after the incident in question. This would grant an assisting State unlimited, arbitrary access to a requesting State's treasury. Taken to its logical conclusion, Amuko's argument creates an incentive for assisting States to manufacture minor, harmless nuclear releases on their own territory during the course of assistance, specifically for the purpose of creating and demanding reimbursement for artificially generous benefit programs.

Rentiers does not accuse Amuko of intentionally inflating the compensation program benefits, but notes that Amuko has offered no evidence that life-long medical testing is medically necessary based on its citizens' actual exposure, that permanent evacuation of Robelynch was necessary, or that the compensation fund's monetary awards are reasonably related to the actual damages incurred.[16] Deciding whether such payments are reasonable, now and in the future, would unreasonably burden the court. For these reasons, post-hoc compensation programs cannot be compensable under the Assistance Convention.

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[15] *See* ADELE, *supra* note 6, at 104.

[16] The Vienna Convention on Civil Liability For Nuclear Damage, art. I(1)(k)(iii)-(vi), *concluded* May 21, 1963, 1063 U.N.T.S. 265, *amendment concluded* Sep. 12, 1997, 2241 U.N.T.S. 270, extends nuclear liability to cover such expenses. The Vienna Convention is not a part of customary international law, and neither party to this case has elected to sign it.

B. RENTIERS IS NOT RESPONSIBLE FOR AMUKO'S EXPENSES UNDER CUSTOMARY INTERNATIONAL LAW.

Amuko's claim for compensation under the general principles of international law is similarly misplaced. Rentiers concedes that a State must take responsibility for its internationally wrongful acts,[17] that "[t]here is an internationally wrongful act of a State when conduct consisting of an action or omission: (a) is attributable to the State under international law; and (b) constitutes a breach of an international obligation of the State,"[18] and that the international responsibility of a state requires it to make reparations for internationally wrongful acts.[19] Rentiers was clearly responsible for approving the Nihon plant and requesting assistance from Amuko, but neither of these acts were internationally wrongful. The meltdown of the Nihon plant was neither internationally wrongful nor attributable to Rentiers. The spill of radioactive material near Robelynch may be internationally wrongful, but was not attributable to Rentiers. As no internationally wrongful act is attributable to Rentiers, Rentiers bears no international responsibility for the damages alleged.

1. Rentiers complied with all international obligations as to the Nihon plant, and is not responsible for damages caused by its meltdown.

Damages stemming from the meltdown of the Nihon plant cannot be attributed to Rentiers, because the plant was operated by a private corporation. (R.8). A corporation's acts can only be attributed to Rentiers if the corporation was an organ of the state,[20] was exercising

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[17] Responsibility of States for Internationally Wrongful Acts, art. 1, G.A. Res. 56/83, Annex, U.N. Doc. A/RES/58/83/Annex (2002) [hereinafter Responsibility]. While the Articles do not have the force of a convention, they are widely recognized as authoritative. *See* PHILIPPE SANDS, PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW (2d ed. 2003).

[18] Responsibility, art. 2.

[19] *Id.*, art. 31, 34-39.

[20] *Id.*, art. 4.

governmental authority,[21] or was controlled by the state.[22] International law does not generally treat private citizens and corporations as agents of a State,[23] and no evidence suggests that the Nihon operating corporation was owned or controlled by the government of Rentiers. Amuko's attempt to recover from the government of Rentiers an alleged debt attributable to a private corporation should be denied.

More importantly, the damage was not internationally wrongful, because Rentiers and the plant operator properly applied due diligence in all phases of the construction and operation of the Nihon plant. While a State has an undisputed duty to avoid imposing nuclear damages on other states,[24] the member states of the IAEA have never agreed that liability for nuclear damages can exist without a finding of fault.[25] Customary international law only imposes liability for damages caused by a State's failure to exercise due diligence.[26]

Rentiers complied with its obligation to perform due diligence in the siting and approval of the Nihon plant. While customary law only requires a state to perform due diligence according

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[21] *Id.*, arts. 5, 9.

[22] *Id.*, art. 8.

[23] Commentary on the Articles on State Responsibility, chap. II, cmt. 2, Rep. of the Int'l Law Comm'n, 53rd Sess., Apr. 23–June 1, July 2–Aug. 10, 2001, 202-03, U.N. Doc. A/56/10; GAOR, 56th Sess., Supp. 10 (2001) [hereinafter Commentary on Responsibility]. While the *Trail Smelter* tribunal imposed state liability for pollution created by a privately-operated facility, it did so only because the state in question voluntarily assumed such liability. Trail Smelter Arbitral Decision (U.S. v. Can.), 3 R.I.A.A. 1905, 1912-13 (1938/1941).

[24] P.W. BIRNIE & A.E. BOYLE, INTERNATIONAL LAW AND THE ENVIRONMENT 469 (2d ed. 2002); YASUHIRU SHIGETA, INTERNATIONAL JUDICIAL CONTROL OF ENVIRONMENTAL PROTECTION 270-71 (2010).

[25] BIRNIE & BOYLE, *supra* note 24, at 468, 73; SHIGETA, *supra* note 24, at 271-72.

[26] BIRNIE & BOYLE, *supra* note 24, at 467-68; SHIGETA, *supra* note 24, at 271-72. While strict liability may exist for damages caused by specifically prohibited activity such as illegal nuclear-waste dumping, BIRNIE & BOYLE at 473, such activities are not alleged here.

to its own national standards,[27] the RNRA went beyond that and performed a comprehensive evaluation of the nuclear reactor site location according to IAEA guidance. (Clars.A17). This evaluation considered the possibility of seismic activity at the site. (Clars.A18) The plant's construction met all applicable industry standards, (Clars.A7), as did the spent fuel assemblies stored at the site, (Clars.A21), and the plant passed RNRA safety inspections. (Clars.A20). It is a testament to the robust construction of the plant that despite the occurrence of the most powerful earthquake in over 200 years, (Clars.A19), only one of the two Nihon reactors suffered damage, and the other successfully contained all contamination within the reactor building. (R.8).

Effectively, Amuko seeks to impose liability on Rentiers due to the mere fact that Rentiers constructed a nuclear facility near the States' border. Such a basis for liability has never been recognized,[28] and the international community continues to promote the use of "safe and environmentally sound nuclear power."[29] Rentiers intended no harm to Amuko, and damage from the Nihon meltdown was completely contained; there is no evidence that the spent fuel pool would have contaminated Amuko territory, even had it been allowed to continue leaking. (R.11).

2. Rentiers' request for assistance was not internationally wrongful.

While Rentiers' request for assistance from Amuko is clearly attributable to Rentiers, it was not internationally wrongful, unfortunate consequential damages notwithstanding. An act is only wrongful if it violates an international obligation.[30] The Assistance Convention specifically

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[27] SHIGETA, *supra* note 24, at 278-80.

[28] BIRNIE & BOYLE, *supra* note 24, at 470.

[29] Agenda 21 ¶ 39.7, *in* Report of the United Nations Conference on Environment and Development, U.N. Doc. A/CONF.151/26 (Vol. I-III) (1992); Johannesburg Declaration, Report of the World Summit on Sustainable Development 2, U.N. Doc. A/CONF.199/20 (2002) (reaffirming Agenda 21).

[30] Responsibility, art. 2(b).

gave Rentiers the right to request assistance from Amuko, and Rentiers made its request accordingly.[31] Even if Rentiers' request had not been pursuant to the Assistance Convention, Amuko's consent to the request precludes any wrongfulness.[32] The request was further justified by necessity, in that requesting assistance was the only way to safeguard the lives and health of those persons near the Nihon site.[33] The request presumably did not "impair an essential interest" of Amuko,[34] as Amuko voluntarily agreed to the request. While in some circumstances a State may agree to pay compensation despite the existence of consent or necessity,[35] damages here should be fully precluded.[36] Amuko assumed the risk of damages when it agreed to the dangerous task of nuclear transport without requesting unconditional indemnification, as it could have done.[37]

3. The Robelynch spill occurred under the control of Amuko, not Rentiers.

Amuko's negligent spill of radioactive materials near Robelynch cannot be attributed to Rentiers, because the spill occurred while the waste was under Amuko's control, within Amuko's territory, while being conveyed in a mode selected by Amuko. The conduct of Amuko's negligent driver could only be attributed to Rentiers if the driver had been placed at Rentiers' disposal, and was acting under Rentiers' authority.[38] Even if Amuko's driver was under

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[31] *See* Assistance Convention, arts. 2(1)-(2), 3(a)-(b), 8.

[32] *See* Responsibility, art. 20.

[33] *Id.*, art. 25(1)(a).

[34] *Id.*, art. 25(1)(b).

[35] *Id*., art. 27(b).

[36] *See* Commentary on Responsibility, art. 27 cmt. 6 ("It will be for the State invoking a circumstance precluding wrongfulness to agree with any affected States on the possibility and extent of compensation payable in a given case.")

[37] *See* Assistance Convention, art. 7(1)-(2).

[38] Responsibility, art. 6.

Rentiers' authority while operating in Rentiers' territory, he reverted to Amuko's control once he crossed the border back into Amuko. Further, even if the driver were still under Rentiers' control while in Amuko's territory, the driver's negligence clearly was outside of the scope of his instructions, rendering his actions not attributable to Rentiers.[39]

Although the record does not show that Rentiers was involved in planning Amuko's removal of the Nihon spent fuel rods, Rentiers concedes that the recovery of the spent fuel from the Nihon plant is attributable to Rentiers under the Assistance Convention, which states that the management of the assistance "shall be the responsibility *within its territory* of the requesting State."[40] This clause, however, excludes all activities occurring *outside* the requesting State's territory. Further, the Assistance Convention requires a requesting State only to "ensure the protection of personnel, equipment and materials *brought into its territory*."[41] These clauses acknowledge the practical limits of the requesting State's actual power to protect the assisting State, consistent with the customary rule that a state is responsible to exercise due diligence to prevent its territory from being used to harm others.[42] Amuko does not argue that any dangerous condition existed on Rentiers' territory, with the exception of the nuclear waste which it voluntarily took control of.

In fact, once Amuko took possession of the Nihon waste, Amuko was the only state with the power to ensure the waste's safety. Amuko could have selected a better driver, thus averting

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[39] *See id.*, art. 7.

[40] Assistance Convention, art. 3(a) (emphasis added).

[41] *Id.*, art. 3(b) (emphasis added).

[42] SHIGETA, *supra* note 24, at 277.

the crash. Amuko could have selected a more secure vehicle, thus averting the release.[43] Amuko could have selected a less precarious route, thus potentially averting the crash or the release. By agreeing to take possession of the Nihon waste, Amuko certified that it had the "administrative and technical capacity, as well as the regulatory structure, needed to manage the spent fuel… in a manner consistent with" the IAEA Spent Fuel Convention.[44] In doing so, Amuko certified that "criticality and removal of residual heat generated during spent fuel management are adequately addressed" by its processes,[45] that qualified staff would be available for all safety-related activities,[46] and that Amuko had appropriate emergency plans in place.[47] While it now appears that none of these requirements were complied with by Amuko, Rentiers was reasonably satisfied at the time it accepted Amuko's assistance that Amuko had the "administrative and technical capacity" to safely dispose of the Nihon waste.[48] Amuko's negligence is clearly and solely responsible for the release of nuclear material on Amuko territory, and any liability should therefore be borne by Amuko, in concordance with the "polluter pays" principle.[49]

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[43] The record is silent as to the specifications of Amuko's truck, but Rentiers notes that any packaging consistent with IAEA standards would have been able to survive being crushed, impaled, and heated to 800°C, while holding a heat-generating radioactive payload, without leaking. IAEA, NO. TS-R-1, REGULATIONS FOR THE SAFE TRANSPORT OF RADIOACTIVE MATERIAL 99-100 (2003).

[44] Joint Convention on the Safety of Spent Fuel Management and on the Safety of Radioactive Waste Management, art. 27(1)(iii), *entered into force* June 18, 2001, 2153 U.N.T.S. 303.

[45] *Id.*, art. 4(i).

[46] *Id.*, art. 22(i).

[47] *Id.*, art. 25(1).

[48] *See id.*, art. 27(1)(iii)-(iv).

[49] *See* DE SADELEER, *supra* note 11, at 21; SANDS, *supra* note 17, at 279 (2d ed. 2003). While not yet adopted as a customary principle of international law, Rentiers and Amuko adopted the principle by their participation in drafting the Rio and Johannesburg Declarations. *See* Rio Declaration on Environment and Development, Principle 16, U.N. Doc. A/CONF.151/26; Johannesburg Declaration at 2 (reaffirming the Rio Declaration).

II. THE REPUBLIC OF RENTIERS' ACTIONS AS TO ITS SOVEREIGN BONDS ARE CONSISTENT WITH INTERNATIONAL LAW.

A. THE RENTIERS BOND ACTIONS ARE NOT AN EXPROPRIATION IN VIOLATION OF CUSTOM OR TREATY.

The Rentiers bond actions were not an expropriation in violation of the RABBIT or of any other treaty or customary international law. Article 10 of the RABBIT provides, with certain exceptions: "Neither Contracting Party shall take any measure of expropriation, nationalization, or other measures having effect equivalent to nationalization or expropriation against the investment of nationals or companies of the other Contracting Party." (R.7-8). Article 1 defines "investments" as "all kinds of assets that have been invested in accordance with the laws of the Contracting Party receiving them,"[50] (R.7). However, neither the RABBIT nor any other treaty, agreement, or practice suggests a definition of the aforementioned "expropriation, nationalization" or equivalent measures, nor is there any indication of a source from which a definition should be sought. No generally-accepted ordinary meaning of "expropriation" exists.[51] It is therefore appropriate to define the term as it is generally defined under customary international law.[52]

Under customary international law, expropriation need not be a direct taking—indirect interference may be sufficient. The International Court of Justice addressed this issue in *Elettronica Sicula S.p.A.*, in which the United States argued expropriation includes "not merely outright expropriation of property, but also unreasonable interference with its use, enjoyment or

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[50] Respondent concedes that the RABBIT's broad definition of "investments" includes the sovereign bonds at issue.

[51] See, e.g., L. Yves Fortier & Stephen L. Drymer, *Indirect Expropriation in the Law of International Investment: I Know It When I See It, or Caveat Investor*, 13 ASIA PAC. L. REV. 79, 79-80 (2005).

[52] VCLT art. 31(3)(c); *see also* Fortier & Drymer, *supra* note 51, at 81 n.8. This Court applies international conventions, custom, and general recognized principles of law. I.C.J. Statute, art. 38.

disposal."[53] To properly examine a claim of expropriation requires a tribunal weigh "the real interests involved and the purpose and effect of the government measure."[54] As Rentiers did not forcefully or completely take or occupy the property of Amuko or its citizens, Amuko must show the circumstances and interests involved in this case amounted to an indirect expropriation.

1. The bond actions did not destroy investors' rights under the bonds.

Bond default and restructuring constitute indirect expropriation if they destroy investors' existing rights under the bonds, considering all the circumstances to determine whether a right exists and has been extinguished.[55] The *CMS* tribunal found no indirect expropriation when "the investor is in control of the investment … and the investor has full ownership and control of the investment."[56] Expropriation can only occur when a state repudiates, confiscates, or virtually destroys a debt; no expropriation occurs unless the state effectively extinguishes the investors' rights under the bond.[57]

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[53] Case Concerning Elettronica Sicula S.p.A. (ELSI) (U.S. v. It.), 1989 I.C.J. 15, ¶ 114 (July 20); *accord* Metalclad Corp. v. United Mexican States, ICSID Case No. ARB(AF)/97/1, Award (Aug. 30, 2000), 16 ICSID REV. FOREIGN INVESTMENT L.J. 168 (2001); *see also* Rudolf Dolzer, *Indirect Expropriations: New Developments?*, 11 N.Y.U. ENVTL. L.J. 64, 65 (2002).

[54] S.D. Myers, Inc. v. Canada, First Partial Award (Nov. 13, 2000), 40 I.L.M. 1408, 1440 (2001).

[55] Oscar Chinn Case (U.K. v. Belgium), 1934 P.C.I.J. (ser. A/B) No. 63, at 4 (Dec. 12) (no taking when complainant's business could not compete with state-subsidized competitor); Revere Copper v. Overseas Private Investment Corp., Award, Aug. 24, 1978, 56 I.L.R. 258 (1978) (taking when state repudiated tax and royalty guarantees).

[56] CMS Gas Transmission Co. v. Argentina, ICSID Case No. ARB/01/8, Award, ¶ 259 (May 12, 2005), 44 I.L.M. 1205 (2005).

[57] *See* Lauder v. Czech Republic, UNCITRAL Arb. Trib., Final Award, ¶ 200 (Sept. 3, 2001) (finding an indirect expropriation "effectively neutraliz[es] the enjoyment of the property," and noting each case thereof is "to be decided on the basis of its attending circumstances"); Michael Waibel, *Opening Pandora's Box: Sovereign Bonds in International Arbitration*, 101 AM. J. INT'L L. 711, 744-46 (2007) (reviewing international law regarding bond default).

Rentiers did not extinguish the investors' rights to their investment. Rentiers did not repudiate the debt; in fact, Rentiers paid the debt according to the terms of the Fresh Start Act, despite the severe economic reality in which Rentiers found itself. (R.11-12, Clars.A29). In the meantime, investors were still entitled to use, sell, and borrow on the bonds just as any other bond, sovereign or corporate. Just as in *CMS*, the investors remained in control and retained full ownership of their investments despite any change in value or return; there was no repudiation leading to the destruction of the investors' contractual rights.[58] Following this line of cases, there was no repudiation and so no expropriation.

2. The bond actions were not contrary to investors' legitimate expectations.

There can be no expropriation when the action complained of was foreseeable to the investor. The *Oscar Chinn* tribunal noted that Chinn must have been aware of the market he was entering and the government's level of involvement therein, and so there was no expropriation when Chinn's business could not compete with its government-subsidized competitor.[59] The *Methanex* tribunal found no expropriation when an investment was reduced in value by the enactment of environmental regulations, because they were foreseeable to the investor at the time of the investment.[60] Government actions only constitute indirect expropriation when "actions taken by a government contrary to and damaging the economic interests of aliens are in conflict

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[58] *See supra* notes 55-56.

[59] Oscar Chinn Case, 1934 P.C.I.J. at 84 ("Mr. Chinn … could not have been ignorant of the existence of competition which he would encounter … [and] of the connection it had with the Colonial and Belgian governments.").

[60] Methanex Corp. v. U.S., Award (Aug. 3, 2005), 44 I.L.M. 1345 (2005).

with undertakings and assurances given in good faith … as an inducement to their making the investments affected by the action."[61]

Rentiers actions were not contrary to the Amuko investors' reasonable expectations, and did not contravene any assurances given by Rentiers. The sovereign bonds issued by Rentiers were purchased by investors seeking a financial return. (Clars.A9). While bonds in general are acknowledgements of debt accompanied by a promise to repay in time the debt plus interest,[62] the 112 sovereign defaults in recent decades indicate even sovereign bonds carry risk, regardless of issuer.[63] The Amuko investors were presumably financially sophisticated and thus aware of this fact, as Amuko is known for its financial sector. (R.6). The investors purchased Rentiers' sovereign bonds in 2000 and again in 2005,[64] (R.6), despite nearly two decades of well-publicized sovereign financial troubles affecting both industrialized and developing economies.[65] At that point, the investors must have been aware of the plain economic fact that all bonds carry a risk of default and restructuring.

The investors bought into a commercial market seeking a financial gain and knowingly bore the attendant risks. As the *Oscar Chinn* tribunal noted, "Favorable business conditions and

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[61] Revere Copper, 56 I.L.R. at 271; *see also* Metalclad Award at ¶ 107 (finding government's assurances created legitimate expectations giving rise to expropriation upon their violation).

[62] *See, e.g.*, Waibel, *supra* note 57, at 719.

[63] *See* ANDREW G. HALDANE, FIXING FINANCIAL CRISES IN THE TWENTY-FIRST CENTURY 3-4 (2004) (noting numerous financial crises and sovereign defaults, including 112 since the late 1970s); ANDREAS F. LOWENFELD, INTERNATIONAL ECONOMIC LAW 566-616 (2002); Waibel, *supra* note 54 at 711-12.

[64] Note that the 2000 bond purchase was prior to the entry into force of RABBIT in 2002. Because Rentiers' acts as to its bonds were consistent with international law and it does not owe compensation, Rentiers does not argue these two purchases are due different treatment. Under custom, RABBIT applies to investments in place at the time of the treaty's entry into force.

[65] *See supra* note 63 and accompanying text.

good-will are transient circumstances, subject to inevitable changes; … No enterprise can escape from the chances and hazards resulting from general economic conditions."[66] The investors need not have been aware of the specific risk that an environmental disaster might lead to a severe economic downturn, thus impairing Rentiers' debt. In fact, the risk they took on was the risk that the unexpected might happen. Bonds entail interest payments in part to account for this inherent risk.[67] Individual investors in possession of sovereign bonds are not entitled to use international law as insurance against ordinary commercial risk.[68] As the *Starett Housing* tribunal explained, investors "have to assume a risk that the country might experience strikes, lockouts, disturbances, changes of the economic and political system and even revolution;" such events do not entitle them to compensation under international law.[69] Multiple tribunals echoed these sentiments.[70]

Risk is inherent in financial instruments, and any investor is aware of this fact. International investment laws regarding expropriation protect investors from frustration of legitimately-formed expectations by the acts of host States, not ordinary commercial risk.[71] Thus, no investor purchasing Rentiers' sovereign bonds could reasonably have believed that the bonds were risk-free. The Amuko investors' losses on Rentiers' bonds were an ordinary commercial risk, not an expropriation.

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[66] Oscar Chinn Case, 1934 P.C.I.J. at 27.

[67] *See* Waibel, *supra* note 57, at 754-55.

[68] *Id.* at 754.

[69] Starett Housing Corp. v. Iran, 4 Iran-U.S. Cl. Trib. Rep. 122, 156 (1983).

[70] CMS Gas Transmission Co., Objections to Jurisdiction, ¶ 29 (July 17, 2003) and Award, ¶ 244 (May 12, 2005); Generation Ukraine, Inc. v. Ukraine, ICSID Case No. ARB/00/9, Award, ¶ 20.37 (Sept. 16, 2003); Maffezini v. Spain, ICSID Case. No. ARB/97/7, Award, ¶ 64 (Nov. 13, 2000); Saluka Investments BV v. Czech Republic, UNCITRAL Arb. Trib., Partial Award, ¶¶ 55, 275 (Mar. 17, 2006); *see also* Waibel, *supra* note 57, at 754-55.

[71] *See* Waibel, *supra* note 57, at 755 n.252 and accompanying text.

B. EVEN ASSUMING RENTIERS' ACTIONS AS TO ITS SOVEREIGN BONDS WERE AN UNCOMPENSATED EXPROPRIATION AND SO IN VIOLATION OF INTERNATIONAL LAW, THE DOCTRINE OF NECESSITY EXCUSES THOSE ACTIONS.

The doctrine of necessity excuses the wrongfulness of an act so long as (1) the act is the only way for a state "to safeguard an essential interest against a grave and imminent peril"; and (2) does not "seriously impair an essential interest" of another state or of the international community.[72] The circumstances surrounding Rentiers' bond restructuring meet both conditions. Thus, even if the restructuring was an uncompensated expropriation, the doctrine of necessity precludes the wrongfulness of this act.

1. The bond restructuring was the only means to safeguard the economic viability of Rentiers against grave and imminent peril.

In the Gabcikovo-Nagymaros Project case, the I.C.J. found that an act is excused by financial necessity when: (a) the act "must have been occasioned by an 'essential interest'" of the acting state; (b) that interest must have been threatened by a 'grave and imminent peril'"; and (c) the act at issue "must have been the 'only means' of safeguarding that interest."[73]

Rentiers' economic survival is without question an essential interest. A State's "essential interests" by definition include the existence of the state itself, its economic survival, and the continued functioning of essential services.[74] The Diablo Canyon earthquake, Nihon meltdown, and subsequent shutdown of five of Rentiers' remaining thirteen nuclear reactors clearly imperiled Rentiers' economy. (R.8, 11) Nearly 4,000 people were killed or presumed killed,

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[72] Responsibility, art. 25.

[73] Gabcikovo-Nagymaros Project (Hung. v. Slovk.), 1997 I.C.J. 7, ¶ 52 (Sept. 25).

[74] Addendum – Eighth Report on State Responsibility by Mr. Roberto Ago, Special Rapporteur – The Internationally Wrongful Act of the State, Source of International Responsibility (Part I), ¶ 2, Int'l Law Comm'n, U.N.Doc. A/CN.4/318/Add.5-7 (1980) [hereinafter Report on Responsibility]; *see also* Commentary on Responsibility 202-03.

40,000 were injured, and 150,000 lived in temporary shelters. (R.8). Property damage exceeded 10 billion tenge. (R.8). As nuclear power constituted 75% of Rentiers' electricity production, rolling blackouts were felt across the nation. (R.8, 11). Facing these damages, the government of Rentiers was crippled by its obligation to service its outstanding sovereign bonds, and it elected to restructure those bonds. (R.11-12). To do so was necessary to allow the government to properly attend to its own reconstruction.

It is not relevant that total economic collapse may not have occurred immediately: A peril may be grave and imminent even if it threatens long-term rather than immediate consequences.[75] In *LG&E,* Argentina faced economic disaster similar to that facing Rentiers. Faced with 25% unemployment and a large drop in the value of its currency, the nation was unable to service its international debt. Finding that this constituted a grave and imminent peril to Argentina's economy even if total economic collapse was not imminent, the tribunal exonerated Argentina under the doctrine of necessity.[76] Similarly, the collapse of the devastated Rentiers economy may not have followed immediately, but the peril was in fact grave and imminent.

2. The restructuring did not seriously impair any essential interest belonging to Amuko or the international community.

The second prong of the necessity doctrine requires a weighing of the essential interest safeguarded by the acting State against the allegedly impinged-upon interest of the complaining state.[77] The relevant question is the proportion between the two interests rather than absolute

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[75] Gabcikovo-Nagymaros Project at ¶ 54.

[76] LG&E Capital Corp. v. Argentina, ICSID Case No. ARB/02/1, Award, ¶ 257 (Oct. 3, 2006), 2006 WL 2985837.

[77] Report on Responsibility at 20.

value.[78] This prong supports Rentiers' claim of necessity. While Rentiers faced an environmental and economic disaster necessitating its bond actions, any damage resulting to Amuko was simply a financial loss born by some portion of its financial industry. The situation in Rentiers threatened the State's entire economy and thus its population. Amuko and Rentiers enjoyed a similar per capita GDP, (Clars.A12), but Amuko has a population of 10 million versus Rentiers' 70 million. (R.6). The survival of the population and economy of Rentiers, each several times larger than that of Amuko, clearly outweighs the minor financial loss faced by a small subset of Amuko's economy.

3. Rentiers did not contribute to the situation giving rise to the claim of necessity.

The Nihon plant meltdown cannot be attributed to Rentiers: the plant was privately owned and operated, and Rentiers and the operator acted with full due diligence in the plant's construction, operation, and inspection.[79] Nor did Rentiers contribute to the resulting economic turmoil by shutting down the five reactors near the Diablo Canyon fault; this act was necessitated by the Precautionary Principle. The Precautionary Principle dictates that when there is a likelihood of significant harm to the environment, States must act in accordance with the degree of the risk and their own capabilities and priorities to mitigate or prevent this harm.[80] Rentiers acted accordingly, aware of its reliance on nuclear power and the likelihood of exacerbating its economic instability, and thus cannot have contributed to the circumstances of necessity.

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[78] *Id.* ("[T]he interest in question cannot be one which is comparable and equally essential to the foreign State concerned.").

[79] *Supra* Part I.B(1).

[80] Rio Declaration on Environment and Development, prin.15, U.N. Doc.A/CONF.151/26 (1992); *see also* BIRNIE & BOYLE, *supra* note 24 at 120; SANDS, *supra* note 17 at 270.

4. The invocation of necessity does not require compensation.

Article 27 leaves open the question of compensation for material loss despite a State's invocation of necessity, but this Court is not the proper place for the formulation of an answer.[81] The record is silent as to Amuko's material losses as well as Rentiers' capacity to pay, if any, and so this tribunal cannot properly decide the question of compensation. Rentiers' bond actions were motivated by necessity, which precludes any wrongfulness. Accordingly, Rentiers has no legal obligation to compensate Amuko.

CONCLUSION

The Republic of Rentiers respectfully requests that this Court declare:

1. Rentiers does not have any legal obligation to compensate or reimburse Amuko.
2. Rentiers' actions are consistent with international law.

Respectfully submitted,

Team 1228

AGENTS OF RESPONDENT

[81] *See supra* Part I.B(2).