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IN THE
INTERNATIONAL COURT OF JUSTICE
AT
THE PEACE PALACE, THE HAGUE
THE NETHERLANDS

CASE CONCERNING QUESTIONS RELATING TO A NUCLEAR ACCIDENT AND SOVEREIGN DEBT

FEDERAL STATES OF AMUKO,
APPLICANT

V.

REPUBLIC OF RENTIERS,
RESPONDENT

MEMORIAL FOR THE APPLICANT

2011 Stetson International Environmental Moot Court Competition

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STATEMENT OF JURISDICTION

The Federal States of Amuko and the Republic of Rentiers submit the present dispute to the International Court of Justice. Pursuant to Article 40, paragraph 1 of the Statute of the International Court of Justice, States may bring cases before the Court by special agreement. Statute of the International Court of Justice, art. 40(1), T.S. No. 993 (1945). On June 6, 2011 the parties signed a special agreement and submitted it to the Registrar of the Court. *See* Special Agreement Between the Federal States of Amuko and the Republic of Rentiers for Submission to the International Court of Justice on Differences Between Them Concerning Questions Relating to a Nuclear Accident and Sovereign Debt. (R. at 2–5). The Registrar for the Court addressed notification to the parties on June 20, 2011. (R. at 2).

QUESTIONS PRESENTED

1. WHETHER RENTIERS IS REQUIRED TO COMPENSATE AMUKO FOR DAMAGES SUFFERED BY AMUKO WHILE PROVIDING ASSISTANCE TO RENTIERS.
2. WHETHER RENTIERS EXPROPRIATED THE PROPERTY OF AMUKO CITIZENS, INVOKING ITS DUTY TO PROVIDE JUST COMPENSATION.

STATEMENT OF FACTS

The Federal States of Amuko and the Republic of Rentiers share a common territorial border and are industrialized countries. (R. at 6).

Both are members of the United Nations and the International Atomic Energy Agency (IAEA). (R. at 6). They are parties to the Statute of the International Court of Justice, the Vienna Convention on the Law of Treaties, the IAEA Convention on Early Notification of a Nuclear Accident, the IAEA Convention on Assistance in Case of a Nuclear Accident or Radiological Emergency, and the Joint Convention on the Safety of Spent Fuel Management and on the Safety of Radioactive Waste Management. (R. at 6). Both States fully participated in the 1972 United Nations Conference on the Human Environment at Stockholm, the 1992 United Nations Conference on Environment and Development at Rio de Janiero, and the 2002 World Summit on Sustainable Development at Johannesburg. (R. at 6–7). Rentiers is a party to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention). (R. at 8).

Rentiers and Amuko have entered into a bilateral investment treaty, the Rentiers-Amuko Bilateral Business Investment Treaty (RABBIT), which forbids expropriation of property. (R. at 7–8). Investment companies in Amuko purchased sovereign bonds issued by Rentiers. (R. at 6). One million tenge worth of bonds were purchased in November 2000, and another two million tenge were purchased in November 2005. (R. at 6). All of these bonds had a maturity date of November 30, 2010. (R. at 6).

On February 5, 2010, an massive earthquake struck the territory of Rentiers along the Diablo Canyon fault line. (R. at 8). Significant damage occurred to the city of Nihon, Rentiers,

causing a partial core meltdown in a reactor at the privately-owned Nihon Nuclear Power Plant. (R. at 8). Rentiers immediately notified the IAEA and Amuko. (R. at 8).

On February 7, 2010, the Rentiers Nuclear Regulatory Agency (RNRA), a national agency, began directing containment and response efforts at the plant. (R. at 9). Discovering that the storage pools for the spent fuel rods were leaking, Rentiers requested assistance from Amuko. (R. at 9). Rentiers requested that Amuko remove the spent fuel rods and transport them to a more secure facility located in Amuko. (R. at 9). The Amuko Ministry of Energy (AME) removed the spent fuel rods and placed them in specially manufactured vehicles. (R. at 9).

While transporting the spent fuel rods, one of the vehicles crashed in Amuko territory due to the driver's negligence. (R. at 9). The driver and a security guard, both AME employees, were killed. (R. at 9). The accident caused a fire and the release of radioactive material. (R. at 9). Due to health concerns, the AME evacuated Robelynch, requiring 466 families to leave their homes. (R. at 9). After the accident, the Amuko Congress established a compensation fund for the families of the deceased driver and security guard, and the former residents of Robelynch. (R. at 9).

In September 2010, the RNRA ordered rapid closure of all plants. (R. at 11). Two months later, the Rentiers President announced that Rentiers would default on its sovereign bonds. Then on December 1, the Rentiers Parliament enacted the Fresh Start Act, which restructured Rentiers sovereign bonds such that investors would receive only ten percent of their entitlements under the bonds. (R. at 11–12).

Amuko sought compensation from Rentiers for the compensation program established by the Amuko Congress, and just compensation for the expropriation of the Amuko investors' property resulting from the default on its sovereign bonds. (R. at 10, 12). Rentiers denied that

compensation was due for either action. (R. at 10–13). After failing to resolve the dispute, the parties agreed to submit the matter to the ICJ. (R. at 13).

SUMMARY OF ARGUMENT

Rentiers is required to compensate Amuko under international law. Amuko suffered substantial losses while transporting spent fuel rods on Rentiers' behalf, thus invoking Rentiers' duty to compensate under the IAEA Assistance Convention. The establishment of a compensation program did not discharge this duty. However, even if this Court finds the Assistance Convention inapplicable, compensation is still due to Amuko under customary international law. Under customary rules of state responsibility, the conduct of the AME's employees is attributable to Rentiers because they were exercising elements of Rentiers' authority. Therefore Rentiers is responsible for the damage caused by the accident under the "polluter pays" principle.

Rentiers also violated international law by expropriating the investments of Amuko citizens without providing just compensation. By defaulting on their sovereign bonds and passing the Fresh Start Act, Rentiers seized control of the value of the sovereign bonds, failed to meet the reasonable expectations of the investors, and reduced the value of the bonds substantially. Under the Rentiers-Amuko Bilateral Business Investment Treaty and customary international law, this was unlawful expropriation because Rentiers did not provide a valid public purpose or just compensation. It is inappropriate for Rentiers to claim force majeure or necessity as precluding wrongfulness because Rentiers contributed to the situation by knowingly placing nuclear power plants near the Diablo Canyon fault line. Therefore, Rentiers is responsible for compensating Amuko investors.

ARGUMENT

I. INTERNATIONAL LAW REQUIRES RENTIERS TO REIMBURSE AMUKO FOR THE COMPENSATION PROGRAM ESTABLISHED BY THE AMUKO CONGRESS

Amuko suffered significant losses as a result of providing assistance and resources to Rentiers, thus invoking Rentiers's responsibility to compensate Amuko. First, Rentiers's responsibility to provide compensation is required under Article 10 of the Convention on Assistance in the Event of a Nuclear Accident or Radiological Emergency.[1] This responsibility to compensate was not discharged by the establishment of a national compensation program created by the Amuko Congress because it is still possible for Rentiers to fulfill its treaty obligations. However, in the event this Court finds the Assistance Convention inapplicable, Rentiers should still be required to compensate Amuko under customary international law.

A. Rentiers is Required to Compensate Amuko Under Article 10 of the IAEA Assistance Convention for Losses Incurred by Amuko as a Result of Providing Assistance to Rentiers

Amuko was providing assistance to Rentiers pursuant to Article 2 of the IAEA Assistance Convention[2] when its vehicle crashed, resulting in the loss of the lives of the AME employees and the evacuation of Robelynch.[3] Therefore, under Article 10 of the Assistance Convention, Rentiers is required to reimburse Amuko. Article 10 provides that:

> [A] requesting State shall 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

[1] International Atomic Energy Agency, Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency art. 2, *opened for signature* September 26, 1986, 25 I.L.M. 1377 [hereinafter "Assistance Convention"].

[2] IAEA Assistance Convention, *supra* note 1, at art. 2.

[3] R. at 9.

> requested . . . assume responsibility for dealing with legal proceedings and claims brought by third parties against the assisting party . . . and . . . compensate the assisting party . . . for death of or injury to personnel of the assisting party or persons acting on its behalf . . . .[4]

Pursuant the Vienna Convention on the Law of Treaties, which both States are parties to,[5] this provision should be interpreted to require compensation for both the deaths of the AME employees, and the losses sustained by the residents of Robelynch. Furthermore, the establishment of a compensation program by the Amuko Congress did not discharge Rentiers' duty to compensate Amuko under Article 10.

i. Amuko's interpretation of Article 10 is consistent with its ordinary meaning and the Convention's object and purpose

According to Article 31(1) of the Vienna Convention on the Law of Treaties, the Assistance Convention "shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[6] This Court has stated "the first duty of a tribunal which is called upon to interpret and apply the provisions of a treaty is to endeavor to give effect to them in their natural and ordinary meaning in the context in which they occur."[7]

Article 10(2) of the Assistance Convention expressly delineates three forms of injury giving rise to a duty to compensate on the part of the requesting State: "death or [] injury to persons, damage to or loss of property, or damage to the environment caused within its territory

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[4] IAEA Assistance Convention, *supra* note 1 at art. 10.

[5] R. at 6.

[6] Vienna Convention on the Law of Treaties art. 31(1), *opened for signature* May 23, 1969, 1155 U.N.T.S. 331 [hereinafter "Vienna Convention"].

[7] *Competence of the General Assembly for the Admission of a State to the United Nations*, Advisory Opinion, 1950 I.C.J. 4, 8 (Mar. 3).

or other area under its jurisdiction or control . . . ."[8] Contrary to Rentiers' contention that the entire scope of Article 10(2) is limited to damages caused within the requesting State's territory,[9] Article 10(2)'s plain meaning demonstrates that the geographic limitation applies only to environmental damage. The placement of the geographic limitation with environmental damage within a separate clause from the other two forms of injury demonstrates its application to environmental damage only.[10] Had the Convention intended Article 10.2 to limit compensation for all forms of damages to those suffered within the requesting State's territory, it would have done so expressly.[11]

Amuko's interpretation is also consistent with the Convention's object and purpose. The Assistance Convention was intended to "strengthen further international co-operation in the safe development and use of nuclear energy" by providing "an international framework which will facilitate the prompt provision of assistance in the event of a nuclear accident or radiological emergency to mitigate its consequences."[12] By ensuring compensation for State parties, Article 10(2) encourages the voluntary provision of assistance. Because Article 2 of the Assistance Convention does not require State parties to provide assistance when requested,[13] an interpretation that encourages the provision of assistance furthers the Assistance Convention's

[8] IAEA Assistance Convention, *supra* note 1 at art. 10.

[9] R. at 10.

[10] IAEA Assistance Convention, *supra* note 1 at art. 10.

[11] *See Sovereignty Over Pulau Ligitan and Pulau Sipadan* (Indon./Malay.) 2002 I.C.J. 625, ¶ 43 (Dec. 17) (declining to find an additional function for a boundary line without an express provision in the treaty's text).

[12] IAEA Assistance Convention, *supra* note 1 at Preamble.

[13] *Id.* at art. 2(3) ("Each State Party to which a request for such assistance is directed shall promptly decide and notify the requesting State Party, directly or through the Agency, whether it is in a position to render the assistance requested . . . .").

object and purpose. A State would be discouraged from providing prompt assistance to a requesting State under Rentiers' narrow interpretation of Article 10(2), which is inconsistent with the object and purpose of the Convention.

ii. The actions of the Amuko Congress did not relieve Rentiers of its responsibility to compensate Amuko

Rentiers' responsibility under Article 10(2) is to "assume responsibility for dealing with legal proceedings and claims brought by third parties" and also to "compensate the assisting party" for the "death of or injury to personnel of the assisting party or persons acting on its behalf."[14] The establishment of a compensation program by the Amuko Congress did not discharge Rentiers's responsibility to perform its treaty obligations. With respect to the deaths of the AME employees, the Assistance Convention merely establishes a *duty to compensate* the assisting State, and therefore is unaffected by Amuko's actions. While the compensation provided for the residents of Robelynch involves the settlement of third party claims, such an action did not discharge Rentiers' duty to assume responsibility for those claims by reimbursing Amuko for their nonjudicial settlement. A state's duty to perform its treaty obligations may only be discharged under the provisions of the Vienna Convention on the Law of Treaties.[15] By its diplomatic note sent April 1, 2010,[16] Rentiers appears to be invoking supervening impossibility of performance,[17] a provision not applicable to the present situation.

Under Article 61 of the Vienna Convention, impossibility of performance may be invoked only where "the impossibility results from the permanent disappearance or destruction

[14] IAEA Assistance Convention, *supra* note 1 at art. 10(2).

[15] Vienna Convention, *supra* note 6 at art. 42.

[16] R. at 10–11.

[17] Vienna Convention, *supra* note 6 at art. 61.

of an object indispensable for the execution of the treaty."[18] However, the actions of the Amuko Congress did not render impossible Rentiers' ability to assume responsibility for third party claims. Instead, the "doctrine of approximate application"[19] is applicable to the present situation. According to Judge Lauterpacht, this doctrine applies "whenever a legal instrument of continuing validity cannot be applied literally owing to the conduct of one of the parties."[20] Instead, the instrument "must . . . be applied in a way approximating most closely to its primary object."[21] The goal is "to give effect to the instrument—not to change it."[22] Under this doctrine, the actions of the Amuko Congress should be interpreted as facilitating Rentiers' ability to fulfill its treaty obligations by providing a means for prompt settlement of third party claims.

In *Gabcikovo-Nagymaros Project*, this Court stated that this principle could only be employed "within the limits of the treaty in question" and that Slovakia's actions fell outside the doctrine.[23] In that case, the treaty at issue provided for the construction of a system of locks on the Danube "as a joint investment constituting a single and indivisible operational system of works," which could not be carried out by the unilateral action of Slovakia.[24]

In contrast, the Assistance Convention does not preclude the actions taken by the Amuko Congress. Article 10(3) of the Assistance Convention expressly states that the compensation

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[18] *Id.*

[19] *Gabcikovo-Nagymaros Project* (Hung./Slovk.), 1997 I.C.J. 7, ¶ 75 (Sept. 25).

[20] *Admissibility of Hearings of Petitioners by the Committee on South West Africa*, Advisory Opinion, 1956 I.C.J. 23, 46 (June 1) (separate opinion of Judge Lauterpacht).

[21] *Id.*

[22] *Id.*

[23] *Gabcikovo*, 1997 I.C.J. at ¶ 76.

[24] *Id.* at ¶ 77.

provisions within Article 10 "shall not prevent compensation or indemnity available under any applicable . . . national law of any State."[25] Thus, Amuko's actions do not preclude the application of the doctrine of approximate application.

B. Rentiers is Required to Compensate Amuko for Losses Sustained by Amuko Under Customary International Law

Even if this Court finds that Article 10 of the Assistance Convention does not apply to the present case, it should still hold that Rentiers is required to compensate Amuko under customary international law. Under customary international law, a State's responsibility is invoked when conduct "attributable to the State under international law . . . constitutes a breach of an international obligation of the state."[26] Here, the crash of the vehicle transporting the spent fuel rods is attributable to Rentiers because the AME employees were acting under Rentiers' direction and control. Therefore, Rentiers is responsible for the resulting damages under the principle "that the costs of pollution should be paid by the polluter."[27]

i. The AME employees were acting under the authority of Rentiers; therefore their conduct is imputable to Rentiers

Article 6 of the International Law Commission's Draft Articles on State Responsibility imputes "[t]he conduct of an organ placed at the disposal of a State by another State . . . [to] the former State under international law if the organ is acting in the exercise of elements of the governmental authority of the State at whose disposal it is placed."[28] State practice supports the

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[25] IAEA Assistance Convention, *supra* note 1 at art. 10(3).

[26] *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, [2001] 2 Y.B. Int'l L. Comm'n 26, U.N. DOC. A/56/49(Vol. I)/Corr.4; *see also Chorzów Factory Case* (Ger. v. Pol.), (Jurisdiction) 1927 P.C.I.J. (ser. A) No. 8, at 21 (July 26) ("It is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form).

[27] Malcolm N. Shaw, International Law 779 (5th ed. 2003).

[28] *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, *supra* note 27 at 26.

recognition of this concept as customary international law.[29] For example, the Judicial Committee of the Privy Council in the United Kingdom has long sat "as the final court of appeal for a number of independent States within the Commonwealth" and its decisions in those cases are "attributable to that State and not to the United Kingdom."[30] Additionally, under customary international law, "the conduct of any organ of a state must be regarded as an act of that state."[31]

Under these rules of customary international law, the conduct of the AME employees while transporting the spent fuel rods is attributable to Rentiers. The RNRA, a national agency of Rentiers, directed the containment and response efforts at the Nihon Nuclear Power Plant.[32] In removing and transporting the spent fuel rods from the plant, the AME employees were acting under the direction and control of the RNRA.[33] Therefore, Rentiers is responsible under customary international law for the harm resulting from the accident.

ii. Rentiers is responsible under the "polluter pays" principle for the transboundary harm caused by the accident

Rentiers and Amuko are parties to several international instruments demonstrating the recognition by both parties, as well as the international community, of the principle that the costs of pollution should be borne by the polluter.[34] At the 1972 United Nations Conference on the

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[29] *Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries*, [2001] 2 Y.B. Int'l L. Comm'n 31, 43–45.

[30] *Id.* at 45.

[31] *Difference Relating to Immunity from Legal Process of a Special Rapporteur*, Advisory Opinion, 1999 I.C.J. 62, ¶ 62 (Apr. 29) (recognizing the imputability of an act of a State organ to the State as customary international law).

[32] R. at 9.

[33] R. at 9.

[34] R. at 6.

Human Environment at Stockholm, Rentiers and Amuko, along with other State participants, issued the Stockholm Declaration.[35] Principle 21 of the Stockholm Declaration states that it is the responsibility of States "to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction."[36] Rentiers and Amuko, along with the rest of the international community later reaffirmed this principle at the 1992 United Nations Conference on Environment and Development at Rio de Janiero with the Rio Declaration.[37] Principle 2 of the Rio Declaration restates Principle 21 of the Stockholm Declaration verbatim, reaffirming the continuing acceptance of this principle among participating States.[38] Additionally, Principle 16 of the Rio Declaration affirmatively states, "that the polluter should, in principle, bear the cost of pollution."[39]

These international legal instruments are considered expressions of a rule of customary international law first established by an arbitral panel in the *Trail Smelter* arbitration.[40] In *Trail Smelter*, the tribunal held Canada strictly liable for injuries within the United States caused by

[35] United Nations Conference on the Human Environment, Stockholm, Swed., June 6-16, 1972, *Declaration of the United Nations Conference on Human Development*, U.N. DOC. A./CONF. 48/14/REV 1.

[36] *Id.* at princ. 21.

[37] United Nations Conference on Environment and Development, June 3-14, 1992, *Rio Declaration on Environment and Development*, U.N. DOC. A/CONF. 151/26 (1992).

[38] *Id.* at princ. 2.

[39] *Id.* at princ. 16.

[40] Thomas W. Merrill, *Golden Rules for Transboundary Pollution*, 46 Duke L.J. 931, 951–952 (1997) (stating that Principle 21 "is widely viewed as reflecting the precedent established by the Trail Smelter arbitration); see also *Trail Smelter* (U.S. v. Can.), 3 R.I.A.A. 1905 (1949).

the transboundary pollution of a smelter operating within Canadian territory.[41] This Court, in *Corfu Channel*, recognized this principle by holding Albania responsible for damages occurring within territory under Albania's control.[42]

This principle is especially applicable to the present case. Here, the damages resulting from transboundary pollution occurred due to the negligence of an individual acting under the direction and control of Rentiers.[43] The culpability of the conduct attributable to Rentiers in the present case is thus higher than the standard required under the rule of customary international law. Additionally, both Rentiers and Amuko are parties to the Joint Convention on the Safety of Spent Fuel Management and on the Safety of Radioactive Waste Management,[44] which imposes additional responsibilities on State parties in the area of nuclear energy. The Preamble to the Convention states that "the ultimate responsibility for ensuring the safety of spent fuel and radioactive waste management rests with the State."[45] In light of the "polluter pays" principle, and Rentiers' additional responsibility for ensuring the safety of spent fuel management, Rentiers should be required to compensate Amuko for the losses sustained in the accident.

[41] *Id.* at 947–50.

[42] *Corfu Channel* (U.K./Alb.), 1949 I.C.J. 4, 23 (Apr. 9).

[43] R. at 9.

[44] R. at 6.

[45] Joint Convention on the Safety of Spent Fuel Management and on the Safety of Radioactive Waste Management Preamble, *opened for signature* Sept. 29, 1997, 36 I.L.M. 1436.

II. RENTIERS VIOLATED INTERNATIONAL LAW BY EXPROPRIATING WITHOUT JUST COMPENSATION THE INVESTMENTS OF AMUKO CITIZENS AND RENTIERS CANNOT CLAIM FORCE MAJEURE OR NECESSITY AS DEFENCES TO THE EXPROPRIATION

The law of treaties rests on the doctrine *of pacta sunt servada*, meaning that international agreements are binding.[46] States can put their faith in the stability of an agreement because a State may not unilaterally alter the terms of an agreement. When an agreement is broken, the legal consequences of a breach are decided under the customary law of state responsibility. Unlawful expropriation is one such state action that requires state responsibility. Here, Rentiers must take responsibility for unlawful expropriation.

The expropriations in this case are the direct result of Rentiers' debt restructuring program. The sovereign bonds in question were within the scope of protected property against unlawful expropriation both by the RABBIT and customary international law. However, Rentiers' violated its agreement with Amuko investors, under the RABBIT, by passing legislation that directly conflicted with Rentiers' obligation to repay the bonds. Rentiers further violated customary international law by expropriating foreign property without just compensation. It is inappropriate for Rentiers to assert force majeure or necessity as defenses to the claim of unlawful expropriation because Rentiers contributed to the problem by placing nuclear power plants near the Diablo Canyon Fault line.

A. The Default and Debt Restructuring was Expropriation Without Just Compensation in Violation of Both the Rentiers-Amuko Bilateral Business Investment Treaty (RABBIT) and Customary International Law

Sovereign bonds are protected property within the scope of indirect expropriation. Rentiers' default and debt restructuring program was a state action calculated to take the property

[46] Vienna Convention on the Law of Treaties, art. 26, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331; see also *Amco Asia Corp. v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Award (Nov. 20, 1984), 89 I.L.R. 405, 495–97 (1992).

of Amuko investors. Rentiers' actions meet the threshold requirements of unlawful expropriation in violation of the RABBIT and customary law.

i. Sovereign bonds are protected property within the scope of indirect expropriation under the RABBIT and customary international law

Although one billion tenge of sovereign bonds were purchased prior to when the RABBIT entered into force,[47] all three billion tenge of sovereign bonds have been indirectly expropriated because sovereign bonds fall within the scope of property protected from indirect expropriation under customary international law.

The RABBIT defines "investments" as "all kinds of assets that have been invested in accordance with the laws of the Contracting Party receiving them including though not exclusively any: (a) movable and immovable property and other property rights such as mortgage, usufruct, lien, or pledge;" and "(b) title or claim to money or to any contract having a financial value[.]"[48] Here, by the plain meaning, title to sovereign bonds can be classified as a title or claim to money or a contract having a financial value, falling under the definition of "investments."

Sovereign bonds are also protected property under customary international law because property is broadly defined, encompassing both tangible and intangible interests.[49] For example, in *Amoco International Finance Corp*, the Iran-U.S. Claims Tribunal noted that expropriation is "a compulsory transfer of property rights" including intangible property.[50] The Iran-U.S. Claims Tribunal illustrated this view when it stated that expropriation includes "all kinds of takings,

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[47] R. at 7.

[48] *Id.*

[49] *See* Christopher F. Dugan et al., Investor-State Arbitration 439–40 (2008).

[50] *Amoco Int'l Fin. Corp. v. Iran*, 15 Iran-U.S. Cl. Trib. Rep. 189 (1987).

whether formal and direct such as nationalization, or informal and indirect such as so-called constructive takings and creeping expropriation."[51]

As protected property, sovereign bonds are subject to indirect expropriation. Within the international community, "[t]here is general agreement that government interference or other measures short of seizure can at some point constitute an expropriation."[52] In *Starrett Housing Corp v. Iran,* the Iran-U.S. Claims Tribunal decided that customary law recognizes expropriation when a State's actions have rendered property nearly "useless[.]"[53] This is true even when "legal title to the property formally remains with the original owner."[54] Similarly, here, the sovereign bonds were expropriated because they were rendered nearly useless, although the title to the bonds still remained with investors in Amuko. Furthermore, the RABBIT established evidence of state practice in including title or claims to money and contracts for financial gain under the umbrella of "investments" protected against unlawful expropriation.[55]

ii. Rentiers' default and debt restructuring constitutes expropriation in violation of the RABBIT and customary international law

Unlawful expropriation is prohibited by both the RABBIT and customary law. Bilateral investment treaties (BITs) are evidence of state practice and customary law.[56] In the absence of a detailed expropriation clause, it is necessary to draw from customary international law to

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[51] *See* Michael G. Parisi, *Moving Toward Transparency? An Examination of Regulatory Takings in International Law*, 19 Emory Int'l L. Rev. 383, 387 (2005).

[52] Dugan et al., *supra* note 49, at 451.

[53] *Starrett Housing Corp v. Iran*, 4 Iran-U.S. Cl. Trib. Rep. 122 (1983).

[54] *Id.*

[55] *See* Malcolm N. Shaw, International Law 747 (5th ed. 2003).

[56] *See id.*

determine the meaning of each requirement.[57] According to custom, to prove unlawful expropriation, investors must generally demonstrate "a loss of control over the investment, the disappointment of certain expectations regarding the investment, and a diminishment of value due to government action."[58]

First, the investors of Amuko lost control of their investment when Rentiers defaulted and restructured its debt. Custom dictates that expropriation occurs when the owner has been deprived of "possession or access to the benefit and economic use of his property" or when the property rights are "practically useless."[59] In *Metalclad v. Mexico*, the tribunal said that "[a] regulatory measure qualifies as expropriatory if it deprives the investor in whole or in significant part, of the use or reasonably-to-be expected economic benefit of property."[60] Tribunals have found a loss of control over the investment where the remaining value is substantially reduced, such as in *CME v. Czech Republic*, where there was liability because 90.5 percent of the investment had been destroyed.[61] Similarly, Rentiers deprived Amuko investors of 90 percent of the benefit and economic use of their bonds, rendering them essentially useless. This loss of control was directly related to the Rentiers' decision to default and restructure.

Second, the investors of Amuko suffered the disappointment of certain expectations regarding their investment. BITs are designed to protect private foreign direct investment from

[57] *See* Dugan et al., *supra* note 49, at 442.

[58] Justin R. Marlles, *Public Purpose, Private Losses: Regulatory Expropriation and Environmental Regulation in International Investment Law*, 16 J. Transnat'l L. & Pol'y 275, 296 (2007); *see also* U.S. Model BIT, Annex B, *available at* www.state.gov/documents/organization/117601.pdf ("Intended to reflect customary international law concerning the obligation of States with respect to expropriation.").

[59] Marlles, *supra* note 58, at 298.

[60] *Metalclad Corp v. United Mexican States*, ICSID Case No. ARB (AF)/97/1, Award (Aug. 30, 2000), 119 I.L.R. 618 (2002).

[61] *See CME Czech Republic B.V. v. Czech Republic*, UNCITRAL case, Final Award (Mar. 14, 2003), 9 ICSID Rep. 264 (2006).

the fear of "political risk" in the form of government intervention through unexpectedly passed legislation.[62] In *AMINOIL* and *Metalclad*, the tribunals recognized that investors enter into agreements based on expectations of their risks and benefits.[63] Here, the default and debt restructuring by Rentiers undermined the essential purpose of protection under the RABBIT. Under custom, Rentiers cannot pass a law that unilaterally alters performance of the RABBIT, fundamentally destroying the settled, reasonable expectations of the investors.

The third element of expropriation, a diminishment in value, depends on the extent of loss that a foreign investor has suffered. Custom suggests that expropriation can be found when the investor suffers a "substantial deprivation" or the State action had a "devastating effect."[64] Here, the 90 percent taking of the investors' property should be more than sufficient to satisfy the "substantial deprivation" standard.

Amuko investors lost control of their property, suffered disappointment in their expectations based on the RABBIT and custom, and were subjected to the extreme diminishment in value of their investment because of the regulatory actions of Rentiers, which qualified as expropriation.

iii. The expropriation was unlawful

Under the facts of the present case, the expropriation was unlawful under both the RABBIT and customary international law. Under both, expropriation is only lawful where it has been made 1) for a public purpose, 2) it does not discriminate against foreigners, and 3) it is

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[62] Paul E. Comeaux & N. Stephen Kinsella, *Reducing Political Risk in Developing Countries: Bilateral Investment Treaties, Stabilization Clauses, and MIGA & OPIC Investment Insurance*, 15 N.Y.L. Sch. J. Int'l & Comp. L. 1, 4–5 (1994).

[63] *See* Dugan et al., *supra* note 49, at 466.

[64] See *CMS Gas Transmission Co. v. Argentine Republic*, ICSID Case no. ARB/01/8, Final Award (May 12, 2005), 44 I.L.M. 788 (2003).

accompanied by just compensation.[65] Although the debt restructuring was non-discriminatory, there was not adequate compensation nor a public purpose.

The first requirement of lawful expropriation under the RABBIT and international law is that it must be for a purpose authorized by law, interpreted as a "public purpose." This requirement initially rested on the idea that the expropriation should be "based on grounds or reasons of public utility, security or the national interest which are recognized as overriding purely individual or private interests."[66] However, the public purpose element is extremely narrow and has not been supported universally as a justification for expropriation.

In *Amoco International Financial Corp. v. Iran*, the panel noted that there is no specific "agreed upon" definition of "public purpose" and States are given "extensive discretion."[67] In the *Liamco* case, it was held that "the public utility principle is not a necessary requisite for the legality of a nationalization."[68] In *Santa Elena* and *ADC Affiliate Ltd. V. Hungary* tribunals also decided that there cannot be special treatment for expropriation enacted for a public purpose.[69] Furthermore, even when panels have recognized a public purpose as a justification for expropriation, many have stated that the legitimate public purpose does not excuse a state from paying compensation.[70]

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[65] *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 712 (1987); *see also* Permanent Sovereignty Over Natural Resources, G.A. Res. 1803 (XVII), U.N. Doc. A/1803 (Dec. 14, 1962); *see also* Rentiers-Amuko Bilateral Business Investment Treaty, March 2002, R. at 7–8 [hereinafter "RABBIT"].

[66] G.A. Res. 1803, *supra* note 65, art. 4.

[67] *Amoco Int'l Fin. Corp. v. Iran*, 15 Iran-U.S. Cl. Trib. Rep. 189 (1987).

[68] *Libyan American Oil Co [LIAMCO] v. Libyan Arab Republic*, *Ad Hoc* Tribunal, 62 I.L.R. 140 (1977).

[69] *Compania del Desarrollo de Santa Elena, S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/96/1, Final Award (Feb. 17, 2000), 5 ICSID Rep 153 (2002); *see ADC Affiliate Ltd. v. Republic of Hungary*, ICSID Case no. ARB/03/16, Award (Oct. 2, 2006).

[70] *See Azurix Corp v. Argentine Republic*, ICSID Case No. ARB/01/12, Award (July 14, 2006).

Here, Rentiers claimed that its debt restructuring under the Fresh Start Act was necessary because of the earthquake damage and closure of its power plants,[71] however, this purpose should not be considered in the present case. The public purpose element is not an automatic release from liability. Furthermore, there cannot be a valid public purpose because the financial difficulties of Rentiers could have been prevented to a certain extent if Rentiers had placed its nuclear power plants away from the fault line. This contribution to the problem further bars Rentiers from using the public purpose element as a justification for this unlawful expropriation.

Although the second requirement, non-discrimination, is not at issue here, the third requirement calling for just compensation has not been met. Under the RABBIT, compensation shall "be the value of the investment immediately before the expropriation taking into account customary norms of international law."[72] However, the standard for compensation within bilateral investment treaties only applies to cases of lawful expropriation. In the case of unlawful expropriation, such as the present case, a customary standard must apply.

In *ADC*, the tribunal looked past the bilateral investment treaty because it "only stipulate[d] the standard of compensation that [was] payable in the case of a lawful expropriation."[73] Instead of applying the treaty, the tribunal applied the *Chorzow Factory* test.[74] In *Chorzow Factory*, the Permanent Court of International Justice held that "reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation

[71] R. at 11–12.

[72] R. at 8.

[73] *ADC Affiliate Ltd. v. Republic of Hungary*, ICSID Case no. ARB/03/16, Award (Oct. 2, 2006).

[74] *Id.*

which would, in all probability, have existed if that act had not been committed."[75] In *ADC*, the tribunal granted the investors the value of the investment at the time of the award, which was greater than compensation would have been under the bilateral treaty.[76]

Here, Amuko investors should be awarded the full value of the sovereign bonds as of the date of maturity because Rentiers has committed unlawful expropriation. The Fresh Start Act only provided investors with 10 percent of what they would have been entitled to otherwise.[77] Even if this were lawful expropriation, ten percent does not comply with the RABBIT. At the very least, Rentiers should provide the value of the bonds immediately before the expropriation. However, the consequences of Renters' illegal act of expropriation should be minimized by providing full compensation.

In sum, Rentiers has unlawfully expropriated the investments of Amuko citizens and must take responsibility. By defaulting on payment of its sovereign bonds and restructuring its debt, Rentiers engaged in the taking of foreign property, without a valid public purpose, without just compensation. Accordingly, Rentiers must be held responsible for this unlawful expropriation.

[75] *Id.* (citing *Chorzow Factory Case* (Ger. v. Pol.), (Merits) 1928 P.C.I.J. (ser. A) No. 17 (Sept. 13)).

[76] *Id.*

[77] R. at 12.

B. Even if the Precautionary Principle Warranted the Closure of Numerous Nuclear Power Plants, it is Inappropriate for Rentiers to Claim Force Majeure or Necessity Because Rentiers Knew of the Existence of the Diablo Canyon Fault and Permitted Nuclear Power Plants to be Built Nevertheless

In the case of threats of serious or irreversible damage to the environment, States must take precautionary action.[78] Here, Rentiers took precautionary measures by closing nuclear power plants following the earthquake. However, Rentiers placed these power plants near the Diablo Canyon Fault line with knowledge of Rentiers' extensive history of seismic activity. The knowledge of this potential risk precludes Rentiers from claiming force majeure or necessity.

i. Force majeure

Although force majeure is an accepted defense within international law, it is inapplicable in the present case. Article 23 of the ILC Articles notes that a State may claim force majeure as a defense to breaking an obligation with another State where an act occurred due to an unforeseen event, beyond the control of the offending State.[79] However, article 23(2) goes on explain that force majeure does not apply when "(a) the situation of force majeure is due, either alone or in combination with other factors, to the conduct of the State invoking it; or (b) the State has assumed the risk of that situation occurring."[80]

Force majeure is an inapplicable defense in this case because Rentiers knowingly constructed nuclear power plants along the Diablo Canyon fault line.[81] Seismic activity is common in Rentiers and the existence of the Diablo Canyon fault line has been known for

[78] *See* United Nations Conference on Environment and Development, June 3-14, 1992, *Rio Declaration Environment and Development*, U.N. DOC. A/CONF. 151/26 (1992).

[79] *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, [2001] 2 Y.B. Int'l L. Comm'n 27, U.N. DOC. A/56/49(Vol. I)/Corr.4.

[80] *Id.*

[81] *See* R. at 14; *see also* R. Clarification at 1.

centuries.[82] Knowing the risk of great danger, Rentiers constructed nuclear power plants near the fault line.

Furthermore, as clarified by the *Rainbow Warrior* arbitration, the standard of force majeure is "absolute and material impossibility."[83] For example, in the *Serbian Loans* case, this Court held that even the First World War did not make it *impossible* for Serbia to repay a loan.[84] Thus, in the present case, Rentiers cannot claim that economic difficulty renders performance of its treaty obligations impossible, when it is only more burdensome.

ii. Necessity

According to ILC Article 25, a State may claim necessity as a preclusion against wrongfulness if the State's course of action was "the only way for the State to safeguard an essential interest against a grave and imminent peril" and the action "does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole."[85] However, much like force majeure, necessity does not apply when "the State has contributed to the situation of necessity."[86] Additionally, although this Court has recognized necessity, in the *Gabcikovo-Nagymaros Project* this Court stated that necessity can only be accepted "on an exceptional basis."[87]

First, it cannot be said that the default and debt restructuring was the only way to prevent grave or imminent peril. Rentiers' economy had suffered as a result of the earthquake, but

[82] R. Clarification at 3.

[83] *Rainbow Warrior Affair Case* (N.Z. v. Fr.), 82 I.L.R. 499, 551 (UNRIAA 1990).

[84] *Serbian Loans Case* (Fr. v. Yugo), 1929 P.C.I.J. (ser. A) No. 20 (July 12).

[85] *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, *supra* note 34 at 28.

[86] *Id.*

[87] *Gabcikovo-Nagymaros Project* (Hung./Slovk.), 1997 I.C.J. 7, ¶ 40 (Sept. 25).

Rentiers cannot show that the Fresh Start Act was the only way to recover from such damage. Second, Rentiers contributed to the problem by placing its nuclear power plants near the Diablo Canyon fault line. It is reasonably foreseeable that an earthquake could affect such precious investments.

Rentiers' cannot claim force majeure or necessity as a defense to expropriation because of Rentiers' contributory actions.

CONCLUSION

Applicant, the Federal States of Amuko respectfully requests the International Court of Justice adjudge and declare that:

1. Rentiers violated international law by failing to compensate Amuko for expenses incurred while assisting Rentiers following a nuclear accident; and
2. Rentiers has expropriated the investments of Amuko companies without just compensation.

Respectfully Submitted,

X_____
Representatives for the
Federal States of
Amuko